

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

Apr 20 2020

SC 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

Case No. 2019-CP-40-4900

Appellate Case No. 2017-01899

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. II; 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. II; 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 the Appellant.

**RESPONDENTS' RETURN TO APPELLANT'S MOTION TO
SUPPLEMENT THE RECORD ON APPEAL
AND MOTION FOR SANCTIONS**

Introduction

This appeal deals with four discrete and well-defined issues:

(1) Did the Circuit Court abuse its discretion when it granted Respondents' relief from entry of default,

(2) Did the Circuit Court err in denying Appellant's motion to disqualify counsel for representing the Attorney General of South Carolina and to enjoin Mr. Russell L. Bauknight from allegedly acting on behalf of the Attorney General,

(3) Did the Circuit Court err in ruling that the sitting Attorney General cannot be deposed in Case No. 2010-CP-40-4009, which was brought by his predecessor, and

(4) Did the Circuit Court err in dismissing the Attorney General as a party pursuant to Rule 21, SCRCF.

This appeal has been fully briefed for some time. The Court of Appeals has informed the parties of its intention to decide this appeal on the briefs sometime in the court's April term. **(Exhibit 1)**. Now, at a point later than the eleventh hour¹, Appellant moves to supplement the record on appeal. For the following reasons, Respondents who are represented by undersigned counsel ask the Court to reject Appellant's motion and move for sanctions against Appellant for filing her motion.

Argument

I. Appellant's Motion is a Direct Violation of This Court's April 26, 2018 Order.

At the start of this appeal, Respondents were forced to make an unprecedented motion to strike Appellant's initial brief for a number of deficiencies and improprieties. This Court granted

¹ As argued in this return, Appellant's motion is so improper as to be worthy of sanctions, it is therefore reasonable to assume she has some other motive for making her motion. That motive may be to cause delay in the Court's stated objective of deciding the appeal on the briefs within the April term.

the motion by order of April 26, 2018 (“The Order”). In that brief and uncomplicated order, this Court directed Appellant to file an amended initial brief and an amended designation of matter. The order also clearly directed that “... *Appellant shall not list or reference any orders or other documents that were not presented to the circuit court as part of this case. Further, Appellant shall not designate or reference any documents filed or presented to the circuit court after this appeal was filed*” (Order of April 26, 2018)(emphasis added). (**Exhibit 2**). Appellant filed this appeal September 12, 2017.

A. Virtually all of Appellants offered Exhibits violate The Order.

- Exhibits F, G, H, I, J, K, L, M, N, O, P, Q, and R violate The Order because they are all documents dated “after this appeal was filed.”
- Exhibits D and E (filed in Richland Case 350, which was consolidated but not merged with Richland Case 4900), also violate The Order, because they are “documents that were not presented to the circuit court as part of this case.”
- Only exhibits A, B, and C appear to have been filed, either in part or in whole, in Case 4900, but it does not appear they were used by Appellant at any of the hearings that generated the orders that are the subjects of this appeal.

B. All of Appellants offered Filings violate The Order.

Filing numbers 1, 2, 3, 4, 5, and 6 are documents dated “after this appeal was filed” and are not “documents that were presented to the circuit court as part of this case.”

2. The Exhibits and Filings Offered by Appellant Violate South Carolina Appellate Court Rules 209 and 210.

Even absent the April 26, 2018 order, which is dispositive against Appellant’s motion to supplement, Appellant’s motion should be denied because virtually all of the offered documents

and filings violate Rule 209(b), SCACR, (“A party shall not include any matter in his Designation which is not relevant to the appeal”) and Rule 210(c), SCACR, (“The Record shall not, however, include matter which was not present to the lower court or tribunal”). *See* the analysis of the offered exhibits and filings in section one, *supra*.

3. Appellant’s Request for Judicial Notice is Improper.

Appellant asks this Court to exercise judicial notice of six filings from various matters. Appellant’s request must be denied. Appellant’s motion both misstates the purpose of judicial notice and is improperly applied, because each document for which she seeks judicial notice contains legal argument and numerous matters of disputed fact, and Appellant makes no effort to delineate what fact(s) for which she seeks judicial notice.

A brief statement of the purpose of judicial notice excludes the filings Appellant offers: “A trial court may take judicial notice of a *fact* only if sufficient notoriety attaches to the *fact* involved as to make it proper to assume its existence without proof.” *Bowers v. Bowers*, 349 S.C. 85, 94, 561 S.E.2d 610, 615 (Ct. App. 2002) (quoting *Eadie v. H.A. Snack Co.*, 322 S.C. 164, 171-72, 470 S.E.2d 397, 401 (Ct. App. 1996)(emphasis added). “A *fact* is not subject to judicial notice unless the fact is either of such common knowledge that it is accepted by the general public without qualification or contention, or its accuracy may be ascertained by reference to readily available sources of indisputable reliability.” *Eadie*, 322 S.C. 171-72, 470 S.E.2d at 401 (emphasis added).

