

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

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. 2010-CP-40-4900

Appellate Case No. 2020-001383

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' RESPONSE TO APPELLANT'S MOTION TO SUPPLEMENT THE
RECORD BASED ON ATTORNEY GENERAL'S PUBLIC RELEASE OF DOCUMENTS
AND, IN THE ALTERNATIVE,
RESPONDENTS' COUNTER-DESIGNATIONS TO PROPOSED APPENDIX**

Introduction

Appellant Adele J. Pope’s (“Pope”) Motion to Supplement the Record Based on Attorney General’s Public Release of Documents (“Appellant’s Motion,” “Pope’s Motion”, or “The Motion”) should be denied, because: (1) it is improperly before the South Carolina Supreme Court; (2) it violates Rules 209(b), 210(c) and (h), and 212(b), SCACR; (3) it presents no new argument Pope has not made repeatedly in this appeal; (4) it is moot; and (5) Appellant has no legal authority to support her Motion.

Furthermore, pursuant to Rule 212(b), SCACR, Respondents also designate supplemental materials to add to the record should the Court grant the Motion.

Argument

I. APPELLANT’S MOTION IS IMPROPER AT THIS TIME, BECAUSE THE SUPREME COURT HAS NOT RULED ON HER PETITION FOR CERTIORARI.

The Court of Appeals issued refiled Opinion No. 2020-UP-216 on September 16, 2020, ruling that each of Pope’s appeals in this case (“Case 1899”) were dismissed as not immediately appealable, except her appeal of the lower court’s order dismissing the Attorney General (“AG”) from the action, which the Court of Appeals affirmed. Pope filed a petition for rehearing, which was denied. At this point, Pope’s only recourse is to file a petition seeking certiorari before the Supreme Court, which she did on October 14, 2020. Pope may not seek to supplement the record at this time.

First, supplementing the record must be done “before argument commences.” Rule 212(b), SCACR. The Court of Appeals dismissed this case without oral argument. Thus, the Motion is not timely.

Second, Rule 242(c), SCACR, states “[a] decision of the Court of Appeals is not final *for the purpose of review by the Supreme Court* until the petition for rehearing or reinstatement has

been acted on by the Court of Appeals” (emphasis added). If the Court of Appeals has dismissed the appeal, the appellant has filed a petition for rehearing, and the Court of Appeals has denied the petition, then the opinion is final with respect to the Court of Appeals except *for the purpose of review by the Supreme Court*. Rule 242(a), SCACR states certiorari is to “review a final decision of the Court of Appeals.” These Rules taken together recognize that where a petition for rehearing has been denied, the Court of Appeals’ order is a final order and ripe for review by the Supreme Court. This posture precludes the Court of Appeals from hearing any further motions in the case. Rules 242(a) and (c) perform the important function of prohibiting motions subsequent to a petition for rehearing because they could unnecessarily delay either consideration by the Supreme Court or the conclusion of the matter.

Third, a case is not before the Supreme Court until “[t]he Supreme Court, or any two (2) justices thereof, may in its discretion, on motion of any party to the case or on its own motion, issue a writ of certiorari to review a final decision of the Court of Appeals.” Rule 242(a), SCACR. “A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons.” Rule 242(b), SCACR. A matter is not before the Supreme Court until certiorari is granted, and certiorari is not a guarantee. Until the Supreme Court makes its discretionary decision as to certiorari, no other matters in the case are—or can be—before the Court. The Court cannot consider a motion when it has not yet decided to take up the case on certiorari.

Therefore, Pope’s motion to supplement the record is not properly before the Court of Appeals because its opinion is final except for review by the Supreme Court, and her motion is not properly before the Supreme Court because the Court has not decided whether to take the case (Respondents’ response to Appellant’s separate Petition for Certiorari will state why Pope’s petition does not rise above the Rule 242(b)(1) bar and certiorari should be denied).

Pope attempts to circumvent these rules by filing the Motion with her petition for certiorari and incorporating the one into the other. (Appellant’s Motion at p. 2 n. 1.) By doing so, Pope disregards court rules and attempts to manipulate the certiorari process in a gambit to get before the Supreme Court what she dramatically, but misleadingly, characterizes as “new public information” (*see* Section III, below) in order to improperly influence the certiorari process. But her sensationalized argument must wait its turn. The Court of Appeals’ opinion is final, except for Supreme Court review, and the Supreme Court has not yet decided to grant certiorari. Thus, Pope’s motion is not proper at this time.

