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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.

BRIEF OF APPELLANT

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Statement of Issues on Appeal

- I. THE CIRCUIT COURT HAD SUBJECT MATTER JURISDICTION TO HEAR AND DECIDE THIS 10-YEAR-OLD FOIA CASE
- II. THIS COURT SHOULD PROCEED WITH DIRECTING THE AG TO PROPERLY RESPOND TO APPELLANT'S JUNE 30, 2011 FOIA REQUEST, INCLUDING BY PRODUCING STATE-OWNED FORMER LEGACY TRUST DOCUMENTS AND DOCUMENTS HELD BY WINGATE
- III. RICHLAND 4900 DISCOVERY PROCEEDINGS DO NOT EXEMPT ANY REQUESTED DOCUMENT FROM PRODUCTION UNDER FOIA
- IV. THE AG SHOULD PRODUCE WINGATE AND LEGACY TRUST DOCUMENTS UNDER FOIA
- V. IN REVERSING THE ORDERS APPEALED FROM, THIS COURT SHOULD FIND THAT APPELLANT IS THE PREVAILING PARTY AND IS ENTITLED TO ATTORNEY'S FEES AND COSTS
- VI. THE ATTORNEY GENERAL'S FOIA NONCOMPLIANCE HAS VIOLATED THE FOIA AND DUE PROCESS RIGHTS OF APPELLANT, ROBERT BUCHANAN AND OTHER S.C. CITIZENS

Statement of the Case

This case has a history spanning well over a decade, including a previous appeal to this Court, which reversed the 2016 dismissal of the case and remanded it for further proceedings. In accordance with Rule 208(b)(1)(c), Appellant confines her statement of the case to the history necessary to understand this appeal. Appellant refers to and incorporates her briefs in *Pope v. Wilson (James Brown Legacy Trust)*, Appellate Case No. 2016-1727, of which she asks the Court to take judicial notice, for a fuller history of the case up to the date of that filing.

Plaintiff, a Newberry County resident, filed this action under the South Carolina Freedom of Information Act¹ (“FOIA”) Newberry County on August 3, 2011. [Complaint, R. 43-79] The original defendants were the Honorable Alan Wilson, in his capacity as Attorney General of South Carolina (the “Attorney General”) and the James Brown Legacy Trust. [Complaint, p.1, R. 43]

The complaint seeks a declaration that the Attorney General and the James Brown Legacy Trust are public bodies under FOIA; that the court compel the Attorney General to perform his official duty and the James Brown Legacy Trust to comply by permitting Plaintiff to inspect and copy certain public records; that the Court determine and order the payment to Plaintiff of reasonable attorney’s fees and other litigation expenses pursuant to S.C. Code Ann. §30- 4-100; that the Attorney General should direct the law firm of Sweeney Wingate and Barrow, PA (“SWB”) and all special counsel to comply with their duties under FOIA; and that the Court set a hearing at the earliest possible date on the matters set forth in the complaint. [Complaint, pp. 2,3, R.44-45]

The complaint asserts that on June 30, 2011 Appellant sent to AG Wilson and the James Brown Legacy Trust separate requests under FOIA for public records related to the Legacy Trust, namely “the final and all drafts, signed and unsigned” of the James Brown Legacy Trust. [*Id.*] It

¹ S.C. Code Ann. §30-4-10, *et seq.*

states that, in addition, the FOIA request sought the following from the Attorney General:

All correspondence, email and/or other communications between any member of the Office of the [Attorney General] and Russell 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 2000 Irrevocable Trust. [Complaint, p.5, R. 47]

The complaint asserts that SWB had for months refused to release the requested public documents and other public documents, although the Attorney General's Retention Agreement for other Special Counsel requires special counsel to comply with FOIA. [Complaint, ¶¶20-22, R. 47]

The complaint further asserts:

31. Based upon the facts set forth above, this Court should enter an order declaring that the requested records are public records and should be made available to the public and Defendant by both AG Wilson and the Legacy Trust, as well as by all special counsel, for inspection and copying as provided by FOIA. [Complaint, ¶31; R. 49]

Attached to the complaint were the June 30 letter of Appellant to the Custodian of Records of the Office of the Attorney General [Complaint, Exhibit A; R. 52]; the letter of Appellant to the Custodian of Records of the James Brown Legacy Trust [Complaint, Exhibit B; R. 54]; the Attorney General's Statement on Campaign Contributions by Special Counsel [Complaint, Exhibit C; R.56-57]; and an affidavit of Appellant [Complaint, Exhibit D; R.59-76].

On September 29, 2011 Appellant moved for summary judgment. [Mot. SJ; R. 934-59; Affidavit in Support of SJ, filed 9/30/11, R. 943-59]

Both Defendants moved to dismiss the complaint on the grounds that venue was improper and that another action was pending between the parties. [Mot. Dismiss or Strike of AG, filed 9/6/11, R.80-105; R. 106-9]

The complaint, motion for summary judgment, and Appellant's opposition to motions to dismiss and strike were supported with a brief, affidavits and other filings. [R. 184-89; Aff. Opp. Mot. to Dismiss, filed 9/6/11, pp. 1-6 and Exhibit A, R. 909-15; Affidavit of Pope Opp. Mot. of

Legacy Trust to Dismiss, filed 9/12/11, pp. 1- 10, R., 481-90; Supp. Aff. of Plf., dtd. 9/16/11, pp. 1-5, R. 900-04; Aff. Supp. All Relief and *In Camera* Review, dtd. 10/6/11, pp 1- 8, R. 497-5-4; Aff. Smith Supp. Release of All Public Documents..., dtd. 12/9/11, p. 1-4, w/Exhibits A, B, C, D, filed 12/14/11, R. 520-544; Aff. Opp. Striking or Disregarding..., dtd. 1/3/12, pp. 1-2, R. 547-53; Aff. Farrer, dtd. 1/4/12, p. 1-2, R. 556-7; Aff. Supp. in Camera Review..., dtd. 1/6/12, pp. 1-4, w/Exhibits A, B and C, R. 560-81; Aff. D. Williams, dtd. 1/6/12, w/ Attachment, filed 1/9/12, R.558-9]

An Affidavit of Sr. Asst. Attorney General Tracy Meyers (“AG Meyers”) dated October 20, 2011 was filed by the Attorney General. [Aff. Meyers, 10/20/11, R. 166-8] An Affidavit of Russell L. Bauknight was filed by the James Brown Legacy Trust. [Aff. Bauknight, 1/10/12, R.582-5]

On January 6, 2012 Appellant submitted an Affidavit of Adele J. Pope Supporting In Camera Review and Immediate Release of Documents Requested Under FOIA and Expedited Ruling which attached, among other documents, a letter of Pope to AG Meyers and the Custodian of Records of the Office of the Attorney General dated October 5, 2011, and letters from the Office of the Attorney General dated October 3, 2011 and January 5, 2012. [Aff. Pope, w/ Exhibits A and B, Ltrs. to and From AG Meyers and OAG, and Exhibit C; R. 560-581]

On January 11, 2012 a hearing was held in Newberry before the Honorable Frank R. Addy, Jr. (“Judge Addy”) [Tscpt. Hrg. 1/11/12, R. 360-7] That day the circuit court issued a Form 4 order transferring venue of this FOIA case to Richland County. [Ord. 1/11/12, R. 10-11] It was assigned Case No. 2012-CP-40-0350.

On February 1, 2012 the Attorney General filed a motion to consolidate this FOIA case with Richland County Case 2010-CP-40-4900 (“Case 4900”) and another FOIA case. [Mot. AG to Consolidate, 1/2/12, with Exhibits A, B, C, D, & E, R. 128-159] The Attorney General’s motion gave the following reason for the request to consolidate:

Consolidating case 350 with cases 4900 and 379 would permit all FOIA and discovery issues to be determined in one proceeding.

Therefore, the Attorney General respectfully requests that case 350 be consolidated with case 4900. [Mot. Consolidate, 2/1/12, p. 2, R. 129]

The Attorney General's motion to consolidate attached an Order of Judge Addy dated November 22, 2011 in former Newberry County FOIA Case 2011-CP-36-379. [Mot. AG to Consolidate, Exhibit A-2, R. 137-43]; a June 7, 2011 Motion to Compel of Appellant in Case 4900 [Mot. Consolidate, Exhibit A-2; pp. 1 -5, R. 145-49]; Plaintiffs' Motion for Protective Order Concerning Various Documents Requested by Defendant ...Pope [Mot. Consolidate, Exhibit C, pp. 1-3; R. 151-53]; a letter of Adam Silvernail, Esq., dated June 15, 2011 to SWB attorney Mark Gende, Esq., seeking certain documents [Mot. Consolidate, Exhibit D, p1.; R.155] ; and a Letter of Gende to Silvernail dated June 17, 2011 [Mot. Consolidate, Exhibit E, pp. 1- 3, R. 157-9]

Appellant opposed the consolidation on multiple grounds. [Aff. Pope Opp. Consolidation ..., dtd. 2/22/12, pp. 1-9, R. 621-30; Aff. Summer, dtd. 3/26/12, pp. 1-6 and Exhibits A-G, R. 641-58]

On July 5, 2012 the Honorable L. Casey Manning issued an order in this FOIA case and two other cases granting the motion of the Case 4900 Plaintiffs for a 30-day continuance. [Ord. re: Plf. Mot. Continuance, 7/5/12, R. 12-14]

On March 7, 2013 the Attorney General served an answer in this FOIA case. [Ans. AG w/ Exhibit(s), dtd. 3/7/13; R. 190-240]

On March 15, 2013 the James Brown Legacy Trust moved to stay this case. [LT Mot. Stay, dtd. 3/15/13; R. 244-7]

On April 1, 2013, Appellant filed a status report and memorandum of law. [Status Rept and Memo., dtd. 3/27/13, w/Exhibit A; R. 252-62]

Between April 2013 and March 2016 Appellant's counsel made multiple requests for a FOIA hearing. [R. 668-74]

By Order of the Honorable Donald W. Beatty dated March 24, 2016 this FOIA case was assigned to the Honorable Doyet A. Early, III ("Judge Early"). [Ord. dtd. 3/24/16; R. 15]

On May 17, 2016 a hearing was held in this FOIA case. [Tscpt. Hrg., 5/17/16, pp. 1-37, R.368-404] The Legacy Trust asserted that the "court approved Legacy Trust under the settlement agreement does not exist." [R. 389]

By order dated June 14, 2016, the circuit court granted the Attorney General's motion to dismiss. [Ord., dtd. 6/14/16, R. 16-18]. By separate order, the circuit court granted the James Brown Legacy Trust's motion to dismiss.[Ord. filed 6/20/16 (undated); R. 19-21]

Appellant timely filed motions to alter, amend or vacate the orders which were denied on July 27, 2016. [Mot. Alter/Amend (AG), dtd. 6/26/16, pp. 1-4, 16, R. 263-6; Ord., dtd. 7/27/16; R. 22]

Appellant appealed the dismissal, and this FOIA case became S.C. Court of Appeals Case No. 2016-001727.

