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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Richland County
Court of Common Pleas

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.

INITIAL REPLY BRIEF OF APPELLANT

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Appellant respectfully responds to the Brief of the Honorable Alan, Wilson, Attorney General of South Carolina ("AG") in this 11-year-old FOIA[1] case.

This FOIA case was previously dismissed on motion of the AG, and this Court reversed and remanded the action in *Pope v. Wilson*, 2019-UP-219 (June 19, 2019). While the 2016 dismissal and this Court's analysis were focused on the AG's argument that discovery in a separate 2010 civil action[2] took precedence over Appellant's FOIA rights, the AG offered its alleged non-receipt of the June 30, 2011 FOIA request as an additional ground for dismissal in the lower court and as an additional sustaining ground in this Court. *See* Brief of Resp. AG, dtd. 4/12/17, Appellate Case No. 2017-1727, pp. 18-19. Both the lower court and this Court correctly declined to find that the evidence presented by the AG showed that the lower court has lacked jurisdiction over this case since 2011.

Nonetheless, on remand the AG, apparently scrambling to justify its decade of noncompliance with FOIA, rehashed its claim to say that the AG's office never received the June 30, 2011 FOIA request and that the lower court has been deprived of subject matter jurisdiction since 2011. The AG put forth no new evidence in support of its argument, continuing to rely solely on an October 2011 Affidavit of Sr. Asst. AG Tracy Meyers ("AG Meyers").[3]

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[1] The South Carolina Freedom of Information Act, S.C. Code Ann. §30-4-10, *et seq.*

[2] The AG, Russell Bauknight "on behalf of" the AG and others filed Richland County Case 2010-CP-40-4900 against Robert Buchanan, Jr. and Appellant in May 2010, through the private law firm of Kenneth Wingate, Esq. It is referred to within the Record as the "Wingate Suit," "Richland 4900," and "Case 4900." [Aff. Pope, 12/18/20, p. 5; Complaint, ¶¶7-8]

[3] As discussed later, AG Meyers would, within months, have denied at least seven (7) FOIA requests, including one related to the claimed $4.7 million value which is central to this appeal. [Aff. In Support of *in Camera* review, with ltrs. to/from Meyers and Pope, Exs. A, B

Based on the AG's assurances that its jurisdictional argument was dispositive and that it had not been previously ruled upon, the lower court dismissed this 2011 FOIA case.

The AG's brief, like all of its actions in this FOIA case, demonstrates the lengths to which the AG has gone to make the FOIA seem excessively complex and technical. The AG's arguments are inconsistent with the AG's own stated policies and intended to cover up its own FOIA noncompliance. As set out below, the AG's actions in this case are out of line with both the letter and spirit of the FOIA and the AG's own FOIA directives to public officials.

> The AG again asks the Court, as it asked the lower court, to overlook the fact that the AG has refused since 2011 to release under FOIA multiple public James Brown documents which it owns; which it has used for 11 years to falsely accuse Robert Buchanan, Esq. ("Buchanan") and Appellant of a federal felony; and which it has retained and controlled for that entire period. [Mot. Alter, dtd. 4/13/21]

The AG's brief asks the Court to overlook more than 10 affidavits filed in the first seven months of this 2011 FOIA case which show how the AG, the AG's trustee Russell Bauknight ("Bauknight"), and the AG's private attorneys, the law firm of Kenneth Wingate, Esq. ("Wingate"), coordinated their effort to prevent release of public documents owned and used by the State/AG [Aff. Summer, R., ;Aff., Young, R. ; Ltr. of SWB to AG, 1/20/12, R.] The public documents not released under FOIA in this case include nine months of communications between the AG's office and Bauknight about their May 2011 claim to the South Carolina Supreme Court that the worldwide music empire of entertainer James Brown when he died was not worth almost $85 million, but less than $4.7 million, and that James Brown's "I Feel Good" education charity was not worth $80 million, but less than $4 million.

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and B (cont'd).

The AG's brief said that the public importance of whether James Brown's "I Feel Good" charity was worth $80 million or less than $4 million is of no import in this FOIA case. The AG repeats the substance of what he has told the lower court since 2011: affidavits of S.C. journalists and other citizens who believe that the AG should comply with his FOIA obligations in James Brown FOIA cases are irrelevant, and this FOIA case is "a waste of time." [Tscpt. 5/17/16, p. 7]

Appellant submits that the AG has wasted an immense amount of his own staff's time, Appellant's time and the Court's time in clinging to one flawed technical argument after another, instead of simply providing a proper FOIA response in 2011 or at any point since.

