

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

Apr 14 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
Trial Court Case 2010CP4004900

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 Vanisha Brown; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor children, Sydney L., Carrington L., and 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 Vanisha Brown; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown - Lewis; Yamma N. Brown, individually and on behalf of her minor children, Sydney L., Carrington L., And 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

**RETURN OF ATTORNEY GENERAL IN OPPOSITION
TO MOTION TO SUPPLEMENT THE RECORD**

The Attorney General most strongly opposes this last minute motion to supplement the record which is contrary to this Court’s Order of April 26, 2018. The Record in this case has been complete since this Appellant filed the Supplemental Record on Appeal on December 17, 2018, which consisted of a document designated by the Attorney General but omitted. The Motion also comes after this Court’s letter of April 1, 2020, saying that it would consider this appeal on the records and briefs this month without oral argument. The documents that Appellant seeks to include are either ones she knew about before designating matter for the Record or are ones that, contrary to the Order of this Court of April 26, 2018, were not presented to the circuit court in this case prior to her appeal. That Order stated, in part, 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.”

“Few appeals involve the need for a supplemental record.” Toal, Walker, Baker, *Appellate Practice in SC*, 3d ed., p. 417. Appellant’s Motion is not one of the “few.” It is contrary to this Court’s 2018 Order, serves only to delay this appeal further, and should be quickly denied. Consideration of this appeal on the briefs should proceed this month as scheduled. Brief discussion is set forth below as to why the additional documents should not be included in a supplemental record.

Exhibits

With the exception of Exhibits A (see next section) and as noted below, N and P, all exhibits were generated in cases other than the instant case and should not be included for that reason.

- Exhibits B and C are depositions of the Attorney General and Solicitor General in Pope v. Estate of James Brown, 2013-CP-02-1337 in which the AG was not a party. The case is under a separate appeal before the Court of Appeals. Case 1337 is not consolidated with the instant case.
- Exhibits F, J, O were filings in cases to which the Attorney General is not a party.
- Exhibits D, E, G, H, I, K, L, M, Q and R were all filed in Appellant's Freedom of Information Act cases both of were the subject of opinions of this Court in June last year. The "Legacy Trust" FOIA case was never consolidated with case 2010-CP-40-4900. The "Wingate FOIA" documents Appellant seeks to include were not presented to the Circuit Court prior to this appeal.
- Exhibit N was a memorandum filed over a month ago in case 2010-CP-40-4900 and was not presented to the circuit court prior to this appeal. Therefore, it should be excluded under the April 26, 2018, Order.
- Exhibit P is just an email cancelling oral argument in this case.
- Exhibit R is a letter filing an initial reply brief and designations in a separate appeal in this case, 2018-02229.

Exhibits that Appellant failed to designate earlier

Appellant's Exhibit A pre-dates the time for designations for the Record in this Appeal. Appellant had the opportunity to seek to designate it for the Record when she did her designations in this appeal. Exhibits B - E also pre-date the Record and would be barred by this Court's Order of April 26, 2018, as noted above.

Judicial notice requests

Appellant also requests this Court to take judicial notice of filings in cases in which the Attorney General is not a party (Items 1, 2, 3 and 6) and briefs in the separate Appeal 2018-02229 (Items 4 & 5). This Court denied consolidation of Appeal 2229 with the instant appeal by Order filed December 10, 2018.

The Motion Should Be Denied

As noted, this Court ordered nearly two years ago that Appellant should not list or reference any orders or documents that were not presented to the circuit court as part of this case or that were not filed or presented before this appeal was filed. “Because any supplemental material becomes part of the record, a party may not seek to include material not previously presented to the lower court” Toal, p. 418 citing Rule 210(c), SCACR (“The Record shall not, however, include matter which was not presented to the lower court”) and *Williamsburg Rural Water and Sewer Co., Inc. v. Williamsburg Cnty. Water and Sewer Auth.*, 367 S.C. 566, 627 S.E. 2d 690 (2006)(“Nothing in the appellate court rules permits a party to unilaterally add after-created evidence to the record.”); *see also, Norris v. Ferre*, 315 S.C. 179, 183, 432 S.E.2d 491, 493 (Ct. App. 1993), cited in Toal at p. 418 (motion to supplement the record denied “since the matters were not presented to the trial judge. Rule 209(c), SCACR.”).

The above authority bars consideration of all exhibits other than Exhibit A because they were not presented to the circuit court prior to the Notice of Appeal in this case or were not even filed in the instant case. Exhibits A and B-E were all filed, as noted, before briefing and designations in this case, but Appellant waived that opportunity to seek their designation then.

Similarly, this Court should not grant judicial notice of Items 1, 2, 3 and 6 because they were filed in cases other than the instant case, and Items 4 and 5 were filings in a separate appeal and not presented to the circuit court. Moreover, items 1 – 5 are pleadings or briefs and are not evidence. “[O]riginal judicial notice of adjudicative facts at the appellate level should be limited to matters which are indisputable. *Masters v. Rodgers Dev. Grp.*, 283 S.C. 251, 256, 321 S.E.2d 194, 197 (Ct. App. 1984). Moreover, “[e]very trial judge knows, as every trial lawyer knows, and every appellate court judge should know, that the statements of counsel in an argument are not evidence but are merely the expression of his individual view” *Harper v. Bolton*, 239 S.C. 541, 562, 124 S.E.2d 54, 64 (1962).

Finally, Appellant asks this Court to consider *State v. Bellardino*, S.C. Sup. Ct. Op. 27924 (April 8, 2020) “on the duties of the Attorney General as a party to this proceeding.” That Opinion addressed payment for a competency examination. Appellant did not follow the process required for supplemental authority in Rule 208(b)(7), and the citation should be disregarded.

Because these documents are not properly before the Court now, the Attorney General does not address Appellant’s over five pages of argument on the merits of the issues that she is attempting to raise now. For these same reasons the Attorney General does not designate additional matter now pursuant to Rule 212(b); however, should this Court grant this Motion, the Attorney General would respectfully request leave to designate additional matter then and to respond briefly to Appellant’s argument on the issues in her motion.

Conclusion

This Appeal has been pending for nearly three years. The Record consists of over 2200 pages in five volumes and a supplement. Now, even later than the eleventh hour, Appellant should not be permitted to delay this appeal by supplementing the already huge record with 277

pages of even more documents plus numerous additional pleadings and briefs of which she asks this Court to take judicial notice. All of the documents except Exhibit A are barred by this Court's Order of April 26, 2018, and she could have sought to designate Exhibit A long ago. This appeal by Appellant should be brought to a close by the denial of this motion and by this Court's consideration of the briefs on appeal without argument.

Respectfully submitted,

/s J. EMORY SMITH, JR.

S.C. Bar No. 5262

Deputy Solicitor General

ALAN WILSON

Attorney General

ROBERT D. COOK

Solicitor General

S.C. Bar No. 1373

Office of the Attorney General

Post Office Box 11549

Columbia, SC 29211)

(803) 734-3680; (803)734-3677 (Fax)

esmith@scag.gov

ATTORNEYS FOR RESPONDENT

ATTORNEY GENERAL

April 14, 2020