

STATE OF SOUTH CAROLINA
In the Court of Appeals

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Appeal from Richland County
Court of Common Pleas

SC Court of Appeals

The Honorable Clifton B. Newman, Circuit Judge

Appellate Case No. 2021-000518

Adele J. Pope..... Appellant,

v.

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

**APPELLANT’S RETURN TO MOTION OF RESPONDENT ATTORNEY
GENERAL TO DISMISS OR STRIKE APPELLANT’S INITIAL BRIEF AND
DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON
APPEAL**

Appellant Adele J. Pope (“Appellant”) opposes the motion of Respondent Alan Wilson, in his capacity as Attorney General for South Carolina (“Respondent”). Neither dismissal of this appeal nor striking of Appellant’s Initial Brief and designation is warranted, and Respondent’s motion should be denied in full. The grounds for Appellant’s opposition are set out below.

Background and Summary of Appellant’s Position

This is an appeal from 2021 Orders of the Richland County Circuit Court dismissing this Freedom of Information Act (“FOIA”) case more than a decade after Appellant made her June 30, 2011 FOIA request to the South Carolina Attorney

General for public documents including the purported \$4.7 million valuation of James Brown's extensive and important music catalog and other assets. Although the basic issues under FOIA in this case are simple, the procedural history and factual background by the time of the 2021 dismissal had been enlarged and complicated by the positions taken by Respondent, including its attempts to consolidate this case with others.

Appellant timely filed her Initial Brief and Designation of Matter to be Included in the Record on Appeal. Nearly a month later, Respondent moves to dismiss Appellant's appeal or strike her entire Initial Brief and Designation of matter for alleged violations of the Appellate Court Rules. Respondent's position conflicts with its own repeated use of material which is not on file in this case below, including its presentation of several Orders from other cases in support of its motion. Appellant submits that Respondent's motion is made to further delay this decade-long FOIA case and avoid substantive review of the FOIA claims. The motion should be denied in its entirety, so that this FOIA matter may be finally decided.

I. All materials cited in Appellant's Initial Brief and/or designated for inclusion in the Record on Appeal were "presented to the lower court" as required by the Appellate Court Rules.

Respondent argues that Appellant has discussed matters and cited documents which were "not before the lower court judge as to the orders under the [sic] appeal [and] documents filed in other cases involving her or other James Brown cases but not presented in this case." Appellant submits that all matter cited or designated was "presented to the lower court," as required by Rule 210(c), SCACR. While Respondent seems to take the position that the Rules allow inclusion

of only matters *filed*¹ in the instant case, Appellant submits that the actual language of Rule 210(c) is broader and properly encompasses all matters included in her Initial Brief and Designation.

As an initial matter, Appellant notes that Respondent presents documentation in support of its motion which were not filed in this case in the lower court. Respondent includes five (5) Orders of the Supreme Court, all but one of which are not on file in this case in the lower court. These Orders were filed in appeals from Richland County Case No. 2010-CP-40-4900 (“Richland 4900”) and Aiken County Case No. 2013-CP-02-1337 (“Aiken 1337”). Nearly all of the documents and citations to which Respondent objects are on file in one or both of these cases. In addition, as shown in the Affidavit filed herewith and by the public record, most are actually filed *in this case* as well as in the other cases the AG sought to consolidate, and all were presented to the FOIA lower court.

In support of Appellant’s argument that all cited and designated material was presented to the lower court, she submits that this FOIA case has been assigned to the same Circuit Judge as Richland 4900 (and the separate FOIA case consolidated therewith) since 2012. Since 2016, it has been assigned to the same Circuit Judge as both Richland 4900 and Aiken 1337. Hearings were almost always held on multiple cases on the same day. Since 2019, when he was assigned to all of these cases, the Honorable Clifton B. Newman has heard numerous motions and issues in this case,

¹ While most documents listed in Respondent’s motion were actually filed in this case, to the extent the documents were not filed, they were clearly referenced in other filings. As a result, where any citation is alleged to be inadequate, the same fact is supported by numerous other filings in this case. Appellant’s affidavit and

the separate Richland 4900 FOIA case, Richland 4900 and Aiken 1337.

The fact that Judge Newman has been presented with all matter in all of these cases is borne out in multiple transcripts.

On January 31, 2020, Judge Newman held a status conference in the Richland 4900 FOIA case. The transcript of the Aiken 1337 hearing includes Judge Newman's discussion with counsel about how that FOIA case related to Richland 4900 and also another case to which Appellant is not a party. (Exhibit A, 1/31/20 Trscpt., pp. 1, 4) This was just shortly after the assignment of all of these cases to Judge Newman, and his Honor and counsel in the various cases regularly referred to different cases during hearings and status conferences.

Respondent asks that this Court strike a number of documents and references to the Richland 4900 FOIA case, which is particularly egregious. The two FOIA cases were almost always heard at the same time and always by the same Judge. The transcript of the April 21, 2021 hearing in both FOIA cases before Judge Newman is one instance of the overlap among the records in all of these cases. The Court makes extensive inquiry regarding the Wingate Contract which was the subject of the Richland 4900 FOIA case while discussing Appellant's request for the valuation documents which are the subject of this case. (Exhibit B, 4/21/21 Trscpt., pp. 1, 58) Later in that same hearing, Judge Newman hears argument from Mark V. Gende, Esquire. Mr. Gende is not counsel of record in either FOIA case, but represents more than a dozen Plaintiffs in Richland 4900; Mr. Gende's firm formerly

attachments supports this fully.

