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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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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

Appellate Case No. 2018-002229

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 "MOTION FOR JUDICIAL NOTICE AND EXPEDITED CONSIDERATION OF APPEAL BASED ON ATTORNEY GENERAL'S OCTOBER 2020 PUBLIC RELEASE OF DOCUMENTS BEARING ON CRITICAL ISSUES HEREIN"

AND

RESPONDENTS' MOTION TO STRIKE

Introduction and Requested Relief

Respondents[1] oppose Appellant's "Motion for Judicial Notice and Expedited Consideration of Appeal Based on Attorney General's October 2020 Public Release of Documents Bearing on Critical Issues Herein." This Motion is an attempt to flood the appellate record with exhibits, filings, and conspiracy theories, *all of which are disputed by Respondents.* Appellant's Motion is non-conforming to the well-established rules of appellate practice.

Appellant's Motion should be denied and stricken from the record in this case. Further, Respondents request that Appellant be enjoined from additional filings of this sort. Finally, Respondents request their reasonable attorneys' fees incurred in responding to this Motion.

Facts Bearing Upon the Motion

As the Court is aware, this appeal concerns three issues: 1) whether the trial court erred in denying Appellant's motion to dismiss, 2) whether the trial court erred in granting Respondents' motion for summary judgment as to Appellant's counterclaims, and 3) whether the actions of the Attorney General deprived Appellant of her due process rights. (*See* Respondents' Final Brief, Statement of Issues on Appeal, at p. 1.) The Amended Record on Appeal in this case is four volumes,[2] which contain a record representing years of litigation. This appeal is fully briefed and ready for consideration.

Yet, at this late hour, Appellant seeks to add to this Record certain recent court filings containing documents from an apparent October 2020 FOIA release by the Attorney General's Office (hereinafter "AG"). Respondents' counsel has not seen this FOIA request. Nor has

[1] As used herein, "Respondents" refers to all Respondents except the Attorney General's Office, which is separately represented in this appeal.

[2] The first Record on Appeal was five volumes, but this record was stricken due to Appellant's inclusion of improper information. *See* Order of the Court of Appeals, filed May 21, 2020, App. Case No. 2018-002229.

Appellant told this Court who made this FOIA request. Respondents' counsel also has not seen this FOIA response in full. Respondents' counsel does not know what documents were included in this FOIA response, other than what Appellant has placed in various filings. To the prejudice of Respondents, Appellant seeks to have all of this "information" added to the record in a case that has already been briefed.

Argument

I. JUDICIAL NOTICE OF APPELLANT'S SUGGESTED DOCUMENTS IS IMPROPER, BECAUSE RESPONDENTS DISPUTE APPELLANT'S INTERPRETATION OF ALL OF THEM.

One need look no further than this Court's own jurisprudence to appreciate the rarity of judicial notice at the appellate level: "original judicial notice of adjudicative facts at the appellate level should be limited to matters *which are indisputable*." *Masters v. Rodgers Development Group*, 238 S.C. 251, 256, 321 S.E.2d 194, 197 (Ct. App. 1984) (emphasis added). As the *Masters* Court explained:

> For a fact to be subject to judicial notice, it must be so notorious that the court may properly assume its existence without proof. Unless the fact is either of such common or general knowledge that it is accepted by the public without qualification or contention, or its accuracy is capable of verification by reference to readily available sources of indisputable reliability, it is not subject to judicial notice. Judicial notice takes the place of proof . . . *Appellate courts are generally reluctant to notice adjudicative facts even when those facts may be absolutely reliable. Notice of "facts" for the first time on appeal may deny the adverse party the opportunity to contest the matters noticed; it may also violate the general principle that appellate review should be limited to the record. Finally, appellate courts, limited to the "cold" record, cannot be as sensitive to the appropriateness of judicial notice as the trial judge.* For the foregoing reasons we hold that original judicial notice of adjudicative facts at the appellate level should be limited to matters which are *indisputable*.

