

Oct 04 2022

SC Court of Appeals

THE 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.

**Amended Second Supplement to Record on Appeal
(Pages 934-991)**

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF NEWBERRY	)	Civil Action No. 2011-CP-36-00364
	)	
Adele J. Pope,	)	
	)	
Plaintiff,	)	PLAINTIFF'S MOTION FOR SUMMARY
	)	JUDGMENT
v.	)	
	)	
Alan Wilson, in his capacity as	)	
Attorney General of South	)	
Carolina and James Brown	)	
Legacy Trust, by Russell L. Bauknight,	)	
its Trustee	)	
Defendants.	)	
	)	

TO: DEFENDANTS AND/OR THEIR COUNSEL.

YOU WILL PLEASE TAKE NOTICE that, ten (10) days after service hereof, or as soon thereafter as counsel may be heard, Plaintiff Adele J. Pope, through her undersigned counsel, will move at the Newberry County Courthouse, 1226 College Street, Newberry, South Carolina, for an order granting her summary judgment on all claims in the complaint herein.

The grounds for this motion are that, viewing the evidence in the light most favorable to Defendants, there is no genuine issue of material fact as to the following:

The Office of the Attorney General and the Legacy Trust are Public Bodies for the Purposes of the Freedom of Information Act

1. It is undisputed that the Office of the South Carolina Attorney General is a public body under the South Carolina Freedom of Information Act ("FOIA").
2. The James Brown Legacy Trust (the "Legacy Trust") is a public body as defined in FOIA because it is supported by the State in the following ways:

- a. It was created by South Carolina Attorney General ("AG McMaster"), who in his Official Capacity as AG, was designated as both a Settlor and Beneficiary thereof.
- b. AG Alan Wilson, as successor in office to AG McMaster, has all of the privileges and obligations of his office with respect to the Legacy Trust.
- c. The State, through the Office of the AG, actively supports the Legacy Trust through the salaries of State employees and other resources of the State.
- d. The Legacy Trust's funding source is, on information and belief, public because it was accomplished solely by AG McMaster's assertion of his *parens patriae* authority by contracting on August 10, 2008 to place the private assets of the Estate of James Brown and the James Brown 2000 Irrevocable Trust in the Legacy Trust.¹
- e. AG Wilson controls the Legacy Trust by the unfettered right to remove and replace Russell Bauknight, selected by AG McMaster, and Bauknight's successors.
- f. All major actions of the Legacy Trust require a vote of the AG, and the method of voting – or losing the right to vote -on significant events requires constant vigilance on the part of AG Wilson's Office.
- g. AG Wilson has a further statutory duty to enforce the proper operation of The James Brown "I Feel Good" Private Foundation, transferred to the Legacy Trust by AG McMaster,
- h. The "I Feel Good" Foundation, after payment of 47 1/2 % of taxes and expenses of the Legacy Trust, and after further reduction of \$2 Million, will receive 47 1/2 % of the income of the Legacy Trust.
- i. AG Wilson controls the "I Feel Good" Foundation through Bauknight, its trustee, who was appointed by AG McMaster and may be removed or replaced at will by the AG.
- j. On information and belief, having taken control of both Brown's

¹ McMaster's agreement to fund the Legacy Trust was objected to by all of Brown's claimed and acting PR/Trustees, some of whom have appealed. No stay is in place, however, and the Legacy Trust is now in active operation.

private assets and his foundation for the Legacy Trust through the exercise of public authority and placed them in the Legacy Trust, the AG may not now shield them from public scrutiny.

- k. The AG has delegated to Bauknight, Trustee of the Legacy Trust, and his advisors certain essential public functions of the Office of the AG, including oversight of the "I Feel Good" private foundation and defense of the appeal described below.
- l. The AG has, since 2009, dedicated considerable State resources to defending the May 26, 2009 Aiken County Order which approved AG McMaster's takeover of James Brown's private property, and transfer of same to the Legacy Trust.
- m. The AG has allowed the current Trustee of the Legacy Trust to purport for more than 1 year to speak for the State in pending litigation.

The Attorney General has Approved the FOIA Request

3. On June 30, 2011, Plaintiff sent to AG Wilson and the Legacy Trust separate requests under FOIA for public records related to the Legacy Trust. Plaintiff requested copies of:

The Final and all drafts, signed and unsigned,
of the James Brown Legacy Trust

4. The request to AG Wilson, in addition, sought:

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 the value of the assets of the Estate of James Brown and/or the James Brown 2000 Irrevocable Trust.

5. The AG's office declined to provide the requested documents but did not allege that any such document was exempt from being disclosed under FOIA. As a result of the failure to produce requested documents, Plaintiff filed this action on August

3, 2011.

6. S.C. Code Ann. § 30-4-30(b) provides as follows:

If written notification of the determination of the public body as to the availability of the requested public record is neither mailed nor personally delivered to the person requesting the document within the fifteen days allowed herein, the request must be considered approved.

7. The AG did not respond to Plaintiff's request within 15 days. Although a member of the AG's office asserted on August 5, 2011 that the AG had not received the June 30, 2011 request, that request was attached to the complaint herein, which was served on the AG on August 5, 2011. Plaintiff has not to date received any response to her June 30, 2011 FOIA request.

8. Far more than 15 days have now passed since Plaintiff made her June 30, 2011 FOIA request, and, pursuant to S.C. Code Ann. § 30-4-30(b), the request must now be considered approved.

The Requested Documents are Public

9. On September 14, 2011 *The State* newspaper ran an article entitled "Wilson, Loftis Spar Over Hiring Law Firms," a copy of which is attached hereto as Exhibit A which included the following language:

Wilson's office said it is transparent. Contingency agreements with outside law firms are available to members of the public who request them. The office [is] in the process of posting all such agreements on its Web site, said an agency spokesman.

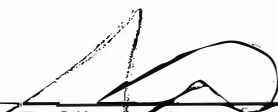
10. Additionally, an article in the September 21, 2011 edition of the *Newberry Observer* entitled "AG's Promise to Release Contracts May Resolve Newberry James

Brown FOIA Case" told that the article's author had received an email from a member of Defendant's staff agreeing to send the author a copy of the fee agreement requested herein. A copy of the article is attached hereto as Exhibit B.

11. It is clear from the Attorney General's statements to the press that his office is aware and believes that the requested documents are public.

For the reasons stated above, Plaintiff asks that the Court issue its order granting her summary judgment on all claims in the complaint herein. This motion is based on the South Carolina Rules of Civil Procedure, applicable case and statutory law, the affidavit of Adele J. Pope filed herewith, all earlier affidavits of Plaintiff on file herein, and such additional documentation as shall properly come before the Court prior to the hearing on this matter.

Respectfully submitted,



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September 29, 2011

Attorney for Plaintiff



The State
South Carolina's Homepage™

EXHIBIT A

[Back](#)

Wednesday, Sep 14, 2011

Posted on Wed, Sep. 14, 2011

Wilson, Loftis spar over hiring law firms

Being 'proactive' or 'pay for play'?

By GINA SMITH

gsmith@thestate.com

State Attorney General Alan Wilson wants two law firms, accused of making pay-to-play political contributions in other states, to monitor transactions in South Carolina's multi-billion-dollar retirement system.

Wilson received \$12,000 in campaign contributions from one of the firm's partners in 2010 although he says that money played no role in his recommendation.

State Treasurer Curtis Loftis opposes Wilson's proposal, saying its unnecessary. Their disagreement also is a sign of friction between two rising stars in S.C. Republican politics.

At issue is an announcement last month by Wilson, elected the state's top lawyer in November, that he wants to hire the two firms, one in Charleston and one in New York, to monitor transactions in the state's retirement system for fraud.

That system has \$26 billion in assets.

Wilson said he has been in talks with Loftis to hire the firms to ensure the investments are watched closely. "In other states, we've seen problems with fraud," Wilson said. "I'm trying to be proactive here in South Carolina."

Loftis said monitoring by outside attorneys is not needed.

"As treasurer, I am the custodian of the state's funds," Loftis said in a statement. "It is important that these large-dollar contracts be without political involvement or interference. Campaign contributions have no place in the decision process of protecting our \$26 billion trust fund.

"We currently monitor for fraud, waste and abuse utilizing several entities and a variety of methods," he said. "Our custodial bank has extensive abilities to monitor our securities, as well as the Retirement System Investment Commission and the State Treasurer's office."

The state recently sued a New York bank, saying it sold the retirement fund improperly risky investments.

Wilson says the S.C. Retirement System Investment Commission has the final say on whether the firms are hired, not Loftis. He plans to pitch the idea to commissioners during a Thursday meeting.

Wilson said the campaign contributions did not affect his recommendation of the firms. Instead, he said it was based on the firms' experience in monitoring pension plans and rooting out fraud.

"All a contribution gets you is my gratitude," he said, adding, if the commission would rather work with other firms instead of the two he is recommending, he will engage them instead.

"I don't care who does the work," Wilson said. "What matters to me is they do it well."

"I'm looking at their ability to perform a free service to protect the system," he added.

Under Wilson's proposal, the attorneys of Labaton Sucharow of New York, whose partners have contributed to Wilson, and Motley Rice in Charleston, who did not contribute, would review pension fund transactions free of charge for signs of fraud. They would be paid legal fees only if subsequently hired by the state to recover money.

Both law firms have been accused of taking part in pay-to-play arrangements in other states, contributing to

the election funds of public officials who award them contracts.

In 2010, partners of Labaton Sucharow contributed nearly \$43,000 to New York Comptroller Thomas DiNapoli, who is in charge of the state's pension fund, according to media reports. The contributions came after DiNapoli tapped Labaton Sucharow to represent his office in litigation against a mortgage lender.

And after Jack McConnell Jr. opened a Motley Rice branch in Providence, R.I., becoming one of that state's top political contributors for the 2000 elections, that state's attorney general hired Motley Rice to conduct Rhode Island's highly-publicized lawsuit against lead paint manufacturers.