Appellant asks the Court to take judicial notice of a complaint, a memorandum of law, a reply brief, two initial reply briefs, and apparently the legal argument in an appellate decision. She does not delineate any fact(s) for which she is seeking judicial notice. Such a request is clearly improper. Rule 201, SCRE, is for the “Judicial Notice of Adjudicative *Facts* (emphasis added).

4. Appellant’s Motion Engages in Improper Additional Briefing of Arguments.

Appellant also includes in her motion what is essentially further briefing of her appeal. She asks the Court to consider the impact of a recent decision on an issue in the appeal (Motion to Supplement at p. 4). Such a request is improper and constitutes additional briefing where the appellate record is closed and the case is set for a decision by this Court. There is a proper procedure to provide the court with supplemental authority, see Rule 208(b)(7), SCACR. Appellant chose not to follow the rule.

5. Incorporation of Arguments Made by the Attorney General

In addition, Respondents incorporate and make part of this return all arguments made by the Attorney General in his Return to Appellant’s motion.

Sanctions

Rule 269, SCACR, states,

Where an appeal, petition, motion or return is frivolous or taken solely for the purposes of delay, or is not in compliance with these Rules, the appellate court may upon its own motion or that of a party, after ten (10) days notice, impose upon offending attorneys or parties such sanctions as the circumstances of the case and discouragement of like conduct in the future may require. This Rule does not apply to any matters where counsel is required by law to pursue an appeal or petition for writ of certiorari even though the matter may be frivolous.

Appellant’s motion is in direct disregard of this Court’s April 26, 2018 Order. Moreover, her motion is a violation of Rules 209 and 210, SCACR, an improper request to apply Rule 201, SCRE, and a failure to follow Rule 208(b)(7), SCACR. Furthermore, Respondents’ two other motions to strike in this appeal have catalogued what appears to be Appellant’s consistent pattern to disregard the South Carolina Rules of Appellate Procedure. Therefore, Appellant’s motion

constitutes a frivolous motion under Rule 269, and this Court should impose sanctions, and Respondents hereby move this Court for the same. Appropriate sanctions should include Respondents' costs and attorney's fees for responding to this motion. Because Appellant's motion appears to be another act in furtherance of a consistent pattern of disregard for the rules, as noted in Respondents' previous motions to strike, Respondents also ask the Court to apply any additional sanction it may deem appropriate.

Conclusion

For the reasons stated above, Respondents respectfully request this Court to deny Appellant's motion to supplement the record on appeal and to grant their motion for sanctions. However, should the Court grant Appellant's motion in part or in whole, Respondents respectfully request leave to file an additional response according to Rule 212(b)².

Respectfully submitted,

s/ Mark V. Gende

Kenneth B. Wingate, SC Bar No. 8004

Mark V. Gende, SC Bar No. 72835

C. Griff Doolittle, SC Bar No. 104118

SWEENY, WINGATE & BARROW, P.A.

1515 Lady Street

Columbia, SC 29211

(803) 256-2233

kbw@swblaw.com

mvg@swblaw.com

cgd@swblaw.com

ATTORNEYS FOR RESPONDENTS

(Other than the Attorney General)

² Because Respondents are requesting sanctions to include attorney's fees, and so as not to increase unnecessarily the amount of the sanction sought, counsel has refrained from expending the substantial time necessary to compile a complete list of documents which Respondents would desire to add if the Court grants Appellant's motion until the court rules on whether the motion should be dismissed.

Exhibit 1



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
CHIEF DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

April 1, 2020

Mr. Kenneth B. Wingate, Esquire
PO Box 12129
Columbia SC 29211

Mr. Mark V. Gende, Esquire
PO Box 12129
Columbia SC 29211

Mr. J. Emory Smith, Jr., Esquire
PO Box 11549
Columbia SC 29211

Mr. Adam Tremaine Silvernail, Esquire
PO Box 7995
Columbia SC 29202

Mr. Charles E. Carpenter, Jr., Esquire
4825 Portobello Road
Columbia SC 29206

Mr. William Jeffrey Smith, Esquire
1216 Crenshaw Street
Newberry SC 29108

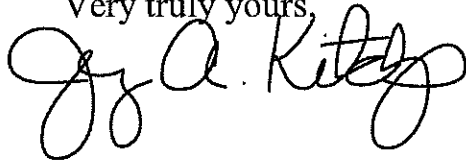
Mr. Daryl L. Williams, Esquire
1416 Laurel St.
Columbia SC 29202

Re: Russell Bauknight v. Adele Pope (2)
Appellate Case No. 2017-001899

Dear Counsel:

After careful consideration by the Court, this case will be submitted on the record on appeal and briefs during the April 2020 term without oral argument.

Very truly yours,

A handwritten signature in black ink, appearing to read "J. A. Kitz". The signature is fluid and cursive, with the first letters of each name being capitalized and prominent.