238 S.C. at 255-56, 321 S.E.2d 196-97 (citations omitted) (emphasis added). Appellant's Motion states that she is asking this Court to take judicial notice of four filings: one sent to the Supreme Court, one sent to this Court, and two sent to the circuit court. (*See* Motion, at p. 2.) Appellant

is also asking this Court to take judicial notice of all of the exhibits and sub-exhibits accompanying these filings and attached to her Motion. Most shockingly, the real implication of her Motion is that she is asking the Court to take judicial notice *of Appellant's own self-serving interpretation of all of these documents*. (*See, e.g.,* Motion, at pp. 4-5.) Appellant's request violates every aspect of the rules related to appellate judicial notice as set forth in *Masters*.[3]

In *Masters*, the requested judicial notice was for the Court of Appeals to take notice of the recitations in a publicly recorded deed. *Masters*, 283 S.C. at 255, 321 S.E.2d at 196. The Court noted that not even the statements in a recorded deed rise to the level of indisputability needed for appellate judicial notice. *Id.* at 256, 321 S.E.2d at 197. If not even a publicly recorded deed is the subject of appellate judicial notice, how much more flawed is Appellant's Motion, which is full of hearsay, exhibits upon exhibits, and contested facts? In the interests of brevity, Respondents highlight the disputability of just a few of Appellant's contentions:

- "The grounds of this motion are that the AG's October 2020 Document, with undisputed facts in the record in this appeal, confirm that for at least 7 ½ years SWB, with clear knowledge that it has no legal authority to do so, has used the prestige and power of the State/Attorney General to benefit Tommie Rae and SWB's other private clients." (Motion, at p. 2.) **Respondents dispute this "fact."**

- "Under Rule 201(b) the facts revealed by the AG's October 2020 Documents are not subject to reasonable dispute and their accuracy is verified because the AG has publicly released documents to clarify his own positions at the relevant time." (Motion, at pp. 2-3.) **Respondents dispute this "fact."**

- "The AG's October 2020 Documents show that SWB and other lawyers who were paid \$375 to \$500 an hour to work for Respondents Legacy Trust have concealed the important facts shown in the October 2020 Documents for at least 7 ½ years." (Motion, at p. 3.) **Respondents dispute this "fact."**

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[3] Appellant cites to Rule 201, SCRE as the legal basis for her request for judicial notice. As the *Masters* Court makes clear, the appropriate standard for *appellate* judicial notice is indisputability, which is a higher standard than Rule 201, SCRE. *Compare* Rule 201, SCRE (fact must be "not subject to reasonable dispute") *with Masters*, 238 S.C. at 256, 321 S.E.2d at 197 (fact for appellate judicial notice must be "indisputable").

- "The AG's October 2020 Documents could not have been presented to this, or any court, earlier." (Motion, at p. 4.) **Respondents dispute this "fact."** *See* Section II, *infra.*

- "In September 2010 the Afterman claimed $4.7 million value arrived. It was absurd." (Motion, at p. 11.) **Respondents dispute this "fact."**

- "The AG's October 2020 Documents provide clear proof that SWB and Bauknight, for the last 7 ½ years have had no authority to use the power of the State to conceal this document to damage . . . Appellant . . ." **Respondents dispute this "fact."**

As mentioned, these are just a few points of contention between Respondents and Appellant in this complicated, lengthy litigation. For Appellant to claim that the "facts" contained in her self-serving thirteen-page Motion and 90 pages of exhibits are "not subject to reasonable dispute" is wholly inaccurate to the point of frivolity. Appellate judicial notice is completely improper in this case.

II. JUDICIAL NOTICE OF APPELLANT'S SUGGESTED DOCUMENTS IS ENTIRELY UNNECESSARY, BECAUSE SHE SEEKS TO CHARACTERIZE AS "NEW" THE ARGUMENTS SHE HAS BEEN MAKING FOR YEARS.

Appellant has repeatedly—and from the beginning of the underlying case in 2010—raised the issue of Sweeny, Wingate & Barrow, P.A.'s (abbreviated herein as "SWB") relationship to the AG. Therefore, Appellant's proposed documents for judicial notice are 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 certain appellate filings in this appeal and a related appeal, in which Appellant states her contentions and her alleged factual support:[4]

[4] 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 documents by the AG is actually a rehashing of arguments that have been in the record since the beginning of this case in 2010.