II. APPELLANT’S MOTION VIOLATES RULES 209(b), 210(c) AND (h), AND 212(b), SCACR, BECAUSE THE DOCUMENTS WERE NOT PRESENTED TO THE LOWER COURT AND ARE IRRELEVANT TO THE APPEAL. FURTHER, APPELLANT HAS BEEN WARNED AGAINST THIS TYPE OF FILING.

Rule 209(b) SCACR, prohibits a party from including in the record documents “not relevant to the appeal.” Rule 210(c), SCACR, prohibits “[documents] which [were] not presented to the lower court or tribunal.” Thus, there is a fundamental principle that appellate cases are decided by a review of the record on appeal, and the record is grounded in the documents presented to the lower court; otherwise, the addition of documents to the record could be nearly endless and the grounds on which the appellate court made its rulings could become clouded. While Rule 210(h), SCACR, Review Limited to Record on Appeal, does provide for limited exceptions, this rule underscores the principle that “the appellate court will not consider any fact which does not appear in the Record on Appeal.” Even Rule 212(b), SCACR, Supplemental Record, supports the position that the record may not be supplemented with matter that was not presented to the lower court. The major treatise on appellate practice in South Carolina interprets Rule 212(b), SCACR thusly:

Rule 212(b), SCACR, must of course be read in conjunction with Rules 209(c) and 210(c), SCACR, which states that the record cannot include matter that was not presented to the lower court or tribunal or which is irrelevant to the appeal.

APPELLATE PRACTICE IN SOUTH CAROLINA, Toal, Walker, and Baker, The South Carolina Bar – CLE Division, Third Edition (2016) at 370.

Because any supplemental material becomes part of the record, a party may not seek to include material not previously presented to the lower court or administrative tribunal. (Citations omitted.)

Id. at 418. See also *Williamsburg Rural Water and Sewer Co., Inc. v. Williamsburg Cnty. Water and Sewer Auth.*, 367 S.C. 566, 571, 627 S.E.2d 690, 693 (2006) (Supreme Court refused to consider an affidavit attached—for the first time—to petition for rehearing filed in the Court of Appeals); *Furman v. Nelson*, 208 S.C. 249, 251-52, 37 S.E.2d 741, 742-43 (1946) (denying motion to supplement record because it would cause delay and moving party did not have “right as a matter of course” to add additional facts to record); *Norris v. Ferre*, 315 S.C. 179, 183, 432 S.E.2d 491, 493 (Ct. App. 1993) (denying motion to supplement record on appeal with deposition transcript that had not been presented to trial court).

Furthermore, the proposed documents are not relevant to Pope’s appeal. “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Rule 401, SCRE. Pope’s appeals deal with lower court orders that (1) drop the AG as a party, (2) prevent the sitting AG from being deposed, (3) relieve Respondents from default as to Appellant’s counterclaims, and (4) deny the disqualification of Sweeny, Wingate & Barrow, P.A. (“SWB”) as counsel for AG and deny enjoining Respondent Bauknight from speaking for the AG. (Motion at pp. 6-7.) Pope’s documents are obviously irrelevant to items (1), (2) and (3). Pope’s documents are also irrelevant to item (4), because what Pope challenged on appeal was the Attorney General’s ability to hire Sweeny, Wingate & Barrow at all

under the circumstances of Case 4900, not whether the particulars of any representation agreement were fully understood the same way by each party to the agreement. The understanding, or lack thereof, between the Attorney General and SWB as to the representation agreement is not a fact of consequence in Pope's appeals. It is a sideshow only Pope is pushing. The proffered documents also do not make any fact of consequence more or less probable concerning the issues on appeal. Therefore, Pope's proffered supplemental documents are not relevant, and her motion should be denied.

Lastly, Respondents note that Appellant has been warned by the Court of Appeals against this type of attempted record supplementation on at least two occasions. (*See, e.g.*, Order Granting Motion to Strike, filed April 26, 2018, Case No. 2017-001899 (this appeal) (attached hereto as **Exhibit A**); Order Granting Motion to Strike, filed May 21, 2020 (a related appeal from the same circuit court case) (attached hereto as **Exhibit B**.) This Motion by Appellant is another example of a tactic that has already been repudiated by the Court of Appeals.