Oral argument was held on February 12, 2019 [Op. No. 2019-UP-219 at 1] On June 19, 2019 the Court of Appeals issued its unpublished Opinion No. 2019-UP-219 in this matter. In the Opinion the Court found that "the *Wilson* opinion mooted the premise for naming the Legacy Trust in this action," [R. 29] The Court reversed the circuit court's decision that the entire matter was moot. The Court remanded the case with direction to issue an order dismissing the Legacy Trust as a defendant. The Court did not reach the issue of whether the Legacy Trust was a public body under *Futch v. McAllister Towing of Georgetown, Inc.* 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999). [R. 29-30]

The Attorney General filed a Petition for Rehearing, asserting among other grounds that

the Court of Appeals should have considered its argument that it never received Appellant's June 30, 2011 FOIA request. [AG Pet. Rhrgr., R. 299-306] The Court did not request a return to the Attorney General's Petition.

Appellant also filed a Petition for Rehearing regarding this Court's findings as to the Legacy Trust. [R. 267-99] Rehearing was denied by Order dated August 22, 2019. [Ord., dtd. 8/22/19, R. 32]

On September 19, 2019 Appellant filed a Petition for Writ of Certiorari to the Supreme Court, asserting that the Court of Appeals erred in failing to find that the Legacy Trust was a public body and directing that it be dismissed on remand. [Pet. Cert. 9/19/19, R. 307-20] Neither Appellant nor the Attorney General sought the Supreme Court's review of this Court's findings as to the Attorney General. The Supreme Court declined to grant a Writ of Certiorari by Order dated April 1, 2020. [Ord., dtd. 4/1/20, R. 33]

On October 27, 2020 Appellant submitted a brief and affidavit regarding issues for the hearing to be held on November 2, 2020, and a supporting affidavit [Brief, R. 681-94; Aff. Supp. Release of Docs, dtd. 10/27/20; R. 695-756].

A hearing was held before the Honorable Clifton B. Newman on November 19, 2020. [Tscpt. Hrg., 11/19/20, pp. 1, 3-9, 16-20, 26-31, 40-42; R. 391-98, 405-8, 413-8, 425-7] At the hearing, the AG argued that the FOIA case should be dismissed and affidavits filed by Appellant stricken. [*Id.*, pp. 5-6, 13-14; R. 394-5, 423-3] Appellant opposed the dismissal and striking of her filings and asserted that she was entitled to summary judgment, FOIA compliance and other relief sought in the complaint. [Tscpt. Hrg. 11/19/20, pp. 1-4, 6-12, 15-90; R. 26-8, 395-401, 424-5; Aff. Pope Opp. AG's Mot. to Strike..., dtd. 10/27/2020, pp. 1-8 and Exhibits A-K, R. 695-744]

On December 18, 2020 Appellant filed an affidavit opposing the participation of counsel for nonparties in this FOIA matter and certain other relief based on the Attorney General's release

of certain documents in the fall of 2020. [Aff. 12/18/20; R. 795-833]

On April 1, 2021 the circuit court issued its order dismissing this FOIA case on the ground that Appellant never properly delivered the June 30, 2011 FOIA request to the Attorney General. [Ord. 4/1/21; R. 36-40]

Appellant filed a timely motion to alter, amend or vacate the order, which was denied on April 23, 2021. [Mot. Alter/Amend, dtd. 4/12/21; R. 327-53; Ord. dtd. 4/23/21; R. 41-2] This appeal followed.

Statement of Facts ²

On June 30, 2011 Appellant made a FOIA request to the South Carolina Attorney General³ for the following documents:

1. The final and all drafts, signed and unsigned, of the James Brown Legacy Trust [also known as the “Settlement Entity”]
2. All correspondence, email and/or other communications between any member of the [OAG] and Russell L. 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 2000 Irrevocable Trust. [Complaint, Ex. A; R. 52]

A copy of the FOIA request was also sent to SWB, a private law firm representing both the Attorney General and the Legacy Trust. [Complaint, ¶20; R. 47]

Neither the Attorney General nor SWB responded within 15 business days, as required by S.C. Code Ann. §30-4-30 (since amended), and Appellant filed this action on August 3, 2011. She seeks herein a declaration that the documents she seeks are public; a direction that the Attorney General comply with the FOIA; and her reasonable attorney’s fees and costs as prescribed by S.C.

² Appellant Incorporates the Statement of the Case in the Statement of Facts.

³ Appellant also made a request to the James Brown Legacy Trust on the same date, seeking only copies of the Legacy Trust and any amendments thereto, signed or unsigned. Legacy Trust counsel David Black, Esq., (“Black”) responded. [Ltr. Black, 7/15/11, R.75-7] referring to the Legacy Trust as “the James Brown Trust,” Black denied the FOIA request and threatened sanctions against Appellant. [*Id.*]

Code Ann. §30-4-100.

On August 5, 2011, two days after this FOIA action was filed, with a copy of the FOIA requests attached, AG Meyers wrote Appellant stating:

I have also been notified by attorneys in the Civil Division of the [AG] that you refer to a request dated June 30, 2011[,] ...Please be advised that the only direct requests I have received from you during the June to August 2011 period are the six referenced above. . . [Op. dtd. 6/19/19, R. 26]

AG Meyers made no mention of the filed Complaint but invited Appellant to send a request within the next five (5) business days. [*Id.*]

On September 29, Appellant filed a motion for summary judgment asking that both Defendants be declared public bodies subject to FOIA; that each should produce the requested documents; and SWB and all other private counsel should be directed by the Attorney General to produce any of the public documents they were holding. [Mot. SJ, 9/30/211, w/ Ex. A, B; R. 934-42]

A media report stated that until recently James Brown's music empire "was widely reported to have a value of \$100 million at his death, less a \$15 million debt." Referring to Brown's "I Feel Good" education charity, the article said, in part:

At about \$80 million, the "I Feel Good" Trust would have been South Carolina's largest private foundation dedicated solely to scholarships for needy and deserving students. [Mot. SJ, dtd. 9/30/11, Exhibit B, p.2; R. 940]

The article, referring to Legacy Trust counsel Black, stated in part:

In Black's email, he claimed Brown's music empire was worth \$4.7 million "because of outstanding debt and bond issues as well as Mr. Brown's prior advisors' mismanagement of his assets." He said further that all of Brown's assets, including the music, had a value of only \$5.7 million. [*Id.*]

The Attorney General's motion to dismiss was based on Rule 12(b)(3) (improper venue, based on the AG's position that Richland County was the proper venue) and Rule 12(b)(8) (another

action pending between the same parties for the same or substantially the same claim, being Richland County Case No. 2010-CP-40-4900 (“Case 4900”). [AG Mot. Dismiss, dtd. 9/2/11; R. 80-83] The motion to dismiss did not allege that the June 30 FOIA request, a copy of which was attached to the FOIA complaint, had not been received. [*Id.*]

In opposition to summary judgment the Attorney General filed an October 20, 2011 affidavit of AG Meyers. [Aff. Meyers, dtd. 10/20/11, R. 166-8]

The affidavit of AG Meyers said she “has reviewed the letter of June 30, 2011...” but did not say when AG Meyers first reviewed it. [Aff. Meyers, dtd. 10/20/11, p. 1, R. 166] The affidavit said she had never received “from Ms. Pope the June 30 Letter,” but did not say when she and others within the Office of the Attorney General did receive the FOIA request or from whom. [*Id.*].

AG Meyers, in the October 20, 2011 affidavit, which does not contain a paragraph 5, then stated:

4. Attachment of the June 30, 2011 letter to the complaint in the above suit does not constitute a request under FOIA to which the Office of the Attorney General must respond.

6. **Upon the conclusion of the suit** and the delivery or mailing of the same FOIA request to the Office of the Attorney General by Ms. Pope or her attorney, a response to the FOIA request will be made then if permitted by any Order of the Court in case 2011-CP-36-364 or any other judicial proceeding related to matters that are the subject of that request. [Emphasis supplied] [*Id.*]

AG Meyers made clear that the Attorney General would not respond to Appellant’s FOIA request “until the conclusion of the suit,” and failed to disclose that her letter claiming that she had not received the June 30 FOIA request “from Mrs. Pope” was written two days after this FOIA complaint was filed. Further, AG Meyers’s affidavit failed to disclose the continuing correspondence of AG Meyers with Appellant since the August 5 letter, including the October 3, 2011 letter Meyers had sent to Appellant. [Ltr. Pope to AG Meyers and Custodian of Records, dtd. 10/5/11, pp. 1-3, Aff. Pope, *in camera* review, filed 1/9/12, Exhibit B, pp. 1-9; R. 509-13] The

letter of AG Meyers to Appellant of October 3, 2011, stated in part:

Responding to your request (numbers 1 and 4), for appraisals and other documents supporting the position of the Office of the Attorney General and/or Russell Bauknight's position on the valuation of the Estate, this Office does not possess any such documents, and therefore, is unable to provide this information to you. [Aff. Opp. Participation of SWB Law Firm..., filed 12/18/20, p. 13, citing ltr. AG Meyers, 10/3/11, p. 1, R. 807]

On January 5, 2012, in response to a FOIA request by another citizen, AG Meyers accused Appellant's counsel of interfering with AG Meyers' compliance with a separate FOIA request.⁴ The claim was incorrect.