- Second Amended Final Brief of Appellant, captioned "Corrected Final Brief of Appellant," filed September 25, 2020, App. Case No. 2018-002229, at p. 33, wherein Appellant briefs her contentions concerning SWB's authorization to initiate the underlying lawsuit on behalf of the AG.

- 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. p. 231, *et seq.*, 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. p. 236-38, wherein Appellant sets forth her litany of contentions related to the relationship between SWB and the AG.

- R. p. 412, *et seq.*, 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. p. 413: "[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. p. 860, *et seq.*, 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. pp. 863-864. 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.

- R. p. 914, *et seq.*, 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. p. 916: "[Governor McMaster] has confirmed under oath in this case ("the Wingate Suit") that he did not authorize [SWB] to name the Attorney General as a Wingate Suit Plaintiff..."

- R. p. 1523, *et seq.*, Supplemental Affidavit of Adele J. Pope Supporting Injunction Against [SWB] and Disqualification From Representing State of South Carolina/Attorney General . . .," filed Jan. 15, 2013, Case No. 2010-CP-40-04900, particularly at R. p. 1525: "[t]he most startling new and/or confirmed facts include that the State of South Carolina/Attorney General recently asserted the State/AG *never contracted* with [SWB] to bring this suit against . . . [Appellant] . . ." (emphasis added).

- *See also* sources cited in Section III of Respondents' Response to Appellant's Motion to Supplement the Record Based on Attorney General's Public Release of Documents . . .," filed November 6, 2020, App. Case No. 2020-001383 (listing additional examples of Appellant's contentions concerning the relationship between the AG and SWB from the record on appeal in a companion appeal).

Without question, any appellate court already has voluminous examples of Appellant's oft-repeated contentions concerning the relationship between SWB and the AG. Appellant's suggested documents for "judicial notice" merely rehash her prior contentions and are entirely unnecessary.

Further, Appellant's claim that these "recently released" documents somehow affect this appeal is disingenuous, *because Appellant has been aware of the AG's position concerning its relationship with SWB since at least early 2013.* Appellant cleverly omits any overt reference to this fact from her Motion, but it is undeniable from a review of the Record on Appeal. (*See* R. p. 1525.)

In sum, none of Appellant's documents represent any new information that has not been included in the record on appeal. Appellant'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 to be significant revelations, which in reality are old, tired allegations she is trotting out once again, as she has many times in the past.

III. APPELLANT SEEKS "JUDICIAL NOTICE" AS AN IMPROPER ATTEMPT TO DEFEAT THE RULES RELATED TO A

SUPPLEMENTAL RECORD, INCLUDING RESPONDENTS' RIGHT TO COUNTER-DESIGNATE.

Appellant's Motion points out that it is *not* a motion to supplement the record (*see* Motion, at p. 12), because she believes that "[a] motion to supplement will likely delay this appeal further" (*id.*). Appellant concedes, as she must, that "[f]ew appeals involve the need for a supplemental record." (*Id.*, quoting APPELLATE PRACTICE IN SOUTH CAROLINA, *infra*, at p. 417.) Appellant then cites to non-controlling, out-of-jurisdiction case law that she argues allows for this late-stage presentation of evidence, claiming that the "just-disclosed documents bear directly on the constitutional issues in this appeal." (*See id.* at pp. 12-13.)

Presumably, Appellant points out to the Court that this is not a motion to supplement because she knows this Motion would violate the rules related to a supplemental record, discussed below. These particular documents were not presented to the trial court. *See* Rule 210(c), SCACR. These documents are not relevant.[5] *See* Rule 209(b), SCACR. Appellant did not present the required appendix. *See* Rule 212(c), SCACR. Most importantly, Appellant's Motion—made pursuant to Rule 201, SCRE and not Rule 212, SCACR—has deprived Respondents of their right to counter-designate. *See* Rule 212(b), SCACR.