Undisputed Facts the Attorney General's Brief Asks the Court to Disregard[4]

Iconic entertainer James Brown died on Christmas Day 2006 leaving the bulk of his fortune to the James Brown "I Feel Good" Trust. At $80 million, Brown's "I Feel Good" charity was believed to be South Carolina's largest ever private foundation dedicated solely to providing education benefits for needy and deserving students. [Aff. Pope, dtd/ 9/12/11, p. 2] Under IRS guidelines known as the "Five Percent Rule," deserving students could look forward to close to $4 million a year in "I Feel Good" scholarships. *See* 26 U.S. Code §4942.

In February 2008 the Honorable Henry McMaster spoke to the WIS-TV audience of the vast value of James Brown's charity, stating in part:

> …[T]here is so much money involved because the name is so big and the rights to his image – a really valuable thing. [Affidavit Pope, filed 10/12/11, p. 6]

4 Appellant refers to the full recitation of facts in her Amended Brief, as well as her briefs from the previous appeal in this action.

In 2009 the AG, through Bauknight and the newly-created "Legacy Trust," "effectively placed himself in control of" the James Brown assets. *Wilson v. Dallas,* 403 S.C. 411, 743 S.E.2d 746 (2013).

In May 2010 the AG, the Legacy Trust and Bauknight "on behalf of" both, with others, sued Buchanan and Appellant in the Wingate Suit. [Aff. Pope, dtd. 9/6/11, p. 2] The AG and Bauknight on the AG's behalf, falsely accused Buchanan and Appellant of overstating the value of Brown's "I Feel Good" charity at $80 million in IRS filings to get a $5 million commission from Brown's estate, a federal felony. [Testimony of Gov. McMaster, Aff. Pope, dtd. 12/18/20, p. 24-5]

Buchanan and Appellant sought the documents to purporting to support the AG's false claim in discovery in the Wingate Suit. [Mot. Compel]. They also sought the AG's public special counsel litigation retention agreement with Wingate. [*Id.*] The AG, through Wingate refused to produce both.

In August 2010, in a filing signed by Sr. Asst. AG Clyde "Sonny" Jones ("AG Jones"), and bearing names of 4 AG attorneys, the AG stated:

> Bauknight has pursued the appropriate fiduciary route…Although the expected appraisal is a couple of weeks away, a preliminary report indicates that the date-of-death value of the Estate and Trust will not exceed Twelve Million ($12,000,000.00) Dollars
> [Aff. Pope, dtd. 10/6/11]

In December 2010 Bauknight told the IRS that Brown's music empire was worth only $4.7 million at his death. [Aff. Pope, dtd. 12/10/11, p. 5] That month the AG and Bauknight filed a joint initial brief in *Wilson*, but did not advise the Supreme Court of the claimed $4.7 million valuation which had arrived two months earlier. [Wilkins email, Ex. A to Plf. Brief, dtd. 10/27/20]

On May 3, 2011 Bauknight filed a sworn I&A in the Aiken Probate Court, asserting James Brown's music empire was worth only $4.7 million. reducing the claimed value of Brown's "I Feel Good" charity to less than 1/20 of its previously-reported value. [Aff. Pope, filed 10/12/11, p. 5]

On May 6, 2011 the AG and Bauknight repeated the false felony claim to the Supreme Court, asserting that Buchanan and Appellant had overstated the value of James Brown's assets to the IRS by $79 million to get a $5 million commission on what the AG and Bauknight claimed was James Brown's $5 million estate. [Aff. Pope, dtd. 12/18/20, p. 6] The AG asked the Supreme Court to supplement the Record in *Wilson v. Dallas* with the "fact" that James Brown's worldwide music empire was worth less than $4.7 million when he died. [Mot. Supplement, *Wilson*]

Over the next seven months Appellant, with support from Buchanan, made seven FOIA requests seeking public documents to explain how the AG, the public official charged with the protection of Brown's charity, could have claimed that Brown's music empire was worth less than $4.7 million and his "I Feel Good" charity was worth less than 1/20 its real value. [Aff. Pope, filed 10/12/11, p. 5] At the end of the seven months, not a single document related to the $79 million devaluation had been produced to Buchanan and Pope in discovery in the Wingate Suit or by the AG or Wingate under FOIA. [Aff. Pope, 12/18/20]

Appellant's first FOIA request, mailed to the AG on June 30, 2011, is the subject of this FOIA action. [Complaint, Ex. A] Appellant also mailed the FOIA requests which are the subject of this action to the AG's private Wingate law firm, and a related FOIA request to the Legacy Trust. [Complaint, ¶18-20] The requests seek under FOIA the final and all drafts of the 2010

amendment to the Legacy Trust signed by now-Governor AG McMaster, who was AG at the time, and:

> All correspondence, email and/or other communications between any member of the Office of the [AG] and [Bauknight] between August 1, 2010 and May 4, 2011 related to the value of the assets of the Estate of James Brown and/or the James Brown Irrevocable Trust. [*Id.*]

On July 26, 2011 Buchanan and Appellant moved in the Wingate Suit to compel the AG to produce AG's public Special Counsel Litigation Agreement with Wingate. [Motion to Compel, 7/26/11, Ex. B to Motion of AG to Dismiss] The AG's Special Counsel Agreement is important to all James Brown FOIA cases because it makes clear that it is a public document subject to release under FOIA; that all documents used by Wingate in the Wingate Suit are property of the State of S.C. subject to release under FOIA; and that Wingate must deliver any FOIA requests to the AG, and must also comply with the FOIA request, after notice to the AG. [Aff. Pope, dtd. 12/18/20, p. 8]

The AG's Special Counsel Agreement also states that the AG is entitled to 10% of the charitable legal fee, may terminate Wingate at any time, and must approve every action and filing of Wingate.

On August 3, 2011, with no response from Wingate or the AG, Appellant filed the complaint in this action. [Complaint] Attachments to the complaint explained the AG's refusal to release these public documents to Buchanan and Appellant for months. [Complaint, Exs.]

On August 5, two days later, Sr. Assistant AG Tracy Meyers ("AG Meyers") wrote Appellant to say that *she* had not received the June 30 FOIA request by mail or hand delivery, although she knew about it. [Aff. Meyers; Ltr. Pope to Meyers, dtd. 10/5/11, Ex. B to Aff. in Support of *in Camera* Review]

In August 2011 Buchanan and Appellant continued to seek the AG's Special Counsel Agreement in the Wingate Suit, as Appellant sought it in a FOIA request. [Mot. Compel]

On September 9, 2011 Appellant made a second FOIA request to the AG's Custodian and AG Meyers, which was more specific. The FOIA request referred to the AG's August 2010 claim to the Supreme Court that James Brown's assets were worth less than $12 million, and sought:

> 1. All preliminary appraisal reports and/or other documents which support the August 23, 2010 [in bold] statement to the Supreme Court by then-Attorney General McMaster and four Assistants, signed by Clyde (C.H.) Jones, placed in context as follows:…
>
> > 6. Respondents dispute Appellants' assertion that the settlement agreement has the potential to divert "tens of millions of dollars" from the Trust… Presumably this representation to the Court is based on representations about the date-of-death value of the Trust, ranging anywhere from Approximately ….$85,000,000 to approximately One Hundred Million in affidavits, pleadings and testimony…
> >
> > Bauknight has pursued the appropriate fiduciary route…Although the expected appraisal is a couple of weeks away, a preliminary report indicates that the date-of-death value of the Estate and Trust will not exceed Twelve Million ($12,000,000.00) Dollars
>
> AND
>
> 4. Any Document(s) which show when and in what form … Bauknight, serving at the pleasure of the [AG] notified the Office of the [AG] that he asserted that James Brown's assets at his death on December 25, 2006 were worth about $6.5 Million and his worldwide music empire less than $4.7 Million ,,, [Ltr. Pope to Meyers 10/5/11, p.3, Aff. Pope, filed 10/6/11]

AG Meyer's responded to the FOIA request for the $4.7 million valuation documents as follows:

> Responding to your request (numbers 1 and 4)… this office does not possess any such documents, and therefore, is unable to provide this information to you. [Ltr. Pope to Meyers 10/5/11, p.3, Aff., Pope, filed 10/6/11]

On September 12, 2011 Appellant filed an affidavit in this FOIA suit discussing AG Wilson's May 2011 claim to the Supreme Court that James Brown's music empire was worth less than $4.7 million, when he died. [Affidavit, Pope, Opposing Motion to Dismiss (LT), filed 9/12/11]

On October 5, 2011 Appellant wrote AG Meyers again, protesting the AG's assertion, through AG Meyers, that the AG had no documents responsive to the FOIA request of September 9. [Ltr. Pope/Meyers, 10/5/11, Ex. B, Affid. Pope in Further Support of all Relief Req. Complaint, Expedited Hearing, etc. filed 10/6/11] Appellant sent the FOIA request both by Fax and First Class Mail, and included $300 in the mailed copy. [Ltr. Pope, 10/5/11]

On October 25, 2011 the AG filed a Memorandum in Support of: Motion to Dismiss and Motions to Strike and In Opposition to Summary Judgment. [Memo, AG 10/25/11] On page 12, for the first time, the AG referenced "Plaintiff's Apparent Failure to Mail or Deliver the FOIA request to the Office of the [AG]" as a basis for dismissal. [*Id.*]

The AG did not claim that the AG's Office never received the June 30 FOIA request, simply that AG Meyers did not. [p. 13] The AG said AG Meyers requested certain logs, but did not say whether she spoke to the many attorneys, both in-house and at the Wingate firm who were concealing the public AG's Special Counsel Agreement which made every document used in the Wingate Suit property of the State of S.C. and subject to release under FOIA. [p. 13] The AG also failed to mention AG Meyers' claim that the AG had no documents related to the $4.7 million valuation, and Appellant's response to AG Meyers. [Memo AG, 10/15/11]

The AG argued that attaching the FOIA request to the complaint was inadequate. [Memo, AG, 10/15/11, p. 13] At that time, the AG did not address the receipt of the FOIA request by private counsel Wingate.