On January 6, 2012 Appellant's Case 4900 counsel, Daryl Williams, Esq. ("Williams"), wrote AG Meyers to correct the inaccuracy, and submitted an affidavit in this FOIA case to clarify the record prior to the first FOIA hearing. [Affidavit., D. Williams, dtd. 1/6/12, R. 558] Williams confirmed that neither AG Meyers nor anyone else from the Office of the Attorney General was present at the status conference AG Meyers referenced to deny FOIA compliance to a citizen and place the blame for noncompliance on Appellant's counsel. [Ltr. Williams, 1/6/12, R. 559]

Williams confirmed that AG Meyers's claim that either he or other counsel for Appellant had "stopped" release of any document was incorrect. [Aff. D. Williams, Ltr. Williams to AG

⁴ On January 6, 2012 Appellant served an affidavit which included a letter of AG Meyers dated the day before (January 5, 2012) which said incorrectly:

This Office does not object to providing the public portions of that item and, in fact, previously attempted at a status conference in the civil case to have turned over documents which would be subject to your request in item 6, but were stopped by Ms. Pope's counsel from doing so ...Based upon Ms. Pope's counsel's position, the court in the civil case is in the process of scheduling a review of the private portion of the fee contract in order to determine if it is confidential. [Emphasis added] [Ltr. of AG Meyers, dtd. 1/5/12 to Summer, Exhibit A, p. 2, Aff. Pope Supp. *In camera* review, filed 1/9/12, R.565]

Meyers, pp. 1- 2, R. 558-9]

On January 9, 2012 Appellant filed an affidavit which asked for in camera review of the documents requested. [Aff. Pope Supp. *In camera* review, filed 1/9/12, pp. and Exhibits A-C, R. 560-585] The Affidavit contained two letters of AG Meyers, and a letter of Appellant to AG Meyers dated October 5, 2011 regarding AG Meyer's response to Appellant's follow-up request for information related to the claimed \$4.7 million value. [*Id.*]

Prior to the first hearing, Appellant also provided additional documentation and support for her positions. [Plf. Ret. to Mot. of LT to dismiss, filed 9/12/11, pp. 1-4, R. 106-9; R. 934-60]

Appellant's filings included affidavits of lawyers, reporters, FOIA advocates and other citizens setting out the public importance of the value of James Brown's music empire and his "I Feel Good" charity; the public importance of FOIA compliance, generally; and the public importance of the Attorney General's FOIA compliance in matters related to James Brown's estate and charity. [Affs. Steven Farrer, dtd. 1/4/12, filed 1/10/12, R. 556; W.J. Smith, dtd. 12/9/11, filed 1/3/12, w/Exhibits, R. 520; Thomas R. Young, Jr., filed 12/11/11, Exhibit B to Smith 12/9/11 Affidavit; R. 537]

In opposition to dismissal, Appellant stated under oath:

4. I reaffirm that, so far as I know, in the more than 20 James Brown cases filed in Aiken County, the 1 in Richland County, the 3 or 4 Federal District Court Cases, the 1 New York case, and others, nobody has asked for relief under FOIA.

5. The vast majority of the James Brown cases, many still pending, were commenced in the Aiken County Probate Court where, in my 35 years as a Trust and Estate lawyer, I do not recall anyone asserting a FOIA Suit could be commenced.

6. My FOIA request is for the State/AG to produce communications with Russell Bauknight, the PR of Brown's Aiken County Estate, related to Bauknight's ... assertion ... in a sworn Inventory & Appraisal (I&A) filed in the Aiken County Probate Court in May 2011 that Brown's worldwide music empire was worth less than \$4.7 million when he died.

7. On May 6 ... AG Wilson's Office asked our S. C. Supreme Court to supplement the...ROA... in an Aiken County appeal with Bauknight's \$4.7 Million, and said it was the correct value of Brown's music empire. I want to know what basis the State had for this representation to our highest Court.

8. I believe the public and I have a right to know why the Attorney General ... who, as the State's chief law enforcement officer, enforces the tax laws... and criminal actions against violators of FOIA, would tell our Supreme Court that Brown's assets are worth less than 1/15 what every fiduciary other than Bauknight who has served James Brown . . . was their value – about \$100 Million (\$85 Million after Brown's debt to the New York Teachers). [Aff. Pope Opp. LT Mtn. to Dismiss, filed Newberry County 9/12/11, filed Richland County 1/17/12, p. 1-2, R. 481-2]

Appellant consistently opposed dismissal and asserted that venue where she lived, worked and sent the FOIA requests was proper. [Plf. Ret. to LT Mot. Dismiss or Strike, dtd. 9/12/11, p. 3, R.108] Appellant also asserted:

9. The Freedom of Information Act has no provision which could be construed to curtail a person who has been sued by the State from obtaining public documents held by public bodies.
[*Id.*]

Appellant stated under oath that many of the public documents now being secreted had been made public, stating:

Many of the documents Bauknight and Wingate are trying to secrete to protect Tommie Rae and Terry from disclosure of the true value, approximately \$100 million value, of Brown's music empire and the fact that Brown was not married to Tommie Rae when he died were made public by consent of Brown's fiduciaries, then represented by Lewis & Babcock, and pursuant to Order of the Honorable Doyet A. Early, III dated August 10, 2007, in Aiken County Case No.... [Aff. Pope Supp. Expedited Ruling..., dtd. 1/6/12, filed 1/9/12, p. 1, n. 1, R. 560]

In partial support of the motion for expedited consideration, Appellant attached a 2011 motion to strike a brief filed in January 2011 by the Attorney General, Bauknight and Legacy Trust owners. [Aff. Pope, dtd. 1/9/12, Exhibit C, R. 578-81] In the January 2011 motion, Legacy Trust attorneys and the Attorney General claimed:

Pope and Buchanan's frivolous conduct has forced the Respondents to expend valuable time and resources ... Pope and Buchanan have a long, tortured history with this Court and its ruling that relate to their involvement in the Estate and Trust litigation. From that history, it is untenable to conclude that Pope and Buchanan have acted in good faith...Moreover, Pope and Buchanan have injected themselves into this appeal without any authority, ... Accordingly, Respondents respectfully request that this Court sanction Pope and Buchanan by requiring them to pay for the costs and attorney fees expended to respond to their frivolous brief. [Mot. to Strike Pope and Buchanan's Brief, dtd. 1/31/11, Page 2, Exhibit C, Affidavit, Pope, 1/9/12, R. 579]

In support of dismissal, an affidavit of Bauknight stated in part:

... 4. For nearly three years I have also served as the Trustee for the James Brown Legacy Trust. The Legacy Trust was created pursuant to a settlement agreement that ended years of litigation surrounding the validity of James Brown's Will and Trust.

5. As its Trustee, I manage, control and oversee the Legacy Trust. While the South Carolina Attorney General has the right to remove and replace me, the beneficiaries of the Legacy Trust – the James Brown Children, for example – also have the right to remove me pursuant to the Trust Code.

6. Ms. Adele Pope appealed the settlement agreement and that appeal is pending at the South Carolina Supreme Court. . .

...9. Similarly, the Legacy Trust will be funded with the private property of James Brown pursuant to the terms of the settlement agreement. The Legacy Trust is designed to carry out the same private charitable goals as the Trust. Consequently, the Legacy Trust is also private...

...15. . . . Judge Casey Manning previously ruled that actions involving the James Brown Trusts, including the Legacy Trust, are subject to venue in Richland County. . .

16. In the event that this action is not dismissed, it should be transferred to Richland County. . . [Aff. Bauknight, 1/10/12, pp. 1-3, Exhibit C, R. 582-4, 600-5]

The first hearing in this FOIA case was held before Judge Addy on January 11, 2012. [Tscpt. Hrg, 1/11/12 pp. 1-27, R. 961-87] The Attorney General complained that Appellant "has continued to pepper . . . the parties with a -- a swarm of affidavits." [*Id.*, pp. 9, R. R. 969]

The Attorney General made an oral motion for change of venue and consolidation with

Richland 4900. [*Id.*] Counsel for the James Brown Legacy Trust, agreeing with the Attorney General, said there was “simply no reason not to transfer them all to one place.” [*Id.*, p. 13; R. 973]

Referring to AG Meyers’ affidavit, the Attorney General’s counsel stated: “Obviously, we know about the FOIA complaint.” [*Id.*, p. 9; R. 969]

The circuit court noted that “five different courts have already looked at this.” [*Id.*, p. 15; R. 975] The Court asked Appellant’s counsel: “What is it that the Plaintiff is so uncomfortable with this?” [*Id.*] This is the first of many instances in which the circuit court erroneously viewed this FOIA action as a component of Case 4900, culminating in Judge Early’s now-reversed 2016 dismissal of this case on the basis that Appellant’s FOIA claims were subordinate to discovery in Case 4900.

Appellant’s counsel asserted that a transfer would violate Appellant’s FOIA and Due Process rights and would not serve judicial economy. [*Id.*, pp. 28-29; R. 987-8] Counsel stated that the FOIA matter was ready to be heard, and Appellant had no fewer or greater FOIA rights than other residents seeking FOIA compliance. [*Id.*]

Appellant’s counsel also argued that the parties to Richland 4900 were not the same, and that the private Richland 4900 plaintiffs should have no say in the Attorney General’s FOIA compliance. [*Id.*, pp. 28, 45-47; R. 987, 989-91] Counsel argued that it violated both FOIA and the Constitutional rights of Appellant to allow the private parties in the Richland County suit to interfere with Appellant’s FOIA request. [*Id.*]

Appellant’s counsel argued that this FOIA case and Richland 4900 were not claims arising out of the same event. [*Id.*, pp. 16-17; R. 976-7] He stated of this FOIA case: “this litigation should not be complex.” [*Id.*]

The circuit court stated its intention to transfer venue, and stated:

I've consulted with some other judges on this very issue and I have yet to hear one of them remark that this is a bad idea. [*Id.*, p. 32; R. 367]

The circuit court also stated: "I hope you get the information sooner rather than later," and said "I'd be very surprised if some other judge would say you're not entitled to the documents. [*Id.*, p. 31; R.366] Despite Judge Addy's belief that transferring this case to Richland County would promote speed and efficiency, Appellant has not received FOIA compliance more than a decade later.

