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In The
Supreme Court of Virginia

Record No.171022

MARIAN M. BRAGG,

Appellant,

v.

BOARD OF SUPERVISORS OF
RAPPAHANNOCK COUNTY, et al.

Appellees.

BRIEF OF APPELLEES

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I. Statement of the Case

This matter arises from the appeal of Marian M. Bragg ("Appellant" or "Bragg") concerning the dismissal of her amended petition filed in Rappahannock County Circuit Court (the "Trial Court"). In her amended petition she claims that the appellees (the "Appellees" or "the County") violated the Virginia Freedom of Information Act, Virginia Code Section 2.2-3700 *et seq*. ("FOIA"), by conducting a non-public meeting regarding the hiring of a new County Attorney. (Record at 180-196). Bragg relied on two purported affidavits in support of her amended petition to satisfy the requirement of Virginia Code Section 2.2-3713 that a petition to enforce FOIA be supported by an affidavit showing good cause: an "Acknowledgement" from Board of Supervisor member Ronald L. Frazier (the "Frazier Acknowledgment") that is not actually an affidavit and an affidavit from Bragg (the "Bragg Affidavit"). (Record at 16-17, and 206).

After hearing oral argument on the matter on January 18, 2017 (of which no transcript or statement in lieu has been made part of the record), the Trial Court issued a letter opinion on March 15, 2017 (the "Letter Opinion"), granting the County's motion for dismissal of the amended petition. (Record at 389-394). Bragg filed a motion for reconsideration that the Trial Court denied in a letter opinion of April 11, 2017 (the

"Reconsideration Letter"). (Record at 395-405, and 420-421). A final order incorporating the Trial Court's rulings in its Letter Opinion and Reconsideration Letter was entered May 30, 2017. (Record at 471-474).

The Trial Court granted the County's motion for dismissal because it found that the "infirmities" of the affidavits allegedly supporting the amended petition were such that the amended petition failed to satisfy even the minimum legal requirements for bringing Bragg's action pursuant to FOIA. (Record at 389-394 and 420-421).

Now, on this appeal, Bragg advances several red herrings in an attempt to turn a straight forward decision by the Trial Court into a policy discussion of Virginia's FOIA. First, Bragg raises as errors motions that the Trial Court did not entertain, let alone grant. During the January 18, 2017 argument, the Trial Court did not turn the County's motion for summary judgment into a plea in bar. On the contrary, the Trial Court ruled on the County's motion for dismissal and never had to consider the motion for summary judgment- let alone turn it into a plea in bar. (Record at 420).

Second, the Trial Court's consideration of the legal deficiency of the Bragg Affidavit had nothing to do with the Rule 1:10 requirement that Bragg now raises regarding the timing for a defendant to object to the lack of an affidavit when one is not filed with a petition that statutorily requires an

affidavit. On its face, an affidavit was filed with the Bragg lawsuit. The Trial Court correctly found that this affidavit was legally deficient. Furthermore, Bragg did not raise or preserve an objection regarding Rule 1:10 with the Trial Court. (See Final Order, Record 471-474).

Third, while cloaking herself in the "liberal construction" mantra of FOIA, Bragg ignores that she has failed to meet a basic requirement of filing an action under FOIA- that the action be supported by an appropriate affidavit demonstrating good cause- and is attempting to turn what is supposed to be 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.

II. Standard of Review

The Trial Court's decision that the Frazier Acknowledgment and the Bragg Affidavit were insufficient affidavits to meet the "good cause" requirement for a FOIA enforcement petition was within its sound discretion and on appeal is reviewed for abuse of discretion. See Rakes v. Fulcher, 210 Va. 542, 546, 172 S.E.2d 751, 755 (1970); See also Laughlin v. Rose, 200 Va. 127, 129, 104 S.E.2d 782, 784 (1958).

III. Law and Argument

The decision of the Trial Court should be affirmed because: (1) the Trial Court did not abuse its discretion in finding the Frazier Acknowledgment legally insufficient; (2) the Trial Court did not abuse its discretion in finding the Bragg Affidavit legally insufficient and Virginia Supreme Court Rule 1:10 did not preclude the Trial Court form considering the legal sufficiency of the Bragg Affidavit; (3) the Trial Court followed established rules of statutory construction in determining that Bragg's amended petition was legally insufficient; (4) the Trial Court did not ignore Bragg's allegations regarding violations of FOIA's closed session rules; rather Bragg failed to establish a *prima facie* case warranting that the Trial Court address such issues; and (5) Bragg has failed to file a transcript or statement in lieu of a transcript of critical arguments in the Trial Court upon which this Honorable Court may consider the entire proceedings below, and therefore the appeal should be dismissed pursuant to Virginia Supreme Court Rule 5:11.

