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. 2016-001708

Adele J. Pope. . . . . Appellant,

v.

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

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES

1. Whether the circuit court properly dismissed this case because Appellant's Freedom of Information Act (S.C. Code Ann. §30-4-10, et seq.) request sought documents that were potentially discoverable in pending civil litigation?

2. Whether FOIA exempts matters covered by the Rules of Civil Procedure and whether this Court or the circuit court would have subject matter jurisdiction to address the merits of such matters?

3. Whether FOIA may be used to bypass civil discovery in a pending civil case?

4. Whether this case is moot when the Office of the Attorney General has supplied Appellant with the only document that could be considered responsive to her request, and she already has possession of the three page private Wingate agreement at issue in the related *Bauknight v. Pope* litigation (2010-CP-40-4900)?

5. Whether this case was subject to dismissal under Rule12 (b)(8), because the related case 4900 was pending when the instant suit was commenced.

6. Whether the Circuit Court's November 22, 2011, Order regarding Respondent's Motion to Dismiss, disposed of Respondent's arguments in his Answer, Motion to Amend Answer and Amended Answer and Motion for Judgment on the Pleadings when the ruling only addressed the Rule 12(b)(3) and 12(b)(8) arguments in the Motion to Dismiss, and whether that issue is properly before the Court.

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

8. Whether Appellant is entitled to summary judgment when the case was properly

dismissed by the circuit court, a decision that is also supported by the additional sustaining grounds discussed in this brief?

9. Whether Appellant's constitutional claims are before this Court when she did not raise them below.

10. Whether Appellant's affidavits should be 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 10, 2011. Record (R.) p. 16. The Complaint requested, in part, that the Court declare public documents that she sought by a July 19, 2011, Freedom of Information Act request and that they be made available for inspection and copying. That FOIA request was directed to the "Custodian of Records" at the Office of the Attorney General.

The Respondent Wilson moved to dismiss this case on September 12, 2011, under Rules12(b)(3) and (8), SCRCP, on the ground that venue should be in Richland County and another action was pending in Richland involving motions directed to the same documents requested in the FOIA request at issue. R. p. 73. The Motion included a motion to strike an affidavit of Appellant attached as Exhibit E to the Complaint because it included statements that were not based on personal knowledge, that were hearsay and / or that were irrelevant. R. p. 74. Appellant filed a Motion for Summary Judgment dated September 21, 2011. R. p. 94. She also filed numerous affidavits that were the subject of several Motions to Strike filed by the Respondent. R. pp. 92, 103, 105, 107, 134, 136. Respondent moved to strike the affidavit and

newspaper articles attached to the Motion for Summary Judgment and other affidavits filed by Appellant. R. pp. 92, 103, 105 and 107. By Order dated November 22, 2011, the Court of Common Pleas for Newberry County, denied the Defendant Wilson's Motion to Dismiss this case pursuant to Rule 12(b)(8), but ordered that this case be consolidated with *Bauknight v.* Pope, 2010-CP-4900, pending in Richland. R. p. 9. The Court did not rule on the motions to strike and other pending motions.

Appellant moved to "partially" alter or amend the Court's Order of November 22. R. Supp. p. 1. The Court apparently denied that motion. She continued to file affidavits in this case which Respondent moved to strike. R. p. 136.

Respondent filed an Answer to the Complaint dated December 6, 2011. R. p. 126. The Answer preserved defenses in the Motion to Strike and added defenses including that Appellant could not use FOIA to overrule or bypass proceedings in case 4900. Respondent filed a Motion for Judgment on the Pleadings dated December 20, 2012. R. p. 132.

On March 7, 2013, Respondent moved to amend his Answer by dropping the venue defense as moot, consolidating other defenses, and subject to any defenses, attaching documents and adding a defense that Respondent had no other documents that could be considered responsive to the FOIA at issue other than a three page document currently under judicial review. R. p. 143 (Motion including proposed Amended Answer and attachments).

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. pp. 197 – 199, 403, 410, 413 and 415 (letters, Smith to Judge, 3.7.13, 3.28.13, 11.27.13; 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. p. 3 (Order of June 14, 2016, p. 1.). He issued an Order dated June 14 dismissing this case. R. p. 1. He found that the documents at issues were 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. p 208) by Form 4 Order dated July 27, 2016 and filed August 10, 2016. R. p. 1. This appeal then followed.