III. APPELLANT'S MOTION PRESENTS NO NEW ARGUMENT. POPE HAS MADE THESE ARGUMENTS IN THIS APPEAL AND IN MULTITUDINOUS FILINGS SINCE 2010.

Pope argues the alleged new documents merit consideration because they (1) "show the court of appeal's (sic) opinion was erroneous ... but (2) also that neither the Court of Appeals nor the circuit court had the benefit of compelling evidence" of alleged "constitutional and other issues." (Motion at p. 7.)

As argued in Section II, *supra*, Pope cannot supplement the record with documents that were not presented to the lower court and are not relevant to the appeal. Moreover, Appellant has repeatedly—and from the beginning of the underlying case in 2010—raised the issue of SWB's relationship to the AG. Therefore, Appellant's supplemental documentation is superfluous and unnecessary for a reviewing court. Below is a non-exhaustive list of examples in this case from

the Record on Appeal, as well as the appellate filings, in which Appellant states her contentions and her alleged factual support:¹

- Final Brief of Appellant, filed December 4, 2018, App. Case No. 2017-001899, at pp. 12-14, wherein Appellant briefs her issues concerning SWB’s representation of the AG.
- Return and Memorandum Opposing Motion of Respondents to Strike, filed September 24, 2018, App. Case No. 2017-001899, at p. 5: “[then-Attorney General, now] Governor McMaster has now stated under oath that he did not authorize SWB to bring Richland 4900 in the name of the State/AG.”
- R. 193-204, Motion to Dismiss of Defendant . . . Adele J. Pope, filed July 26, 2010, 2010-GC-40-00073 (probate case number that later became 2010-CP-40-04900), particularly at R. 198-200, wherein Appellant sets forth her litany of contentions related to the relationship between SWB and the AG.
- R. 477-480, Defendant Adele J. Pope’s Motion to Disqualify and/or Enjoin Sweeny, Wingate & Barrow from Representing the State of South Carolina or Attorney General, etc., filed May 19, 2011, 2010-CP-49-04900, particularly at R. 478: “[t]he contingency-fee contract entered into by former AG McMaster and the Sweeny firm . . . is illegal and void, and violates the Due Process and First Amendment rights of Defendants . . .”
- R. 794-799, Return and Opposition to Request for Stay and Request for Expediting Hearing, Scheduling Order and Related Relief, filed April 1, 2013, 2010-CP-40-04900, particularly at R. 795: “[SWB] has no authority to make the . . . Motion on behalf of at least 11 of the Plaintiffs because either: they have terminated [SWB]; they never engaged [SWB]; or [SWB] is otherwise prohibited from speaking for them, including: . . . Alan Wilson as Attorney General of South Carolina, who notified [SWB] *in writing and prior to the service of the . . . Motion* that [SWB] does not represent the AG’s Office . . .” (emphasis in original).
- R. 802-805, Status Report of Defendant Adele J. Pope, filed April 1, 2013, 2010-CP-40-04900, particularly at R. 802: “Attorney General Wilson’s recent confirmation that the AG’s Office is not represented by Plaintiffs’ counsel herein . . .”

¹ Of course, Respondents dispute Appellant’s legal arguments and factual recitations, but Respondents provide these examples to the court so that the court may be aware that Appellant’s contentions concerning SWB and the AG have been raised repeatedly. Appellant’s attempt to sensationalize an apparent “public release” of “startling facts” is actually a rehashing of arguments that have been in the record since the beginning of this case in 2010.

