IN THE

Supreme Court Of Virginia

RECORD NO. 171022

MARIAN M. BRAGG,

Appellant,

v.

BOARD OF SUPERVISORS OF RAPPAHANNOCK COUNTY, VIRGINIA, et al.,

Appellees.

REPLY BRIEF OF APPELLANT

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Reply Brief of Appellant

COMES NOW Appellant, Marian M. Bragg, pursuant to Rule 5:29 of the Rules of the Supreme Court of Virginia, and submits her Reply Brief.

I. REPLY TO COUNTY'S COUNTER-STATEMENT OF CASE.

The County has misstated a number of essential facts relative to the material proceedings in the Trial Court. First, it is clear that this case was dismissed when the Trial Court granted Appellees' Motion for Summary Judgment. The Trial Court's March 15, 2017 letter opinion states clearly:

> Dear Counsel,
>
> This matter is before the Court on Respondents' Demurrer, Plea in Bar, Motion for Summary Judgment and for Dismissal. Petitioner's motion to "supplement" her response to these motions is granted; however, the added response does not affect the ruling on the motions.
>
> For reasons that follow, Respondents' Motion for Dismissal is granted. In view of this ruling, it is unnecessary to rule on the remaining motions.

(Record at 389). The Letter Opinion specifically recites four motions that were before the Court, (even though no pleading entitled or subtitled "Plea in Bar" was actually before the Court [1]) and stated "Respondents' Motion

[1] Before the Amended Petition was filed, the County did file a "Plea in Bar" on November 7, 2016 on the limited issue of the issue of sovereign immunity relative to Bragg's request for Declaratory Judgement, which request was deleted from the Amended Petition, so the Plea in Bar was moot at the time of the Trial Court's

for Dismissal is granted." (Record at 389, emphasis added).

But Respondents' Motion for Dismissal was not filed as a separate, stand-alone motion – it was section "I." of their December 19th Motion for Summary Judgement, *viz*. (Record at 239)

> VIRGINIA: IN THE CIRCUIT COURT FOR RAPPAHANNOCK COUNTY
>
> Marian M. Bragg, Petitioner
>
> vs. Civil #16-180
>
> Board of Supervisors of Rappahannock County, *et als.,* Respondents
>
> Pursuant to Rule 3:18 (e) this pleading contains the following:
>
> I. MOTION FOR SUMMARY JUDGMENT AND FOR DISMISSAL OF *AMENDED PETITION*, pp. 1-19;
> II. MOTION FOR SUMMARY JUDGMENT AS TO PETITIONER'S REQUEST FOR PRODUCTION OF DOCUMENTS, pp. 19-24;
> III. A MOTION FOR SANCTIONS, pp. 24-37.
>
> I. MOTION FOR SUMMARY JUDGMENT AND FOR DISMISSAL OF *AMENDED PETITION*[1]
>
> 1. The Respondents move they be granted Summary Judgment and the *Amended Petition* be dismissed because it is not supported by an adequate affidavit, nor does it show good cause, and therefore it does not state a cause of action.

On March 15, 2017, this was the only pending motion that sought dismissal of Bragg's Amended Petition due to alleged "infirmities" in the

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March 15, 2017 Letter Opinion, and no longer "before the Court."

Affidavit in Support of the Amended Petition, and was, in fact, the County's "Motion to Dismiss" that the Trial Court granted.

Second, Appellees allege that Bragg failed to preserve her Rule 1:10 objection in the Final Order. While specifically not mentioning Rule 1:10, Bragg's Motion for Reconsideration (at page 2, Record at 396) addressed the issue of the filing of an incorrect motion and Exceptions 4 and 5 specified the Trial Court's "holding that the Amended Petition was deficient as to the requirement of 'an affidavit showing good cause.'" (Record at 472). But this is irrelevant since Appellees do not deny they failed to file a "Motion to Strike" or other objection to Bragg's affidavit in accordance with Rule 1:10 in a timely fashion. Such failure constituted an absolute waiver of their objection.