Judge Addy issued a Form 4 Order transferring this once-Newberry County FOIA case to Richland County. [Ord. dtd. 1/11/12; R. 10]

On February 1, 2012, the Attorney General served a motion to consolidate this FOIA case with Case 4900. [AG Mot. Consolidate, filed 2/2/12; R. 128] The Attorney General's motion bore the caption of both cases, with a shortened caption for Case 4900. [*Id.*] No reference was made to AG Meyers' claimed nonreceipt of the June 30, 2011 FOIA request. The Attorney General's motion stated in part:

Although the claims in the complaints of the two cases are not identical, case 4900 is the subject of a number of allegations in and a lengthy exhibit to Complaint in case 350. *See, eg.* Complaint in 350 at paragraphs 7 -11 and Exhibit D to Complaint (all references to this exhibit are subject to motions to strike, *infra.*) Moreover, the documents requested in the [FOIA] request of the Attorney General at issue in case 350 are also the subject of pending discovery related motions in case 4900. *See* Exhibit D to case 350 Complaint . . . Attached Exhibit B, Motion to Compel...; Attached Exhibit C, Motion for Protective Order...Plaintiff is essentially pursuing through case 350 the same discovery issues that are pending before the Court in Case 4900. Therefore common questions of law or fact are present. [*Id.*, p. 2; R.129]

The Attorney General's motion to consolidate attached numerous exhibits, including:

- a. An order of Judge Addy in FOIA Case 2011-CP-36-379 dated November 22, 2011 [*Id.*, Ex. A-2, R. 135]
- b. A June 7, 2011 Motion to Compel Discovery (Requests for Production of Documents) of Appellant in Case 4900 [*Id.*, Ex. B, R.145]

c. A July 1, 2011 motion of Attorney General, the Legacy Trust and other Richland 4900 Plaintiffs for a protective order in Case 4900. [*Id.*, Ex. C; R.151]

d. A letter from Adam Silvernail, Esq., to the Attorney General's SWB counsel dated June 15, 2011 seeking correspondence and documents related to appraisals obtained by Mr. Bauknight, the appraisals itself and all earlier drafts; ... [*Id.*, Ex. D; R. 155]

e. A letter from the Attorney General's and Legacy Trust's SWB counsel dated June 17, 2011, refusing to produce the requested documents. [*Id.*, Ex. E; R. 157]

The motion made clear that the Attorney General did not seek a protective order in Case 4900 until after Appellant made her June 30 FOIA request. The motion also made clear that documents sought in this FOIA case related to the \$4.7 million appraisal do exist. [Ltr. SWB, 6/17/11, R. 103-5]

Appellant opposed the consolidation motion with two affidavits. [Aff. Pope, 2/24/12, R. 621; Aff. Summer, 3/29/12, R. 641]

Appellant's affidavit stated in part:

4. No AG or assistant has ever appeared as counsel or signed a pleading in Case 4900 since its filing 21 months ago. All have been signed and filed by Wingate [SWB]

5. During this period Wingate has, I believe, improperly, purported to represent, and be the sole attorney in Case 4900 for, two AGs. [Aff. Pope, 2/24/12, p. 2, R. 622]

The Affidavit stated the Attorney General's own criteria for meeting Due Process requirements in the use of special counsel with the AG, had not been met in Case 4900. [*Id.*]. Appellant asserted that by seeking consolidation the Attorney General was "attempting to mask [SWB's] improper assertion in Case 4900 that he speaks for the State." [*Id.*]

The affidavit opposing consolidation outlined in detail the positions of Tommie Rae Hynie, Terry Brown, Venisha Brown, and other Case 4900 Plaintiffs to support Appellant's position that these Richland 4900 Plaintiffs "either have no connection to FOIA or are actively seeking to deny

my FOIA rights...” [*Id.*, pp. 6, 7; R. 626-7]

Appellant’s affidavit noted that since 2009 Bauknight had hired no fewer than fourteen lawyers “to help ‘protect’ what he asserts is a music empire worth less than \$4.7 [million] when Brown died on December 25, 2006...” [Aff. Pope, 2/24/12, Footnote 3; R. 628]

Appellant also filed an affidavit of a journalist for the *Newberry Observer*, who described her own FOIA attempts to obtain public James Brown information, including the claimed \$4.7 million valuation and related documents. [Aff. Summer, 3/29/12, pp. 1-6, and Exhibits; R. 641-62] The affidavit attached FOIA requests made by the journalist on December 6, 2011 and March 1, 2012 [Exhibits A and E, R. 647; 655]; a letter to AG Meyers dated January 8, 2012; a letter to AG Meyers dated January 29, 2012 [Exhibits C and D, R. 651; 653]; and two articles from the *Newberry Observer* [Exhibits F and G, R. 656-662]

The February 2012 Motion of Attorney General to Consolidate Cases was never heard. When this second FOIA appeal was filed in 2021 it was still pending.

In a July 5, 2012 order of the Honorable Casey Manning (“Judge Manning”), consented to by the Attorney General, Richland 4900, this FOIA case and another FOIA case were stayed. [Ord. 7/5/12, p. 2; R. 13] The order stated in part:

Counsel for Defendant Pope, Adam Silvernail, Esquire and Daryl Williams, Esquire, opposed Plaintiff’s Motion on the grounds that their client had waited a long time to be heard on the matters set for the April 12, 2012 hearings and their client desired the Court to hear and rule on each pending motion. [*Id.*]

On December 20, 2012 the Attorney General filed a Motion to Amend its Motion to Dismiss. [AG Mot. Amend Mot. Dismiss, 12/20/12, R. 160] More than two years after the FOIA case was filed, the Attorney General began claiming that “... Plaintiff failed to mail or deliver her Freedom of Information Act request at issue to the Office of the Attorney General as required by S.C. Code Ann. 30-4-30(c).” [Proposed Amd. Mtn., p. 1; R. 162]

As support for the claim, the Attorney General re-submitted the October 20, 2011 affidavit of AG Meyers, prepared nearly four months after the FOIA request; referencing a letter sent two days after the FOIA case was filed; and failing to recount the full history of either Appellant's repeated FOIA requests or those of other citizens which AG Meyers had rejected.

On February 27, 2013 the Supreme Court of South Carolina issued its first, later substituted, opinion in *Wilson v. Dallas*, 403 S.C. 411, 743 S.E.2d 746 (2013). The Supreme Court voided the 2008 settlement agreement and found the Attorney General had overstepped its authority in reaching that agreement. *Id.*

On March 7, 2013 the Attorney General answered and moved for judgment on the pleadings. [AG Mot. for Jmt. On Pldgs., 3/7/13, R. 241; AG Ans., 3/7/13, w/Attachments and Ltr. of Smith to clerk, dtd. 3/7/13, R. 190-240] The Attorney General attached an unsigned copy of the Legacy Trust from 2008 but did not attach the amendment to the same Legacy Trust/Settlement Entity signed by the Honorable Henry McMaster, Terry Brown and others just before Governor McMaster left office as Attorney General. [Confirmation and Amendment, R. 689-94]

Among the documents attached to the Attorney General's Answer was a June 2012 FOIA request by another citizen for documents related to the Attorney General's claimed \$4.7 million value for James Brown's music empire [AG Ans., Exhibits M-5 and 6, p.2; R.205-5] and a letter of AG Meyers, denying the FOIA request on the basis that there were no documents responsive to the request. [AG Ans., Exhibit 7, Ltr. Meyers, dtd. 7/10/12; R. 205]

On March 15, 2013 the James Brown Legacy Trust filed a motion to stay this FOIA case, which stated in part:

The South Carolina Supreme Court recently issued an opinion in the case of *Wilson, et al., v. Dallas...* The Supreme Court held that the compromise agreement was not just and reasonable and reversed the lower court's approval of the compromise. The opinion states that the settlement could not replace James Brown's estate plan and trusts by

creating new trusts.

...Since there is a significant question as to whether the Legacy Trust exists, which will be resolved at the time of the remittitur, Defendant Bauknight respectfully requests that the motion as to the Legacy Trust be stayed. [LT Mot. Stay, 3/15/13, pp. 1, 2; R. 244-5]

No stay was ordered. Nonetheless, no hearing was held in this FOIA case from 2013 until 2016 despite numerous requests by Appellant's counsel. [R. 663-74]

On April 1, 2013 Appellant filed a Status Report and Memorandum of Law opposing the Legacy Trust's efforts to delay this FOIA case based on its claimed nonexistence. [Status Rept., dtd. 4/1/13; R. 252-62] The status report attached a Confirmation and Amendment to the Legacy Trust. The Amendment was signed by Attorney General McMaster, Terry Brown, and attorneys for Tommie Rae and numerous others. In addition to Attorney General McMaster's signature, the Legacy Trust Amendment bears the names of four other attorneys on the AG's staff. [Pl. Status Report and Memo, dtd. 4/1/13, w/Exhibit A, Confirmation and Amendment, signature pages; R. 252-62].

The Legacy Trust/Settlement Entity amendment, which had not been produced under FOIA or in Case 4900 discovery by the Attorney General or Legacy Trust in the two years since it was signed, was executed on or about January 4, 2011. This was between August 2010 and May 2011, when the Attorney General's claimed value of James Brown's music empire became \$4.7 million and the period to which the FOIA request applied.

The Confirmation and Amendment deals with Terry Brown's right of first refusal to buy the James Brown music empire (the "ROFR"). [*Id.*] The Confirmation and Amendment states in part:

...Terry Brown ("Terry") has a Right of First Refusal ("ROFR"). This agreement confirms that Terry's ROFR in all respects under the agreement applies only to "the sale of all or substantially all" of the "James Brown Assets" (as the term is defined in paragraph 1 of the agreement)...

2... (c) there is no prohibition against the Settlement Entity, and/or Russell Bauknight, as fiduciary or any agent or consultant employed by the ...Settlement Entity, soliciting...discussing, or accepting offers with respect to the sale, . . .or other disposition or exploitation of any of the James Brown assets (including any offer generated by a beneficiary of the estate...) [Id.]