served as private counsel for the Attorney General in that matter, as well.²

During the November 19, 2020 hearing in both FOIA cases, Judge Newman again made reference to matters presented to the lower court in another case assigned to his Honor which related to the Estate of Venisha Brown. (Exhibit C, 11/19/20 Trscript, pp. 1, 56) After Judge Newman *sua sponte* inquired about whether an Order of the Supreme Court in the Venisha Brown case would have any effect on this FOIA case, Respondent's counsel replied:

MR. SMITH: Well, Your Honor, I would certainly like to apply those – that order that you referenced of the Supreme Court to this case. There was also another earlier order in, I think, 2016^[3] . . . We have not asserted that position here. Our, our – but I certainly wouldn't object to it if Your Honor thinks it's applicable. (Exhibit C, p. 57)

Respondent did not object to the lower court's consideration of matters not of record in this case when Respondent might benefit, but now asks this Court to take drastic action against Appellant for referring to and including matter which was very clearly presented to the lower court.

Appellant submits that every fact and document complained of by Respondent was “presented to the lower court” and is properly before this Court. Appellant's affidavit, filed herewith, along with its attachments which are all *on file in this case* gives a detailed view of all the facts and documents that were presented

² One of Mr. Gende's clients, the James Brown Legacy Trust, was formerly a party to this case. Prior to its consolidation with Richland 4900, Mr. Gende's firm (Sweeny, Wingate and Barrow, P.A.) attempted to intervene in the Richland 4900 FOIA case on behalf of more than a dozen private clients. Mr. Gende's firm, while acting for the Attorney General in both FOIA and Richland 4900 matters, has tried to consolidate Richland 4900 with three FOIA cases, including the *Summer* FOIA case referenced in Appellant's Affidavit.

³ The Order Respondent refers to is in yet another case.

below. As set out in the Affidavit, Appellant asks that this Court take judicial notice of its own files in several cases, which files contain many of the documents referred to and designated by Appellant.

Respondent's 37 specific objections, as noted in the Affidavit, suggest that the Attorney General made little or no effort to actually determine which documents from other cases the Attorney General himself, the Legacy Trust or Appellant had filed within the lower court record of this FOIA case. Among the overlooked documents were a number which were attached by the Attorney General to his Answer in this FOIA case.

II. Appellant's entire Initial Brief and Designation of Matter are relevant to this appeal and presented in order to allow this Court to fully decide the merits of this decade-old FOIA case.

Respondent argues that numerous statements and documents in Appellant's Initial Brief and Designation of Matter are irrelevant to this appeal, because, Respondent argues, "[t]he 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." (Motion at 6)

While Respondent is correct that Judge Newman's Order addressed only the dismissal of this case on the stated ground, Appellant's Initial Brief sets forth clearly that she has provided all information and argument needed for this Court to proceed with a substantive conclusion to this FOIA case, which has now been pending for more than ten (10) years. *See* Appellant's Corrected Initial Brief, p. 44 n. 15. The issues covered and argued in the Brief have already been fully briefed and argued before the Honorable Doyet A. Early, III (in 2016); in this Court (in Appellate

Case No. 2016-1727); and again before Judge Newman (in 2021).

S.C. Code Ann. §30-4-10 provides that the FOIA is intended to allow access to public documents “at a minimum cost or delay to the persons seeking access to public documents. . .” Appellant respectfully asks this Court, as she did in her Brief, to proceed with a final determination that she is entitled to a proper FOIA response from the South Carolina Attorney General. Doing so would serve both the spirit and letter of the FOIA and judicial economy by avoiding another remand for further proceedings and delay in the lower court.⁴

As addressed in Appellant’s Affidavit and its exhibits, all of which are on file in this case, the context of this case and the conduct of the Attorney General and former defendant Legacy Trust in this and other cases demonstrate the unnecessary delay and complexity Appellant has faced in vindicating her FOIA rights. All of her factual allegations and supporting documents are relevant to her argument that this Court should proceed with reversing the lower court and directing Respondent to comply with the FOIA.

III. Respondent improperly asks this Court to strike statements and documents it makes no attempt to identify.

Respondent notes that its “motion and schedules do not necessarily cover all problems with Appellants brief and designations in that they are virtually everywhere in these documents.” (Motion at 6-7) In Exhibit B to Respondent’s motion, it further argues that certain listed documents “and probably others, should be struck from the Record as they do not appear to have been filed in the instant

⁴ Appellant acknowledges that remand would still be necessary to resolve the simple

case.” Respondent asks this Court to take the drastic action of dismissing this case or striking all of Appellant’s filings without taking the time or care to be certain which documents fit even Respondent’s criteria for inclusion in the Record on Appeal, clearly overlooking documents attached to filings in the lower court record of this FOIA case.

As set out above, Appellant’s filings were entirely in compliance with the Rules, and no part should be stricken. Nonetheless, Respondent’s motion is so vague that in the event this Court grants it, Appellant would be left uncertain of what was struck.

Appellant submits that this is further evidence of Respondent’s true intention in filing this motion just before its own brief and designation were due: to further delay substantive review of Respondent’s refusal to comply with the FOIA. Respondent’s motion should be denied.

Conclusion

While purporting to point out errors of Appellant, Respondent’s motion highlights that both the brief and every document designated by Appellant was appropriate. In addition, the motion shows that the Attorney General, while asserting that Appellant acted improperly, has failed to check even its own filings within the record. The brief should not be stricken. The designations should be found to be appropriate. This ten-year-old FOIA case should proceed to its conclusion.

Respectfully submitted,

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