

RECEIVED

Aug 23 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

The Honorable Doyet A. Early, III, Circuit Judge

Appellate Case No.: 2021-000518

Adele J. Pope.....Appellant,

v.

Alan Wilson, in his capacity as Attorney General of South Carolina,.....Respondent.

RETURN TO MOTION TO CERTIFY APPEAL TO SUPREME COURT

SUMMARY OF RESPONSE TO MOTION

Appellant respectfully submits this return to the motion of the Attorney General of South Carolina¹ to certify this case for review by the Supreme Court pursuant to Rule 204(b) SCACR. For the reasons set forth below, Appellant consents to, and joins in, the Attorney General’s motion to certify.²

¹ The Attorney General of South Carolina is referred to herein as the “Attorney General” or the “AG.”

² Appellant denies all allegations in the AG’s motion for certification not explained or ratified herein. Appellant sets out herein facts within the record and undisputed public facts confirming the significant public interest in this case which justifies certification.

SPECIFIC RESPONSE TO MOTION TO CERTIFY

This 12-year-old case, brought in August 2011 under the South Carolina Freedom of Information Act, S.C. Code Ann. §30-4-10, et seq. (“FOIA”), warrants review by the South Carolina Supreme Court under Rule 204(b) both because it involves a matter of significant public interest and because it raises a novel issue of law.

The documents sought in this case relate to the purported \$4.7 million dollar at-death valuation of the intellectual property of celebrated entertainer James Brown, who died on Christmas Day 2006. Indeed, in its 2013 decision in *Wilson v. Dallas*, 403 S.C. 411, 743 S.E.2d 746, the Supreme Court noted:

James Brown ("Brown"), a singer and entertainer known as "The Hardest-Working Man in Show Business" and "The Godfather of Soul," died in Atlanta, Georgia on December 25, 2006. Brown left an estate widely estimated to be worth anywhere from \$5 million to over \$100 million that is at the heart of this dispute among numerous parties.

Both before and after this Court’s *Wilson* decision, the value of Brown’s music empire and the actions of the AG in connection with Brown’s Estate and “I Feel Good” charity have been matters of significant public interest.

Further this appeal presents a novel issue of law, in that the circuit court dismissed this FOIA action after nearly a decade of litigation, based on the statement of an AG staff member that the office of the Attorney General did not receive Appellant’s FOIA request in June 2011. The circuit court dismissed the case, despite undisputed evidence that the FOIA request was delivered to the AG’s private counsel and was attached to the Complaint served on the AG in August 2011. The AG has never responded to the FOIA request at issue herein.

Appellant briefly addresses both the public interest in this case and the novel issues of law below. This matter is fully briefed, and Appellant incorporates her briefs and the Record on Appeal herein.

a. This case relates to matters of significant public interest.

More than 24 years ago entertainer James Brown, aided by financier David Pullman, took out a \$26 million “Pullman Bond” loan secured only by royalties to about 800 of Brown’s copyrights. Brown and Pullman valued Brown’s worldwide music empire at \$100 million. That year James Brown also made a voice tape of his charitable intentions and signed the first version of his “I Feel Good” education charity.³ The final version of Brown’s “I Feel Good” charity was signed the following year.

Since Brown’s 2006 death, the value of Brown’s assets and “I Feel Good” charity, along with size and payoff of the Pullman Bond loan, have been issues of significant public interest.⁴ Similar public interest has focused on The Ray Charles Foundation and the estates Michael Jackson, Prince and others who earned high status in the music world, the philanthropic world, or both.⁵

³ See: *Variety Magazine*, “Brown’s New Bonds,” Sandler, Adam, 5/3/1999 This article discusses the \$26 Million “Pullman Bond” loan Brown took out in 1999 in collaboration with financier David Pullman, and that Brown was among the few songwriters at the time who were able to secure a loan of this size backed solely by the income stream from about 800 of Brown’s now 1,100+ copyrighted songs.

⁴ *Forbes*, “Brown Leaves unfinished Bond Suit Behind,” Olson, Parmy, 12/26/06, re: status at Brown’s death of Brown’s suit against Pullman over Pullman’s halting of a 2006 refinancing of almost 8% Pullman Bond with the Royal Bank of Scotland (RBS). *CMU*, “James Brown Estate and Primary Wave sued by Bowie Bonds creator,” 11/17/22, Cooke, Chris. re: Pullman’s \$11 million claim against Brown’s estate filed after the \$90 million sale of Brown’s music empire and home estate in 2021. *James Brown and His Money Man*, Daviss, Fred, 2021.