Just prior to the January 12, 2012 hearing in this case, another problem developed with AG Meyers, which was addressed in a letter and affidavit of Daryl Williams, Esq. ("Williams") [Aff. Williams, 1/6/12]. The affidavit shows that AG Meyers wrote a journalist on January 5 claiming that Appellant's counsel at a Wingate Suit hearing had "stopped or attempted to stop" the release of the AG's Special Counsel Litigation Retention Agreement with Wingate. [*Id.*] Buchanan and Appellant had both been seeking its release for more than a year. [Complaint]

In his letter correcting AG Meyers' misstatement, Williams stated that the Meyers description of a December 12, 2011 status conference in "No. 4900" was not correct; that neither he nor any counsel for Appellant "stopped or attempted to stop production of any document to the Court or to anyone else;" and that "neither you [AG Meyers] nor any attorney on the AG's staff were present." [Ltr. Williams to Meyers, 1/6/12, R. pp.]

Williams, who was at the status hearing, suggested that the fact that neither AG Meyers nor any member of the AG's staff was at the hearing "reflects a misunderstanding of what occurred." [Williams, Aff., Exhibit, Ltr. Williams/Meyers, 1/6/12]

In 2012 AG Meyers, other AG staff, Wingate and Bauknight became deeply involved in preventing release of public documents under FOIA that would undermine the AG's position in the Wingate Suit and parallel representations the AG and Bauknight were making to the Supreme Court in *Wilson v. Dallas*. [Ltr. Wingate to AG, AG Meyers, others, 1/20/12;

Mot. Consolidate] Their actions included moving this FOIA case from Newberry County and then attempting to consolidate it with the Wingate Suit. [Mot. Consolidate]

On January 20, 2012, AG Tracy Meyers became more embroiled in the AG's expanding FOIA noncompliance. In a letter sent from Wingate to AG Meyers, AG Wilson, AG Jones and other AG staff, a Wingate Attorney advised AG Wilson, as his attorney, not to release the AG's public Special Counsel Agreement. Wingate advised the AG that it would be publicly embarrassing to comply with his FOIA obligations, and that it might damage the AG's Wingate Suit co-plaintiffs, Wingate's private clients. [Ltr. of Gende to Wilson, et al, dtd. 1/20/12, Aff. Pope, dtd. 10/27/20, Ex. B]

Despite multiple FOIA requests, the AG did not release the Wingate direction that he not comply with his FOIA obligations for 8 ½ years. The AG did not release the public Wingate Agreement to a journalist who had requested it until ordered to do so by the Honorable Eugene Griffith in 2014. After Judge Griffith's FOIA order, the AG continued to refuse to release the public Wingate Agreement to Appellant under FOIA until ordered to do so by the Honorable Clifton Newman in 2020. [Aff. Pope, dtd. 10/27/20, Ex. K]

In March 2013, after the Supreme Court in *Wilson v. Dallas* admonished that the Wingate Suit and the AG's FOIA suits should be considered by the lower court in the first instance, the AG told the Supreme Court that it was getting out of the Wingate Suit, and that the AG hoped to conclude the FOIA matters within a short while. [Aff. Pope, dtd. 12/18/20, p. 16-17; Aff. Pope, dtd. 10/27/20, p. 4] The AG did not do either.

In April 2013 the AG informed Wingate that the AG's office had never hired Wingate in the Wingate Suit, and that the AG and Wingate did not share any attorney-client privilege. [Ltr. McIntosh to Kendall, dtd. 4/24/13, Ex. I to Aff. Pope, dtd. 10/27/20] Neither the AG nor

Bauknight informed Appellant or any court of this document until it was released by the AG under FOIA in 2020. [Aff. Pope, 10/27/20, pp. 2-3] Wingate and Bauknight both continued to act for the State/AG in the Wingate Suit. [Aff. Pope, dtd. 12/18/20, pp. 19-21]

Two days after the *Wilson v. Dallas* decision, the AG and Bauknight, through Wingate, asked for, and obtained, a 3-year *de facto* stay of this FOIA case and the Wingate Suit from 2013 until 2016. [Aff. Pope, dtd. 12/18/20, p. 20; Ltr. of SWB, dtd. 5/10/13]