After a more-than 3 year delay, a hearing was held in this FOIA case on May 17, 2016. [Tscpt. Hrg., 5/17/16, pp. 1,2,8, 9, 12- 26, 32, 33, 35, 36; R. 369-90]. The Attorney General argued that Appellant did not mail or deliver her FOIA request. [Id. at 12; R. 372] . Appellant disagreed. [Id. at 12, 13; R. 372-3]. Appellant also asserted that the AG did have responsive documents and did not produce them, and they should have been produced by the AG and SWB. [Id. at 15; R. 375] Appellant asserted she was entitled to a proper FOIA response, which had never been given. [Id. at 18; R. 378]

The AG confirmed that he had moved to strike all fourteen of the affidavits filed over five years in support of the FOIA requests. [Id. at 19; R. 379]

At the conclusion of the FOIA hearing, David Black, Esq. – the Legacy Trust’s general attorney who denied Appellant’s FOIA request, but was not an attorney in the FOIA case – talked about the \$4.7 million valuation, which he referred to as “the appraisal that’s subject here that Ms. Pope has seen . . .” [Id. at 25; R. 385]

Of the document which the AG and Legacy Trust had both used since 2011 to make false felony accusations against Appellant, Black, a Legacy Trust lawyer not counsel in the case, stated to the Court:

It is not a public document. The AG doesn’t have it. Mr. Bauknight has it. And that’s why they’re trying to get to it so They can parade it around. But she had seen the document. This is all about them trying to get attorneys’ fees, Your Honor. [Id.]

To which the AG’s counsel, responding to Legacy Trust’s counsel, stated: “That’s correct,

Your Honor.” *Id.*]

In an order dated June 14, 2016, the circuit court granted the AG’s motion to dismiss. In its order, the circuit court referenced Case 4900 and concluded that FOIA “is not a tool that may be used to bypass civil discovery in a pending case.” [Opinion, Ct. App., p. 3, R., p. 26] The circuit court also concluded that the requested documents were exempt under FOIA because the South Carolina Rules of civil Procedure constitute “law” for purposes of exemptions in §30-4-40(a)(4), which allow a public body to exempt from disclosure “[m]atters specifically exempted from disclosure by statute or law.” [Op. at 4; R. 27] Appellant filed a motion to alter or amend the circuit court’s order, which was denied. [Mot. Alter, dtd. 6/27/16, R. 263; Ord. dtd. 7/22/16, R. 22]

Oral argument took place on February 12, 2019. The Legacy Trust asserted that it did not exist.⁵ The AG asserted that Appellant was not entitled to the documents she had requested under FOIA in 2011. Alternately, the AG claimed he had given Appellant all of the documents responsive to her 2011 FOIA request, but the record contained various documents from other sources received in the eight intervening years confirming that there were numerous documents responsive to the June 30, 2011 request which were never received.

The Court of Appeals held that the case was not moot because an actual controversy still exists. [Opinion, p. 5; R. 28] The court also found that Wilson mooted the premise for the action against the Legacy Trust and directed that it be dismissed as a party. [*Id.* at 6; R. 29]

The Court noted that the circuit court’s order granting the AG’s motion to dismiss was virtually identical to its order dismissing the complaint in *Pope v. Wilson*, 427 S.C. 377 (Ct.App. 2019). The Court reversed the circuit court’s decision for the reasons discussed in section I of that

⁵ Appellant asks this Court to take judicial notice of its own recording of the February 12, 2019 oral argument in this case, which is a part of this Court’s file.

published opinion, issued the same day. [Opinion at 7; R. 30] The case was remanded for further proceedings, including the dismissal of the Legacy Trust. [*Id.*]

Respondent AG filed a petition for rehearing. In Argument II the AG argued that on August 5, 2011 – after the FOIA complaint was filed – the Office notified Appellant that the FOIA request had not been received. [AG Pet. Rhg., p. 4; R. 303] The AG overlooked that the letter of AG Meyers said only that she had not received the June 30 FOIA request “from” Appellant. [*Id.*] Nor did it discuss the subsequent claim of AG Meyers that there were no documents related to the claimed \$4.7 million valuation, and Appellant’s disagreement with that statement.

Appellant sought reconsideration of the Court of Appeals’ ruling as to the Legacy Trust only, which reconsideration was denied. [Appellant’s Pet. Rhg.; R. 267] The Supreme Court declined to review the ruling. [Ord. dtd. 8/22/19, R. 33]

The remittitur was filed on April 1, 2020, and the case was assigned to the Honorable Clifton Newman.

By Order of Judge Newman filed May 15, 2020 the Legacy Trust was dismissed as a party to this FOIA case. [Ord. dtd. 5/15/20, R.34]

On October 27, 2020 Appellant filed a brief regarding issues to be heard at a hearing scheduled for November 2, 2020. Appellant noted that in October 2020 the Attorney General had released under FOIA a number of documents which were responsive to Appellant’s FOIA requests related to the valuation documents between August 2010 and May 2011. [Brief, dtd.10/27/20, p. 2; R. 682].

Among the documents was a fully-redacted (except for 2 words) letter copied to members of the AG’s office dated January 5, 2011. [*Id.*] Also attached were now-public documents which were responsive to the original FOIA request made to the AG in 2011. [Plf. Brief, dtd. 10/27/20, Exhibits A and B; R. 686-94, w/Aff. Pope; R. 704]

Exhibit A to the Brief was a December 17, 2010 email among Legacy Trust attorney Black, 2 AG attorneys and a lawyer for Hynie re: the appraisal, the significance of the appraisal in *Wilson v. Dallas*, and the decision to withhold the valuation information from the Supreme Court in the Attorney General's brief to be filed. [*Id.*, Exhibit A, p. 1, R. 686]

The affidavit filed on October 27, 2020 with the Brief also provided a history of the interference of SWB, speaking for the Legacy Trust, Tommie Rae Hynie, the Attorney General, and others in this FOIA case, and attached a number of just-released public documents to confirm the history of FOIA disruption by SWB while acting for the Attorney General.

The exhibits to the Affidavit included:

Exhibit A – a fully redacted January 5, 2011 letter from SWB to Bauknight, with copy to Sr. Asst. AG Havird Jones and Asst. AG Mary Frances Jowers [released by the Attorney General under FOIA in 2020, but not to Appellant] [Exhibit A, Aff. Pope, dtd. 10/27/20; R. 704]

Exhibit B – A January 20, 2012 letter of SWB to Attorney General Wilson advising the Attorney General, “as your attorney in this matter” not to release the public Wingate Contract under FOIA because it will be “more costly and publicly embarrassing than a decision to continue litigating;” it “will jeopardize the rights of your co-litigants;” and “whether this complicated fee agreement is privileged is currently before the Court” [on motion of SWB] [*Id.*, Exhibit B, p. 1; R. 705]

Exhibit D – A March 25, 2013 letter of SWB making an “Urgent Meeting request” to meet with the Attorney General [*Id.*, Exhibit D; R. 721]

Exhibit E – An April 12, 2013 letter of SWB related to termination of representation by SWB of the Attorney General, in Richland 4900, which the Attorney General was seeking to consolidate with this FOIA case. [*Id.*, Exhibit E; R. 723]

Exhibit F – SWB's proposed TERMINATION OF LEGAL REPRESENTATION to Attorney General effective March 25, 2013, confirming an “attorney-client relationship” between the Attorney General and SWB, and stating:
The Attorney General and the Firm warrant that all communications between them, as well as those among the parties to this Engagement, are, and shall remain, confidential and protected by the Attorney-Client privilege. [*Id.*, Exhibit F, p. 1; R. 725]

Exhibit H – Letter of SWB to Office of Attorney General dated April 23, 2012

entitled “Privileged Attorney-Client Communication”
[*Id.*, Exhibit H; R. 734]

Exhibit I – Ltr. of Office of Attorney General to SWB dated April 24, 2013 stating that the Attorney General’s office has no responsibility for SWB’s legal fees, and stating in part:

Your letter is entitled “Privileged Attorney-Client Communication”. Please be advised that the Office of the Attorney General has never been a client of Sweeny, Wingate & Barrow in this matter. [*Id.*, Exhibit I; R. 736]

Exhibit K – A letter of the Office of the Attorney General releasing to Appellant a portion of the “Wingate Agreement” requested under FOIA, and claiming that the release is “voluntarily, solely discretionary and not due to Plaintiff’s FOIA request or this litigation.” [*Id.*, Exhibit K; R. 741]

The October 27, 2020 filings also attached a copy of the Legacy Trust’s Confirmation and Amendment signed by Attorney General McMaster before he left office in January 2011, but which the Attorney General had still not produced under FOIA. [Brief, dtd.10/27/20, Exhibit B; R. 689]

A hearing was held on November 19, 2020, more than nine years after the original FOIA requests were made. All substantive matters were argued. [Tscpt. Hrg. 11/19/20; R. 391]

The Attorney General referenced a federal court order issued years after this FOIA suit was filed and said “the appraisal plaintiff seeks is confidential...” The AG made this claim even though the \$4.7 million valuation had been used by the Attorney General for a decade to accuse Buchanan and Appellant of impropriety. [*Id.* at 9; R. 398] Counsel said: “So, we don’t have it, but she would have it or have access to it.” [*Id.*] The AG overlooked the year during which Buchanan and Pope repeatedly attempted to secure the documents related to to this more-than \$75 million claimed change in the value of James Brown’s charity before Appellant filed this FOIA suit.