Finally, the claim that Bragg is "attempting to turn what is supposed to be an action for injunctive relief or mandamus into a declaratory judgment action seeking a broad ruling from the Trial Court about the County's actions governing closed sessions" is completely without merit. The County's characterization of "what this case is all about" completely negates all of FOIA's presumptions that: (i) **all meetings of all public bodies are presumed open**, (ii) that all **exceptions are narrowly**

construed (iii) that the statute is to be liberally construed, and (iv) that **any citizen** denied any rights conferred by FOIA – here the right to witness the operations of government – **is entitled to seek enforcement and obtain remedial relief**. Nowhere in its Brief does the County answer the main issue in this Appeal: "how does the citizen wrongfully excluded from a public body's meeting verify under oath that what was discussed there went beyond the permissible FOIA exemptions other than a statement on information and belief?"

II. AUTHORITIES AND ARGUMENT

A. REPLY TO THE COUNTY'S CLAIMED STANDARD OF REVIEW

In a FOIA case, a circuit court's interpretation of the statute is subject to *de novo* review, while findings of fact can be overturned only if plainly wrong or without support in the evidence. ***Hill v. Fairfax County School Board***, 727 S.E.2d 75, 79 (2012). ***RF & P Corp. v. Little***, 440 S.E.2d 908, 915 (1994). Here, the Trial Court made no findings of fact because the case was erroneously dismissed before an evidentiary hearing.

In addition to FOIA case authority establishing the *de novo* review standard, since this case was dismissed on the County's Motion for Summary Judgment, the application of law to undisputed facts also is

reviewed *de novo* on appeal, ***Va. Fuel Corp. v. Lambert Coal Co***., 291 Va. 89, 781 S.E.2d 162 (2016), ***Deutsche Bank Nat'l Trust Co. v. Arrington***, 290 Va. 109, 114, 772 S.E.2d 571, 573 (2015), not on the "abuse of discretion" standard posited by the County (Brief at 3).

B. <u>REPLY TO THE COUNTY'S PROCEDURAL ARGUMENTS.</u>

Rule 1:10 requires that an objection to a pleading that is required to be sworn be made via a "Motion to Strike" filed within seven days. The County failed to do either, and instead filed a "Motion for Summary Judgment and Dismissal" (*supra.*, page 2, Record at 239-258). The County's assertion that a Rule 1:10 waiver argument cannot be raised for the first time on appeal (Brief at 2-3 and 11) contradicts this Court's holding in ***Herbert Bros., Inc. v. McCarthy Co. of Virginia-Maryland***, 265 S.E.2d 685, 686 (1980). *De novo* review permits the Court to entertain this issue regardless of whether Bragg raised it below.

The County wants to "have its cake and eat it too" by arguing, on the one hand, that Bragg is barred from raising the County's waiver of its objection to the adequacy of Bragg's Code § 2.2-3713(A)Affidavit under Rule 1:10 on appeal, and on the other that the County raising an objection to the adequacy of Bragg's Affidavit via a Motion for Summary Judgment

does not, in effect, constitute such a waiver. Not only does the County ask the Court to ignore Rule 1:10 providing for a waiver of the objection unless a "**Motion to Strike**" is filed within seven days, but more importantly the legal impact of trying to raise such an objection via a Motion for Summary Judgment that by law admits the truth of all potentially disputed factual issues raised in the Amended Petition. ***Klaiber v. Freemasons Assocs***., 587 S.E.2d 555, 558 (2003).

As explicated in ***Lewis' Adm'r v. Hicks***, 30 S. E. 466, 466-67 (1898), a Motion for Summary Judgment "joins" the substantive issues on the pleas of the Amended Petition thereby rendering the sufficiency of Bragg's Affidavit irrelevant. A Rule 1:10 Motion to Strike would have preserved the County's other defensive claims, but the County's December 19th Motion for Summary Judgment had the legal effect of waiving all objections based on any inadequacies of the affidavit, independently of whether the Court rejects Bragg's Rule 1:10 argument.