CLERK

cc: Alan McCrory Wilson, Esquire
Robert D. Cook, Esquire

Exhibit 2

The South Carolina Court of Appeals

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. II; 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. II; 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,

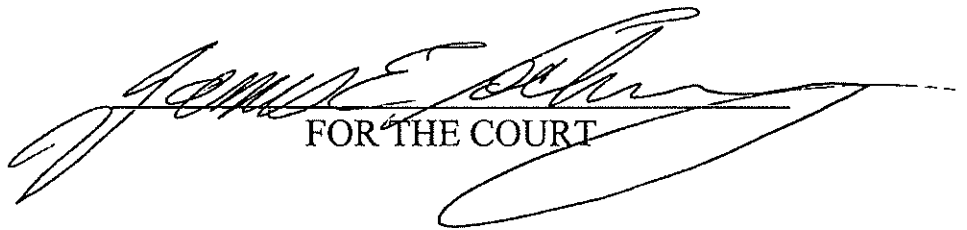
Of whom Adele J. Pope is the Appellant.

Appellate Case No. 2017-001899

ORDER

The motions to strike are granted. Within thirty days of this order, Appellant shall serve and file an amended initial brief and an amended designation of matter. In the amended designation of matter and the amended initial brief, Appellant shall not list or reference any orders or other documents that were not presented to the circuit court as part of this case. Further, Appellant shall not designate or reference any documents filed or presented to the circuit court after this appeal was filed.

To the extent that Respondents are requesting that this court strike documents that were presented to the lower court as part of this case prior to this appeal, the requests are denied.


FOR THE COURT

Columbia, South Carolina

cc:

Kenneth B. Wingate, Esquire
Everett Augustus Kendall, II, Esquire
Mark V. Gende, Esquire
Clyde H. Jones, Jr., Esquire
J. Emory Smith, Jr., Esquire
Adam Tremaine Silvernail, Esquire
Walter Henry Bundy, Jr., Esquire
Michael Brent McDonald, Esquire

FILED

April 26, 2018

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

Apr 20 2020

SC 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

Case No. 2019-CP-40-4900

Appellate Case No. 2017-01899

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. II; 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. II; 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 the Appellant.

PROOF OF SERVICE

I certify that on April 20, 2020 I served Respondents' Return to Appellant's Motion to Supplement the Record on Appeal and Motion for Sanctions by depositing a copy of it in the

United States Mail, postage prepaid, and by e-mailing a copy of the same, to the following attorneys of record:

Charles E. Carpenter, Jr.
Carpenter Appeals & Trial Support, LLC
4825 Portobello Road
Columbia, SC 29206
(803) 758-2886
charlie.ceclaw@gmail.com

Adam T. Silvernail, Esquire
LAW OFFICE OF ADAM T. SILVERNAIL, LLC
P. O. Box 7995
Columbia, SC 29202
(803) 779-1770
adam@silvernailfirm.com

Mr. William Jeffrey Smith
1216 Crenshaw Street
Newberry, SC 29108
wjstv@mindspring.com

Mr. Daryl L. Williams
Gertz & Moore, LLP
1416 Laurel St.
Columbia, SC 29202
(803) 252-1524
dwilliams@gertzandmoore.com

Attorneys for the Appellant

J. Emory Smith, Jr., Esquire
Office of the Attorney General
1000 Assembly Street
Columbia, SC 29201
esmith@scag.gov

Attorney for Attorney General

s/ Mark V. Gende
Mark V. Gende, SC Bar No. 72835
SWEENY, WINGATE & BARROW, P.A.
1515 Lady Street
Columbia, SC 29211
(803) 256-2233
mvg@swblaw.com

From: Mark V. Gende
Sent: Monday, April 20, 2020 11:21 AM
To: charlie@carpenterappeals.com; adam@silvernaillawfirm.com; wjstv@mindspring.com; dwilliams@gertzandmoore.com; esmith@scag.gov
Cc: Ken B. Wingate; Griffith Doolittle
Subject: Bauknight v. Pope; Appellate Case No. 2017-01899
Attachments: Respondents' Return to Appellant's Motion to Supplement the Record on Appeal and Motion for Sanctions.pdf; Exhibit 1.pdf; Exhibit 2.pdf

Dear Counsel:

Attached and hereby served upon you is Respondents' Return to Motion to Supplement the Record on Appeal and Motion for Sanctions, which is being e-filed with the Court of Appeals today. Once e-filed, I will send you a copy of the Proof of Service.

Sincerely,

Mark Gende

RECEIVED
Apr 20 2020
SC Court of Appeals



Mark V. Gende | *Member*
Sweeny, Wingate & Barrow, P.A.

1515 Lady St. (29201)
PO Box 12129
Columbia, SC 29211

T ■ [803-256-2233](tel:803-256-2233)
F ■ [803-256-9177](tel:803-256-9177)

[Web](#) | [Bio](#) | [Email](#)

This message may be confidential and protected by the attorney/client, attorney work product or other privileges. It is intended only for the use of the individual named above and the privileges are not waived by virtue of this having been sent by electronic mail. If the person actually receiving this electronic mail, or any other reader of such electronic mail, is not the intended recipient, any use, dissemination, distribution, or copying of the communication is strictly prohibited. If you received this message in error, please send a reply, delete the message immediately, and do not forward this message to any other person.