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SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM RICHLAND COUNTY  
Court Of Common Pleas  
Circuit Court Case No. 2012CP4000350

The Honorable Clifton B. Newman, Circuit Court Judge

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Appellate Case No.2021-000518

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Adele J. Pope.....Appellant,

v.

Alan Wilson, in his capacity as Attorney General of South Carolina . . . . Appellant.

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**MOTION OF ATTORNEY GENERAL TO DISMISS APPEAL, AND  
ALTERNATIVE MOTION TO STRIKE INITIAL BRIEF  
AND DESIGNATION OF APPELLANT,  
AND REQUEST TO STAY BRIEFING**

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Attorney General Wilson moves for this Court to dismiss this appeal or alternatively to strike Appellant Pope's Initial Brief and Designation of Matter for the Record. The Brief and Designation violate the Appellate Court rules and at least four orders of this Court in other cases striking Appellant's filings. Numerous parts of the brief contain statements referring to matters not before the lower court judge as to the orders under the appeal, documents filed in other cases involving herself or other James Brown cases but not presented in this case, and statements that are unsupported by citations to designated matter or, in many instances, any citations whatsoever. *See*, Exhibits, pp. 1-4, Attachment A, Schedule Of Matters To Be Struck From Initial Brief; Schedule B, Schedule of Matters to Be Struck From Designation.

The Brief and Designation are so riddled with these violations that Appellant's entire appeal should be dismissed. Her filings not only demonstrate a disregard of the Appellate Court Rules and Orders, they prolong resolution of this case contrary to the Supreme Court's admonition in its denial of certiorari in appeal 2017-001899 (*Bauknight v. Pope*, Sup. Ct. Appellate Case No. 2020-001383 – copy attached, Exhibits, p. 9). Although the Order was issued in the other case, the Court's desire "that the extensive litigation in this matter . . . be promptly concluded" surely includes the instant case.

Alternatively, Appellant's entire brief must be struck. Many parts of the designation must be struck for similar problems. Should this Court allow Appellant leave to refile, any corrections to the Brief should be limited to addressing the errors in the Brief and should not include any new or edited substantive arguments.

While the Court considers this Motion, the Attorney General respectfully requests that the time limits for filing his initial brief and designation be stayed or tolled.

### **BACKGROUND**

Plaintiff brought this action by a Complaint filed in Newberry County on August 3, 2011. The Complaint requested, in part, that the Court declare public documents that she sought by a June 30, 2011, Freedom of Information Act request and that they be made available for inspection and copying.

Following the denial of his earlier motion to dismiss and the transfer of venue to Richland County, Defendant Attorney General filed an Answer to the Complaint that included the defenses asserted in the Motion to Dismiss and Motion to Amend Motion to Dismiss, and added the defense of lack of subject matter jurisdiction because Plaintiff failed to accomplish mailing or delivery of her FOIA request as required by §30-4-30(c) and because the items

requested were exempt from disclosure under FOIA because they are subject to the rules regarding discovery in the Rules of Civil Procedure for which Plaintiff was seeking the documents. The Answer also included the defense that the Office of the Attorney General had no documents that could be considered responsive to the FOIA request except for a draft of the Legacy Trust attached thereto and included in the Record on Appeal in *Wilson v. Dallas*, 403 S.C. 411743 S.E.2d 746 (2013). The Respondent AG also filed a Motion for Judgment on the Pleadings on March 7, 2013.

Judge Early heard pending motions in this case on May 17, 2016. He issued an Order dated June 14, 2016 dismissing this case. He found that the documents at issues are potentially discoverable in pending litigation in Richland / Aiken counties and would be governed by the Rules of Civil Procedure. He found that the documents were exempt from disclosure under FOIA for this reason and that FOIA could not be used to bypass civil discovery. The Court denied Plaintiff's Motion to Alter or Amend (by Form 4 Order dated August 11, 2011. Plaintiff appealed the above 2016 Orders.

The Court of Appeals reversed the circuit court's order dismissing Complaint and remanded for further proceedings on the basis of its conclusion in its Opinion in *Pope v. Wilson*, 427 S.C. 377, 389, 831 S.E.2d 442, 448, (Ct. App., 2019) which included the statement that “[i]f the government invokes the exemption in section 30-4-40(a)(4), ‘[m]atters *specifically* exempted from disclosure by statute or law,’[footnote omitted; emphasis as added by Court of Appeals] to seek protection under discovery rules, it must point to the specific language of a discovery rule that expressly prohibits disclosure of a particular type of record.” The Court of Appeals found that the case was not moot because Plaintiff challenged the claim that the Attorney General had given her all the documents responsive to her request. The Court did not address the Attorney

General's additional sustaining ground that the Court lacks subject matter jurisdiction because Plaintiff failed to accomplish mailing or delivery of her FOIA request as required by §30-4-30(c) and also the ground that the Court should strike Pope's 14 affidavits because they are irrelevant and also because many of them are not based upon personal knowledge, contain hearsay, and are speculative.

On remand, the Honorable Clifton Newman heard arguments regarding the additional sustaining grounds set forth above and that the Office of the Attorney General had supplied all documents responsive to Plaintiffs' FOIA request. He issued an Order on April 1, 2021, dismissing this case because Plaintiff's FOIA request was never received by the Office of the Attorney General by mail or delivery.

## **ARGUMENT**

### **I**

#### **Generally**

Appellant's Brief and Designation do not comply with the authority set forth below:

Rule 208(b)(1)(D): "A party may . . . include a separate statement of facts [in the initial brief] relevant to the issues presented for review, with reference to the record on appeal . . ."