Efforts to reach both firms for comment Tuesday were unsuccessful.

Wilson said accusations are not proof of anything.

However, the relationship between some politicians and some law firms is the subject of increasing scrutiny.

Lisa Rickard, president of the U.S. Chamber Institute for Legal Reform, a national campaign founded by the U.S. Chamber of Commerce to clamp down on litigation, said her organization is speaking out against state attorney generals taking contributions from law firms and awarding them contracts.

"The reality is that these plaintive firms are traveling around the country, visiting with the state attorney generals and selling them on ideas for lawsuits," Rickard said, adding attorney generals should not use outside counsel.

"It's an appearance of impropriety," she said. "If they (attorney generals) are taking contributions and then giving contracts out without going through some kind of process where they're looking at other firms who can also do the work, then there's a problem. It looks like a quid pro quo is going on. These are elected officials who should have a transparent process for bidding out this work."

Wilson's office said it is transparent. Contingency agreements with outside law firms are available to members of the public who request them. The office in the process of posting all such agreements on its Web site, said an agency spokesman.

Reach Smith at (803) 771-8658.

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EXHIBIT B

[print](#)

AG's promise to release contracts may resolve Newberry James Brown FOIA case

by Sue Summer
For The Observer
09.21.11 - 08:07 am

In Newberry on Sept. 12, Attorney General (AG) Alan Wilson filed a motion to dismiss a Freedom of Information Act (FOIA) lawsuit in which he was asked to release copies of public documents related to the James Brown music empire.

Among the requested documents was a contingency-fee agreement between former AG Henry McMaster and outside counsel, Columbia attorney Ken Wingate. Wingate represents the State and about 15 private plaintiffs in a Brown suit in Richland County.

Other Brown cases are pending in the Aiken County Circuit Court, the S.C. Court of Appeals, and the S.C. Supreme Court.

The FOIA lawsuit was filed by Newberry resident Adele Pope in August. She and Aiken attorney Robert Buchanan, former Brown trustees, have repeatedly attempted to obtain the fee agreement and other documents for 10 months.

Only two days after Wilson's motion to dismiss the Newberry FOIA suit, on Sept. 14, The State newspaper reported Wilson had announced, through an agency spokesperson, that contingency agreements with outside law firms are available to members of the public who request them and that the AG's office is in the process of posting all such agreements on its website.

"We hope this announcement means that the AG will release the public documents which Pope and Buchanan have been trying to obtain for almost a year, first from McMaster and now from Wilson," said Adam Silvernail, Pope's attorney.

The unreleased contingency-fee contract between McMaster and Wingate authorized Wingate to sue Buchanan and Pope on behalf of the state while simultaneously representing about 15 private plaintiffs.

In a hearing scheduled for Richland County Sept. 14, Pope and Buchanan sought to disqualify Wingate from representing both the state and the private individuals.

In a brief filed last week, Pope also asked that current Brown trustee, Columbia CPA Russell Bauknight, be enjoined from asserting that he acts for the state or the AG. Bauknight replaced Pope and Buchanan as trustee and serves at the AG's pleasure.

Bauknight and AG Wilson have both refused to produce the contingency-fee contract and other documents requested by Pope's two FOIA lawsuits, including documents related to the value of Brown's assets and a copy of McMaster's "Legacy" trust.

In 2008 McMaster forged an agreement with some of Brown's claimed heirs, all of whom were disinherited from his worldwide music empire, and gave them more than half of Brown's assets.

In late 2008 or early 2009, McMaster set up the "Legacy" trust with Bauknight as trustee. To date, no signed complete copy of the Legacy trust has been produced, but at least two incomplete drafts are on file in Aiken County.

Before the McMaster agreement, Brown's estate plan gave his music empire to the "I Feel Good" trust to provide scholarships for needy and deserving students.

Brown's music empire—with royalties to about 850 songs, as well as publicity rights—was widely reported to have a value of \$100 million at his death, less a \$15 million debt. 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.

In December 2010, however, Bauknight filed documents with the Internal Revenue Service placing a \$4.7 million value on Brown's worldwide music empire at his death in 2006.

According to J. David Black of the Columbia law firm Nexsen/Pruet, which represented Bauknight in the IRS filing, Bauknight's \$4.7 million value for Brown's music empire at death is based upon an independent professional appraisal, authorized by Bauknight. When reached by email, Black failed to disclose the name of the New York appraiser.

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.

In 2007 David Cannon, one of three original trustees appointed by Brown, resigned after Pope and Buchanan discovered he had taken \$900,000 from Brown's Trust the previous year. Cannon was indicted in 2010 for felony breach of trust with respect to Brown's assets between 1999 and 2006. He was also indicted for a 2008 forgery related to Brown.

Cannon has not yet been tried, but in November 2010 he was placed, along with former trustee Albert "Buddy" Dallas, on Wingate's witness list in the Richland County case.

Pope and Buchanan, who valued Brown's music assets at about \$85 million, have challenged McMaster's agreement and Bauknight's valuation.

When asked by email when the Wingate contract would be available on the AG's website, spokesperson Mark Plowden responded Tuesday morning, "I am on medical leave, but will have someone send it to you."

Judge Casey L. Manning continued the Richland County hearing to consult with Chief Administrative Judge Alison Renee Lee.

As STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

Adele J. Pope,

Plaintiff,

v.

Alan Wilson, in his capacity as
Attorney General of South Carolina,
and James Brown Legacy Trust, by
Russell Bauknight, its Trustee

Defendants.

IN THE COURT OF COMMON PLEAS

Civil Action No. 2011-CP-36-364

Affidavit of Adele J. Pope
Supporting Summary Judgment
Including Determination that
James Brown Legacy Trust
Created by Henry D. McMaster, in his
Capacity as Attorney General
is a Public Body Under FOIA

Personally appeared before me, Adele J. Pope, who being duly sworn, deposes
and says:

1. This affidavit is based on my personal knowledge and belief.
2. I request that the Court hold an expedited hearing on this matter; review the documents *in camera*; and grant Summary Judgment as follows:
 - a. The James Brown Legacy Trust is a Public Body under the S. C. Freedom of Information Act ("FOIA").
 - b. Defendants should release copies of the Legacy Trust as requested.
 - c. AG Wilson should release documents about Russell Bauknight's \$4.7 Million valuation of James Brown's worldwide music as requested.
 - d. Attorney's fees and costs are appropriate because the State/Legacy Trust have acted in bad faith in refusing the documents.
3. Facts supporting each of the above are set out below.

The James Brown Legacy Trust ("Legacy Trust")

4. I am informed and believe the name "James Brown Legacy Trust" is

deceptive because the Legacy Trust was not created by James Brown, but by AG Henry McMaster and his trustee, Russell Bauknight. It was never a part of Brown's Estate Plan – the exact opposite.

5. I am informed and believe the Legacy Trust is a vehicle by which the State, through AG McMaster – and now AG Wilson — intends to destroy James Brown's "I Feel Good" private foundation; put Brown's private assets in the Legacy Trust, created by a public official, now called "private"; take \$50 Million Brown gave to needy students; and use it for the AG's private purposes; then cover it up by saying the worldwide music empire the AG took over was worth only \$4.7 Million.

6. I am informed and believe that the Charts Bob Buchanan and I presented to the Aiken Court in 2009 (A & B), and others I have created and attached to this Affidavit, demonstrate the need for the public information I have requested under FOIA.

a. Exhibit A:

Chart 1 - James Brown's INTENTIONS in his Last Will & Trust (2000) (2/09);

b. Exhibit B:

Chart 3 - HOW THE PROPOSED "SETTLEMENT" DESTROYS/IGNORES JAMES BROWN'S INTENTIONS (2/09);

c. Exhibit C:

Attorneys' Fees AG Wilson proposes (\$13 - \$15+ Million)

vs.

Attorneys' fees to be paid by PR/Trustees of The James Brown "I Feel Good" Trust if AG McMaster had not taken over (less than \$2 Million)

d. Exhibit D:

Detail, Lawyers AG Wilson Proposes to pay from funds taken by State from Needy Students; (\$13 - \$15+ Million)

e. Exhibit E:

Value of James Brown's Music Empire AG McMaster's August 10, 2008 Agreement Proposes to Transfer to Legacy Trust – \$84 Million or \$4.7 Million?

f. Exhibit F

Legacy Trust Trustees and Beneficiaries' Position about \$4.7 Million value vs. \$100 Million value of James Brown Music Empire Then and Now

7. I am informed and believe that but for the support of the State/AG Wilson, the Legacy Trust would exist, but have no chance of taking over James Brown's music empire or taking \$50 Million from needy students.

8. I am informed and believe the requested documents will show that the mighty power of the State/AG has been used to lend credibility to the fabricated \$4.7 Million valuation of James Brown's worldwide music empire; secrete the alleged independent valuation; and prevent appropriate consequences to those who were involved in the undervaluation scheme, including State employees.

9. I am informed and believe that even though it may have been illegally created, the Legacy Trust now functions as a Public Body under FOIA, and should be subject to FOIA.¹

a. August 10, 2008 - AG McMaster takes over Brown's assets

10. Entertainment icon James Brown, one of South Carolina's most talented and generous citizens, died on December 25, 2006, leaving his \$100 Million music empire in

¹ I am informed and believe that the Court should find that it is a Public Body unless the AG confirms on behalf of the State that it is void because it was illegally created.

trust to educate 7 designated grandchildren² and needy and deserving students.³

11. Bob Buchanan and I became Brown's PR/Trustees on November 20, 2007.

12. In late December 2007 some claimed heirs challenged the Estate Plan.

13. The challenges were baseless.

14. On August 10, 2008, without consulting with any Brown fiduciary, AG

McMaster agreed with some of the claimed heirs Brown intentionally excluded from his music empire:

d. that the parties will create an entity (the "settlement entity") that will receive any and all assets or proceeds payable to any of the parties, now or in the future, by virtue of any rights of James Brown, any of the entities of James Brown, the Estate of James Brown, the August 1, 2000 James Brown Irrevocable Trust, the Charitable Trust, and/or any rights the parties hereto have as heirs, devisees, and/or successors to James Brown for any purpose, including not limited to copyright, royalty, persona, image, likeness, etc. The parties will divide any and all such assets and or proceeds in the following proportions for as long as such assets and proceeds are paid into said entity or any successor entity thereto: (1) 50% to the Charitable Trust; (2) 25% to Tommie Rae.. (3) 25% to all parties hereto represented by Louis Levenson as they agree among themselves. [Emphasis supplied.]