- R. 983-1053, Defendant/Counterclaim Plaintiff Adele J. Pope’s Motion to Alter, Amend, Reconsider and/or Vacate Order Granting Plaintiffs’ Motion for Summary Judgment as to Counterclaims, filed July 14, 2017, 2010-CP-40-04900, particularly at R. 1014: “Governor Henry McMaster has stated under oath that he did not bring the suit as Attorney General, and did not authorize Bauknight to bring it on his behalf as Attorney General; Attorney General Wilson knows nothing about the Suit...”
- R. 1054-1107, Defendant/Counterclaim Plaintiff Adele J. Pope’s Motion to Alter, Amend, Vacate and/or Reconsider Order Granting Attorney General’s Motion to be Dropped as a Party, filed July 19, 2017, 2010-CP-40-04900, particularly at R. 1057-1058. In this portion of that particular motion, Appellant included an excerpt from the deposition transcript of former Attorney General Henry McMaster. In this deposition, Appellant questioned [now] Governor McMaster concerning his knowledge of the commencement of Case 4900. Respondents’ counsel in this appeal have been in Case 4900 since its inception. *See also* R. 1086.
- R. 1235-1253, Agreement for Legal Services. Respondents’ counsel notes that the Fee Agreement between all Respondents and counsel *is already in the Record on Appeal in this matter.*
- R. 1634-1665, Defendant Adele J. Pope’s Brief In Support of Injunctions as to Russell L. Bauknight and Sweeny Wingate & Barrow and Related Relief, filed September 14, 2011, particularly at R. 1639-1640, wherein Appellant sets forth her litany of contentions related to the relationship between SWB and the AG.
- R. 1924-1930, Affidavit of Adele J. Pope in Support of Motion to Strike Consolidation Motion of Attorney General and Others, filed May 27, 2016, 2010-CP-46-04900, particularly at R. 1928: “[o]n information and belief, AG Wilson now asserts, as Buchanan and Pope asserted when Richland 4900 was filed, that [SWB] has no legal authority to claim that he is acting on behalf of the Attorney General of South Carolina in Richland 4900 . . .”
- R. 1996-2020, Memorandum in Support of Deposition of Attorney General and Opposing Protective Order, filed August 26, 2016, 2010-CP-40-04900, *passim*, particularly at R. 2006 at n. 24: “McMaster testified he knows almost nothing about what happened during this period . . . and did not authorize [SWB] to file Richland 4900 on behalf of the State/Attorney General.”

Without question, any appellate court reviewing the filings and Record on Appeal in this case will have voluminous examples of Appellant’s oft-repeated contentions concerning the

relationship between SWB and the AG. Appellant’s suggested supplements to the Record merely rehash her prior contentions and are entirely unnecessary.

Pope has been arguing the same points over and over again in this appeal and in filings since 2010, and Pope’s claim that these “recently released” documents somehow affect this appeal is disingenuous, *because Pope has been aware of the AG’s position since at least March of 2013*. Pope cleverly omits any overt reference to this fact from her Motion, but it is undeniable from a review of the Record on Appeal. At R. 795, Pope advised the circuit court via a Return dated March 29, 2013 (filed April 1, 2013) as follows:

“[SWB] has no authority to make the . . . Motion on behalf of at least 11 of the Plaintiffs because either: they have terminated [SWB]; they never engaged [SWB]; or [SWB] is otherwise prohibited from speaking for them, including: . . . Alan Wilson as Attorney General of South Carolina, who notified [SWB] *in writing and prior to the service of the . . . Motion* that [SWB] does not represent the AG’s Office . . .” (emphasis in original).

In sum, none of Pope’s documents represent any new information that has not been included in the record on appeal and considered by the Court of Appeals, and is, therefore, available for review by the Supreme Court if it should grant certiorari. Pope’s Motion is in the simplest terms a crass attempt to flaunt the rules of appellate practice under the pretext of newly available information in order to get an additional chance to present what she deems explosive revelations, which in reality are old, tired allegations she is trotting out once again, as she has many times in the past.

IV. APPELLANT’S MOTION IS MOOT, BECAUSE THE COURT OF APPEALS PROPERLY UPHELD THE LOWER COURT’S RULE 21, SCRCF, DISMISSAL OF THE ATTORNEY GENERAL.

Respondents agree with the opinion of the Court of Appeals in this case, dropping the Attorney General from the case under Rule 21, SCRCF. Moreover, this Court, in its 2013 opinion in *Wilson v. Dallas*, notes (with apparent approval) the intention of the Attorney General

to withdraw from Case 4900. *See* 403 S.C. 411, 449 n.30, 743 S.E.2d 746, 767 n.30 (2013). Therefore, Pope's motion is moot, because the Court of Appeals properly dismissed the AG from the action.