⁵ See, for example, *The Hollywood Reporter*, 1/30/13, “Ray Charles’ Children Win Lawsuit

Some citizens also believed that when the Pullman Bond debt was satisfied in 2011 James Brown's "I Feel Good" charity would be worth at least \$95 million. Under the IRS's "Five Percent Rule" this would mean \$4 million or so in "I Feel Good" scholarships would be distributed each year to needy students. Some citizens and family members believed James Brown deserved respect for the creation of this unprecedented charitable legacy.

The settlement brokered by then-AG Henry D. McMaster in 2008, which this Court found to be a "dismemberment" of Brown's noble estate plan, proposed to give about \$50 million of James Brown's "I Feel Good" charity to a claimed spouse and some of Brown's family members. *See Wilson, supra.*

On August 23, 2010 the Attorney General, speaking of the trustee he had chosen to manage James Brown's fortune through his "Legacy Trust," told the Supreme Court:

. . . Bauknight has pursued the appropriate fiduciary route and engaged a nationally-renowned and respected appraisal firm to value the Estate and Trust. Although the expected final completion for that appraisal is a couple of weeks away, a preliminary report indicates that the date-of-death value of the Estate and Trust will not exceed Twelve Million (\$12,000,000.00) Dollars. In light of that actual appraised value, Appellants' claim for approximately Five Million (\$5,000,000.00) Dollars for their commissions and fees total perhaps half or more of the date-of-death value of the Estate and Trust, which further refutes any notion that their counsel are acting for the public good. [R. 499]

The AG adopted that valuation and asked that the Supreme Court adopt it as well. In defending the settlement and the valuation, the AG took the position that it was good for the AG to give \$3 million to the claimed spouse and family members, leaving less than \$1

over song Rights;" *Forbes* "Michael Jackson's Estate to IRS: Beat It, 8/21/13, Phillips, Kelly; Law360, "MJ's Estate Accuses gov't IP Expert of Perjury in Tax Trial, 4/14/17, Hoover, Jimmy.

million for charity. The rationale, said the Attorney General, was that the AG's charity was getting half of the U.S. Copyright Act termination rights of the settling parties, which the AG and others alleged to be worth tens of millions of dollars.⁶

While concealing the documents which purportedly support his \$4.7 million claim (the "Valuation Documents"), the AG and Legacy Trust began to use the Valuation Documents to falsely accuse two S.C. citizens of a felony in a tort suit the AG had filed against them. [R. 818-9] The AG and his Legacy Trust said the two had overstated the value of Brown's assets to the IRS by \$79 million to get a \$5 million commission from Brown's \$5 million estate, a federal felony. *See* 18 U.S.C.A. §1001.

The two citizens immediately sought the Valuation Documents from the AG and Legacy Trust in discovery in the tort suit, but the AG, the Legacy Trust and their private Special Counsel in the tort suit refused to release any of the requested documents.

In 2011 the public had a right to know why the AG claimed that the "I Feel Good" Trust was not among a small handful of S.C.'s over-\$50 million individually-created foundations, and instead claimed it was among more than 1,000 small charities holding only a fraction of that amount.⁷

⁶In 2009 Brown's music empire was earning \$5 million a year. In 2017 the AG's expert Roger Miller valued the termination rights of all of James Brown's heirs at only \$8.8 million. [R. 333; 341] In 2020 the claimed spouse who the AG said held half of the termination rights was determined not to be Brown's spouse and to have no termination rights. *In re Estate of Brown*, 430 S.C. 474, 846 S.E.2d 342 (2020). In 2021 the music empire sold for \$90 million.

⁷ Also *see* Cause IQ statistics and the IRS's public 990-PFs for The James Brown "I Feel Good" Trust; Large S.C. foundations whose value is published annually by the IRS include The Graham Foundation and The Johnson Foundation. The smaller S.C. private foundations include The Joanna Foundation, The Bill and Mary Carter Foundation, The Pope-Brown Foundation and The Grant-McDonald Foundation. Public IRS PDF forms

In 2011 attorneys speaking for the AG and Legacy Trust, in oral argument in *Wilson*, stated emphatically that nobody had ever made an offer for Brown's assets and that Brown's Estate and 2000 Trust had no corpus to speak of. The AG used the \$4.7 million valuation to join in the claim that:

As of the date of James Brown's death, the intellectual property assets of his Estate were worth roughly \$4.7 million. As noted, this figure accounted for the huge debt burden. Once the debt is repaid, the royalty stream from James Brown's intellectual property will begin to fund the education of underprivileged children and young adults all over South Carolina and Georgia. [Motion to Supplement Record or for Judicial Notice, dtd. May 6, 2011, *Wilson v. Dallas*]

By 2021 no James Brown "I Feel Good" scholarships had been paid, even though the "huge" Pullman Bond debt had been paid in full a decade earlier. That year the AG's chosen trustee, after a \$90 million sale of James Brown's music empire, claimed to *The New York Times* that the \$85 million "increase" in Brown's worldwide music empire was the result his management – not six decades of effort by the hardest working man in show business.

The public has a right to know whether this credit and respect should, instead, be given to James Brown, and that public interest justifies transfer of this case to the Supreme Court.

Twelve (12) years ago, after almost a year of discovery efforts to obtain the Valuation Documents and other public documents was unsuccessful, Appellant made

through 2019 show that The James Brown "I Feel Good" Foundation's assets are zero. https://www.causeiq.com/directory/south-carolina-state/#search_section (Accessed August 22, 2023)

FOIA requests for the Valuation Documents, certain Legacy Trust documents, and the AG's public Special Counsel Agreement in the tort suit. [R. 52]

The AG did not respond to the FOIA request for the Valuation Documents and Legacy Trust documents. [R. 47] The Legacy Trust, through counsel, denied a similar FOIA request and threatened Appellant with sanctions or a lawsuit if she continued to exercise FOIA rights. [R. 75-7] The AG's Special Counsel in the tort suit did not respond.

The two citizens continued their discovery requests for the AG's Special Counsel Agreement, the Legacy Trust documents, and the Valuation Documents in the tort suit, but they have not been produced as of August 2023.

While the AG refused FOIA compliance related to his change of value of the Brown's assets from \$85 million to \$5 million, and the AG used the \$5 million to falsely accuse two citizens of a federal felony, there was significant public interest in James Brown's assets and the career which produced them. *See* Smith, R.J., *The One: The Life and Music of James Brown, Chapter 19, "Follow the Money."* (2012); McBride, James, *Kill 'em and Leave: Searching for James Brown and the American Soul* (2016); Daviss, Fred, *James Brown and his Money Man* (2021); SC Bar Convention, Prof. Lee-Ford Tritt, "The Curious Case of James Brown," (2021) SC Bar, CLE (2021); Finney, Prof. Nikky, "I Feel Good", from *Migration and Requiem for Mother Emmanuel* (2016)(*See also* Finney, Nikky, "I Feel Good, *The Atlantic*, Sept. 2020; Finney, Nikky, "I Feel Good, *The Best American Poetry 2021*, Ed. Tracy K. Smith; CNN, Thomas Lake "The Circus Singer and the Godfather of Soul" (2021).

In 2021, after reporting that James Brown’s music empire had sold for \$90 million, *The New York Times* and other media expressed interest in the continued claim of the AG’s trustee that it was he – and not James Brown – who had increased the value of the Godfather of Soul’s music empire nearly twenty-fold after the AG took control of Brown’s assets in 2009. *See*: Sisario and Knopper, “After Fifteen Years of Infighting, James Brown’s Estate is Sold,” *New York Times*, December 13, 2021.

b. This case presents novel issues of law.

In 2021 the Honorable Clifton Newman (“Judge Newman”) ordered that the public AG’s Special Counsel Agreement be released to Appellant by the AG’s Special Counsel in tort suit discovery and by the AG under FOIA. The orders came more than nine years after the FOIA request was properly made.

The AG’s Special Counsel Agreement makes clear that every document held, gathered, or used in the tort suit is property of the State of S.C. and subject to release under FOIA both by the AG and by Special Counsel. [R. 44-5] Special Counsel not only had a duty to comply with FOIA, but to notify the AG when a FOIA request was received. [*Id.*]

In 2021, despite the clear record of multiple discovery and FOIA requests to the AG by Appellant and other citizens for the Valuation Documents and the Legacy Trust documents, the AG moved to strike citizen affidavits and claimed – based solely on a specious October 2011 affidavit – that the circuit court had no jurisdiction to proceed because the AG had not received the 2011 FOIA request in the proper form.

