

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

RECEIVED

Nov 23 2020

SC Court of Appeals

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.; 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.

**APPELLANT'S REPLY TO RETURN OF SWEENEY, WINGATE & BARROW, P.A. TO
MOTION FOR JUDICIAL NOTICE AND EXPEDITED APPEAL**

Appellant Adele J. Pope (“Appellant”) submits this reply to the returns of Sweeny, Wingate & Barrow, P.A. (“Wingate”)¹ to Appellant’s motion for judicial notice and expedited appeal based on the Attorney General’s October 2020 public release of documents bearing on critical issues herein (“Appellant’s Motion”). For the reasons set forth below, Appellant submits that her motion should be granted.

SUMMARY OF APPELLANT’S POSITION

Wingate, true to form, opposes this Court’s taking judicial notice of recent filings and recently released documents, despite those documents being generated by Wingate and the AG, but never disclosed by either until October 2020. As discussed below, Respondents misapprehend the nature of Appellant’s motion, which should be granted. The very existence of the October 2020 documents bears on issues in this appeal, including the grant of summary judgment, and this Court should take Judicial notice of them.

ARGUMENT

I. Wingate Misunderstands the Judicial Notice Sought in Appellant’s Motion, which properly seeks judicial notice of important documents.

Wingate asserts that Appellant asks this Court to take judicial notice of Appellant’s “*own self-serving interpretation of*” the documents listed in her motion. (*See* Return at 4), completely disregarding that the motion clearly asks this Court to take judicial notice of the documents specifically referred to in her motion. (*See* Motion at 2) Based on its own misreading of the motion, Wingate goes on to construct a legal argument against this Court taking judicial notice.

In fact, Appellant’s motion properly seeks judicial notice of *the documents* which it refers to and presents to this Court. Appellant has indeed presented the context for why judicial notice

¹ The AG has filed a brief return, which “concur” in Wingate’s arguments. Appellant incorporates her separate reply to the AG herein.

is appropriate and necessary as to these documents, which could not have been included in the record at the time the orders on appeal were issued or earlier in the appellate process. Wingate relies primarily on *Masters v. Rodgers Development Group*, 238 S.C. 251, 321 S.E.2d 194 (Ct.App. 1984), in its argument that this court cannot take judicial notice of the filings offered by Appellant. While *Masters* is an instance in which this Court declined to take judicial notice of the content of a recorded deed, Appellant submits that the case is distinguishable in two important ways from this one.

First, the deed offered to this Court in *Masters* was apparently referred to at the oral argument of the case, and the Court found that taking judicial notice of statements within the deed could deprive the opposing party of an opportunity to respond. *Id.* at 256, 321 S.E.2d at 197. Respondents *have* had an opportunity to respond via their return, but they have not suggested that the October 2020 documents are not genuine – or that that they can be characterized differently from how Appellant has presented them.

Notably, the *Masters* Court was particularly concerned that allowing the opposition to respond to the deed raised at oral argument would have allowed evidence outside the pleadings on appeal from a default judgment “through the back door of judicial notice.” *Id.* This case is an appeal, in part, from an order granting summary judgment to Respondents on Appellant’s counterclaims. Because the documents of which Appellant asks this Court to take judicial notice include startling new information which was, by no fault of Appellant, not available for the circuit court’s consideration, their existence is cause enough for reversal of the circuit court’s order.

A motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter

of law." Rule 56(c), SCRCF. "An appellate court reviews the granting of summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRCF." *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 379, 534 S.E.2d 688, 692 (2000).

"In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party." *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *Lanham v. Blue Cross & Blue Shield of S.C.*, 349 S.C. 356, 362, 563 S.E.2d 331, 333 (2002). Moreover, because summary judgment is a drastic remedy, it should be cautiously invoked to ensure a litigant is not improperly deprived of a trial on disputed factual issues. *Madison ex rel. Bryant v. Babcock Ctr., Inc.*, 371 S.C. 123, 134, 638 S.E.2d 650, 655 (2006).

In this instance, the documents released in October 2020 are more than a scintilla of evidence that this case was commenced in the name of the State/AG by private individuals and a private law firm, which the AG never engaged or authorized to file suit in its name.