As ***Hicks,*** *supra*. teaches, once the County "joined the issues" by filing its plea to the merits, the lack or sufficiency of any required affidavit or other procedural deficiency became a moot point. *See, e.g*., ***Preston v. Salem Imp. Co.1***, 22 S.E. 486, 487 (1895).

C. REPLY TO THE COUNTY'S ARGUMENTS ON THE FRAZIER ACKNOWLEDGMENT.

Appellees argue that the Frazier Acknowledgement is not a substitute for the required Code § 2.2-3713(A) Affidavit. Bragg never contended otherwise. Rather, the "Acknowledgement" – so titled based on the August 2016 Freedom of Information Advisory Council's Opinion AO-02-16. (*See*, Opening Brief of Appellant at 20-21, fn [6]) – formed the basis for Bragg's allegations "on information and belief" of what transpired in the Board's closed sessions at the June, July, August and the two September 2016 meetings, and allowed Bragg to satisfy the "well grounded in fact" requirement of Code 8.01-271.1. Without the Frazier Acknowledgement, Bragg had no way to comply with FOIA's requirement that her affidavit "show good cause" with respect to what happened at meetings from which she was unlawfully excluded and satisfy Code § 8.01-271.1. Both the Trial Court – and now Appellees – cast aspersions on the Acknowledgement's lack of *jurat* because it was not sworn as if it was intended as a substitute for Bragg's own Code § 2.2-3713(A) Affidavit. But it never was so intended.

The Trial Court's ruling and the County's argument (Brief at 8-9) that

the Frazier Acknowledgment failed to "establish good cause" or that Bragg (and/or Frazier) is estopped from asserting a position contradictory to his Code § 2.2-3712(D) vote once the Board had certified FOIA compliance flies directly in the face of Code § 2.2-3713(E). The statute provides that the public body always bears the burden of proof as to every element of FOIA compliance and that "[n]o court shall be required to accord any weight to the determination of a public body as to whether an exclusion applies."

The Trial Court's ruling and the County's argument stand logic on its head: What if a public body inadvertently violated FOIA closed meeting restrictions and discussed non-exempt matters in executive session based on incorrect advice of counsel? Or worse, what if a corrupt public body did so deliberately with intent to circumvent FOIA? What if later, one or more members realized the error, or wanted to purge their unlawful action? Under the Trial Court's ruling, the member's previous Code § 2.2-3712(D) certification vote would bar or estop each member from righting the wrong. This cannot be the correct result the General Assembly intended in this remedial statute. It produces such an absurd result that it is excluded as a correct interpretation of the law based on rules of

statutory construction. ***Chaffins v. Atlantic Coast Pipeline,*** 801 S.E.2d 189, 191-92 (2017). Such a twisted interpretation violates the rule laid down by this Court held in ***White Dog Publishing v. Culpeper County Board of Supervisors***, 634 S.E.2d 334, 339 (2006): "We do not isolate particular words or phrases but, instead, examine a statute in its entirety. ***The purpose for which a statute is enacted is of primary importance in its interpretation or construction***." (emphasis added).

D. THE COUNTY'S ARGUMENT THAT BRAGG'S AFFIDAVIT IS DEFECTIVE BASED ON *CLOWSER* IS ERRONEOUS.

The County relies on an ancient case, ***Clowser v. Hall*** , 80 VA 864 (1885) (Brief at 7, 9-11), in support of its argument that Bragg's affidavit is legally insufficient because of inclusion of the phrase "except to the extent therein stated to be on information, and to such extent she believes them to be true" with regard to the allegations concerning what actually transpired at the unlawfully closed executive sessions, ***Clowser*** is not good law and not applicable to the facts of this case.

Twenty-eight years after this Court's decision in **Clowser**, the U.S. Supreme Court had occasion to explicate the decision in ***Thompson v. Thompson***, 226 U.S. 551, 564-566 (1913):

> The Virginia decree now in question is attacked for want of jurisdiction on the ground that the affidavit used as a basis for the order of publication was made upon information and belief, and not upon personal knowledge. It is insisted that the order was therefore unauthorized and all proceedings based upon it null and void. * * *
>
> ***Clowser v. Hall***, 80 Va. 864 * * * was [decided] in 1885, and thereafter the section relating to foreign attachments was amended by permitting all of the averments of the affidavit to be based upon the belief of the plaintiff, his agent or attorney. Va. Code, § 2959.

