

STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

The Honorable Doyet A. Early, III, Circuit Court Judge

The Honorable L. Casey Manning, Circuit Court Judge

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OCT 17 2018
SC Court of Appeals

Appellate Case No.: 2017-001899

RUSSELL L. BAUKNIGHT, as Trustee of The James Brown 2000 Irrevocable Trust and the James Brown Legacy Trust, as Personal Representative of the Estate of James Brown, and on behalf of Alan Wilson, in his capacity as Attorney General of the State of South Carolina; Tommie Rae Brown, individually and on behalf of her minor child, James B.; Daryl J. Brown, individually and on behalf of his minor child, Janise B.; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor child Sydney L. And Carrington L.; Tonya Brown; Venisha Brown; Larry Brown; and Terry Brown

And

ALAN WILSON, in his capacity as Attorney General of the State of South Carolina; Tommie Rae Brown, individually and on behalf of her minor child, James B.; Daryl J. Brown, individually and on behalf of his minor child Janise B.; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor child Sydney L. and Carrington L.; Tonya Brown; Venisha Brown; Larry Brown; and Terry Brown, Respondents.

v.

Adele J. Pope, and Robert L. Buchanan, Jr. Defendants,

Of whom Adele J. Pope is Appellant.

**REPLY TO RETURN OF ATTORNEY GENERAL OPPOSING
MOTION TO CONSOLIDATE APPEALS**

In the Return of Attorney General Alan Wilson to Appellant's Motion to Consolidate two pre-trial appeals from Richland County Case 2010-CP-40-4900 (Richland 4900)¹, the Attorney General asserts that Appellant has waived her right to request consolidation because her brief in the FOIA case states that "[t]here was no basis for consolidation with the [instant] suit." [Return, p. 2]

Appellant's brief in the FOIA suit states, correctly, that in 2011 there was absolutely no basis for the Attorney General to have a Newberry County James Brown FOIA suit seeking the Attorney General's public contract with Sweeny, Wingate and Barrow, P.C. (SWB) transferred from Newberry to Richland County; consolidated with Richland 4900, a tort suit the Attorney General and 16 others were pursuing against Appellant; and subordinated to Richland 4900 discovery in which the Attorney General and others were claiming that the Wingate contract is private. Appellant asserted then, and asserts now, that the 2011 consolidation was a violation of her FOIA rights.

Appellant's position (in 2011 and today) that consolidation of the *merits* of the FOIA and tort suits should never have happened, and would delay her FOIA request for years, should not be considered a waiver of Appellant's right to ask this Court (in 2018) to consolidate the appeals of dismissal of the FOIA suit and dismissal of the Attorney General from his tort suit under Rule 21, *neither of which ever received a merits hearing.*

On page 2 the Attorney General states:

No document in the record of either case supports Appellant's undocumented assertion that the AG was responsible for

¹ This Case and S.C. Court of Appeals Case No. 2016-0001708 (the "FOIA" case, or 2016-1708). The Attorney General has correctly noted the Appellant did not seek to consolidate a second FOIA case the Attorney General moved from Newberry County to Richland County. The Attorney General was seeking to consolidate the second FOIA case and Richland 4900, but it was not consolidated.

consolidation of the cases below.

In fact, multiple documents in both appeals show that the Attorney General was responsible for the consolidation of the two cases, working both through his office (OAG) counsel and SWB. In his order dated November 22, 2011, located in both records on appeal (ROAs), the Honorable Frank R. Addy, Jr, over objection of Appellant, ruled:

...2. At the conclusion of the pleadings phase of this case, this matter will be consolidated with *Bauknight v. Pope*, 2010-CP-40-4900. (R., p. 61-69)²

The Attorney General asserts on page 2 that the June 22, 2018 FOIA position of Appellant's counsel, who had undergone certain medical procedures, that he does "not wish to see these matters delayed" contradicts the motion to consolidate. This is not the case. Only months later, after the Attorney General moved to strike additional documents and "correct the record" did it become clear that the full record of the efforts of the Attorney General, both in Richland 4000 FOIA and Richland 4900 discovery, to prevent release of the Wingate contract was material to this appeal.

The Attorney General's assertion on page 3 that he is representing himself "on appeal" and has only filed one brief is inconsistent with the full record and the signature of his counsel of record since 2011. The brief filed by SWB states clearly that it is for "Respondents." It does not say "Respondents Other than the Attorney General." While it is correct, as the Attorney General states, that "Appellant has no authority to determine counsel for the AG," the AG's own counsel of record for more than eight years, since May 19, 2010, has spoken for the Attorney General in his brief as to whether Attorney General filed two briefs.

² Also see Appellant's Motion to Amend, R., p. 561-567 and Motion of Attorney General to dismiss, 2016-1708 R., p. 73-74.

On page 3 the Attorney General states that “[t]he three page Wingate document at issue in this case is completely irrelevant to this case...” This statement ignores that the 3-page document is actually part of the Wingate contract which is at the center of this case and this appeal. (R., p. 1235-1253)

The Attorney General states on page 3 that Appellant’s argument “is absolutely wrong in saying the [OAG] ‘worked to assure that it was not disclosed’ and that the ‘resistance to its disclosure did not stop.’” Both of these statements are absolutely true, and demonstrate the double-teaming of the OAG’s FOIA counsel and his SWB counsel. While the Attorney General’s OAG FOIA counsel professed to desire to comply with FOIA (2016-1708 R., p.118-119), the Attorney General’s SWB counsel opposed releasing the public Wingate contract. (2016-1708 R.,p. 190). On page 4 the Attorney General cites one of the examples of this double-teaming. He says:

...[T]he Record in that case, makes clear that the AG’s position had long been that he had no opposition to releasing the document if Judge Manning found it may be released when he considered a pending motion for a protective order.