15. In late 2008 or early 2009 the Legacy Trust was created, with Bauknight as its trustee.

16. Modifications to the Legacy Trust were made.

17. The State/AG's office vigorously support the Legacy Trust and its taking of James Brown's private property, intended for needy students.

² A fund of \$285,000 each.

³ Chart 1 and Chart 3 are part of the Record on Appeal ("ROA") and an attachment to Appellant's brief in the appeal from Aiken County Case No. 2008-CP-02-1647 ("Case 1647").

18. In a hearing on January 30, 2009 AG Jones, five months after AG McMaster asserted control over Brown's private assets, said:

There's never been a question with Attorney General McMaster as far as any resources I needed to proceed in this case. We've had these people, these attorney, including myself, to devote whatever time was necessary to proceed with this action. . . [Tr. 1/30/09, Case 322, p.67]

19. Between August 10, 2008 and May 26, 2009 about 5 attorneys paid by the State joined by more than 20 private attorneys fought all of Brown's fiduciaries; to take \$50 Million from The James Brown "I Feel Good" Trust; and transfer Brown's private assets to the Legacy Trust, to be taken over and controlled by the AG.

20. About \$14 Million of the \$50 Million would go to contingency fee lawyers representing clients with baseless claims.

21. The May 26, 2009 circuit court order allowing Brown's assets to be taken by McMaster and put in the Legacy Trust is on appeal, but no stay is in place.

22. I am informed and believe that the State/AG has the awesome duty to control the Legacy Trust and Brown's music empire under ¶ 7.2 of the Trust, which says:

7.2 Right to Remove and Replace. The Trustee of the [Legacy] Trust shall be chosen and appointed by the South Carolina Attorney General, who has the power and right to remove and replace the Trustee.

23. As the person who selects and removes the Trustee the Attorney General/Settlor has the duty to insure, as required by Article XIV that:

The Trustee shall administer the Trust in a manner that does not adversely affect the current qualification and continued qualification of the "I Feel Good" Trust as a charitable trust. If necessary or desirable, the Settlers [including AG/State] agree to modify the terms of this

Agreement to the extent necessary to preserve the charitable tax-exempt status of the I Feel Good Trust to the extent allowed by law.

24. I am informed that the AG's condoning a fabricated "fair market value" of \$4.7 Million for Brown's \$84 Million music empire by the AG's appointee where a private beneficiary has a right of first refusal to buy the music empire is – at best – troublesome, and threatens to take away what remains of The James Brown "I Feel Good" private foundation – now also controlled by AG Wilson.

25. I am informed and believe that the State/AG Wilson is actively supporting the Legacy Trust's devaluation of the \$80 Million "I Feel Good" Foundation, as follows:

- a. First, by reducing the "I Feel Good" Trust from \$80 Million to 47 ½% of \$80 Million LESS \$2 Million, about \$38 Million.
- b. Then by selling the \$80 Million asset to Terry, a family member, for a fake \$4.7 Million "fair market value."

26. Chart C shows how the State/AG Wilson is supporting Terry Brown and Bauknight's other beneficiaries under the Legacy Trust by condoning the fabricated \$4.7 Million value which all know to be false.

27. I am informed and believe that AG McMaster delegated to Bauknight and his advisors the duties of the AG's Office to see that the "I Feel Good" private foundation is managed, operated and invested in accordance with IRS guidelines, making it important for the public to see if Bauknight and others are engaging in self-dealing or impropriety.

28. I am informed that all of the provisions of the Legacy Trust not only allow – but require – the Attorney General/State to support and oversee the management and operation of the Legacy Trust.

29. Between May 26, 2009 and June 8, 2010 the Legacy Trust, supported by

the State, added 10 Nexsen Pruet attorneys and a battery of other attorneys, to insure the Legacy Trust would take over Brown's assets; pay them; and pay the disinherited claimed heirs; and be secured for future control by the AG.

30. At the same time, NP's managing partner announced he was running to be the next AG. And AG McMaster was running to be governor. Both lost on June 8, 2010.

31. The AG's Office, NP and others, however, continued to dedicate extraordinary effort to see that needy students do not get what Brown intended for them.

32. AG Wilson has important day-to-day functions and control over the Legacy Trust, and his active oversight and vigilance is required in at least the following particulars:

- a. Under ¶ 6.1 the approval of AG Wilson or his successor, is required to sell all or substantially all of the assets of the Legacy Trust.
- b. Under ¶ 6.2, however, the State/AG's failure to respond within 30 days to any Beneficiary's request for a vote on any matter could arguably be disastrous. It states:

6.2 Notice of Vote. The Trustee or any Beneficiary may at any time request a vote of the Beneficiaries as to any such matter as may require a vote under this Agreement by giving notice and a request to all the Beneficiaries of a vote pursuant to the terms of Sections 8.3 and 8.4 below. **If a noticed beneficiary [ie., the State/AG] does not respond with its vote on the applicable matter in writing within 30 days after such time as the notice is deemed to have been given, such Beneficiary [the State/AG] shall no longer have the right to vote on such matter.** [Bolding and brackets supplied]

- c. Under §8.3 of the Legacy Trust instruments are deemed delivered either when sent and confirmed (fax) or three days after mail or express service is received by the sending service.

33. Having served as an advisor to trustees for more than 30 years, and having

qualified without objection as an expert in Probate and Trust law in James Brown Case 2009-CP-02-1647, I can say to a reasonable degree of professional certainty that the terms of the Legacy Trust which I have reviewed:

- a. place a high burden of continuing vigilance on the AG to protect the "I Feel Good" Private Foundation, which AG McMaster has already agreed to reduce to less than 47 ½% of its original size; and
- b. could arguably cede all power – and loss of the Trust assets – to minority private beneficiaries by the AG's mere failure (or Bauknight's for him) to respond in 30 days to a faxed vote request.

34. The AG/State has supported the Legacy Trust by delegating to Bauknight, its Trustee, essential functions of the AG's office, including the oversight of the dramatically reduced "I Feel Good" private foundation.

35. The AG/State has supported the Legacy Trust by authorizing Bauknight to assert to the court that he "speaks on behalf of" the Attorney General of South Carolina.

36. AG Wilson's Office supported the wrongdoing of the Legacy Trust's trustee by joining Bauknight's representation to the Supreme Court that Brown's music empire at death was worth less than \$4.7 Million.

37. During this period the State/AG has supported the Legacy Trust by condoning the payment of what will be \$14 Million or more in contingency and secret legal fees, to be taken from needy students and funneled and paid through the Legacy Trust.

38. AG Wilson has supported the Legacy Trust by not admonishing or replacing those who fabricated and/or condoned, a \$4.7 Million value of Brown's music empire when all have knowledge (as defined in the Trust Code) it is false.

39. The State/AG continues to support the Legacy Trust – now paying its own attorneys and allowing the Legacy Trust to hire distinguished outside counsel to fight

this FOIA request so that the public will be prevented from knowing:

- a. How much more than \$14 Million does AG Wilson intend to pay lawyers for dismantling The James Brown "I Feel Good" Foundation?
- b. What members of the AG's Office were involved in the fabricated \$4.7 Million valuation of Brown's assets?
- c. Why did the State authorize the Wingate Firm/Legacy Trust Trustee to accuse Bob Buchanan and me of causing tens of millions of dollars of damage to Brown's music empire while at the same time the trustee (Bauknight) presented to the IRS a fabricated \$4.7 million valuation of the same music empire?
- d. Why did AG Wilson not fire Bauknight and admonish his staff for presenting the \$4.7 Million to the Supreme Court when public documents make clear it was outrageous?
- e. Does AG Wilson's cover up of AG McMaster's takeover of Brown's private property by resisting all FOIA requests mean those intending to create charitable foundations will not do so for fear their private property will be taken over as "the Attorney General's money?"

40. I am informed and believe that the Court should find that the James Brown

Legacy Trust is a Public Body under FOIA.

c. The Legacy Trust should be disclosed by both Defendants

41. The Legacy Trust was created by the Attorney General of South Carolina and is now controlled by the Attorney General of South Carolina.

42. The trustee of the Legacy Trust has asserted that he "acts of behalf of" the Attorney General.

43. The Legacy Trust and all modifications are public documents and should be disclosed.

d. The Valuation information is public and should be disclosed

44. The Attorney General of South Carolina has told our Supreme Court that Bob Buchanan and I have misrepresented the value of Brown's music empire to them.

45. The AG's appointee has told the IRS Bob and I lied to them and overstated the James Brown assets to get a big fee.

46. 135+ boxes of James Brown documents which would show that this \$4.7 Million fabrication is an outrage were already made public in August 2007.

47. Documents made public in 2007 show that between 1999 and 2006 Brown earned at least \$50 Million as follows:

In Road Show Revenues, etc.	\$25,000,000.00+
In Royalties	<u>\$25,000,000.00+</u>
	\$50,000,000.00+

And that from 2003 - 2006 Brown earned more than \$5 Million per year, with:

Road Shows (Wm. Morris)	\$ 18,000,000.00+/-
Royalties	<u>\$ 12,000,000.00+/-</u>
	\$ 30,000,000.00+/-

48. In February 2007 one of the attorneys for Brown's original Trustees, Rodney Peebles, Esquire, described to the Aiken Circuit Court Brown's worldwide importance by explaining that Brown earned \$1 Million a week in his annual 3-week overseas show tours.