STATEMENT OF FACTS

Appellant requested the following documents which are described at more length in her July 19, 2011 FOIA request attached as Exhibit B to the Complaint. R. p. 26.

1 and 2. Published policies of the Office of the Attorney General regarding engagement of private attorneys including contingency fee counsel in effect in May, 2010 and in effect on July 19, 2011.

3. The contract of then-AG Henry McMaster and / or the State engaging Kenneth B. Wingate and Everett Kendall, II to commence Civil Action 2010-GC-4000073 in the Probate Court for Richland County on behalf of the AG.

4. Any contract and / or other document authorizing Russell Bauknight to commence case 400000073 on behalf of the AG and/ or the State.

The Office of the Attorney General did respond to this request by letter dated August 5, 2011, and proposed to put the requests on hold pending the outcome of Richland County litigation, 2010-CP-40-4900. R. p. 30 (Ex. C to Complaint). The letter noted several motions pending related to discovery requests and that FOIA is not designed to supplement the rules of civil or criminal discovery.

The relationship of the instant action to Richland proceedings in the main *Bauknight v. Pope* action is set forth in Appellant's complaint. Instant Appellant Pope acknowledges that she is the Defendant in a Richland County suit brought by the former Attorney General McMaster and the current trustee of the James Brown Legacy Trust. (2010-CP-40-4900). She 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.

Most of the documents requested in the Freedom of Information Act request of the Attorney General are the subject of pending Motions in case 4900 as Appellant acknowledges. See, R. p. 71 (Plaintiff's Motion for Expedited Hearing, p. 2, ¶6 ["Because certain documents sought in Case 4900 discovery are public documents in the possession of public bodies, Plaintiff attempted to obtain some of those documents through FOIA requests"]); *see, also,* R. pp. 85 and 88 (exhibits to Motion to Dismiss: Exhibit B, Motion to Compel, p. 2, item 3, July 26, 2011[requesting contingency fee contract] (attachments to Motion omitted); Exhibit C, Motion for Protective Order regarding fee agreement.).

Respondent's proposed Amended Answer (R. p. 153) included the following Fourth Defense and provided the only document that could be considered responsive to this request

except the three page Wingate document now in Appellant's possession and in the public domain.[1]

> Subject to and without waiving any defenses raised as to this complaint by this Answer or by Motion, including all grounds for lack of subject matter jurisdiction, the Attorney General responds herein that the Freedom of Information Act is very important to his Office and that his Office has no documents that could be considered responsive to the FOIA at issue other than as set forth below and attached hereto as an exhibit except for a three page document currently under judicial review which he will release if authorized by the Court.
>
> > A. The Office of the Attorney General responded to essentially the same FOIA request in another matter as Plaintiff's request 3 for "[t]he contract of then-AG Henry McMaster and / or the State engaging Kenneth B. Wingate and Everett Kendall, II to commence Civil Action 2010-GC-4000073 in the Probate Court for Richland County on behalf of the AG ." That other request was made by Plaintiff Summer who later brought the case *Summer v. Wilson*, 2012-CP-36-0688 The Defendant craves reference to his Office's response to the Summer FOIA which are at Exhibits pp. 1-10, *infra* and of public record in *Summer*. These responses make clear that the only document not of record that could be considered responsive to Plaintiff's request and provided herewith to Plaintiff is the three page document under judicial review in the main part of the instant case 4900. The Attorney General has no objection to disclosing this document if the Court rules that it may be released.
> >
> > B. As to Plaintiff's FOIA requests 1 and 2. [Published policies of the Office of the Attorney General regarding engagement of private attorneys including contingency fee counsel in effect in May, 2010 and in effect on July 19, 2011], the Defendant attaches the policy from his Office manual: Exs. p 11 *infra* [Other parts of the page of the Office manual on which the policy appears are redacted only because they are not related to the FOIA request]

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1 Appellant contends that a senior attorney in the Office of the Attorney General said in 2011 that the "AG was ready and more than willing to release the Wingate Agreement." Brief at p. 7. Appellant omits a key part of the letter which said that "in an abundance of caution the Office will not provide the document until it receives further guidance from the court as to whether it would be a violation of the Court's order to provide the document. R. p 292 (Ex. A. Supplemental Affidavit of Pope). The OAG stated in this case that it would be prepared to submit the three page document to the Court and Plaintiff at an anticipated hearing on March 18, 2013, if Judge Manning ruled that it could be released in the main action in case 4900. R. p. 197 (Letter, Smith to Judge Manning, March 7, 2013). The Court held a status conference that day and did not rule on pending matters. Appellant later received the three page document as a result of other litigation. *See, infra.*

C. As for Plaintiff's FOIA request 4 [Any contract and / or other document authorizing Russell Bauknight to commence case 400000073 on behalf of the AG and/ or the State], the Office of the Attorney General does not have such documents.