On May 29, 2013, shortly after the Supreme Court handed down the *Wilson v. Dallas* decision remittitur, Tommie Rae Hynie and Louis Levenson, Esq., announced to the Honorable Doyet A. Early, III, in open court -- with AG Jones present – their plan to disregard the Supreme Court's decision in *Wilson* and reinstate the 2008 settlement deal brokered by the AG which the Supreme Court had found to dismember James Brown's estate plan. [Aff. Pope, dtd. 12/18/20, p. 20]

In 2014 the AG did not release the documents requested under FOIA although the order of Judge Griffith in the journalist's FOIA suit made clear that the AG should produce under FOIA documents held and used by Wingate in the Wingate Suit.

In 2014 the AG continued to refuse to release documents responsive to this FOIA suit and the order of Judge Griffith. The AG cited a 7-year-old unconstitutional *ex parte* order secured by Hynie as the basis for refusal to release Hynie's public handwritten bigamy admissions which the AG had received in 2008. [Aff. Pope, dtd. 10/27/20, Ex. C, Order of the Hon. Eugene Griffith, dtd. 9/19/14]

In refusing to release the 2010 $4.7 million valuation, the AG relied on an ill-gotten confidentiality order Bauknight had secured in 2013.[5] [Mot. Alter, 4/13/21, p. 11]

A hearing in this FOIA case finally took place on May 17, 2016, at which Appellant argued in favor of her long-pending motion for summary judgment. [5/17/16 Tscpt.] Instead, the lower court granted the AG's motion to dismiss. [Order, dtd. 6/24/16] On appeal, this Court reversed and remanded, and the remittitur was issued on April 1, 2020. [Remittitur]

By the time this case was remanded and presented to the lower court in 2021, it was clear that the AG's office and Bauknight had worked together to violate Buchanan's and Appellant's Due Process rights as well as their FOIA rights by concealing the claimed $4.7 million valuation, which should have been released in 2011 to Appellant, in 2012 to the journalist, and in 2014 under the order of Judge Griffith. [Aff. Pope, dtd. 12/18/20].

Although Wingate continued to interfere with this FOIA case, in the fall of 2020 the AG finally released under FOIA documents it should have released in 2014 when Judge

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5 Bauknight represented to the federal court that he had kept the $4.7 million valuation confidential. [Mot. Alter, 4/13/21; Aff. Afterman; Declaration of Afterman] In fact, over three years, Bauknight had shared the $4.7 million valuation with Hynie; Peter Afterman, who was working for Hynie's attorneys as Hynie siphoned off U.S. royalties devised to Brown's "I Feel Good" charity; and Wingate's other private clients who were seeking to dismember James Brown's charity. [*Id.*] In 2013 Hynie's son provided the Supreme Court with the details of the alleged-confidential $4.7 million valuation. [Aff. Pope, dtd. 12/18/20, pp. 17-18] Grandson Forlando Brown, after reviewing the $4.7 million valuation, stated under oath that it was "bogus." In sworn testimony Buchanan agreed. [Aff. Pope, dtd. 12/18/20, p. Mot. Alter, dtd. 4/13/21, p. 7]

While the AG cited the 2013 federal court order as a basis for refusing FOIA release of the $4.7 million valuation to the journalist, who had requested the valuation years before the order was obtained, the AG did not heed the same 2013 order that found the Wingate Special Counsel Agreement was public.

Griffith ordered that the AG produce "all documents in possession, owned, used, possessed, or retained in whole or part," by the Wingate firm. [Aff. Pope, dtd. 12/18/20]

By the time this FOIA case was heard the record showed that the AG had withheld public documents for 6 years in violation of a FOIA order which, if produced as ordered, would likely have ended this FOIA case in 2014 and ended the AG's false felony claim against Buchanan and Appellant. The documents belatedly released under FOIA by the AG in late 2020 revealed:

a. In January 2012 Wingate, acting as attorney for the AG, advised AG Wilson not to produce the AG's public Wingate Retention Agreement which makes every document property of the State of S.C. and subject to release under FOIA by both Wingate and the AG if it was possessed, owned, used or retained in the Wingate Suit. [Ltr. of Gende to Wilson, et al, dtd. 1/20/12; Aff. Pope, dtd. 12/18/20, p. 8]

b. In March and April 2013 the AG informed Wingate that the AG's office had never engaged Wingate in Richland 4900, and that the AG's office shared no attorney client privilege with Wingate. [Ltr. McIntosh to Kendall, dtd. 4/24/13]

c. Bauknight acting on behalf of the AG, had shared the $4.7 million valuation with Hynie and others, but claimed to the federal court that it was confidential. [Aff. Pope, dtd. 12/18/20, pp. 17-18]

d. The AG had withheld Hynie's public bigamy admissions and the $4.7 million value which should have been released in 2014, helping Hynie and Wingate's other private clients carry out Hynie's announced plan to disregard the Supreme Court and reinstate the AG's 2008 settlement. [Mot. Alter, 4/13/21]