V. APPELLANT'S MOTION SHOULD BE DENIED BECAUSE IT CITES NO RULE FOR SUPPORT, RELIES ON NON-BINDING, OUT-OF-JURISDICTION CASES, AND THE ONE SOUTH CAROLINA AUTHORITY CITED IS ACTUALLY CONTRARY TO APPELLANT'S POSITION.

Pope relies on no South Carolina Appellate Court Rule to support her Motion, other than a perfunctory reference to Rule 212(b), SCACR. Respondents argue this omission is because Pope's Motion is contrary to the rules, *see* Section II, *supra*. Furthermore, Pope cites two out-of-jurisdiction federal cases, one from the D.C. Circuit and the other from the 11th Circuit. Neither of these cases is controlling in South Carolina. Finally, the authority that Pope does cite does not support her Motion. Instead, as argued in Section II above, the authoritative treatise, *APPELLATE PRACTICE IN SOUTH CAROLINA*, supports Respondent's opposition to Pope's Motion. Therefore, Pope has no rule, controlling case, or treatise to support her Motion.

VI. IN THE ALTERNATIVE, PURSUANT TO RULE 212(b), RESPONDENTS SUBMIT THE FOLLOWING COUNTER-DESIGNATIONS TO THE PROPOSED APPENDIX TO THE RECORD ON APPEAL.

In the event that the Court grants this Motion, Respondents are required by Rule 212(b) to submit counter-designations to supplement the Record. Respondents' Appendix designations are as follows:

- Certificate of Service Page, Plaintiffs' Answer to Counterclaim, filed November 16, 2010, 2010-CP-40-04900.
- Plaintiff Henry D. McMaster's As Attorney General for the State of South Carolina Responses to the Supplemental Requests to Admit of Defendant Adele J. Pope and Certificate of Service Page, served January 7, 2011, 2010-CP-40-04900.

- Alan Wilson’s Verification of Answers to Interrogatories and Certificate of Service Page, served May 3, 2011, 2010-CP-40-04900.
- Redacted March 30, 2012 Email from Attorney General’s Office to Mark V. Gende, Esq.
- Deposition Transcript, Everett A. Kendall, II, Esq., March 6, 2017, 2013-CP-02-01337, at pp. 14, 19-38, 44-45, 51, 53-55, 57-59, 65-68.
- Deposition Transcript, Kenneth B. Wingate, Esq., March 6, 2017, 2013-CP-02-01337, at pp. 11-22, 25-31, 48-54, 58-61, 63-66, 74-77.
- Deposition Transcript, Vol. II, C. Havird Jones, Jr., Esq., May 5, 2016, 2013-CP-02-01337, at pp. 58-61, 124-131, 157-158, 160.
- Deposition Transcript, Hon. Alan M. Wilson, March 21, 2017, 2013-CP-02-01337, at pp. 12-15, 17, 21, 30-31, 50-51, 54, 58-70, 80-88.
- Deposition Transcript, Robert D. Cook, Esq, February 8, 2017, 2013-CP-02-01337, at pp. 9-17, 52-53.
- Deposition Transcript, Hon. Henry D. McMaster, August 18, 2016, 2010-CP-40-04900, at pp. 5-6, 16-21, 32-33, 66, 72, 127-146, 169-175.
- Deposition Transcript, Hon. Henry D. McMaster, October 19, 2016, 2013-CP-02-01337, at pp. 100-101.
- Deposition Transcript, John W. McIntosh, Esq., February 8, 2017, 2013-CP-02-01337, at pp. 60-66.

Conclusion

Pope’s Motion is merely an effort to exploit an inconsequential FOIA release and improperly place additional material into the appellate record. The Motion, however, contains its own poison pill. Pope is forced to admit that on at least two occasions, an attorney representing the Attorney General’s Office admitted on the record and in open court that Sweeny, Wingate & Barrow were the Attorney General’s lawyers. (Motion, p. 5 at n. 2, 3.) Thus, to the extent there are any differences of opinion about that relationship, it is at best an internecine issue between the Attorney General and Sweeny, Wingate & Barrow.

Pope's Motion is not properly before the court, is in violation of the SCACR because the documents were not presented to the lower court and are irrelevant, and makes absolutely no new argument.

Therefore, for the reasons stated above Respondents respectfully request that the Court deny Appellant's Motion to Supplement the Record.

Respectfully submitted,

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