49. The extraordinary value of Brown's Publicity Rights is exemplified by the single example of the Global Gaming contract negotiated just before Brown's death. According both to Brown's original fiduciaries and published reports, it was projected to produce \$500,000 per year after a 2-3 year development period.

50. Just after Brown's death, a family-owned company, Pinnacle, issued a prospectus to raise \$200 Million for the acquisition of the James Brown assets, asserting that exploitation of Brown's assets was virtually without limit.

51. The AG's Office has even filed with the Supreme Court the portions of the

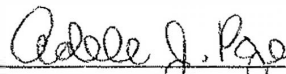
IRS documents it wants the Court to see.

52. The AG's appointed trustee has asserted to the IRS that Bob and I lied and that his independent appraisal is proof of that lie – and the AG's Office has told that to our Supreme Court.

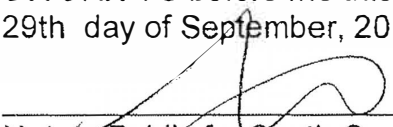
53. I am informed and believe that the documents I seek are public statements by the AG and public documents, and should be disclosed for one or more of the following reasons:

- a. The State has access and control over the appraisal, the IRS documents and the documents it relied on to accuse us of wrongdoing.
- b. There is no basis for confidentiality. All valuations of Brown's assets have been fully aired in Aiken County.
- c. All of Brown's historical financial information was available for inspection and copying without limitation.

FURTHER DEPONENT SAYETH NOT.


ADELE J. PORE

SWORN TO before me this
29th day of September, 2011



Notary Public for South Carolina

(L.S.)

My Commission expires: 7/13/2016

Chart 1
James Brown's INTENTIONS in his
Last Will & Trust (2000)

2/09

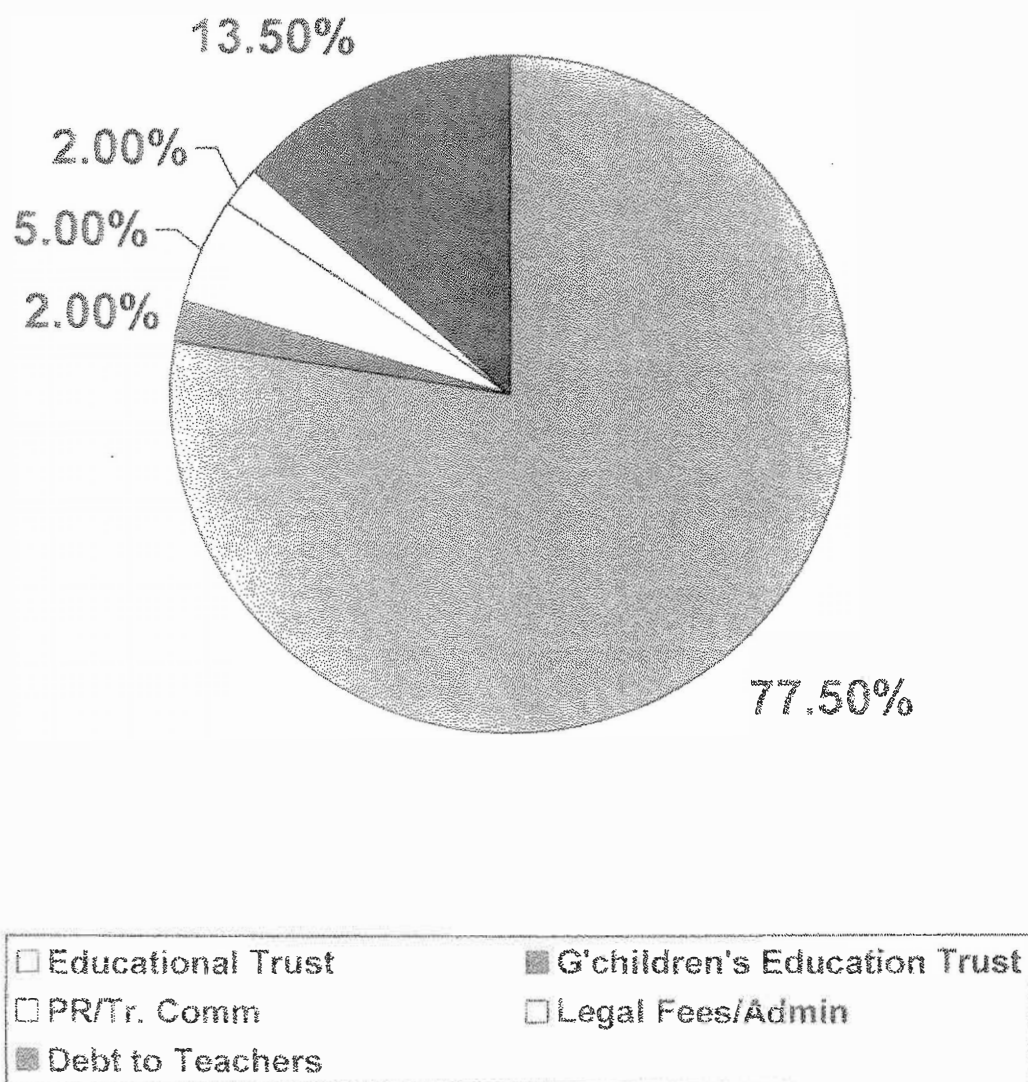
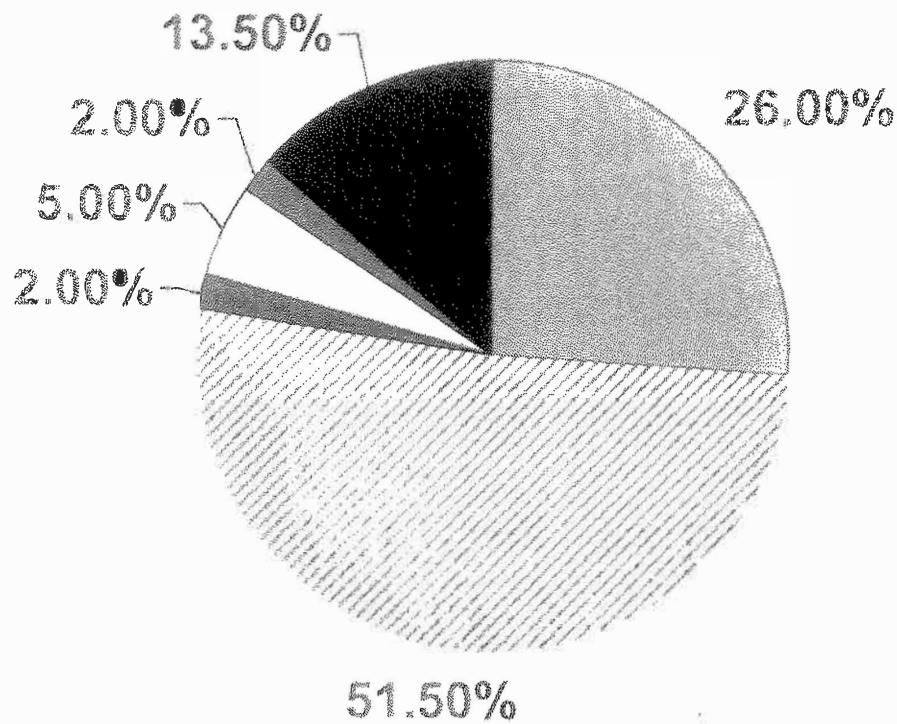


Chart 3

HOW THE PROPOSED "SETTLEMENT" DESTROYS/IGNORES JAMES BROWN'S INTENTIONS

James Brown Estate/Trust Settlement Proposal
(Hynie Brown/AG/8 of 13+ potential Heirs)
(Over objection of PR/Trustees Buchanan and Pope)
(2/09)



- ☐ Educational Trust
- ☒ Settling Parties, their Attys., taxes, etc.
- ☒ G's children's Education Trust
- ☐ PR/Tr. Comm
- ☒ Legal Fees/Admin
- ☒ Debt to Teachers

Exhibit C

Attorneys' Fees AG Wilson proposes to pay vs. Attorneys' fees PR/Trustees would pay⁴

I. AG Wilson proposes to pay attorneys:

A.	Contingency Fees:	
	Rosen and Team (est.):	\$ 6.6 Million
	Levenson	\$ 7.7 Million
B.	Other Attorneys' Fees:	
1.	10 Lawyers at Nexsen Pruet	Unknown
2.	Contingency Fee Counsel Kenneth Wingate	Percentage of claimed "tens of millions" of losses
3.	A. Camden Lewis	Unknown
4.	19 other attorneys	Unknown
	Total AG-approved fees	\$14.3 Million + Unknown additional payments

II. Attorney Fees of Estate/2000 Trust including The James Brown "I Feel Good" Trust if Appeal Successful.

A.	Contingency Fees	None
B.	Others: James Bailey \$100,000; Lewis & Babcock, Thurmond; A. Silvernail; Hogan & Hartson; Tressa Hayes; Daryl Williams, Cal Watson, further administration:	Less than \$1.9 Million
	Total Buchanan/Pope fees	Max \$1.9 Million, less recovery from Dallas, Cannon, Children, Forlando*

* Pyt. for frivolous suits sought from TPP proceeds and \$285,000 Forlando Fund

⁴ Few/Gilreath claim omitted from both; payable from recovery from Cannon/Dallas.