In addition to being inapposite because the Code section on which the Court relied in ***Clowser*** was limited in scope to requirements for swearing out an affidavit in support of an *ex parte* foreign attachment – not a FOIA Petition – the statute was amended and this special requirement deleted.

Moreover, the County's reliance on ***Clowser*** totally ignores Virginia Code § 8.01-280, which provides:

> "when an affidavit is required in support of ***any pleading*** or as a prerequisite to the issuance thereof, ***it shall be sufficient if the affiant swear that he believes it to be true.***" [sic] (emphasis added).

The County's attempts (Brief at 10-11) to sidestep ***Paris v. Brown***, 129 S.E. 678 (1925) and ***Carpenter v. Gray*** 75 S.E. 300 (1912), which impliedly overruled ***Clowser***, ignore the remedial nature of both FOIA and Code § 8.01-280, the express directive of Code § 2.2-3700(B) liberally to construe the statute, and the requirement of Code 2.2-3713(D) that the petition for enforcement and affidavit demonstrate good cause only with

"reasonable specificity." Bragg has more than met the "substantial compliance" test established in ***Carpenter*** and ***Paris***, *supra*.

E. THE TRIAL COURT APPLIED ERRONEOUS RULES OF STATUTORY CONSTRUCTION.

The County would have this Court read right out of the statute FOIA's directive that "[t]he provisions of this chapter ***shall be liberally construed to promote*** an increased awareness by all persons of governmental activities ***and afford every opportunity to citizens to witness the operations of government***, (Code § 2.2-3700(B), emphasis added) and to ignore rules of liberal construction of myriad remedial statutes honored by this Court for centuries and too numerous to cite here as well as its decisions construing the Freedom of Information Act dating back to 1982. This Court should reject the County's shocking claim that FOIA's purpose was "to protect public bodies like the County from frivolous and unsupported allegations" and to "lessen wild, baseless, exaggerated or flatly false claims against a government entity." (Appellees' Brief at 12- 13). The County would have this Court endorse the view that FOIA was enacted to protect the government from its citizens, rather than the other way around. In doing so, the County ignore asks the Court to ignore

Article I, Section 2 of the Constitution of Virginia and the imprecations of this Court in ***Va. Dep't of Corr. v. Surovell***, 776 S.E.2d 579 (2015) ["By its own terms, the statute puts the interpretative thumb on the scale in favor of disclosure."] as well as this Court's holding in ***Cartwright v. Commonwealth Transportation Commissioner***, 613 S.E.2d 449, 451 (2005):

> "[T]he statute provides that in such proceedings 'the public body shall bear the burden of proof to establish an exemption by a preponderance of the evidence. * * * ***This is contrary to the rule in common law mandamus proceedings which places the burden on the petitioner to prove the violation of a right or privilege and in which there is a presumption of regularity in the conduct of government business.*** ***(emphasis added***)"

The County asks this Court to ignore that it – not Bragg -- has the burden of proof of FOIA compliance, and that its decisions enjoy no presumption of correctness or validity in a FOIA case.

F. THE COURT SHOULD NOT IGNORE THE TRIAL COURT'S ERROR AS TO BRAGG'S SWORN ALLEGATIONS NOT BASED "ON INFORMATION AND BELIEF."

The County asks the Court (Brief at 13-14) to ignore the most glaring error of the Trial Court's decision, which overlooked that Bragg's Affidavit on the Amended Petition was in two parts. The first part of her affidavit verified "all the allegations" in her Amended Petition "except to the extent

therein stated to be on information and belief." (Record at 206.)