When the Supreme Court directed in February 2013 that Appellant's FOIA matters be considered by the circuit court "in the first instance," the AG did not tell the Supreme Court it would be refusing FOIA compliance or claim that AG Meyers did not get the FOIA request. Nor did it advise the Supreme Court that AG Meyers had denied a specific request for the $4.7 million valuation. [Aff. Pope, dtd. 12/18/20, p. 16-17; Aff. Pope, dtd. 10/27/20, p. 4] The AG told the Court he hoped to conclude the FOIA cases soon, and that he had provided all documents he could legally provide. [*Id.*]

Then the AG refused to release the public Wingate Special Counsel Agreement to Appellant under FOIA until 2020. In 2022 the AG is still withholding more than 8 months of public documents showing why the AG and Bauknight decided to tell the Supreme Court in 2011 that James Brown's $80 million charity was worth less than 1/20 of the value placed on it by every trustee before Bauknight.

Argument on Reply

I. The OAG's allegation that it did not directly receive Appellant's June 30, 2011 FOIA request did not deprive the lower court of subject matter jurisdiction.

Appellant thoroughly addressed this issue in her brief-in-chief, but replies to address two matters. First, the AG claims that it is "incorrect" that it undisputedly received the June 30, 2011 FOIA request more than ten (10) years ago. While the AG attempts to redefine "receipt" as some term of art defined between the lines of a statute, it cannot dispute that it received the FOIA request over a decade ago.

First, the AG admitted in its answer that its then-counsel had received the request. [Answer of AG, ¶17] Second, the request was attached to the Complaint herein, which was undisputedly served on the AG in early August 2011. The FOIA request was therefore undisputedly received by the AG more than 10 years ago, and Appellant's statement stands as correct.

Second, the AG urges the Court to adopt its idea that "receipt" under the FOIA is somehow different from the standard definition of "receipt." *See* Resp. Brief at 11-12. Admitting that its counsel *had* received the FOIA request, the AG nonetheless pronounces receipt by its counsel did not constitute "receipt" under the FOIA. The AG cites no authority for this idea, and Appellant submits that no authority supports the AG's assertion.

Instead, the AG's own standard Litigation Retention Agreement for Special Counsel specifically anticipates that counsel may receive FOIA requests. The entire "Public Records" section of the AG's Litigation Retention Agreement reads as follows:

> Any material, data, files, discs, or documents created, produced, or gathered by Special Counsel or in Special Counsel's possession in furtherance of this litigation, or which fulfills and obligation of this appointment, shall be considered the exclusive property of the State of South Carolina. Special Counsel agrees to adhere to South Carolina's Freedom of Information Act, South Carolina Code of Laws §30-4-10 *et. Seq.*, and maintain all public records in accordance with State law; provided, however, that Special Counsel shall consult with, and obtain the approval of, the Attorney General before responding to any public records request. Special Counsel agrees to comply with the Attorney General's policy on document retention and to refrain from destroying documents unless otherwise permitted under this policy. Special Counsel agrees to request written confirmation from the Attorney General's Office prior to destroying any documents. This Agreement shall be considered a public document.

The *most* that the Affidavit of AG Meyers can be construed to say is that the AG's office does not have a record of directly receiving the June 30, 2011 FOIA request in its mail and delivery logs, and that AG Meyers did not herself receive the document. The AG is incorrect in arguing, and the lower court erred in agreeing, that AG Meyers' affidavit was sufficient to deprive the lower court of subject matter jurisdiction over this case despite the following undisputed facts in the record:

1. The August 3, 2011 Complaint and the attached affidavit of Appellant both state clearly that Appellant mailed her FOIA request;

2. The Complaint alleges *and the AG's Answer admits* that the AG's private counsel received the FOIA request; and

3. The AG received the FOIA request no later than upon service of the Complaint, which attached the request.

4. The AG, through AG Meyers, received the overlapping FOIA request for $4.7 million valuation documents before AG Meyers prepared the October 2011 affidavit, and refused to release the $4.7 million value or the related documents.

Appellant submits that dismissal on the basis of lack of subject matter jurisdiction was error, and this Court should reverse the dismissal of this FOIA case.

II. This FOIA case is not moot, both because the AG refused to provide any documents prior to March 7, 2013 and because the AG has still not produced responsive documents in its possession.