What the Attorney General fails to tell the Court is that it was the Attorney General, himself, through SWB, who had filed the motion for protective order to keep his own, public, unsigned contract with the Wingate firm from being disclosed. (2016-1708R, p. 90). The Attorney General, with others, asserted that the Wingate contract was “the epitome of privileged communication.” (2016-1708R., p. 90)

The 2010 tort suit the Attorney General and private Plaintiffs, sharing a private law firm, filed against Buchanan and Pope, *on the merits*, remains distinct from Pope’s FOIA request for the public contract to bring that suit. What unites the *appellate* issues, and makes consolidation of the

two appeals meritorious, is the lower court's allowing the Attorney General to violate Appellant's FOIA and Due Process in various matters in the same case, and prior to any hearing on the merits.

The Attorney General on page 3 asserts that it is improper for Appellant to ask the Court to take judicial notice of another public copy of the Attorney General's standard Litigation Retention Agreement With Special Counsel (Mellon). The Attorney General does not dispute that the Mellon agreement is the same standard LITIGATION RETENTION AGREEMENT FOR SPECIAL COUNSEL APPOINTED BY THE SOUTH CAROLINA ATTORNEY GENERAL³ incorporated by now-Governor McMaster referenced in his letter of May 18, 2010 which is a principal subject of this appeal. (R., p 1250) In that letter Governor McMaster states, in part:

Also, per your conversation with Senior Assistant Attorney General C.H. Jones, Jr., in connection with the charitable trust portion of this matter⁴ [Richland 4900], you have agreed to use the terms and conditions as outlined in the attached "Agreement for Legal Services" which references and incorporates the Attorney General's standard Litigation Retention Agreement. (R., p. 1250) [Emphasis supp.]

The request for judicial notice of the Mellon contract is an appropriate request that the Court consider an undisputed, reliable, contemporaneous, public copy of the Attorney General's standard Litigation Retention Agreement. Further, the 2016-1708 ROA contains two additional examples of the Attorney General's Litigation Retention Agreement for Special Counsel, Eli Lily and AstraZeneca, which the Court may also consider (2016-1708 R, p. 45 – 69)

³ R., P. 123- 1249.

⁴ It is unclear whether the Attorney General, by "charitable trust portion" was referring to the entire Plaintiff James Brown Legacy Trust; the 47 ½% of Plaintiff James Brown Legacy Trust which is owned by the AG's (New) Charity, or its successors; or the (at the time) 41/42 of Brown's assets devised to Brown's "I Feel Good" Charity for needy students under his Will and 2000 Trust.

The Attorney General, in footnote 1 on page 4, refers to Appellant's "husband" and suggests that his deposition testimony⁵ testimony about "a FOIA case in which she was not even a party" is improper. This is incorrect. The testimony was part of a professional opinion/affidavit presented to the lower court prior to the filing of this appeal.

The testimony of Thomas H. Pope III, who represented a journalist in a FOIA suit seeking the Attorney General's Litigation Retention Agreement with the Wingate firm, is part of the Richland 4900 record. (R., 2191 -2209). It provides evidence of the merits of consolidation of 2016-1708 and this appeal, and further supports Appellant's position that the Attorney General was resisting the release of the public Wingate contract under FOIA for years, even after a federal judge ordered it to be released in late 2013.

It is true, as stated in the Attorney General's same footnote 1, that the Attorney General's summary judgment order (obtained for the Attorney General by SWB after the AG was dismissed as a party under Rule 21) is not the subject of this appeal. A motion to reconsider and void that order is pending. There is nothing impermissible about a professional opinion related to that order that was timely presented to the lower court prior to filing of this pre-trial, pre-completion-of-discovery appeal.

⁵ The deposition of Thomas H. Pope III was taken in Aiken County Case 2013-CP-02-1337 (Aiken 1337) on April 11, 2017, by counsel for Plaintiff Estate/2000 Trust of James Brown, the Attorney General's Co-Plaintiff in this suit. (R., p 2191 – 2208) The Attorney General, through SWB, sought twice in 2016 to consolidate discovery in Richland 4900 with Aiken 1337, claiming the cases were two sides of the same coin. Mr. Pope testified about the difficulty he and Jay Bender, Esq., had in obtaining the Wingate contract under FOIA for a journalist. Of his client, Pope stated under oath:

She's a journalist and, on her behalf, we sought out the documents that were very important to the James Brown case and to the public, and those would be the fee agreement Sweeny Wingate had with the attorney general and all the parties, which we got....(R., p. 2203)


Conclusion

The Attorney General's Return, through the OAG, presents no meritorious reason to prevent the consolidation of this appeal with 2016-1708. Both are pre-trial appeals from the same case, Richland 4900. SWB, counsel of record for the Attorney General and sixteen other Respondents, does not appear to have interposed any objection to the consolidation. For the reasons stated in this reply and Appellant's motion to consolidate, the request to consolidate this appeal with the appeal in 2016-1708 should be granted.

Respectfully submitted,

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PROOF OF SERVICE

I certify that I have served the REPLY TO RETURN OF ATTORNEY GENERAL
OPPOSING MOTION TO CONSOLIDATE APPEALS on the Respondents on
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