Contrary to Bragg's first assignment of error, the Trial Court did not grant summary judgment to the County based on a plea in bar standard. Instead, the Trial Court dismissed Bragg's case based on the defects in her

purported affidavits rendering her cause of action legally insufficient under FOIA. (Record at 389-394 and 420-421).

Regarding Bragg's second and third assignments of error, the Trial Court's findings that the Bragg Affidavit and the Frazier Acknowledgment are legally defective is not some narrow technicality that should be overlooked. Rather, the Trial Court recognized the seriousness with which the law treats sworn declarations and the importance of such sworn evidence. That is why the General Assembly, in its wisdom, requires sworn facts as a pre-requisite to every FOIA case in order to prevent "fishing expeditions" at the tax payers' expense.

Bragg's fourth and fifth assignments of error belie the nature of the proceedings below. Because the Trial Court found Bragg's amended petition legally deficient, the Trial Court did not get to the considerations addressed in these assignments of error. There was no need for the Trial Court to pass judgment on such factual considerations when Bragg had not overcome the first requirement—that is, a sworn statement showing good cause.

The arguments Bragg advances are an attempt to re-try her case at the appellate stage. Her arguments do not undercut the Trial Court's logic or reasoning as articulated in its orders and letter opinions. The Trial

Court's reasoning was concise, and consistent with the best traditions of trial courts respecting the minimum-- but legally indispensable-- procedural requirements for a cause of action that the legislature has created. Where the requirements imposed by the legislature are unambiguous, a court cannot impose upon those words a construction "which amounts to holding the legislature did not mean what it has actually expressed." City of Virginia Beach v. ESG Enterprises, Inc., 243 Va. 149, 153, 413 S.E.2d 642, 644 (1992) (citations omitted).

Furthermore, the oral arguments advanced by the parties below at the critical January 18, 2017, hearing on the sufficiency of Bragg's pleadings are missing from the Record. Bragg's appellate arguments attempt to re-characterize the Trial Court's decision, in contradiction to the Trial Court's written opinions, based on a hearing for which no transcript has been provided. This Court, therefore, has an insufficient record upon which to judge Bragg's arguments.

A. The Frazier Acknowledgment is legally insufficient to support the petition under FOIA

The Trial Court did not treat the County's responsive pleading to the amended petition as a plea in bar. Rather, the Trial Court granted the County's motion for dismissal and correctly found that the Frazier Acknowledgment was procedurally and legally deficient to support Bragg's

amended petition pursuant to FOIA. (Record at 389-394). The FOIA statute requires that any petition filed pursuant to it be supported by an affidavit "showing good cause." Virginia Code Section 2.2-3713(A). In Virginia, all affidavits and sworn declarations must comport with certain minimum standards. In Clowser v. Hall, this Court stated that

> '[a]ll the elements of positiveness, knowledge, information, or belief, conjointly or separately, which the statute may require in the making of an affidavit, should therein appear, or be substantially included in its terms; or it will be bad. Thus, if a statute requires a fact to be sworn to, in direct terms, it is not complied with by the parties swearing that he is "informed and believes" the fact to exist'

(quoting Drake on Attachment, sect., 106, 4th edition). 80 Va. 864, 865-866 (1885). The Frazier Acknowledgment did not follow the standard elucidated in Clowser.

As the Trial Court found, the Frazier Acknowledgment nowhere indicates that it is sworn or contains a jurat. (Record at 390). The absence of this basic requirement is fatal to a purported affidavit. See Lancaster v. Wilson, 68 Va. 624, 631 (1876) (citations omitted) (lack of jurat in purported affidavit for attachment proceeding makes it insufficient).

As the Trial Court further found and made clear, even if the Frazier Acknowledgment had been in proper form, it still did not demonstrate the necessary "good cause" to support a FOIA petition. This Court has stated

that to show "good cause," a purported affidavit must show "legally sufficient ground or reason." Bidwell v. McSorley, 194 Va. 135, 140, 72 S.E2d 245, 249 (1952). While Bragg discounts the Trial Court's citation to Bidwell because it is a child custody case, the principle is clear: good cause is not a superfluous phrase but an integral part of the affidavit requirement under FOIA requiring more than the Frazier Acknowledgement set forth. As the Trial Court put it, the words require "more than mere speculation and possibility." (Record at 421).