A case becomes moot when a judgment, if rendered, will have no practical, legal effect on the existing controversy. *Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 630 S.E.2d 474 (2006). The AG complains that this case is moot because it provided the unsigned Legacy Trust documents attached to its March 7, 2013 Answer herein, which was filed more than a year after Appellant brought this FOIA suit. The AG incorrectly asserts that Appellant has not challenged the AG's statement that those documents were the only potentially responsive documents it possesses.

For at least two reasons, this case is not moot. First, the AG admits that it provided responsive documents for the first time more than a year after this FOIA case was commenced, and the law is clear that, even if the documents provided in 2013 were a complete response (which Appellant disputes and addresses below), the case would not have been mooted. Appellant sought attorneys' fees and costs pursuant to S.C. Code Ann. §30-4-100(b) in her complaint, and our Supreme Court has held that a belated FOIA response by a public body does *not* moot a cause of action for attorney's fees and costs. *See Sloan v. Friends of the Hunley, Inc.*, 393 S.C. 152, 157, 711 S.E.2d 895, 897 (2011) ("When a public body frustrates a citizen's FOIA request to the extent that the citizen must seek relief in the courts and incur litigation costs, the public body should not be able to preclude prevailing party status to the citizen

by producing the documents after litigation is filed." (internal citations omitted)). Appellant's claim for attorney's fees and costs is therefore not mooted by the AG's production of certain documents in 2013.

Further, Appellant submits that the AG has failed or refused to produce documents responsive to her FOIA request, which casts doubt on the AG's unsupported assertion that it has no further documents in its possession. Plaintiff presented an email, dated December 17, 2010, which was sent to two members of the AG's staff by William W. Wilkins, Esquire (who was counsel to Bauknight). [Plaintiff's Brief, dtd. 10/27/20, Ex. A] That email discusses a strategic decision by the AG's staff and Bauknight to withhold the $4.7 valuation from the Supreme Court in the case that would result in the *Wilson* opinion. [*Id.*] That document was responsive to the June 30, 2011 FOIA request, but not produced, and confirms the importance the AG and Bauknight assigned to the $79 million devaluation of Brown's music empire in *Wilson.* Nonetheless, the AG has never produced this document, or the others it refers to, in this litigation or in response to Appellant's FOIA request.

Additionally, the Legacy Trust December 2010 amendment, which was signed by then-AG Henry D. McMaster is also responsive to Appellant's FOIA request, along with all drafts of that amendment, and those documents have never been produced in this litigation. [Plaintiff's Brief, dtd. 10/27/20, Ex. B] Appellant has shown that the AG is in possession of responsive documents, and this case is not mooted by a partial, belated response from the AG.

The AG's brief seems to suggest that it would be acceptable for a public body to withhold release under FOIA of a public document; wait years while the citizen

seeking the public document to scramble and find the document elsewhere; then declare the FOIA matter moot. This approach does not conform to the letter or spirit of FOIA, or with the AG's own directions to public officials.

Appellant submits that this Court should reverse the lower court's orders and direct the AG to fully and completely respond to Appellant's June 30, 2011 FOIA request.

III. Appellant's Argument VI is properly included in her amended brief, and the documents referred to and judicial notice requested are proper.

The AG argues that Appellant was somehow restrained from reshaping her arguments in her Amended Brief and, further, that certain references in her Argument VI are inappropriate. As an initial matter, every part of the AG's argument on this point was addressed in its March 2, 2022 Motion to Strike, which this Court denied.[6] The AG now attempts to relitigate this already-decided procedural issue, rather than addressing the substance of Appellant's argument.

In its brief, the AG, declares that it "strongly supports the Freedom of Information Act," but within the same sentence asserts that "this case has failed because Appellant did not meet the notification requirements of the FOIA." [Resp. Brief at 9] While this case has not "failed," it has been longer and at much greater expense to the State of South Carolina than it should have been. That is, however, not because of any failure by Appellant, but rather because the AG has now spent nearly 11 years clinging to alleged technicalities to avoid a simple FOIA response.

[6] To the extent the Court wishes to entertain the AG's argument regarding documents and information referred to in Appellant's Amended Brief, she refers to and incorporates the detailed argument made in her Return to the AG's Motion to Strike, dated March 14, 2022.