In limited circumstances, a party may move to supplement the record on appeal. *See* Rule 212, SCACR. However, 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

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[5] As discussed in Section III, *supra*, Appellant has presented substantially similar information over and over again to the trial court and this court. Thus, Appellant's proposed documents in this Motion are superfluous to the point of irrelevance. Further, the actual issues in this appeal have been briefed by the parties at length. As noted in Respondents' Final Brief at pp. 43-44, Appellant has abandoned her constitutional arguments by failing to brief them with specificity. Therefore, any proposed "information" related to her alleged constitutional arguments is not relevant.

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, 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, 3d. 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).

Nothing about Appellant's Motion complies with these rules, and everything about Appellant's Motion is unfairly prejudicial to Respondents.

IV. THIS CASE DOES NOT REQUIRE "EXPEDITED HEARING."

Respondents have no objection to oral argument being scheduled as promptly as the Court's schedule allows, but Respondents do not agree with the reasons put forth by Appellant that an "expedited hearing" is necessary.

V. RESPONDENTS MOVE FOR AFFIRMATIVE RELIEF.

Because Appellant's Motion is so egregious, as described in Sections I-III above, Appellant's Motion should be considered "frivolous" as that term is used by Rule 269, SCACR. Appellant has a history of disregarding the rules of appellate litigation.[6] Accordingly, Respondents move that this Motion be stricken from the record in this case. Further, Respondents request reasonable attorneys' fees incurred in responding to this frivolous motion, and Respondents request an Order from this Court enjoining Appellant from future filings of this sort. *See* Rule 269, SCACR; *see also* Orders cited in n. 6, *supra*; *In re Maxton*, 325 S.C. 3, 478 S.E.2d 679 (1996) (repeat filer of frivolous petitions warned against continuing to do so).

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[6] Appellant has repeatedly shown disregard for the *Appellate Court Rules* in this appeal and a related appeal, Case No. 2017-001899. In this appeal, Petitioner's first Initial Brief, first Designation of Matter, first Record on Appeal (5 volumes), and first Final Brief were stricken due to various rules violations. *See* Orders of the Court of Appeals, Case No. 2018-002229, dated July 26, 2019, May 21, 2020, and August 21, 2020. In Case No. 2017-001899, Petitioner's first Initial Brief and First Designation of Matter were stricken due to rules violations. *See* Order of the Court of Appeals, Case No. 2017-001899, dated April 26, 2018. Several of these Orders stemmed from Appellant's attempt to add improper information into the record on appeal.

Appellant has also been the subject of three cautionary orders from the Supreme Court, due to her meritless and/or otherwise inappropriate filings. *See* Order of the Supreme Court, lead Case No. 2009-142286, dated June 10, 2015; Orders of the Supreme Court, Case No. 2020-00764, dated August 10, 2020 and November 9, 2020.

Conclusion

For the foregoing reasons, Respondents request that this Court deny Appellant's Motion, strike it from the record in this case, award attorneys' fees for opposing this Motion, and enjoin Appellant from future filings of this sort.

Respectfully submitted,

s/ Mark V. Gende
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November 16, 2020

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In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY
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And

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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 November 16, 2020 I served **RESPONDENTS' RETURN TO "MOTION FOR JUDICIAL NOTICE AND EXPEDITED CONSIDERATION OF APPEAL BASED ON ATTORNEY GENERAL'S OCTOBER 2020 PUBLIC RELEASE OF DOCUMENTS BEARING ON CRITICAL ISSUES HEREIN" AND RESPONDENTS' MOTION TO STRIKE** 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:

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:

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November 16, 2020

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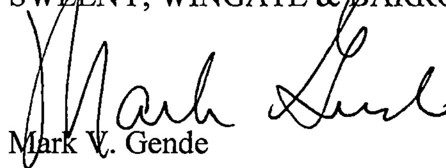
Re: *Russell L. Bauknight, et al. v. Adele J. Pope*
Appellate Case No. 2018-02229
Our File: 4077-7389

Dear Ms. Kitchings:

Enclosed please find our firm's check for $50.00, which represents the motion filing fee of Respondents' Motion to Strike which was e-filed on November 16, 2020, a copy of which is enclosed.

Sincerely,

SWEENY, WINGATE & BARROW, P.A.



Mark V. Gende

MVG/gpc
Enclosure
cc: Counsel of Record

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TO:

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