Exhibit D
Detail, Contingency Fee and other Lawyers State/AG Wilson
Proposes to pay from State or Legacy Trust, taken by State from Needy Students

	<u>Attorney/Firm</u>	<u>Comment</u>	<u>Pay</u>
State of South Carolina			
1.	Henry D. McMaster		State salary
2.	Alan Wilson		State salary
3.	C. H. Sonny Jones		State salary
4.	Mary Frances Jowers		State salary
5.	J. C. Nicholson		State salary
6.	Emory Smith		State salary
Some Attorneys for Family Members and Claimed Family Members			
7.	Louis Levenson	Contingency \$150,000 + 30%	\$7.7 Million
8.	Robert Rosen	Contingency Fee (Est'd)	\$6.6 Million
9.	David Bell	Represents clients opposing & supporting settlement	Unknown
10.	Matt Bodman		Unknown
11.	Peter Shahid	Lawyers for claimed child not born of marriage. Refused DNA test	Unknown
12.	S. Slotchiver	GAL for claimed child who refused DNA testing.	Unknown
13.	Jean Lee	Tax Lawyer	See Rosen
14.	David Michel		See Rosen
15.	Alan Medlin		See Rosen
16.	Heyward Carter		See Rosen
Nexsen Pruet Attorneys			
17.	Freddie Kingsmore	Submitted \$4.7 Million to IRS	Unknown
18.	Rick Reames	Assisted Kingsmore	Unknown
19.	William Newsome		Unknown
20.	David Black		Unknown
21.	Wm. Wilkins		Unknown
22.	Wm Klett		Unknown
23.	Julio Mendoza		Unknown
24.	Gorge Scott		Unknown
25-26.	Other NP Attorneys		Unknown
Sweeney Wingate & Barrow, PC Attorneys			Contingency Fee % of "Tens of Millions of Dollars," but in default on counterclaims.
27.	Kenneth Wingate		
28.	Mark Gende		
29.	Rett Kendall		
30.	William Calhoun		
31.	A. Camden Lewis		Unknown
Total attorneys' fees from "I Feel Good" Trust			\$14.3 Million + Unknown amounts paid to attorneys listed above

Affiant believes none of the Estimated \$14+ Million of Attorneys except L&B Would be paid if the State/AG did not Support the Legacy Trust.

EXHIBIT E
Value of James Brown's Music Empire
AG McMaster's August 10, 2008 Agreement Proposes to
Transfer to Legacy Trust – \$84 Million or \$4.7 Million?

Asset - Description	AG Wilson/Bauknight Value	Buchanan/Pope Value
\$12+ Million claim against Cannon, Morgan Stanley and others. Suits filed 2/08 and later. \$13+ Million documented claim. At death Cannon had \$1,080,000 and 2 beach houses. Had cashed \$5 Million "check to nobody" at defendant Bank.	Unallocated	\$1-10 Million
"Royalties" – rights to more than 800 published and unpublished songs. Averaged \$3+ Million per year before and after death.	Unallocated	\$40-55 Million*
"Publicity Rights" – Worldwide right to exploit image and persona, including finalized Global Gaming Contract.	Unallocated	\$45-55 Million*
Tangible personal property other than jewelry, furs – cars; items sold at Christie's; items on loan to 4 museums, etc. Christie's appraised some of these items.	\$0.5 Million	\$2 Million
Geronimo, LLC; other miscellaneous assets	Unallocated	Unallocated
LESS TIAA Debt	<u>(\$15 Million+/-)</u>	<u>(\$15 Million+/-)</u>
Total	\$4,697,736.00	\$84,000,000.00

*Range of value placed on assets by Cox, Hammond, Dallas, Bradley and numerous others. Court-approved formula to value royalties/publicity rights without appraisal. 3 letters of intent.

EXHIBIT F
Position of Settlor/Beneficiaries of James Brown Legacy Trust
\$100 Million vs. \$4.7 Million Value of
James Brown Musical Empire
Then and Now

1. Office of the Attorney General of South Carolina:

December 6, 2007 AG Sonny Jones:
Re: James Brown Legacy initial offer 10-12-07
I, like each of you, have been contacted by Dr. Cox and Toby Byron as to the purchase (see attached 10/12/07 letter) of the Trust Estate for \$100 million plus 5% of the gross profits from the company to be formed. ...please advise as to the following...
... I have heard for the last 3 months that the sky will fall and the offer will go away if we do not accept it now...your thoughts. Also, who else is out there who can make an offer if at all.

February 7, 2008 AG McMaster appears to WIS TV::

"What the State is saying is that money should go to the needy children through the trust for education."
...Those assets contain his 60-acre Beech Island home and even more importantly, right to James Brown's image and music. **All together the estimated worth is more than \$100 million.**

"So the children" McMaster says, "the needy children stand to gain a lot. . . ."
McMaster **"There is a concern some could be whittled away, but we think there is so much money involved because the name is so big and the rights to his image - really a valuable thing. We're trying to look at this in the long term.**

May 6, 2007 AG Wilson, through Sonny Jones, tells Court \$4.7 Million is correct value of music empire.

2. Terry Brown:

Feb. 29, 2008 Terry Cox for "The James Brown Legacy" makes offer (Letter of Intent) for all assets of 2000 Trust: "The purchase price for the Assets will be between \$90,000,000 and \$100,000,000 plus a continuing payment equal to five percent of the gross profits that we generate from licensing those assets that can be licensed....All cash...90 day due diligence period. Terry Brown make simultaneous offer for Estate Assets (TPP), \$2 Million.
COPIES TO SONNY JONES, BILL SHEARER.

March 27, 2008 Terry Brown, w/ TJBL, offers \$2 Million for TPP and TJBL another \$90 Million - \$100 Million plus 5% from licensing

September 2008 Terry's son Forlando 39% owner and joint venturer with Terry, Cannon, etc., in TJBL, assert \$150 Million offers still open for James Brown assets.

January 30, 2009 AG McMaster gives Terry Right of First Refusal to buy Brown's assets - ie., match a "fair market value" offer.

May 6, 2010 Terry tells Supreme Court that "fair market value" of Brown assets at death is \$4.7 Million

3. Tommie Rae Hynie:

February 9, 2007 Tommie Rae asserts, through counsel,

LITERALLY, IF YOU [JG. Early] DON'T ACT TOMORROW, YOU KNOW, THEY [The Cannon Group] CAN SIGN A CONTRACT TO SIGN ALL OF MR. BROWN'S BOOK OF MUSIC WHICH COULD BE WORTH \$100 MILLION -- THEY COULD SELL IT FOR 20 MILLION IN ORDER TO RECEIVE THEIR 2 MILLION.

MR. PEEPLES: ...MR. BROWN WAS VERY FAMOUS IN JAPAN. HE WOULD GET A MILLION DOLLARS A WEEK FOR THREE WEEKS IN JANUARY EACH YEAR. P. 92

MR. ROSEN: I MEAN, SHE LIVED WITH MR. BROWN FOR TEN YEARS. THE ISSUE OF WHETHER SHE'S HIS WIFE OR NOT HIS WIFE, THAT'S A MATTER TO BE DETERMINED LATER...

May 6, 2007 Tommie Rae tells Supreme Court that \$4.7 Million value for music empire is correct.

4. Dr. Yamma Lumar:

January 2007 President (Husband CFO) of family company, Pinnacle which issues prospectus to raise \$200 Million to acquire James Brown assets.

May 6, 2011 Yamma and siblings tell Supreme Court \$4.7 Million value is correct.

5. Daryl, Deanna, Larry, Venisha – See Yamma.

6. Russell Bauknight:

January 30, 2007 Recommends transferring all James Brown assets to his Legacy Trust, but does not know what they are worth. Has heard \$80 Million.

December 2010 Secretly tells IRS music empire worth less than \$4.7 Million

May 6, 2011 Files fabricated \$4.7 Million figure with Probate Court.

May 6, 2011 Presents fabricated \$4.7 Million value to Supreme Court.

STATE OF SOUTH CAROLINA

CIRCUIT COURT

COUNTY OF RICHLAND

ADELE POPE

2010-CP-40-04900

-vs-

ALAN WILSON, et al

-&-

ADELE POPE

-vs-

2012-CP-40-00350

ALAN WILSON and
JAMES BROWN LEGACY TRUST,
et al

TRANSCRIPT OF RECORD

Heard on May 17, 2016
Aiken, South Carolina

BEFORE:

THE HONORABLE DOYET A. EARLY, III

APPEARANCES:

Adele Pope, Esq.

J. David Black, Esq,

Russell L. Bauknight

J. Emory Smith, Esq.

Ariail E. King, Esq.

David Paavola, Esq.

Adam T. Silvernail, Esq.

Mark V. Gende, Esq.

Cheri L. Young, RPR
Circuit Court Reporter
P O Box 5232
Aiken, SC 29804-5232

1 ON TUESDAY, MAY 17, 2016 AT 3:17 P.M.:

2 THE COURT: All right, gentlemen. Let's see
3 if we're all on the same page. I have set in 350,
4 the Attorney General's motion to amend, motion to
5 strike, motion for judgment on the pleadings,
6 motion to dismiss, Pope's motion for summary
7 judgment. Does that sound right?

8 MR. SMITH: Yes, Your Honor.

9 MR. SILVERNAIL: Yes, Your Honor.

10 THE COURT: 4900.

11 MR. PAAVOLA: We also have a motion to dismiss
12 in 350

13 THE COURT: Wait a minute now. Whoa, whoa,
14 whoa. You're in what case?

15 MS. KING: 350.

16 MR. PAAVOLA: 350.

17 THE COURT: What do y'all have in 350?

18 MR. PAAVOLA: Motion to dismiss and also --

19 THE COURT: I can't hear you.

20 MR. PAAVOLA: Motion to strike affidavits,
21 Your Honor, and motion to dismiss.

22 THE COURT: You're with the attorney
23 general?

24 THE MR. PAAVOLA: No. We represent the
25 Legacy Trust.

1 THE COURT: So I've got the Attorney
2 General's motion to amend, motion to strike, motion
3 for judgment on the pleadings, motion to dismiss;
4 is that correct?

5 MR. SMITH: Yes, Your Honor.

6 THE COURT: And the Legacy Trust we've got a
7 motion for, what?

8 MR. PAAVOLA: Motion to dismiss and motion to
9 strike affidavits in support of the Plaintiff's
10 motion for summary judgment.