On September 6, 2011, the AG's recommendation to public officials was filed in this FOIA case. The AG said, in part:

> Dear Public Official:
>
> The Attorney General's Office uses and recommends the following FOIA
>
> Guidelines:
>
> > When in doubt, disclose the requested information…
> > When in doubt, release the document. [Aff. Pope, dtd. 9/6/11, Ex. A, Ltr. of AG to Public Officials]

The record in this case demonstrates the emptiness of the AG's frequent declarations of support for the FOIA, as well as his refusal to follow his own edict to public officials. At no point since June 30, 2011, has the AG produced a FOIA response. More than a year after this case began, it produced some (but, as noted above, not all) documents, but still insisted the documents *were not produced as a FOIA response.* [Answer, ¶36]

Now, the AG goes so far as to claim editing authority over Appellant's Amended Brief, which was required only after the AG sought and received an Order striking Appellant's entire original Brief. The AG, continuing to delay and complicate this matter, moved again to strike the Amended Brief, and this Court correctly denied the motion. Appellant's Amended Brief complies with the Rules and is properly supported. Rather than responding to the substance of Appellant's Due Process argument, the AG's brief stands as further evidence of the violation of the Due Process rights of Buchanan, Appellant and the citizens of South Carolina.

IV. The AG's numerous motions to strike do not constitute an additional sustaining ground for the lower court's order.

The AG argues that more than a dozen affidavits of plaintiff, journalists and other citizens outlining the AG's FOIA refusal; correcting errors in AG Meyers' statements; urging

the AG to comply with his FOIA obligations in James Brown matters; and relating those FOIA obligations to the AG's statutory duty to protect Brown's $80 million "I Feel Good" education charity should be stricken from the record herein.[7] The alleged basis for striking these affidavits is that they are irrelevant and contain inadmissible hearsay. The AG argued below that "[a]ll that is relevant to [Appellant's FOIA] request is whether Plaintiff is entitled to the documents at issue under the terms of FOIA. That statute does not contain standards of disclosure based upon alleged importance or need." [Brief of AG, dtd. 11/2/20]

The AG further argues that "many of [the affidavits filed herein] are not based upon personal knowledge, contain hearsay, and are speculative." [AG's Brief at 18-19] The AG offers a handful of citations, with his own conclusory labels, in support of his request to all or nearly all of the affidavits filed by Appellant in their entirety.

While the FOIA does not consider importance of the documents or whether the requestor has any particular need therefor, the AG has at various points based its defenses herein on Appellant's identity as a litigant in Richland 4900, as well as its allegations that she was already in possession of documents the AG declined to release to her under FOIA. Appellant argues that the affidavits were, at least in part, offered to show both that this case should not be subordinated to Richland 4900 discovery (as requested by the AG) and that journalists and other members of the public were also interested in the FOIA disclosures

[7] Although the AG's motions seek to strike hundreds of pages of affidavit testimony and exhibits from the record, the motions identify only a handful of statements which the AG claims are inappropriate. Even as to those, the AG, for more than a decade, failed to submit his own affidavits or context to suggest that any portion or any of the affidavits should be stricken. Most of the affidavits were within the Record on Appeal on file in the previous appeal herein, and appropriately detail the joint effort of the AG, Bauknight and the AG's private Wingate Suit counsel to stonewall the release of public documents both under FOIA and in the Wingate Suit. [Aff. Smith, Aff. Williams]

sought by Plaintiff. The affidavits were also necessary to refute the claims made by the AG through AG Meyers.

In any event, the AG fails to demonstrate any connection between striking affidavits and affirming the lower court's orders.

> "The purpose of an additional sustaining ground under South Carolina law is "to relieve a respondent who, in the trial court, has obtained a judgment giving him all the relief that he sought, from the necessity of appealing from adverse rulings that did not affect the result of the lower court's decision." *Thomas v. Davis*, 192 F.3d 445 (4th Cir. 1999) (citing *Colonial Life & Accident Ins. Co. v. South Carolina Tax Comm'n,* 103 S.E.2d 908).

The lower court did not rule on the motions to strike; the AG's argument does not constitute an additional sustaining ground; and the Court need not rule on the motions to strike in order to reverse the orders on appeal; direct the AG to comply with the FOIA; and find that Appellant is the prevailing party and is entitled to an award of reasonable attorney's fees and costs.[8]

CONCLUSION

For the reasons set forth above, Appellant asks that this Court reverse the dismissal of this FOIA action; find that Appellant is entitled to summary judgment on her FOIA claims; direct the AG to fully and properly respond to the June 30, 2011 FOIA request, providing all responsive documents from the time of request to the date of the order for compliance; and remand the matter or the circuit court to determine a reasonable award of attorney's fees and costs owed to Appellant as the prevailing party herein.

[8] Because the AG offers no substantive argument on attorney's fees and costs, other than to suggest that the issue is "premature," Appellant relies on her Amended Brief. As set out therein, this Court has a more than adequate record on which to find Appellant is the prevailing party and is entitled to an award of fees and costs. All that would remain on this case on remand if summary judgment were granted is a final determination of the amount to be awarded.

Respectfully submitted,

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