The Attorney General said that a December 2010 email among the Legacy Trust lawyers and two staff members of the Attorney General deciding not to tell the Supreme Court about the \$4.7 million claimed value was not responsive to Appellant’s 2011 FOIA request. [*Id.* at 10; R. 399] Counsel said:

The other document she has shown, --- an email proposing a footnote to a document...It doesn't attach the appraisal; therefore, its not related to the value of the assets and is not responsive to Pope's FOIA request. [Id., lines 14-21]

Of the April 24, 2013 letter of Chief Deputy John McIntosh stating that the Office of the Attorney General had never hired SWB in Richland 4900, a case the Attorney General was still trying to consolidate with this FOIA case, counsel said:

That letter was about whether a retainer agreement had been signed...
But regardless of whether a retainer agreement existed, the Office of the Attorney General clearly benefitted from representation of Sweeny, Wingate, Barrow ... [Id. at 11, ll. 1,2 and 16-18]

Counsel for the Attorney General stated:

Because the attorney general benefitted from the representation of [SWB], the common interest of the charitable beneficiaries privileges apply, and the production of the firm's file cannot be required. Therefore, we don't believe she is entitled to that. [Id. at 11, l. 25-12, l. 3]

The letter of Chief Deputy McIntosh, however, specifically stated that there was no attorney-client privilege between the Attorney General and SWB. [Ltr. AG McIntosh to SWB, 4/24/13, R. 736]

The Attorney General, who had produced in 9 ½ years only an unsigned copy of the Legacy Trust/Settlement Entity document from 2008, summarized his position:

So, we believe that one, there's no jurisdiction because we never got a request, and attaching it to a lawsuit is not sufficient for purpose of the statute. Two, we have given her what we have on the legacy trust. If – even if the court did have jurisdiction, we don't have the valuation documents that she also wants, and she can't get Sweeny, Wingate, Barrow documents. So, we believe that the suit should be – judgment should be entered for the Attorney General for those reasons. [Id. at 12, l. 22-13, l. 5]

The Attorney General then asked to strike the fourteen affidavits filed over a decade in Appellant's effort to secure the important documents between August 2010 and May 2011 to explain why the Attorney General took the position that James Brown's charity was worth less

than \$3 million, rather than about \$80 million. Counsel described the statements of Appellant as follows:

Affidavits overall are irrelevant in this case as to – they deal with why she thinks she needs the documents...Under FOIA, the question is whether the agency has the documents, whether they are subject to an exemption... all of these affidavits are completely irrelevant.

...the statements in these affidavits are ...just completely baseless speculation, and so we believe they should all be struck. [*Id.* at 13, l. 9-15; R. 402]

Appellant’s counsel noted that the “jurisdictional” claim based solely on AG Meyers’ affidavit of October 20, 2011, was not raised until the motion to dismiss was amended in 2013, two years after the suit was filed. [*Id.* at 19, l. 10-13, R. 407] Appellant reminded the circuit court judge, who had recently been assigned to this FOIA case:

So, from the attorney general’s first filing in this case, his position was that [Appellant] shouldn’t get these because of case 4900...

So, in our case, we have filed these affidavits to show not only that Ms. Pope does need them, is entitled to them. There are affidavits in the record confirming that other people in the state of South Carolina would have an interest in them but shouldn’t have had to go out and request them separately when Ms. Pope was already entitled to them. [*Id.* at 25, ll. 1-15; R. 412]

The Court reviewed a portion of the letter of AG Meyers, which was written after the FOIA complaint was filed, and which acknowledged a July 2011 FOIA request and asked counsel for the Attorney General’s counsel: “So, tell me, what’s going on here and what is she telling Ms. Pope?” [*Id.* at 43-44; R. 428-9]

Without noting the correspondence in the record since 2011, counsel stated, “[a]nd so she didn’t respond to that letter, and then Ms. Meyers later executed the affidavit which we also have there.”... “We never got it.” [*Id.* at 44, ll. 7-15; R. 429]

At the end of the hearing, SWB counsel Aaron J. Hayes, Esquire, asked to speak and said:

MR. HAYES: And I represent the remaining plaintiffs in case 4900

on the tort side. Andy, Your Honor, ...my law firm has been namechecked This morning ...And I just want to respectfully request for the record in case 350 to the extent that this court is inclined to issue an order that would touch documents in our possession, we would respectfully request notice and opportunity to be heard and brief the issue on behalf of SWB's – Sweeny, Wingate and Barrow's – position. We are not currently a party to case 350, but to the extent that our documents could be implicated, we would like an opportunity to be heard on that at the appropriate time. [Id. at 63, ll. 1-14, R. 447]

Appellant's counsel noted that documents sought were those under the control of the Attorney General, and that the Attorney General had not yet made a FOIA response. [Id. at 64, ll. 9-25, R. 448]

On December 18, 2020 Appellant submitted a Supplemental Memorandum in Support of Relief under FOIA and in opposition to the motion of the AG. The memorandum was submitted in the form of a proposed order. [Supp. Memo., dtd. 12/18/20, w/ Attachments, R. 782]

On December 18, 2020 Appellant also filed an affidavit opposing the participation of SWB in this FOIA matters to advance the interest of Tommie Rae Hynie and SWB's other private clients. [Aff. Pope Opp. Participation of SWB, 12/18/20, w/ attachments, R. 795]. Appellant's affidavit reviewed the history of SWB's disruption of this FOIA case for the benefit of Hynie and other private Legacy Trust successor/owners, considering the public documents released by the Attorney General under FOIA in October 2020 which highlighted SWB's and the Legacy Trust's efforts to prevent release of public documents. [Id.]

The affidavit included sworn testimony of Governor McMaster and others of the seriousness of the use of the \$4.7 million undisclosed claimed value by the Attorney General to falsely accuse Buchanan and Appellant of a federal felony. [Aff. Pope, dtd. 12/18/20, excerpting depos. Gov. McMaster, AG Wilson and Bauknight, pp. 25-27; R. 819-21]

On January 19, 2021 the AG filed a Response asserting that the memorandum should be rejected. The AG said the affidavit and memorandum should be rejected as "untimely and

irrelevant.” [Response, dtd. 1/19/21, pp. 1, 2; R.834-5]

On January 29, 2021 Appellant filed a response to the AG’s response. [Response, dtd. 1/29/21; R. 838]

The Court’s ruling was issued on April 1, 2021. The circuit court found that it lacked subject matter jurisdiction, because of the AG’s assertion that it had not received the June 30, 2011 FOIA request nearly a decade before. The circuit court’s ruling was based solely on the alleged nonreceipt of the FOIA request and did not address any of the numerous issues which had been extensively briefed and argued since the filing of this case. [Ord. 4/1/21; R. 349]

Appellant moved to alter or amend the ruling, and the circuit court held a hearing on April 16, 2021. Once again, an SWB attorney appeared, stating “Your Honor, I represent the plaintiffs in case 4900...” [Tscpt. Hrg. 4/16/21, p. 62; R. 471] SWB counsel made a long statement in response to Appellant’s counsel’s correct statement that the Wingate Contract states on its face that all documents held by SWB are subject to FOIA. [*Id.*].

Appellant’s counsel made an objection to SWB’s participation.⁶ [*Id.*, p 63; R. 472]

When this appeal was filed, the Attorney General had made no FOIA response and not produced a single document under FOIA since requested to do so on June 30, 2011. The Attorney General had advised the circuit court that he had benefitted from the actions of SWB, which had disrupted this FOIA case since its inception, even though it was never legally engaged by the Attorney General.

The documents exchanged between Bauknight and the Office of the Attorney General of

⁶ Appellant’s counsel stated: “I want to make the objection Mr. Gende is not counsel in this case,” but the transcription at page 63 inadvertently stated “the affection.” [*Id.* at 62, R. 471] Also note that Mr. Gende introduced himself as counsel for the Plaintiffs in Richland 4900, but then was inadvertently listed as additional counsel for Appellant. [*Id.* at 1, R. 449] Mr Gende had never represented Appellant.

South Carolina between August 2010 and May 2011 which relate to the Attorney General's public May 2011 claim that the worldwide music empire of James Brown was worth only \$4.7 million have not been produced under FOIA. Nor has the amendment to the Legacy Trust signed by now-Governor Henry McMaster, which gave Terry Brown a right of first refusal to purchase the music empire over a decade ago, been produced. Nor has the now-known discussion by the Attorney General and others between August 2010 and May 2011 of the substantially reduced value been produced under FOIA. Each of these is the subject of Appellant's June 2011 FOIA request.

Appellant has never received a FOIA response from the Attorney General to the June 30, 2011 request which has been the subject of 10 ½ years of litigation.

STANDARD OF REVIEW

The lower court's Order sets forth that the Attorney General's motions to dismiss under Rule 12(b)(6) and for judgment on the pleadings pursuant to Rule 12(c) were granted. [Ord. 4/1/21; R. 36]

a. Rule 12(b)(6) Dismissal was a Grant of Summary Judgment.

In considering a Rule 12(b)(6) motion, the circuit court must base its ruling solely on allegations set forth in the complaint. *Spence v. Spence*, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). A Rule 12(b)(6) motion converts to a Rule 56, SCRCP motion for summary judgment if the court considers matters outside the pleadings. *See* Rule 12(b), SCRCP ("If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state facts sufficient to constitute a cause of action, matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56" (emphasis added)).

In this case, the Court issued its decision on a full record, including numerous affidavits, memoranda, and attached documents. Indeed, the final hearing on this matter was on various

pending motions, including Appellant's motion for summary judgment and numerous motions of the AG to strike affidavits. No party sought to confine the circuit court's review of this case to the pleadings, and the circuit court did not strike any material from the record in this case. The AG specifically offered documents outside the pleadings. [Memo. AG, 11/2/20, Exs.; R. 745-81] The parties were therefore "fairly apprised that the court would look beyond the pleadings," and the lower court's order should be considered a grant of summary judgment. *See Higgins v. Med. Univ. of S.C.*, 326 S.C. 592, 598, 486 S.E.2d 269, 272 (Ct.App. 1997).

On review from a grant of summary judgment, this court applies the same standard applied by the circuit court pursuant to Rule 56(c), SCRCF. *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 568, 576, 762 S.E.2d 696, 700 (2014). "Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Murray v. Holnam, Inc.*, 344 S.C. 129, 137, 542 S.E.2d 743, 747 (Ct. App. 2001). "In reviewing the evidence, all inferences must be viewed in the light most favorable to the non-moving party." *Stevens & Wilkinson of S.C., Inc.*, 409 S.C. at 576, 762 S.E.2d at 700.

b. Rule 12(c) Judgment on the Pleadings

This Court previously found that the following standard of review applied to the 2016 grant of the AG's motion for judgment on the pleadings:

"Any party may move for a judgment on the pleadings under Rule 12(c), SCRCF. When considering such motion, the court must regard all properly pleaded factual allegations as admitted." *Falk v. Sadler*, 341 S.C. 281, 286, 533 S.E.2d 350, 353 (Ct. App. 2000). "On review of the motion, the court may not consider matters outside the pleadings." *Id.*

In evaluating a Rule 12(c) motion, the court must consider that "a complaint is sufficient if it states any cause of action or it appears that the plaintiff is entitled to any relief whatsoever. Our courts have held that pleadings in a case should be construed liberally so that substantial justice is done between the parties." *Id.* at 287, 533 S.E.2d at 353 (quoting *Russell v. City of Columbia*, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991)). Moreover, "a judgment on the pleadings is considered to be a drastic procedure by our courts." *Id.* (quoting *Russell*, 305 S.C. at 89, 406

S.E.2d at 339).
Pope v. Wilson, 427 S.C. 377 (Ct.App. 2019)

ARGUMENT

I. The Circuit Court had Subject Matter Jurisdiction to Hear and Decide this 10-year-old FOIA Case.

The lower court dismissed the case based on its finding that the AG's alleged non-receipt of the June 2011 FOIA request divested the circuit court of jurisdiction. [Ord. dtd. 4/1/21 at 4; R. 39] Appellant submits that the circuit court's finding is erroneous and should be reversed on appeal.