AFFIDAVIT AND VERIFICATION
IN SUPPORT OF PETITION FOR ~~DECLARATORY JUDGMENT AND~~
ENFORCEMENT OF VIRGINIA FREEDOM OF INFORMATION ACT

Commonwealth of Virginia)
) *ss*:
County of Rappahannock)

THIS DAY personally appeared before me, the undersigned Notary Public, **MARIAN M. BRAGG,** who, upon being duly sworn by me, stated under oath that all of the allegations in the attached Petition for ~~Declaratory Judgment and~~ Enforcement of the Virginia Freedom of Information Act are true and correct, except to the extent therein stated to be on information, and to such extent she believes them to be true.

Thereupon she duly executed this affidavit and acknowledged her signature thereon this 17 day of November 2016 before me in my jurisdiction.

EVELYN HARDINGER
NOTARY PUBLIC
COMMONWEALTH OF VIRGINIA
MY COMMISSION EXPIRES SEPT. 30, 2020
COMMISSION # 7699887

Marian M Bragg
Marian M. Bragg

NOTARY PUBLIC
My commission expires:
Notary Commission No. September 30, 2020

EVELYN HARDINGER
NOTARY PUBLIC
COMMONWEALTH OF VIRGINIA
MY COMMISSION EXPIRES SEPT. 30, 2020
COMMISSION # 7699887

Hence, there is no issue as to Bragg's allegations in Paragraphs 12,16, 20, 26, and 29 (including fn[3], fn[6], fn[7], fn [8], fn[9]) of the Amended Petition (pages 4, 7, 8, 10 and 12, Record at 183, 186-187, 189 and 191) containing citations to public videotapes of each Board meeting showing that contrary to FOIA requirements, none of the five votes to go into each of the closed sessions was, in fact, taken in open session in direct violation of Code § 2.2-3712(A). *See* ***White Dog,*** *supra*, 634 S.E.2d at 340-41; ***Nageotte v. Board of Supervisors***, 288 S.E.2d 423, 426 (1982).

Nor is there any issue about Bragg's Affidavit relative to the Board's own motions to convene the five executive sessions. Bragg's Amended Petition contains excerpts of the County's motions showing the topics of the five closed sessions included "filling the position of County Attorney," (or "***advertising for*** and filling the position of County Attorney" (Record at 183,, 185, 187, 190-191, ¶¶ 11, 15, 19 24 and 28 of Amended Petition) even though neither "filling a position" or "advertising and filling the position" are permitted exempt topics under Code § 2.2-3711(A)(1). In addition, Paragraph 32 of the Amended Petition (Record at 191-192) detailed non-exempt issues considered in the unlawful executive sessions and was not stated on information. Since none of those allegations was stated to be "on information," none should have been dismissed by the Trial Court because of "infirmities" in Bragg's Affidavit.

G. THE COUNTY'S RULE 5:11 ARGUMENT IS WITHOUT MERIT

There were no proceedings in the Trial Court beyond the argument on the County's Motion for Summary Judgment and Demurrer. There were no stipulations or findings of fact, nor any evidentiary hearings. On appeal, the matter comes before this Court for *de novo* review on issues of statutory construction or application of law to the facts pleaded in the

Amended Petition (and reasonable inferences therefrom), all which are presumed to be true as a matter of law. The arguments of counsel at a motion's hearing in the Trial Court (Appellees' Brief at 14-15) are neither relevant nor required to make the record "sufficient for this Court to make a determination of the issues before it." Rule 5:11(a)(1) is simply not applicable to a case of this nature. The Trial Court's ruling in its March 15th Letter Order must stand or fall on the pleadings and on the applicable law. Counsels' arguments on January 18, 2017 or any other date are not necessary for this Court to adjudicate this appeal.

III. CONCLUSION

For all the foregoing reasons, Bragg respectfully requests this Court to reverse the Trial Court's Final Order dismissing the Amended Petition *with prejudice*, and to remand this case for further proceedings.

Respectfully submitted,

Dated: February 28, 2018

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By counsel

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CERTIFICATE OF SERVICE

In accordance with Rule 5:1(d) and Rule 5:26(e), the undersigned hereby certifies that a true and correct copy of the foregoing Brief was served electronically to the offices of each counsel of record for Respondents/Appellees this 28th day of February 2018 via electronic mail as shown below:

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