Furthermore, as this Court held in Rakes v. Fulcher, the determination of whether a party has established "good cause" is a decision that rests in the sound discretion of the trial court. 210 Va. 542, 548, 172 S.E.2d 751, 756 (1970).

Bragg's heavy reliance on Marsh v. Richmond Newspapers, Inc., 223 Va. 245, 288 S.E.2d 415 (1982), is misplaced because the mayor's "press release" was never questioned as a proper basis for a petition under FOIA. Neither the Marsh trial court nor this Court addressed the issue of whether or not such a document could support a petition. Id. The parties in that case stipulated to the mayor's testimony. Id. at 250, 418. In fact, Bragg cites no case where a trial court was overturned after determining the insufficiency of an affidavit required by statute to support a cause of action.

Finally, the Trial Court was correct in observing that Mr. Frazier was estopped from providing statements necessary to meet the FOIA "good cause" requirement because he had made multiple certifications on the record on earlier occasions pursuant to FOIA requirements that were contrary to the position he stated in the Frazier Acknowledgment. (Record at 389-394). Virginia Code Section 2.2-3712(D) requires that a supervisor such as Mr. Frazier immediately state and explain the substance of any irregularity or illegality regarding a close session. Id. Mr. Frazier having already certified that closed meetings were in compliance with FOIA, the Frazier Acknowledgment was an attempt to rewrite the established legal record. (Record at 389-394, Letter Opinion pg. 2). The Trial Court was correct in finding such a document is insufficient to establish good cause under FOIA.

B. The Bragg Affidavit is legally insufficient to support the petition under FOIA and Rule 1:10 is inapplicable

The Bragg Affidavit fails the Clowser and Bidwell test set forth above. As the Trial Court correctly found, the Bragg Affidavit excepts from its purported swearing all matters contained in Bragg's amended petition that are stated to be on "on information." (Record at 389-394). The matters stated to be on "information" constitute the heart of the amended petition.

(Record at 180-196). The Trial Court determined the remaining allegations of the amended petition were insufficient to constitute "good cause." (Record at 389-394). Furthermore, as the Clowser opinion explains, "information" or a mere "belief" cannot form the basis of a proper affidavit because

> if a statute requires a fact to be sworn to, in direct terms, it is not complied with by the parties swearing that he is "informed and believes" the fact to exist'

Clowser v. Hall, 80 Va. at 866 (citations omitted). Without a proper, legally sufficient affidavit, Bragg's amended petition was incomplete and, therefore, defective under the statute.

Bragg's reliance on Carpenter v. Gray, 75 S.E. 300 (1912) and Paris v. Brown, 143 Va. 896, 129 S.E. 678 (1925), does not vitiate the Trial Court's analysis because neither Carpenter nor Paris dealt with the problem of an affiant who had based his purported swearing "on information and belief." In Carpenter, the substantial compliance analysis dealt with the particular word or words employed to show that the affiant himself had in fact sworn. Carpenter, 75 S.E. at 301. In Paris, the substantial compliance issue was whether a verification of "true to the best of his knowledge and belief" satisfied the statutory requirement that the affiant swear that he "believes it to be true." Paris, 143 Va. at 900, 129

S.E. at 679. Neither case addresses an affiant's underlying basis for the facts to which the affiant is swearing. Unlike the affiants in Carpenter and Gray, Bragg's verification fails to make it clear that she actually had knowledge of the facts set forth in her amended petition as opposed to mere speculation based on information. (Record 389-394).

Finally, Bragg's new argument that the County failed to follow Virginia Supreme Court Rule 1:10 is a misapplication of that Rule. Rule 1:10 applies to cases where a petitioner must file an affidavit/verification and fails to do so. Id. The opposing party has seven days to move to strike the petition for failing to have it sworn. Id. In this case, Bragg *did* file an affidavit with her pleading. The County was, therefore, under no obligation to object within seven days that Bragg's pleading lacked an affidavit (and in fact could not have done so in good faith). The issue on the motion for dismissal and the Trial Court's favorable consideration of that motion was the legal sufficiency of Bragg's amended pleading given the deficient, albeit physically attached, affidavit. (Record at 389-394).

Furthermore, Bragg is raising this Rule 1:10 issue for the first time on appeal. She did not preserve this issue with the Trial Court and her arguments in this regard should not be heard. (Record at 471-474, Virginia Supreme Court Rule 5:25).