South Carolina Circuit Courts have general jurisdiction over actions for declaratory and injunctive relief under the FOIA, as sought by Appellant herein. S.C. Code Ann. §30-4-100(a). The AG used a 9-year-old affidavit prepared almost four months after the FOIA request by one of four attorneys within the AG's office who had become involved in the FOIA request to argue that this Court lacks subject matter jurisdiction over this matter, because it did not receive Appellant's June 30, 2011 FOIA request. The circuit court agreed and dismissed the case. The AG based its argument, and the circuit court in turn based its finding, on *Gasparutti v. U.S.*, 22 F.Supp.2d 1114, 1116 (C.D.Cal.,1998), a case in which a Federal District Court in California found that it did not have subject matter jurisdiction over a Federal FOIA case in which the Appellant had not alleged that he submitted a proper FOIA request to the Internal Revenue Service ("IRS") under the IRS's regulations regarding FOIA requests. The District Court dismissed that case because it found the Appellant had failed to exhaust his administrative remedies prior to filing suit. *Gasparutti* is distinguishable from this case both as to the facts and law and does not justify the circuit court's dismissal.⁷

⁷ Appellant notes that Federal appellate caselaw does not appear to support the AG's contention that receipt of the FOIA request is a precedent to this Court's subject matter jurisdiction over the matter. "[E]xhaustion is a prudential consideration rather than a jurisdictional prerequisite, [and] the district court was not precluded . . . from deciding the merits of Wilbur's FOIA claim

In support of its argument for dismissal, the AG filed the affidavit of AG Meyers, an employee of the Office of the AG (the "OAG"), which states that she checked certain records which indicated Appellant's June 30, 2011 FOIA request was not received by mail or fax. However, the record also contains a letter from Ms. Meyers, dated August 5, 2011, in which Ms. Meyers acknowledges that the Civil Division of the OAG was aware of the June 30, 2011 request. [Ltr. Meyers, dtd. 8/5/11] AG Meyers said nothing in the affidavit about when or how the other attorneys within the office had received the request. Further, she failed to report that Appellant continued to make FOIA requests for the valuation documents which AG Meyers denied prior to signing the October 20, 2011 affidavit. Further, AG Meyers made other incorrect FOIA statements, including representations about a hearing which neither she, nor anyone in the AG's office, attended.

Appellant submitted a June 30, 2011 letter from her counsel to Wingate (which was counsel of record for the AG in Richland 4900) providing a copy of Appellant's June 30, 2011 FOIA request. The AG acknowledges that the letter was sent to Wingate [FOIA Req., 6/30/11; Answer of AG, ¶17] The Wingate Contract requires Wingate to notify the AG of a FOIA request and respond to it. Further, the AG undisputedly received the FOIA request as an attachment to the complaint herein, which was served upon the AG in August 2011. Importantly, the AG's initial motion to dismiss, filed September 2, 2011, makes no mention of the AG's not having received the FOIA request. [Mot. Dismiss, dtd. 9/2/11] The Meyers affidavit was generated more than a month later, and long after the June 30 FOIA request was sent to the AG.

Appellant properly alleged that she had submitted a FOIA request to the AG on June 30,

notwithstanding his failure to comply with the CIA's FOIA appeal deadline." *Wilbur v. C.I.A.*, 355 F.3d 675 (D.C. Cir. 2004).

2011; that her request was transmitted to counsel for the AG on that date; and that the OAG directly received the FOIA request, at latest, upon its receipt of the complaint herein. As further discussed below, the AG's initial response to the complaint asserts that the AG was not required to produce **any** documents to Appellant under the FOIA that the AG considered "subject to pending [discovery] motions" in Richland 4900. The AG did not, as discussed more fully below, make a timely and proper FOIA response upon receipt of Appellant's June 30, 2011 FOIA request, regardless of whether the AG received it directly, through counsel or as an attachment to the Complaint herein.

Even under the analysis of the Federal FOIA used in *Gasparutti, supra*, the circuit court had subject matter jurisdiction to hear and decide the FOIA issues before it. *Gasparutti* involves a dismissal under the exhaustion of remedies doctrine because the plaintiff in that case failed to *plead* that he had submitted a proper FOIA request to the IRS, which complied with the IRS's FOIA regulations. As an initial matter, Appellant notes that the Federal FOIA requires that requestors comply with regulations put in place by Federal entities in making FOIA requests. The South Carolina FOIA, however, simply requires that public bodies respond "upon written request." S.C. Code Ann. §30-4-30(c). No particular form is prescribed for the substance or delivery of the request. The AG has not alleged that the statute allows for the agency to make more restrictive regulations, nor that the AG has any regulations which would require a particular form or method of delivery for FOIA requests. In fact, the AG's stated guidance, as set out in the *Public Official's Guide to the FOIA*, is "[w]hen in doubt, disclose the public record." As set out above, it is undisputed that the AG received the June 30, 2011 FOIA request more than ten (10) years ago, and that Appellant continues to seek the Afterman \$4.7 million valuation and other documents under FOIA. It is undisputed that the AG, through AG Meyers and others, continued to refuse to release the documents sought in Appellant's two FOIA cases based on Appellant's status as a defendant in a civil case brought against her in 2010, and in which the AG was using the documents requested

under FOIA to damage Appellant. It is undisputed that the AG's position in both cases until the 2021 order in the Wingate Contract FOIA case was that the AG would not deliver any documents to Appellant under FOIA so long as the AG was suing Appellant in Richland 4900.

Because the AG's response to the complaint herein was a blanket refusal to provide documents to Appellant, this Court should find that Appellant's FOIA claims are properly before it and ripe for disposition. To the extent the Federal case cited by the AG is applicable to this State FOIA action, a reading of *Gasparutti* in the context of Federal FOIA caselaw supports a decision in favor of Appellant on the merits of this case.⁸

II. This Court should Proceed with Directing the AG to Properly Respond to Appellant's June 30, 2011 FOIA Request, including by Producing State-owned former Legacy Trust Documents and Documents held by Wingate.⁹

The AG argued that, even if this case were not dismissed, it has provided all responsive documents to Appellant's June 30, 2011 FOIA request, and Appellant is therefore entitled to no relief in this action. [AG Memo, dtd. 11/2/20; R. 745] The record shows that the AG is incorrect. S.C. Code Ann. §30-4-30(c) provides that a public body must "notify the person making the request of its determination [of the public records it will release under FOIA] and the reasons

⁸ As a general rule, a Federal FOIA requester must exhaust his administrative remedies. *Oglesby v. Dep't of the Army*, 920 F.2d 57, 65 (D.C.Cir.1990). The court need not dismiss a claim for failure to exhaust if it determines that the "purposes and policies underlying the exhaustion requirement" would not be undermined by reaching the merits. *Wilbur v. CIA*, 355 F.3d 675, 677 (D.C.Cir.2004); see also *Hidalgo v. FBI*, 344 F.3d 1256, 1258-59 (D.C.Cir.2003) (while exhaustion is not jurisdictional, "as a jurisprudential doctrine, failure to exhaust precludes judicial review" if a merits determination would undermine the purpose of permitting an agency to review its determinations in the first instance). Even in Federal FOIA cases where, as here, the public body has taken the clear position that Appellant would not have received a different response to her FOIA request, the Court is justified in proceeding to address the merits of the important FOIA issues presented.

⁹ The circuit court's April 1, 2021 Order does not pass on the AG's additional arguments, nor does its April 22, 2021 Order denying Appellant's Rule 59(e) motion. Nonetheless, especially in light of this case being over ten (10) years old, Appellant submits that this Court, in addition to reversing the dismissal of the case, should proceed with deciding the merits. The issues have been fully argued below, and the record on these matters is complete. For that reason, Appellant submits her argument on this and each successive point for this Court's consideration.

therefor.” The AG’s belated, piecemeal production of certain documents and justifications for not releasing others, which appear to be based solely on the AG’s **possession** (as discussed below) of documents, does not satisfy the AG’s FOIA responsibility under the statute.

First, the AG alleges that it provided two draft copies of the Legacy Trust to Appellant as attachments to its answer herein. [AG Ans., dtd. 3/7/13; R. 190-98] While partially-responsive documents were attached to the answer, the proposed amended answer and attachments were not filed and served until March 8, 2013, more than 18 months after the commencement of this case, and the AG’s answer purports to provide those documents subject to its position that Appellant is not entitled to them under FOIA and without fully complying with Appellant’s FOIA request as to either the \$4.7 million valuation and related documents or the Legacy Trust documents. The S.C. Supreme Court has held that a FOIA action for declaratory and injunctive relief is mooted *upon the public body’s production of the requested document*, but that further causes of action for attorneys’ fees and costs are not mooted by a delayed response. *See Sloan v. SCDOR*, 409 S.C. 551, 762 S.E.2d 687 (2014). The AG’s response, however, had never been complete.

Further, the AG asserted in its answer that it “does not have” documents responsive to Appellant’s request for:

All correspondence, email and/or other communications between any member of the Office of the South Carolina Attorney General and Russell L. 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 2000 Irrevocable Trust.

This “does not have” statement does not constitute an adequate FOIA response. Under S.C. Code Ann. §30-4-20(c), public records include those “prepared, owned, used, in the possession of, **or** retained by a public body” (emphasis supplied). Possession by a public body is therefore not required in order for a document to be a public record responsive to a FOIA request, and so the AG’s filings indicating that it “does not have” further documents responsive to Appellant’s FOIA

request is inadequate.