The circuit court, at the request of the AG, found that it lacked jurisdiction to consider this 2011 FOIA case, requiring this second appeal. [R. 36-40]

This FOIA case was filed in August 2011, and in September of that year it was ready to be decided by summary judgment in Newberry County. [R. 112-20] Affidavits of an editor, a reporter, a state representative and other citizens confirmed both the public importance of the claimed \$4.7 million valuation and other James Brown documents and public concerns about the AG's failure to comply with James Brown FOIA requests. [R. 537-44; 554-57]

In October 2011 the AG began claiming that the AG had not received the FOIA request for the Legacy Trust and Valuation Documents in a form compliant with FOIA. [R. 166-9] The AG never denied that the AG's Office had received the FOIA requests which are the subject of this appeal.

The AG staffer's affidavit said only that *she* had not received the document "*from*" Appellant, and did not deny that the AG's office had the FOIA request shortly after it was sent by Appellant to both the AG and the AG's Special Counsel.

The AG and Legacy Trust moved two FOIA cases to Richland County, consolidating one with the tort suit, and attempting for six years to consolidate this FOIA suit with the tort suit. In addition, the AG and Legacy Trust obtained more than four years of *de facto* and court-ordered stays of this FOIA case, and delayed FOIA compliance for three additional years during the first appeal. [R. 1-7; 128-59]

During the second appeal, the AG continued to make motions to strike documents from the public record and stay the FOIA case while the motions were being considered. [See Motions by AG, dated September 24, 2021; March 2, 2022; and June 24, 2022]

The \$4.7 million valuation, Valuation Documents, and Legacy Trust documents remain concealed in this FOIA case and in the tort suit in August 2023, even though they should have been produced by discovery in 2010 and under FOIA in 2011.

In August 2023 private Special Counsel in the tort suit – still acting for the Legacy Trust and its trustee “on behalf of” the AG -- despite the AG’s clear April 2013 direction that it has no authority to act for the State/AG – sought to have a 2023 appeal transferred to the Supreme Court. [*See* R. 736 for AG’s April 2013 letter to private counsel]

A week later, the Attorney General sought certification, basing its request on a 2023 order in the tort suit, and not on the Supreme Court’s 2013 admonition to the Attorney General that this FOIA suit be considered by the circuit court “in the first instance.” [*See Wilson*, n. 27]

The Attorney General’s request for certification to the Supreme Court comes a decade late, is made based on an incomplete and inaccurate rendering of the record, but should be granted for the reasons stated herein..

CONCLUSION

The Attorney General’s 2010 decision to adopt the position of the trustee of the AG’s Legacy Trust that the claimed value of James Brown’s “I Feel Good” charity should be reduced by \$79 million was of significant public interest. The AG’s failure to comply with FOIA requests for the \$4.7 million valuation and related Valuation Documents and Legacy Trust documents for 12 years continues to deprive James Brown of the public recognition and respect to be accorded to someone who created what some citizens believe to be a private foundation larger than The Ray Charles Foundation, the largest S.C. private

foundation created solely to provide scholarships for needy students, and one of S.C.'s largest private foundations.

The AG's claim in 2011 that Brown's "I Feel Good" charity was worth only \$4 million when he died, and that half of Brown's music empire plus \$2 million should go disinherited relatives chosen by the AG, including a relative with a right to buy the music empire, makes the failure of the AG's release of the \$4.7 million valuation and related Valuation Documents more stunning.

In 2013 the Supreme Court directed that the lower court consider these FOIA matters in the first instance. That did not happen. Instead the AG continue FOIA refusal, making the two 2011 FOIA cases what is believed to be the oldest unresolved state FOIA suits in the nation.

For every reason stated herein, the motion for certification should be granted and this FOIA matter, which should have been resolved in 2011, concluded.

Respectfully submitted,

s/Adam T. Silvernail
Adam T. Silvernail
Law Office of Adam T. Silvernail, LLC
Post Office Box 7995
Columbia, South Carolina 29202-7995
Telephone: (803) 779-1770
adam@silvernaillawfirm.com
S.C. Bar No. 80219

Attorney for Appellant

August 23, 2023

RECEIVED

Aug 23 2023

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.

PROOF OF SERVICE

I certify that I have served the Appellant’s Return to Respondent’s Motion to Certify by emailing a copy of same on August 23, 2023, addressed to his attorney of record as follows:

J. Emory Smith, Jr., Esquire
esmith@scag.gov
Counsel for Respondent Attorney General

s/Adam T. Silvernail
Adam T. Silvernail