11 THE COURT: And then we've got Ms. Pope's
12 motion for summary judgment.

13 MR. SILVERNAIL: Yes, Your Honor.

14 THE COURT: Are we all on the same page?

15 MR. SMITH: Yes, Your Honor.

16 THE COURT: Who wants to go first?

17 MR. SMITH: Your Honor, I would suggest that
18 the Attorney General's motions in Pope One be heard
19 and because they are similar, then Legacy's motions
20 and then Mr. Silvernail responds and he can argue
21 his motion for summary judgment at that point. But
22 our motion to dismiss would take precedence, if
23 Your Honor granted it, over his motion for summary
24 judgment and our motions to strike the affidavits
25 would have bearing on the summary judgment motion

1 that Ms. Pope has made. And so, that's the order I
2 would suggest. And then we do the same thing for
3 Pope Two except Legacy is not a party to Pope Two
4 or 4900, the second Pope case.

5 THE COURT: All right. I'll hear your motion
6 to dismiss. This is in 350, right?

7 MR. SMITH: Yes, Your Honor.

8 I tried to organize it. This has been --
9 there's a lot of paper, obviously, in the case. In
10 fact, this box right here on the table contains our
11 files for both cases, showing the volume of paper
12 in what is really essentially two, or should be two
13 simple cases.

14 The Plaintiff requested two documents -- or
15 two sets of documents from the Attorney General.
16 The final and all drafts, signed and unsigned of
17 the James Brown Legacy Trust, and all
18 correspondence, e-mail and other communications
19 between any member of the Office of the Attorney
20 General and Russell Bauknight between August 1,
21 2010, and May 4th, 2011, relating to the value of
22 the assets of the Estate of James Brown et cetera.

23 The response to this FOIA was that it had not
24 been received by the Office of the Attorney General
25 directly from Plaintiff by mail or delivery. We

1 attached an affidavit to our motion to dismiss a
2 Tracy Meyers of our office and she also referred to
3 it in a letter of her on August 5th, 2011. The
4 Plaintiff didn't waste any time and filed suit just
5 a little over a month after she submitted her FOIA
6 request.

7 We believe we provided the documents that the
8 Plaintiff seeks, but we also believe that there are
9 legal defenses that are set forth in our motion to
10 dismiss and reiterated in our motion for judgment
11 on the pleadings. We would move to amend the
12 motion to dismiss to raise lack of subject matter
13 jurisdiction. We believe that motion should be
14 granted because subject matter jurisdiction can be
15 raised at any time including on appeal. The only
16 other change in the motion to dismiss was that, to
17 drop the change of venue ground which had already
18 been decided at that point.

19 The grounds for the motion to dismiss are
20 that the FOIA request was not mailed or delivered
21 as required by Section 30-4-30(C). Upon written
22 request for records made in this chapter, the
23 statute provides: It shall within 15 days of the
24 receipt of any such requests respond. And so it
25 refers to receiving the request. And we never

1 received the request transmitted by the Plaintiff
2 so as to obtain jurisdiction under the Freedom of
3 Information Act.

4 We -- the fact that we provided some
5 documents does not trigger relief against the
6 Respondent but I think that really goes to another
7 motion rather than the motion to dismiss.

8 THE COURT: Well, is it your position you've
9 already given them that material?

10 MR. SMITH: Well --

11 THE COURT: Or are you saying that you've
12 never received the request or given it to them?

13 MR. SMITH: Our position is that there's no
14 jurisdiction because we didn't get the request from
15 her.

16 THE COURT: Okay.

17 MR. SMITH: And because this is an attempt to
18 bypass the rules of civil discovery in the Case
19 4900 by using FOIA instead, and then this relates
20 more to the judgment on the pleadings motion. We
21 believe that we have given her what she seeks and
22 so --

23 THE COURT: When did you give it to her? How
24 did you give it to her if you didn't receive a
25 request?

1 MR. SMITH: Well, we attached the Legacy
2 Trust drafts to our answer. They're an exhibit to
3 our answer. And we also did an answer in this case
4 after moving to dismiss.

5 As to the appraisal, we don't have that. And
6 so we can't produce what we don't have which is
7 what Judge Griffith ruled in the Summer V Wilson
8 case about the request for the same document.

9 She tries to argue that we should pull in
10 Sweeny Wingate firm documents but she did not make
11 a request for documents from the Sweeny Wingate
12 firm. She made the request from our custodian of
13 records. And that is not enough to pull in lawyer
14 files. And so therefore we believe she is not
15 entitled to it.

16 And I've set forth extensive authority in our
17 memoranda as to --

18 THE COURT: But isn't the end result we are
19 going to end up in 4900 which I'm now having to
20 resolve or rule on and preside in, and discovery is
21 going to be wide open in 4900 and all of this stuff
22 is going to be discoverable; is it not? Aren't we
23 just wasting our time?

24 MR. SMITH: I believe that this case is a
25 waste of time, Your Honor, and it's inappropriate.

1 THE COURT: I don't mean a waste of time, but
2 isn't it duplicative? 4900 is going to open to
3 discovery in the James Brown case, everything
4 that's gone on. Why are we fussing about
5 jurisdiction? And why are we fussing about --

6 MR. SMITH: Because the Plaintiff continues
7 to press this FOIA case and is asking for
8 attorney's fees. That's why -- and is not willing
9 to drop it. That's why we're here.

10 We agree that the documents that she is
11 seeking, the efforts to obtain documents, should be
12 made in 4900. In fact, we believe that the,
13 essentially the same requests have been made within
14 4900 as to many of the documents she seeks in both
15 of these cases. And that's where it should be, not
16 here in an independent Freedom of Information Act
17 action.

18 THE COURT: But aside from that, though, you
19 say you've already given her everything that you
20 have and you don't have the other thing that she
21 wants?

22 MR. SMITH: Yes, Your Honor. As to Case 350.

23 THE COURT: Anything else you want to tell
24 me?

25 MR. SMITH: Well, she says we ought to get

1 them from Sweeny Wingate if they have them. Our
2 position is she did not ask for that. She asked
3 for the records from our -- the record for the FOIA
4 request is for the custodian of records. It's not
5 for anybody who might have access to a document.

6 And I've outlined extensive authority about
7 that issue in our brief. And so she can't make us
8 go get stuff from Sweeny Wingate. And I don't know
9 if they even have it. And so --

10 THE COURT: But Sweeny Wingate's the lawyers
11 in 4900, so obviously all of that stuff is
12 discoverable.

13 MR. SMITH: Your Honor, we believe that
14 the -- that this is -- anything that she wants
15 should be sought through discovery in Case 4900
16 rather than through this independent FOIA action,
17 and that the rules of civil procedure control
18 discovery and that a party cannot bypass the rules
19 of civil procedure and judicial control of the
20 discovery process by making FOIA requests and going
21 around and then seeking attorney's fees.

22 It was not set up that way. And that's not
23 what the law reads. And we set forth extensive
24 authority as to -- including responding to their
25 authority that Freedom of Information Act requests

1 cannot bypass the rules of civil discovery.

2 THE COURT: Thank you. All right. Next in
3 line.

4 MR. SMITH: And, excuse me, if I may, Your
5 Honor.

6 It's in the response to their summary
7 judgment but they've asked for attorney's fees.
8 But they're not entitled to fees if they don't get
9 relief. And they haven't documented them. There's
10 no statement as to the hourly, the billing.

11 There's no billing statement. There's no hourly
12 rate that's supported other than through argument
13 of Ms. Pope, I think, by affidavit that she filed
14 in 2012.

15 And, they have quadrupled their fee claim in
16 one of these cases, tripled it in another, over a
17 2012 affidavit of Ms. Pope in which they claimed
18 only a \$100-an-hour hourly rate and that's somehow
19 become inflated to \$250 an hour. So we believe
20 it's completely unsupported and they're not
21 entitled to fees because they should not prevail.

22 MR. SILVERNAIL: Your Honor.

23 THE COURT: Sir?

24 MR. SILVERNAIL: As to the attorney's fee
25 issue, just starting from the last. My

1 understanding --

2 THE COURT: You can start however you want
3 to. You just have to respond to their motion to
4 dismiss.

5 MR. SILVERNAIL: Yes, Your Honor.

6 THE COURT: And you can do it however you'd
7 like. Whatever order suits you suits me.

8 MR. SILVERNAIL: Thank you.

9 The Court's power to award attorney's fees
10 under the statute that constitutes what we call
11 FOIA, the Freedom of Information Act --

12 THE COURT: That's correct.

13 MR. SILVERNAIL: -- is dependent on the party
14 prevailing in the case. And so, Your Honor, I
15 think the detailed analysis of attorney's fees
16 would follow Your Honor's announcement of a ruling
17 in this case.

18 We're prepared to argue that today if we need
19 to, however the attorney's fee request won't be
20 final until the case is over.

21 THE COURT: I agree with you.

22 MR. SILVERNAIL: And so I'd like to focus a
23 little more on the issues related to the operation
24 of the Freedom of Information Act.

25 THE COURT: Absolutely.

1 MR. SILVERNAIL: Now, Mr. Smith addressed
2 this by the various motions. But as Your Honor
3 heard, they all run together a little bit in
4 justification. And I want to respond to a few of
5 the themes that go throughout what they've argued
6 to the Court.

7 They've asked Your Honor to dismiss this case
8 because of lack of subject matter jurisdiction
9 based on their position, as stated, that Mrs. Pope
10 did not mail her FOIA request or deliver it. Now,
11 there isn't any evidence in the record --

12 THE COURT: I don't think they said that.
13 They said they didn't receive it.

14 MR. SILVERNAIL: They said both, Your Honor.
15 And so we're here, though, in a case that was filed
16 on August 3rd, 2011. The FOIA request was attached
17 to the complaint as an exhibit. The Attorney
18 General was served. He's appeared. If the
19 argument was we didn't get it originally, and that
20 came about in September of 2011, we'd probably have
21 a different situation. It didn't. It came about
22 via an amended motion to dismiss a couple years
23 ago.