The Litigation Retention Agreement between the AG and Wingate provides:

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 fulfils 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 . . . and maintain all public records in accordance with State law”

The AG's answer makes reference to the Litigation Retention Agreement for its terms and does not assert that the Litigation Retention Agreement is inapplicable to the FOIA request at issue herein. [AG Ans., ¶¶17, 19; R. 193-4]

The AG has nonetheless taken the position that it need not produce any documents held by SWB or the former Defendant Legacy Trust the AG created and controlled at least from 2011 until 2013 in response to Appellant's FOIA request. The participation and attempted participation of private civil litigants in this FOIA case to prevent release of documents under FOIA demonstrates the wisdom of having FOIA compliance be a separate regime from civil discovery. *See* Ltr. of Gende to AG directing AG not to comply with FOIA, dtd. 1/20/12 (Ex. B to Aff. Pope, dtd. 10/27/20); R. 705; Tsept. Hrg., pp. 62-64; R. 471-3. Pursuant to both the terms of the Litigation Retention Agreement and §30-4-20(c), responsive documents held by Wingate are “owned” by the State/AG, and in order to make a full and proper FOIA response to Appellant, the AG must include documents held by Wingate in its response to Appellant's FOIA request. Likewise, the documents of the former Legacy Trust over which the AG had effective control at least until *Wilson v. Dallas*, and which then claims to have disappeared, should be produced under FOIA.

III. Richland 4900 Discovery Proceedings do not Exempt any Requested Document from Production under the FOIA.

At the hearing before the circuit court, the AG continued to argue that any response to Appellant's FOIA request was barred by discovery motions in Richland 4900 which were pending

at the time Appellant’s FOIA request was made and unresolved in 2021. In the previous appeal in this case, this Court found¹⁰ that in order to claim a FOIA exemption under S.C. Code Ann. §30-4-40(a)(4) as a result of pending discovery in another case, a public body “must point to the **specific** language of a discovery rule that **expressly** prohibits disclosure of a particular type of record”¹¹ (emphasis supplied). The AG never identified any rule expressly prohibiting it from disclosing the documents sought in Appellant’s FOIA request, and Appellant submits that this Court should find that pending motions regarding civil discovery in another case do not, under the applicable Rules of Civil Procedure, expressly prohibit a public body from releasing public records under the FOIA.

IV. The AG should Produce Wingate and Legacy Trust Documents Under FOIA.

Appellant and other citizens have been denied FOIA rights based solely on the existence of a lawsuit brought in the name of the AG and an entity which his private counsel represented to the Court to be under the control of the AG.

Between 2011 and 2016 this FOIA case, at the AG’s request, was moved from the county where it was filed, and where the FOIA request was made, because the AG alleged that he and others were suing Appellant in Richland County, and that the Legacy Trust which the AG controlled was located there. The AG sought to consolidate this case with Richland 4900 until the first appeal herein was taken, and later with an Aiken County case.

While the appeal was pending, both the AG and the Legacy Trust, through private counsel, continued to be active in that Richland lawsuit despite the testimony of the Governor that, as AG, he did not authorize the private firm to act for the Attorney General in Richland 4900. What is

¹⁰ This Court, in its unpublished opinion in this case, made reference to its decision in *Pope v. Wilson*, 427 S.C. 377, 831 S.E.2d 442 (Ct.App. 2019), for analysis of this issue.

¹¹ *Pope* at 389, 831 S.E.2d 442 at 448 (Ct.App. 2019).

certain is that the Wingate firm and its private clients contracted that every document created, produced or gathered in Richland 4900, or possessed by Wingate in Richland 4900, is the property of the State of South Carolina and subject to FOIA.

If Wingate, who received a copy of the FOIA request, did not comply and the Legacy Trust has now disappeared, the AG's FOIA duties as to the documents held by them continue.

V. In Reversing the Orders Appealed from, this Court should find that Appellant is the Prevailing Party and is Entitled to Attorney's Fees and Costs.

Pursuant to S.C. Code Ann. §30-4-100(b), courts may award the reasonable attorneys' fees and costs to a FOIA plaintiff who has prevailed in an action to secure a public body's compliance with the FOIA. In this case, although the AG provided Appellant with certain documents (over 18 months after she filed this case), the AG's belated partial response to Appellant's FOIA request was inadequate and a proper FOIA request has never been made.

Appellant submits that this Court, especially in light of the previous appeal and the decade of litigation over Appellant's FOIA claims, should reverse the circuit court and direct the AG to make a full and proper FOIA response to Appellant as of the date of the ruling. This Court should further find that Appellant is the prevailing party in this case and that she is entitled to an award of reasonable attorneys' fees and costs incurred herein. *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)). It is undisputed in the record that both before and since Appellant filed her motion for summary judgment in this FOIA case in 2011, Appellant and her counsel, faced by a battery of State attorneys and others purporting to act for the State/AG, have conducted this FOIA case as reasonably and efficiently as possible.

Appellant acknowledges that on remand, this would leave for the circuit court the sole issue of determining the amount of reasonable attorney's fees and costs to be taxed to the AG.

VI. The Attorney General's FOIA noncompliance has violated the FOIA and Due Process Rights of Appellant, Robert Buchanan and other S.C. Citizens.

The South Carolina Attorney General is the State official charged with the enforcement of FOIA. His actions in FOIA matters provide critical guidance to all State officials as to FOIA compliance. As stated in the Attorney General's guide, attached to the Complaint in this action, the Attorney General has directed that, when in doubt, documents responsive to a FOIA request should be produced by the public body.

In August 2010, the AG told this Court that an appraisal was expected within a few weeks which would show that the assets of entertainer James Brown were worth less than \$12 million when he died. [R. 499] If correct, the AG's value would have reduced the value of James Brown "I Feel Good" charity by more than \$65 million.

Robert L. Buchanan, Jr., and Appellant promptly began seeking documents from the AG and the Legacy Trust related to this claim. [Mot. Compel Discovery(Case 4900), dtd. 6/7/11, Exhibit B to AG Amd. Mot. Dismiss, dtd. 12/20/12; R. 169] The AG, while sharing documents related to this substantial devaluation with the Legacy Trust, Tommie Rae Hynie and others, refused to deliver them to Buchanan and Appellant. In December 2010, while preparing filings in *Wilson v. Dallas*, counsel for the AG, the Legacy Trust and others agreed in writing not to discuss a \$4.7 million claimed at-death valuation of James Brown's music empire with the Supreme Court. [Email of Wilkins, dtd. 12/17/10; R. 686] In May 2011, the AG, Hynie and other Legacy Trust owners disclosed the claimed \$4.7 million value to the Supreme Court. [Mtn. to Supplement, *Wilson v. Dallas*; R. 871] The AG, Legacy Trust, Hynie and other Legacy Trust owners then began using the claimed \$4.7 million value to accuse Buchanan and Appellant of a federal felony. [R. 45]

The following month, Appellant made her June 30, 2011 FOIA request. The FOIA request seeks the documents between August 2010 and May 2011. This was the time during which the claimed at-death value of James Brown's charity went from about \$80 million to about \$3 million. Appellant's summary judgment in this FOIA case was sought in January 2012. It was supported by numerous affidavits and admissions, including correspondence by the AG denying that any documents responsive to the FOIA request existed. It was also supported by affidavits of counsel for Buchanan and others outlining the importance of the value of the James Brown assets, as well as the importance of the AG's compliance with FOIA. *See* Affidavits of the Honorable Thomas R. Young and Steven Farrer, Esquire, both counsel for Buchanan, and affidavits of Daryl Williams, Wm. Jeffrey Smith, Sue Summer and letters of AG Meyers; R. 537, 556, 558, 520, 545, 641-659.

The value of James Brown's assets was a matter of public importance in 2010, when Buchanan and Appellant sought the documents and in 2011, when Appellant made this FOIA request. It is a matter of public importance today.¹²

The AG's public statements suggested that the James Brown "I Feel Good" private foundation would be reduced by tens of millions of dollars. Under 26 U.S.C. §4942, a private foundation must distribute 5% of its value each year in support of its charitable mission. In Mr. Brown's case, that means 5% of the value of the "I Feel Good" Trust would be applied annually toward scholarships for needy and deserving students in South Carolina and Georgia.

Whether James Brown's charity has been worth \$3 million or \$80 million has been a question of public importance each year since Appellant's FOIA request was made nearly 11 years ago. In this case, the circuit court's order denies Appellant's FOIA rights based on a finding that

¹² Sisario and Knopper, "After 15 Years of Infighting, James Brown's Estate is Sold," *New York Times*, December 13, 2021. The Court is asked to take judicial notice of this report of the recent sale of James Brown's music catalog for a reported \$90 million.

the AG never received Appellant's 2011 FOIA request. FOIA requests for these documents were clearly made, received and denied, not only by Appellant but by other S.C. citizens. The AG's failure to release these documents under FOIA became not only a violation of the FOIA rights of Appellant and others, but also a violation of the rights of Appellant and others to Due Process under the U.S. and State Constitutions. *See* U.S. Const. amend XIV, § 1; S.C. Const. art. I, § 3.

In defining Due Process rights, the South Carolina Supreme Court has held:

Due process is violated when a party is denied fundamental fairness. *City of Spartanburg v. Parris*, 251 S.C. 187, 191, 161 S.E.2d 228, 230 (1968). Due process is flexible and calls for such procedural protections as the particular situation demands. *Sloan v. S.C. Bd. Of Physical Therapy Exam'rs*, 370 S.C. 452, 636 S.E.2d 598 (2006). The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *S.C. Dep't. of Soc. Servs. v. Beeks*, 325 S.C. 243, 246, 481 S.E.2d 703, 705 (1997). *Theisen v. Theisen*, 676 S.E.2d 133, 382 S.C. 213 (2009)

It is fundamentally unfair for the FOIA rights of Appellant or others to be denied without an opportunity to be heard *on the merits* or "in a meaningful manner" prior to a court denying such rights based on a finding of fact. The circuit court nonetheless did so here, by determining that Appellant's 2011 FOIA request was not properly sent or received where the record contains clear evidence to the contrary. Appellant submits that this court should therefore reverse the orders appealed from.

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 solely for the circuit court to determine a reasonable award of attorney's fees and costs owed to Appellant as the prevailing party herein.

Respectfully submitted,

s/Adam T. Silvernail

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