Rule 208(b)(4) "The brief shall contain references to the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal [see Rule 210(c)] to support the salient facts alleged."

Rule 210(b): "[T]he Designation [of Matter for the Record] may only propose to include portions of the . . . materials which may be properly included in the Record on Appeal [see Rule 210(c)]. A party shall not include any matter in his Designation which is not relevant to the

appeal.”

Rule 210(c). “The Record shall not. . . include matter which was not presented to the lower court or tribunal. . . .”

As stated in former Chief Justice Toal’s book, Toal, Walker, Baker, *Appellate Practice in SC*, 3d ed., p. 407: “

[T]he record must only include matters relevant to the appeal . . . [a]side from violating the Rules, the ‘kitchen sink’ approach requires the reader to sort through items that have nothing to do with the appeal. . . . When the parties honor Rule 209(b)’s requirement to limit the record to that which is absolutely essential, the . . . appellate court judges as well as their law clerks – are able to quickly ascertain the facts the parties view as critical to their respective positions.

Rule 210 (h) “Except as provided by Rule 212 [supplemental record] and Rule 208(b)(1)(C) and (2) [statements of the case], the appellate court will not consider any fact which does not appear in the Record on Appeal.”

Appellant’s Designation violates Rules 209 and 210 by repeatedly including matter not presented to the lower court judge in this case prior to his rulings at issue, and by including matter not relevant to the appeal. Her initial brief violates these rules and Rule 208 in numerous sentences by referring to such improperly included matter and other cases or events not part of this case. The instant FOIA case has not been consolidated with any of the other cases that Appellant references. These problems are specifically identified in the attached schedules. Exhibits, pp. 1-4.

Appellant has been admonished at least four times by this Court not to include matters in her brief and the Record that were not presented to the Circuit Court in the case on appeal. *See*, , Orders, *Bauknight v. Pope*, Appellate Case No. 2018-002229, May 21, 2020, Exs. p. 10 (“Appellant is reminded the record on appeal may not include any matter not presented to the lower court. *See*, Rule 210(c), SCACR. Furthermore, all designated matters must be relevant to

the issues on appeal. *See* Rule 209(b), SCACR.” ”); July 26, 2019, Exs. p. 12 (“amended designation of matter shall not include matter which was not presented to the circuit court, and the amended initial brief shall not include references to matter which was not presented to the circuit court.”); Order, *Bauknight v. Pope*, Appellate Case No. 2017-001899, April 26, 2018, Exs. p. 14 (“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.”); *Pope v. Estate of Brown*, Appellate Case No. 2019-000362, July 8, 2020, Exs. p. 16 (striking record on appeal and initial reply brief – reply brief must “not include new issues on appeal, and . . . provide[] proper citation to authorities to support the salient facts alleged”). She ignores those instructions and continues to violate the Appellate Court rules with her Brief and Designation.

Moreover, most of Appellant’s nearly 19 page long “Statement of Facts” is irrelevant. The only ground upon which Judge Newman dismissed this case was the fact that the Office of the Attorney General never received Appellant’s FOIA request. Instead, Appellant complains for page after page about various suits involving herself and the James Brown Estate and related matters which are completely irrelevant to the issue on appeal. To read her statement, one would think that this brief was being filed in one of those cases. Instead, Appellant has inappropriately layered her complaints about other litigation onto this case and buries the simple question at issue in three pages near the end of the brief. She also includes issues not addressed by the Newman Order in Parts II and III of her Argument. These problems with her Brief and Designations directly violate Rule 208(b)(1)(D) and 210(b) requirements that the Statement of Facts in a brief and the Designation of Matter contain only relevant material.

The instant motion and schedules do not necessarily cover all problems with Appellant’s

brief and designation in that they are virtually everywhere in these documents. This Court should either dismiss this appeal or strike her initial brief and designation. Should the Court grant leave to refile, Appellant's corrections should be limited to addressing the errors and not include new substantive arguments or authority in the briefs or designation.

### CONCLUSION

For the foregoing reasons, the Attorney General respectfully requests that Appellant's Appeal be dismissed or that, alternatively, her Initial Brief and Designation be Struck in their entirety and that any corrected brief or designation subsequently filed be limited to fixing these problems and not present new substantive arguments or exhibits for the record. While the Court considers this Motion, the Attorney General respectfully requests that the time limits for filing his initial brief and designation be stayed and at least held in abeyance while the stay request is considered.

Respectfully submitted,

ALAN WILSON  
Attorney General

ROBERT D. COOK  
Solicitor General  
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s/ J. EMORY SMITH, JR.  
Deputy Solicitor General  
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September 24, 2021

ATTORNEYS FOR THE ATTORNEY GENERAL

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**CERTIFICATE OF SERVICE**

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I hereby certify that I have served the Attorney General's Reply to Return to Motion to be Dismissed as Party to Appeal by emailing it to counsel for the Appellant at the email address below this September 24, 2021 (Copy of email attached):

Adam T. Silvernail, Esquire  
Law Office of Adam T. Silvernail  
adam@silvernailfirm.com

s/ J. EMORY SMITH, JR.  
S.C. Bar No. 5262  
Deputy Solicitor General  
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Counsel for the Attorney General

## Emory Smith

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**From:** Emory Smith  
**Sent:** Friday, September 24, 2021 4:11 PM  
**To:** Adam Silvernail  
**Subject:** RE: Pope v. Wilson, Appellate Case No. 2021-000518  
**Attachments:** Motion to Dismiss or Strike for efilng (02722725xD2C78).PDF; Exhibits to Motion w-cover (02722716xD2C78).PDF

Adam, attached are our Motion to Dismiss the Appeal or to Strike with exhibits which are hereby served upon you.

Emory

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