With the three lines of OAG policy in response to her requests 1 and 2, no other document remained in issue in other than the three page Wingate document which Appellant has in her possession since at least late 2013 as a result of Federal litigation. *Brown v. Pope,* 3:08-cv-14-WOB, November 15, 2013 (the Honorable J. Gregory Wehrman, Magistrate Judge).

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. Appellant's brief includes numerous irrelevant statements and baseless accustions about or related to the James Brown litigation, in which she is a party. 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, the OAG has responded to the request at issue in this case by providing the only document responsive to her request (three lines of an Office manual) except for the three page Wingate document that was subject to pending motions in case 4900 and to which she had access otherwise and is in the public domain. *See*, Exhibits

attached to Answer. The Office of the Attorney General should not have to give Appellant a document that she already has.

Although the OAG has responded to the FOIA, this case was properly dismissed for other reasons. 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 GRANTED JUDGMENT FOR RESPONDENT IN THIS FOIA CASE BECAUSE IT SEEKS DOCUMENTS SUBJECT TO CIVIL DISCOVERY AND THE COURT WAS NOT BOUND BY A 2011 RULING

A

The November 2011 Ruling Did Not Decide This Issue And Appellant's Argument About It Is Not Properly Before This Court

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. p. 4 (Order at p. 2). Appellant contends that this issue was decided in her favor by a 2011 ruling denying Respondent's Motion to Dismiss. The issue was not determined then nor should it be considered now.

Appellant did not raise that issue about the effect of the 2011 ruling until her Rule 59 Motion which was too late. *See,* R. p. 138 (Plaintiff's Return, January 11, 2013);[2] *Hickman v. Hickman*, 392 S.E.2d 481, 482, 301 S.C. 455, 456 (Ct. App.,1990)("A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not."). Appellant did not include the issue in her Statement of Issues. Therefore, it is not properly before the Court now. Rule 208(b)(1)(B)("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.")

That November 22, 2011, ruling only addressed the Rule 12(b)(8)(another action pending as to the same claim) ground in the Motion to Dismiss, subject matter jurisdiction in relation to proceedings in Richland County in case 4900 and consolidation. R. p. 9. The Court determined that the claims in the two cases were not the same, but he consolidated this case with case 4900. The 2011 Order did not rule on whether Appellant was barred from using FOIA as to the documents at issue in the instant case including whether they were exempt from disclosure under FOIA. Instead, subsequent to the 2011 Order, Respondent answered the Complaint and moved for judgment on the pleadings under Rule 12(c). In his 2016 Order, Judge Early granted judgment on the pleadings. Moreover, regardless of what the 2011 Order addressed, the authority below supports the point that judgment was properly granted to the Respondent and may be applied by this Court.

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2 Appellant notes that Respondent did not move for reconsideration of the November 22, 2011, Order, but Rule 59(e), SCRCP, regarding motions to reconsider applies only to judgments. The November 22 Order did not grant judgment and, therefore, was not subject to a Rule 59 motion.

B

Judgment Was Properly Granted To Respondent Because The Documents At Issue Were Subject To Civil Discovery

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 as noted above, she acknowledges that some of the documents are at issue in case 4900 in her Motion for Expedited Hearing. R. pp. 17 and 70 (Complaint p. 2, and Motion). She cannot avoid the Rules of Civil Procedure regarding discovery by this process, and the Court lacks subject matter jurisdiction 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. 190. 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)[3]; *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 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)[4]; *United States v. Hvass*, 355 U.S. 570, 575 (1958)[5]; *State ex rel. Beacon Journal Publ'g Co. v. Waters*, 67 Ohio

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3 "[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.*

4 "[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.*

5 "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.*

St. 3d 321, 323, 617 N.E.2d 1110, 1113 (1993).[6] 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 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

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

"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").

Appellant contends that this authority would prevent media access to public records. No such ruling was made. Media is not a party to the instant case. Instead, the Plaintiff in the instant case is a party to another suit in which discovery issues were pending as to the same documents she seeks via FOIA.