This leads to the second important way in which *Masters* is distinguishable. This Court noted therein that the recitals in the recorded deed "do not establish, *as against strangers*, facts recited there" [emphasis supplied]. *Id.* at 257, 321 S.E.2d at 197. The October 2020 documents do not involve any strangers to this case. All of these documents were generated by parties to this case and/or their counsel, but none had been previously published or produced to Appellant. Neither the AG nor Wingate disputes the genuineness of the documents or the statements contained therein.

Masters does not support Wingate’s argument that this Court may not take judicial notice as requested in Appellant’s motion.

In addition, this appeal involves a circuit court order declining to enjoin Wingate or Russell L. Bauknight from speaking on behalf of the State/AG. The October 2020 documents are among the clearest evidence of the relationship between Wingate, Bauknight and the AG, and this Court should take notice of them in considering this appeal. The very existence of these documents, without any context from either Appellant or Respondents, justifies reversal of the orders on appeal herein, and this Court can and should take judicial notice.

II. The October 2020 Documents Contain Information Never Previously Disclosed to Appellant, the Circuit Court or this Court.

Wingate argues that the October 2020 documents do not “represent any new information that has not been included in the record on appeal.” (Return at 7). Wingate supports its false argument by citing several instances in which Appellant has challenged the authority of Wingate and Bauknight to speak for the State/AG. Wingate’s entire argument is a red herring; Appellant *has* challenged Wingate and Bauknight’s authority to speak for the State/AG consistently since Wingate commenced this case in 2010, and she has cited evidence that Wingate and Bauknight lacked authority to speak for the State/AG.² The October 2020 documents, however, show that both the AG and Wingate knew that Wingate has *never* represented the AG in this action. This is indeed new information.

It is disingenuous for Wingate to assert that the October 2020 documents do not for the first time show that both Wingate and the AG knew Wingate had never represented the AG, when both

² In addition to legal precedent, Appellant has offered the testimony of now-Governor Henry D. McMaster that he, as AG, did not authorize Wingate to bring this action in the name of the State/AG.

have argued multiple times, in this very appeal and before multiple courts that such representation was properly authorized and legal. *See* Brief of Respondents and Brief of Respondent AG herein; Court of Appeals Case Tracking No. 2011186406; Appellate Case No. 2017-1899.

III. Appellant’s Motion Properly Seeks Judicial Notice of the Documents Listed therein and does not Seek to Supplement the Record.

Wingate curiously suggests that Appellant seeks to supplement the record – despite no such request being made in the motion – and then embarks on an argument against this imagined purpose of Appellant’s motion. As is clear from the motion itself, Appellant has not asked this Court to supplement the record; a supplement is not necessary in this case, as the very *existence* of the October 2020 documents gives this Court basis to reverse the orders on appeal. As noted in Appellant’s motion, these documents could not have been presented to the lower court, by no fault of Appellant, but should have been available and considered before any grant of summary judgment or any decision on Appellant’s motion to enjoin/disqualify Wingate and Bauknight from speaking for the State/AG.

As noted above, summary judgment should not have been entered in this case if a “scintilla” of evidence supported Appellant’s counterclaims. *Hancock, supra*. Appellant believes, as argued in her Brief herein, that summary judgment was inappropriate based on the record before the circuit court; however, the *existence* of the October 2020 documents adds materially to the reasons Appellant has advanced for this Court to reverse the orders on appeal. As noted above, neither Wingate nor the AG disputes the genuineness of the October 2020 documents or that the documents had never before been released.

Appellant incorporates the legal argument made in her motion and above in favor of this Court's taking judicial notice; because she has not sought supplementation of the record, she does not undertake to argue the law on that subject as advanced by Wingate.

Appellant notes that Wingate has also relied on documents outside the lower court record, in particular an order of the Honorable Doyet A. Early, III, dated January 16, 2019, issued in a separate case long after the orders on appeal herein were issued. *See* Brief of Respondents at 34, n. 2. In addition, the AG suggests that Appellant may have violated prior Orders of this Court. Those Orders, including one issued *in another case*, related to the preparation of the Briefs and Record on Appeal herein, and Appellant has fully complied with those Orders.