24 And, you know, all that had to happen, if it
25 hadn't made it there, was for the Attorney General

1 who then knew exactly what we were asking for, why
2 and how, just needed to say, gee, golly, we've had,
3 you know, a mail error, something's gone wrong, but
4 here are the documents, here are the public
5 documents.

6 That's a red herring argument in this case.
7 The argument that they have used throughout this is
8 that Mrs. Pope doesn't have any rights to ask for
9 documents from the Attorney General under the FOIA
10 because she's involved in litigation. And I
11 understand Your Honor's concerns about, you know,
12 discovery being wide open in Case 4900. But I've
13 got to point out that the FOIA in discovery, they
14 may intersect at the documents at some point but
15 they run totally separate tracts that don't
16 intersect as far as the analysis.

17 The only question under the FOIA is: Are
18 these documents public. There is no statute under
19 the FOIA that gives us different classes of
20 individuals, different people who can and can't.
21 The law is that if you are a person you are
22 entitled to make a request for public documents and
23 you're entitled to a response. And that response
24 has to be one of three things: Either, here are
25 the documents we've got that are responsive; or, we

1 don't have any documents that are responsive; or,
2 we have documents that are responsive but they fit
3 into one of the few specific exemptions under
4 FOIA. And the response has to identify those and
5 identify the exemption under which they don't
6 release it.

7 And so we've never gotten that response from
8 the Attorney General in this case. We have instead
9 gotten assertions that because discovery was
10 ongoing in Case 4900, and although I think the two
11 are unrelated I would point out that Your Honor
12 inherited all the whatever-number-of-dozens
13 discovery motions there were in 4900. That didn't
14 go anywhere too quick over the last five or six
15 years.

16 These documents were not forthcoming in
17 discovery but it really doesn't matter. If she had
18 gotten them in discovery she would be entitled to
19 ask for them under the FOIA because this law
20 doesn't set out any procedure for differentiating
21 between one person and another. The only thing
22 this laws sets out procedures for differentiating
23 are the documents: If there's a privilege that
24 applies; if there's sensitive personal information;
25 if there's an ongoing criminal probe. And as far

1 as we know they don't claim any of those
2 exemptions. We haven't seen that.

3 And, you know, it's clear the Attorney
4 General did in fact have public records that were
5 responsive to our request because he produced them
6 in his amended answer in 2013, those two drafts of
7 the Legacy Trust documents.

8 THE COURT: So you want -- I'm not sure. You
9 want me to order them to, under FOIA to produce it
10 again even though you've already gotten it?

11 MR. SILVERNAIL: We have sued here for
12 declaratory relief. We would like a declaration
13 that these are public documents and Mrs. Pope is
14 entitled to them. And under the case law including
15 very recent case law in South Carolina, the Supreme
16 Court has found that production of the documents
17 along the way after litigation begins does not moot
18 the question of declaratory relief or attorney's
19 fees.

20 And we've cited in our brief and I bring Your
21 Honor's attention to the 2014 case of Sloan versus
22 the South Carolina Department of Revenue. That was
23 a case in which the Department of Revenue had
24 responded to Mr. Sloan's FOIA request in some way
25 that seemed to defer a final answer until some

1 later date.

2 And, three weeks, I believe, after he filed
3 suit they said, okay, okay, here are your
4 documents. That went all the way to the Supreme
5 Court after the Circuit Court decided we really
6 don't have a case here. You know, you got the
7 documents. We're all finished.

8 The Supreme Court said, no, indeed you are
9 entitled to declaratory relief because you sought
10 it. You're also entitled to your attorney's fees,
11 I believe, including the fees incurred on appeal or
12 at least with the possibility of that.

13 And so, you know, at the very best we've got
14 a similar situation here if that's all the Attorney
15 General has. However, the other argument that we
16 take issue with from the Attorney General is that
17 he doesn't have to produce the valuation because he
18 does not possess it.

19 Now, number one, the Summer versus Wilson
20 case was a Newberry County FOIA proceeding. My
21 client wasn't a party to that. I don't think we're
22 bound by any of the findings in that case.
23 However, I don't know that it matters much because
24 the FOIA does not require a public body to possess
25 a document in order for it to be available under

1 the FOIA. There's a laundry list in the FOIA of
2 documents which have been, among other things,
3 possessed or used by a public body. And the end of
4 that list is an or which indicates any one of those
5 things is satisfactory.

6 Now this idea that Mrs. Pope needed to seek
7 out the Attorney General's lawyers, Sweeny, Wingate
8 and Barrow, and make a specific request to the
9 Attorney General that I would like this from their
10 files is a little bit troubling because I don't
11 know that we ever have to come to a public body,
12 especially a state agency, and identify for them
13 where they will find the documents that we want.

14 This is the Attorney General's lawyer. The
15 fee agreement that was produced, that we'll talk
16 about in a little bit in the other case, in another
17 court says that the lawyer's files are subject to
18 the FOIA. It is the Attorney General's
19 responsibility to figure out what documents are
20 where, if they have been used by him, if they're
21 possessed by him. All right. Otherwise this
22 statute would be meaningless. If it required you
23 to hold the documents then it would just say
24 possessed. It would not have this list that was
25 possessed, used, or other things.

1 And so, we believe that that's not an
2 adequate response. And as far as I can tell in the
3 record in this case the Attorney General has never
4 stated, and Mr. Smith I believe just said, that
5 they don't know whether or not Sweeny, Wingate,
6 Barrow has that. But we're entitled to a proper
7 FOIA response that says what they've got, what
8 they're producing, and if they claim any exemption
9 what that is. And we've never gotten that in what
10 now amounts to nearly five years.

11 Now, you know, this idea that we should have
12 gone and done this through discovery is just way
13 outside the law. There are cases that say FOIA
14 doesn't expand the scope of discovery, it's not a
15 supplement or a replacement. We couldn't go to
16 Judge Manning until the case was sent to him but
17 within Case 4900, you know, it claimed that we have
18 a FOIA right to this so they should give it to us
19 in discovery. Apparently does not fly.

20 Now, this was not that. This was a FOIA
21 request. It was done --

22 THE COURT: Just stop a second. If you were
23 to win, get what you want, tell me succinctly what
24 you're asking for.

25 MR. SILVERNAIL: I am asking for a

1 declaration that Mrs. Pope is entitled to all
2 public documents responsive to her request, an
3 injunctive section directing the Attorney General
4 to turn those over to us and/or give a proper
5 response identifying what would not be turned over
6 and why, and for the attorney's fees in having had
7 to pursue this action rather than getting a
8 response of some sort anywhere along the line
9 between now and 2011.

10 MR. SMITH: Your Honor, may I respond?

11 THE COURT: Sure.

12 MR. SMITH: First of all, I think it's
13 interesting that he said that the only question in
14 this case is, are the documents public --

15 THE COURT: Public.

16 MR. SMITH: -- because Ms. Pope has filed at
17 least 14 affidavits in this case about why she
18 thinks she needs these documents. And we
19 believe -- we've moved to strike all of them, and
20 if he's correct that the only question is whether
21 the documents are public, then this was a complete
22 waste of our time. And we believe it was.

23 THE COURT: Well, are they public?

24 MR. SMITH: Your Honor, we believe that we've
25 given them everything that we have. The Legacy

1 Trust documents, we don't have the valuation. And
2 if I may respond briefly to that. He contends that
3 the -- he can still get documents under FOIA even
4 though they are at issue in --

5 THE COURT: 4900.

6 MR. SMITH: -- civil discovery in 4900.

7 The late Judge Marc Westbrook in the case
8 Luminek V Myers, and I attached a copy of his
9 opinion to one of our filings in this case, said
10 that it's well-settled case law that the FOIA is
11 not intended as a substitute for discovery and was
12 not enacted to provide procedures for obtaining
13 information during litigation or to benefit private
14 litigants. Our Supreme Court has said with regard
15 to criminal discovery, not civil discovery, but we
16 believe the same rationale would apply, has said
17 that FOIA is not to be used to bypass limits on
18 discovery in criminal proceedings. It cited a US
19 Supreme Court case and quoted from it in saying, in
20 construing the federal FOIA, the United States
21 Supreme Court has held that the FOIA does not
22 supplement or displace the applicable rules of
23 discovery.

24 So we believe that under case law that they
25 cannot use FOIA to bypass civil discovery. And so

1 she cannot recover here.

2 Under -- he said that we don't have an
3 exemption, has not pointed to an exemption under
4 the Freedom of Information Act but we have. It's
5 under 30-4-40 which states that a public body may
6 but is not required to exempt from disclosure the
7 following information. Item four. Matters
8 specifically exempted from disclosure by statute or
9 law. A rule of civil procedure is law. It
10 controls access to civil discovery documents by
11 parties and therefore is controlling on Ms. Pope
12 here. And she cannot make an end run around that
13 rule through the Freedom of Information Act.

14 He contends that we can be made to produce
15 third-party documents such as this appraisal that
16 he seeks because the Freedom of Information Act
17 refers to documents used.

18 The Freedom of Information Act also refers to
19 custodians of records. Section 30-4-30(B) permits
20 the custodian of public records to charge
21 reasonable rates. A record in the hands of a third
22 party is not one in the hands of a custodian of
23 public records for the purposes of charging. And
24 so therefore the legislature did not intend to
25 reach third-party documents.

1 Also there's a time limit, as Your Honor
2 knows, under FOIA for responding within 15 days.
3 And that would be inconsistent with a duty to get
4 documents from third parties because the third
5 party might not cooperate, might not be able to get
6 it so couldn't respond within the 15 days required.

7 Also they use the word 'use' here as
8 something that would suggest momentary use of a
9 document. I don't know what our office policy is
10 or other government agencies' policies are. It may
11 vary from office to office. I think some private
12 businesses require, however, that employees,
13 prospective employees produce their original social
14 security card for identification.