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

Appellant 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. She has failed to articulate any reason why her Motion for Summary Judgment should have been granted except that she disagrees with the Judge's ruling regarding civil discovery.

A

The Response of the Attorney General to the Lawsuit Was Timely and Appropriate

Appellant claims that the Attorney General declined to respond to the FOIA request in a timely manner. As noted in the Statement of Facts, the OAG did respond to the request in a timely manner including stating that "FOIA is not designed to supplement the rules of civil or criminal discovery." R. p. 30 (Exhibit C to Complaint).

B

Appellants' Affidavits Should Be Disregarded

Appellant's 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. pp. 92, 103, 105, 107, 134, 136. Respondent AG moved to strike at least nine 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. pp. 92, 103, 105, 107, 134, 136. At least six of these affidavits were executed by Appellant, herself, and many of her personal 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 Examples abound of her violation of the basic rules for affidavits:

Affidavit attached to Complaint:

-p.2, ¶ 5 an attorney for a person not a party to the instant action "threatened" that suit would be brought if appeal in another matter not dropped [hearsay, irrelevant]

-p. 5, ¶21, " I . . . believe the Retention Agreement will show whether AG McMaster . . . was in fact acting to punish Bob and me . . . . ;" [lack of personal knowledge; speculation]

-p. 6, ¶25 "I am informed and believe that the documents requested under FOIA . . . will show[a list follows of speculation about what the documents will show][lack of personal knowledge, hearsay]

Affidavit of Pope (September 1, 2011) Supporting Expedited hearing:

-p.8, ¶ 37 "I am informed and believe the requested documents will begin to show . . . [speculative, lack of personal knowledge];

Affidavit and attachments in support of Plaintiff's Motion for Summary Judgment;

-Affidavit, p.2, ¶ 4 "refusal to comply with my FOIA requests is not only covering up. . . ."[lack of personal knowledge, speculative]

Supplemental Affidavit (September 26, 2011);

-p. 3, ¶8 I am informed and believe that the documents will show [speculation, lack of personal knowledge]

October 6, 2011 affidavit.

-p.4, ¶10 speculation about motives [lack of personal knowledge]

-p.7, ¶¶ 12-14, speculation about what documents will show [lack of personal knowledge]

"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 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 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.

C

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.").

D

Consolidation Of This Case With Richland Case 4900 Was Within The Discretion Of The Court

Appellant appears to complain 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 and the Judge's decision to consolidate cases 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.

E

Appellant Is Not Entitled To Attorney's 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 $38,725 and $1229.60 in costs and fails to document her claims. R. p. 175 (Plaintiff's Brief in Support of Summary Judgment, etc., p. 5) [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 Federal precedent.[8] She also could not claim time for the numerous irrelevant, inadmissible affidavits

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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 in attorney's fees for this case at a rate of $100.00 per hour and $300.00 in costs. R. p. 378. These amounts undermine her more than quadrupling that attorney's fee claim, including the now $250.00 hourly rate, and her quadrupling her costs. Moreover, she cannot testify by affidavit as to the hours expended by her attorney. Only he can do so.

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*).

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

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 request at issue in this case by providing, subject to its defenses, the only document responsive to her request (three lines of an Office manual). The three page Wingate document that was subject to pending motions in case 4900, is in her possession as a result of Federal litigation, and it is in the public domain. *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).

B

This Case Was Subject To Dismissal Under Rule 12(b)(8)

Although not reached by the 2016 Order and decided adversely to Respondent in the 2011 Order, an additional sustaining ground for judgment in this case is that it was subject to dismissal under Rule 12(b)(8) because another action is pending among the same parties as to the same or

substantially the same claim. *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. Complaint at paragraphs, 7-11 and Exhibit E to Complaint (all references to this exhibit are subject to Motion to Strike, *infra*). Moreover, the documents sought in the Freedom of Information Act request of the Attorney General are the subject of pending Motions in case 4900 as noted above. Appellant is essentially pursuing through the instant suit the same discovery issues that are pending before the Court in Case 4900 and are subject to the stay directive. Therefore, this case is subject to dismissal under Rule 12(b)(8).

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

April 27, 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 27 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 . . . . Respondent.

CERTIFICATE OF COMPLIANCE WITH RULE 211 (b)

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

J. EMORY SMITH, JR.
Deputy Solicitor General
Counsel for Respondent Attorney General

April 27, 2017