C. The Trial Court followed appropriate rules of statutory construction in finding Bragg's declaratory judgment action legally insufficient to meet requirements of a mandamus or injunctive relief action under FOIA

The Trial Court properly construed FOIA when analyzing the pleadings and granting the County's motion for dismissal. Bragg's "liberal construction" argument urges this Court to find that the legislature did not really intend the words it meant when it required a petition under FOIA to be accompanied by an affidavit showing good cause. Bragg would have the Court dispense with the affidavit requirement because, she claims, the affidavit requirement puts her in "catch 22." This argument ignores the sound reason for the affidavit requirement and the certification requirement built into the process of closed meetings.

Bragg's argument that FOIA should be "liberally construed" to overlook the lack of a legally sufficient affidavit pushes beyond statutory interpretation into statutory revision. Virginia law is clear that liberally construing a statute cannot go so far as to change the language used by the legislature. Diaz v. Wilderness Resort Ass'n, 56 Va. App. 104, 120 (2010)

The language of the FOIA statute makes it obvious that one purpose of the FOIA affidavit requirement is to protect public bodies like the County from frivolous and unsupported allegations. Requiring a petitioner like

Bragg to be subject to perjury inhibits and lessens wild, baseless, exaggerated or flatly false claims against a government entity. A FOIA violation is a serious charge, undermining public faith in its governing body and public officials. In requiring a sworn pleading, the General Assembly has made clear that the seriousness of such a claim requires a heightened standard for filing such litigation- or more so than does a typical private civil cause of action.

Bragg's "liberal construction" argument would nullify the Virginia perjury criminal statute. See, Virginia Code Section 18.2-434. Bragg essentially is arguing that close enough is good enough for FOIA. If this argument were accepted, however, a person could sign a document like the Frazier Acknowledgment and a list of material falsehoods, and not be subject to criminal prosecution. If the General Assembly had wanted this application to FOIA, it would not have required an under oath pleading or affidavit.

D. The Trial Court did not consider the substance of Bragg's closed session FOIA violation allegations because Bragg failed to make the proper initial showing under FOIA because her amended petition was legally insufficient

Bragg's fourth and fifth assignments of error attempt to circumvent the "good cause" affidavit requirement of Virginia Code Section 2.2-3713 by

litigating the merit of Bragg's case and the potential evidence available to support it. The Trial Court did not address the alleged closed session violations of FOIA because Bragg failed to file a legally sufficient cause of action. The Trial Court makes it clear that, "[f]or the reasons that follow, the [County's] Motion for Dismissal is granted. *It is unnecessary to rule on the remaining motions*." (Record 389-394, March 15, 2017 Letter Opinion, pg. 1) (emphasis added).

In light of the Trial Court's correct decision to dismiss Bragg's amended petition because of its legal insufficiency, there was no reason for the Trial Court to weigh the factual allegations in Bragg's amended petition regarding the closed sessions.

E. Bragg has failed to follow Virginia Supreme Court Rule 5:11

Virginia Supreme Court Rule 5:11 (a) (1) requires that the appellant file either a transcript or statement of facts in lieu of a transcript to ensure that the record is sufficient for this Court to make a determination of the issues before it. Virginia Supreme Court Rule 5:11(b) requires that "the transcript of any proceeding in the case that is necessary for the appeal should be filed in the office of the clerk of the Trial Court within 60 days of judgment." Here, Appellant has failed to file such a transcript or statement

in lieu for the critical oral argument held on January 18, 2017 (Record at 395) that formed the basis of the Trial Court's Letter Opinion.

No such transcript or statement in lieu exists in the Trial Court record, yet the transcript of the January 18, 2017 hearing is crucial in determining the scope and basis of Trial Court's decision rendered in its Letter Opinion. Because this court does not have a complete transcript upon which it can make a ruling, the Bragg's appeal should be dismissed. JSR Mech., Inc. v. Aireco Supply, Inc., 291 Va. 377, 786 S.E.2d 144 (2016).

IV. Conclusion

For the above stated reasons, Bragg's appeal should be denied and the Trial Court's decision should be affirmed.

Respectfully Submitted,

BOARD OF SUPERVISORS OF
RAPPAHANNOCK COUNTY,
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Certificate of Service

I hereby certify that on this 16th day of February, 2018, I have complied with Rule 5:26(e) and Rule 5:28 of the Supreme Court of Virginia and that pursuant to said Rules, three (3) copies of this Brief of Appellees, have been filed with the Clerk of the Supreme Court of Virginia and one (1) copy has been served by email to:

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