15 Under their theory if an employee coming on
16 board brought their social security card into the
17 office to say this shows I am who I am and that I'm
18 a citizen and I have social security or, and here
19 is my -- or here is my passport this proves who I
20 am and the agency official took it in hand and
21 wrote down the information, maybe made a copy of it
22 and gave it back, they would have used it. So then
23 they could make a Freedom of Information Act
24 request for the social security card, the passport,
25 or whatever else, and get it because it was used.

1 That's a nonsensical interpretation of FOIA and
2 they haven't provided any case law support for it.

3 It has to mean the documents that are in the
4 possession and being used by the agency, that's in
5 its custody, that's accessible to the custodian of
6 record. And that's just simply not the case here.

7 THE COURT: You haven't answered my
8 question. Are these public records, public
9 documents?

10 MR. SMITH: We provided the Legacy Trust
11 documents, the copies that they -- I think there
12 were drafts. We provided those. And so we agreed
13 that those were copies and we turned them over. We
14 did not have the appraisal so therefore we don't --

15 THE COURT: You still haven't answered my
16 question.

17 MR. SMITH: It's not a public record then if
18 we don't have it, Your Honor. So that's the
19 answer. It's not a public document. We don't have
20 it.

21 THE COURT: I'll take it under advisement.
22 I'll make a ruling on it. My concern is that 4900
23 is going to get on an efficient track for
24 disposition along with the case here in Aiken,
25 whether or not we consolidate them or not, that's

1 for June -- well, had it set. Now we got some
2 bumps in the road. I'm just going to go ahead and
3 set it. If you come you come, if you don't you
4 don't. It's too hard to get too many peoples'
5 schedules lined up.

6 But once we consider that, discovery is going
7 forward. All of these documents are going to be
8 discoverable I would think. And --

9 MR. SMITH: That's why, Your Honor, we think
10 that the FOIA case should be dismissed and that any
11 documents that are retrievable during discovery be,
12 through discovery be sought in that manner. In
13 fact, in these cases some of the very documents at
14 issue are at issue in the discovery process.

15 THE COURT: I would think most all of them
16 are. But anyway, they made a FOIA request so I've
17 got to rule whether or not it should be dismissed
18 or whether or not you should produce them, whether
19 or not they're public, whether or not they're
20 entitled to attorney's fees for their FOIA
21 requests. And I will do that.

22 Anything else dealing with the FOIA that we
23 need to deal with here today?

24 MR. SMITH: That's in Case 350. We do have
25 Case 4900 which has got similar issues.

1 THE COURT: I'm just talking about the FOIA
2 case, 350. Anything else anybody wants to address
3 in respect to 350?

4 MR. BLACK: Your Honor, if I may.

5 THE COURT: Mr. Black.

6 MR. BLACK: You asked if it's a public
7 document. The only thing I would ask the Court to
8 look at is that there is that federal court order
9 that looked at that document, the appraisal that's
10 subject here that Ms. Pope has seen that was
11 protected by confidentiality. It is not a public
12 document. The AG doesn't have it. Mr. Bauknight
13 has it. And that's why they're trying to get to it
14 so they can parade it around. But she has seen the
15 document. This is all about them trying to get
16 attorney's fees, Your Honor.

17 MR. SMITH: That's correct, Your Honor.

18 We've cited that case in our memoranda. It's
19 Brown V Pope, federal district judge, Acting
20 District Judge Wehrman made that ruling and we
21 provided a copy of that order in our attachments, I
22 think, to our initial brief in that, in -- filed on
23 May 2nd.

24 THE COURT: Which I got right here. Thank
25 you.

1 Hold on one second.

2 MR. SILVERNAIL: Real quickly, Your Honor.

3 That order was in a case to which neither the
4 Attorney General nor the Legacy Trust was a party
5 and so that review was in a different -- that was
6 strictly discovery.

7 The question here will relate to what is and
8 is not a public body, what is and is not a public
9 document by virtue of its possession or use by a
10 public body.

11 THE COURT: Thank you. Yes, sir.

12 MR. PAAVOLA: Yes, Your Honor, were you
13 willing to hear our motion for summary -- dismissal
14 --

15 THE COURT: I just said, does anybody else
16 have anything else in 350.

17 MR. PAAVOLA: Yes, I do, Your Honor.

18 David Paavola on behalf of the James Brown
19 Legacy Trust. And we are here today asking the
20 Court to grant our motion to dismiss the FOIA
21 action against the Trust.

22 As the Court's well aware, the Freedom of
23 Information Act is, was created to help keep
24 citizens informed of activities of public officials
25 and making public duties open to the citizens. It

1 Here the Legacy Trust was not a traditional
2 government entity. It was not created to hold
3 public funds or expend public funds.

4 South Carolina Supreme Court -- really that's
5 the crux of the Plaintiff's argument is that
6 somehow the trust used public funds to be created.
7 The South Carolina Supreme Court has addressed this
8 issue when a private entity can be held to the FOIA
9 in at least two cases. The first case is Weston V
10 Carolina Research and Development Foundation. It's
11 at 303 SC 398. It's a 1991 case.

12 And here the foundation was a charitable
13 nonprofit corporation operating exclusively for the
14 benefit of the University of South Carolina. And
15 the Court was asked to decide if a private entity
16 such as this could be held subject to FOIA. And
17 the Court held that under FOIA it properly could be
18 held subject to FOIA if a block of public funds is
19 diverted amass that organization or to relay the
20 organization to undertake the management and
21 expenditure of public funds.

22 The issue in that case were four transactions
23 that the Court said, yes, this makes this a private
24 entity subject to FOIA. That was, it received
25 money from the sale of public real estate; accepted

1 federal grant money that was earmarked for the
2 university when the university wanted to divert it
3 through the foundation; the foundation also
4 accepted conveyance of real estate from the City of
5 Columbia, and cash grants from the City of
6 Columbia, Richland County; and it also was used to
7 administer research and development grants of the
8 university.

9 Nothing even close or approximately these
10 type of transactions that we have in here. There's
11 no money that's, public money that's changed hands
12 and gone into the Legacy Trust. This is the sole
13 case that the Plaintiff relies on to support its
14 position that the Legacy Trust should be subjected
15 to FOIA.

16 After -- more recently after the most recent
17 round of briefing in this case in 2013, the Supreme
18 Court came out with a second case addressing this
19 very issue. This is a valid case, 404 South
20 Carolina 4303. In that case there was a -- the
21 defendant was a South Carolina Association of
22 School Administrators, a non-private corporation
23 engaged in political advocacy. And it lodged a
24 first amendment challenge to a FOIA being applied
25 to a group that does political advocacy

1 because Mrs. Pope received the fee agreement from
2 another source by order in another court more than
3 two years after this case was filed. And, again, I
4 would submit that the recent case of Sloan versus
5 the DOR is really on point with this.

6 THE COURT: You got an extra copy of that?

7 MR. SILVERNAIL: I certainly do, Your Honor.

8 (Document handed to the Court.)

9 MR. SILVERNAIL: Let me make sure I'm not
10 giving you one I've written on, though.

11 THE COURT: Thank you. Okay.

12 MR. SILVERNAIL: Now, in this case the
13 Department of Revenue responded to Mr. Sloan within
14 the 15 days with a response that said: Your
15 request is currently being researched and
16 reviewed. As soon as the information has been
17 compiled you will be contacted again. And it goes
18 on from there.

19 The Supreme Court labeled this evasive and
20 noted, I believe, in a footnote in this case, that
21 they understand the concern about a short 15-day
22 deadline for a response. But they don't get to
23 write to statutes. That's what the statute says
24 and this was not an adequate response.

25 And this was the case I mentioned a little

1 earlier, Your Honor, wherein the Department of
2 Revenue did eventually, not that eventually but
3 three weeks after the filing of the suit produce
4 the responsive documents. It's hard to tell but I
5 would assume from the wording of the case that they
6 produced all the documents and Mr. Sloan was
7 satisfied.

8 Nonetheless, this proceeded to the Supreme
9 Court over whether Mr. Sloan was entitled to a
10 declaratory judgment and his attorney's fees. And
11 the Supreme Court found that he was entitled to
12 both.

13 Now the fact that after trying for more than
14 two years to get this document from the Attorney
15 General through what is identified in the statute
16 as a means for speedy and efficient release of
17 public documents that Mrs. Pope's case somehow had
18 to die and all of her efforts to get there that had
19 not borne fruit in this case at that time are not
20 compensable, not actionable, nothing, just we got
21 there and, poof, the file is gone.

22 I don't think that's how it works and this
23 case shows very clearly that it isn't. You know,
24 we tried requesting the document. There's a lot of
25 concern from the Attorney General about bringing a

1 lawsuit and incurring attorney's fees. We didn't
2 have to bring this lawsuit if the Attorney General
3 had complied with the FOIA in the initial response.

4 This confusion about discovery, you know,
5 when we look at discovery in a lawsuit especially
6 in something like 4900 where the Plaintiffs number
7 about 17, there may be differing claims to
8 relevancy, privilege, all these other things but in
9 particular relevancy that doesn't come in under the
10 FOIA. And Mrs. Pope asked for this document. If
11 the Attorney General had it, it's a public
12 document. That was the finding of the federal
13 court and that's what the document itself says.

14 The fee agreement is a little collection of
15 documents we now know, but it incorporates what
16 they call the Attorney General's standard
17 litigation retention agreement among the terms of
18 which is, this is a public document.

19 And so that document was public. The
20 Attorney General doesn't get to stop here and claim
21 that discovery questions preclude it from releasing
22 the document. If it fit into an exception it
23 should have been identified as such and/or
24 produced. Instead we got the response that you
25 don't have FOIA rights like everybody else because

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SC Court of Appeals

CERTIFICATE OF COUNSEL

The undersigned counsel for Appellant hereby certifies that the foregoing Second Supplement to Record on Appeal contains matter designated by one or more parties and no other matter.

s/Adam T. Silvernail

Adam T. Silvernail SCBAR#80219

October 3, 2022

Counsel for Appellant