Appellant has noted in her motion that the circumstances surrounding the October 2020 documents are extraordinary, and most cases would not require consideration of these issues after the briefs and record are filed. The unexpected release of the October 2020 documents justifies this Court granting the relief requested.

IV. No Respondent Substantively Opposes Expediting this Appeal.

Wingate claims to oppose Appellant's motion to expedite this appeal, but also consents to argument being scheduled at the Court's earliest convenience. Wingate cites no authority against expediting, and Appellant submits that Wingate has actually or effectively consented to this portion of her motion.

CONCLUSION

For the reasons set forth above and in Appellant's motion, Appellant respectfully asks that the Court grant her motion for judicial notice and expedite consideration of this appeal.

Respectfully submitted,

Charles E. Carpenter, Jr.
Carpenter Appeals & Trial Support, LLC
4825 Portobello Road
Columbia, SC 29206
Telephone: (803) 758-2886
charlie@carpenterappeals.com
S.C. Bar No. 1133

s/Adam T. Silvernail
Adam T. Silvernail
Law Office of Adam T. Silvernail, LLC
Post Office Box 7995
Columbia, South Carolina 29202
Telephone (803) 799-1770
adam@silvernaillawfirm.com
S.C. Bar No. 80219

William Jeffrey Smith
1216 Crenshaw Street
Newberry, SC 29108
Telephone: (803) 597-0209
Email: wjstv@mindspring.com
SC Bar No. 0005225

Daryl L. Williams
Gertz & Moore, LLP
1416 Laurel Street (29201)
Post Office Box 456
Columbia, SC 29202
SC Bar No. 6121

Counsel for Appellant Adele J. Pope

November 23, 2020

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

RECEIVED

Nov 23 2020

SC Court of Appeals

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.; 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.

PROOF OF SERVICE

The undersigned counsel for Appellant certifies that he has served a copy of the following:

1. Reply to Return of Sweeny, Wingate and Barrow to Motion for Judicial Notice;
2. Reply to Return of AG to Motion for Judicial Notice; and
3. Return to Motion of Sweeny, Wingate and Barrow to Strike

on all Respondents on the date shown below, by emailing a copy of the same to their counsel, addressed as follows:

Kenneth B. Wingate
Mark V. Gende
Sweeny, Wingate & Barrow, P.A.
1515 Lady Street
Columbia, SC 29201
Telephone: (803) 256-2253
kbw@swblaw.com
mvg@swblaw.com

Counsel for Respondents

Alan Wilson, Attorney General
Robert D. Cook, Solicitor General
J. Emory Smith, Jr., Deputy Solicitor General
PO Box 11549
Columbia, SC 29211
Telephone: (803) 734-3680
esmith@scag.gov

Counsel for Respondent Attorney General

s/Adam T. Silvernail
Counsel for Appellant

November 23, 2020



Adam Silvernail <adam@silvernaillawfirm.com>

Bauknight, et al v. Pope, Appellate Case No. 2018-2229

1 message

Adam Silvernail <adam@silvernaillawfirm.com>

Mon, Nov 23, 2020 at 1:01 PM

To: "Ken B. Wingate" <kbw@swblaw.com>, "Mark V. Gende" <MVG@swblaw.com>, Emory Smith <ESmith@scag.gov>
Cc: Charles Carpenter <charlie@carpenterappeals.com>, Daryl Williams <dwilliams@gertzandmoore.com>, Jeff Smith <wjstv@mindspring.com>, Adele Pope <adele@popelawfirm.com>

Counsel:

Attached and served upon you are two Replies to Returns to Motion for Judicial Notice, along with our Return to the Motion to Strike.

A copy of this email will be filed with the Proof of Service.

Adam

--

--

Law Office of Adam T. Silvernail, LLC

1905 Marion Street (29201)





Post Office Box 7995

Columbia, South Carolina 29202-7995

803/779-1770

RECEIVED
Nov 23 2020
SC Court of Appeals

4 attachments

-  **Pope 2229 Appeal Return to MTS.pdf**
160K
-  **Pope 2229 POS Replies JN and Return MTS.pdf**
93K
-  **Pope 2229 Reply to Return of AG re Judicial Notice.pdf**
177K
-  **Pope 2229 Appeal Reply to Return of SWB re Judicial Notice.pdf**
178K