

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM NEWBERRY COUNTY  
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

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Case No. 2012-CP-36-688

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Susan D. Summer, . . . . . Respondent,

**RECEIVED**

FEB 12 2015

**S.C. Supreme Court**

v.

Alan Wilson, in his capacity as Attorney General of South Carolina. . . . Appellant,  
and Applicant for Intervention Russell L. Bauknight, as Person Representative of the  
Estate of James Brown and Trustee of the James Brown 2000 Irrevocable  
Trust. . . . . Respondent.

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NOTICE OF APPEAL

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Alan Wilson, in his capacity as Attorney General of South Carolina, appeals from the attached Order of the Honorable Eugene C. Griffith, Jr., dated January 16, 2015. Appellant Wilson received written notice by email of the entry of the Order on that day, but he does not appear to have received a copy of it by United States mail. Another appeal is pending by the Attorney General as to earlier orders in the Circuit Court in this case, and it has been certified to this Court (Order, December 17, 2014, Appellate Case No. 2014-002222).

ALAN WILSON  
Attorney General

[Signature block continues next page]

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BY:   
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February 12, 2015

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STATE OF SOUTH CAROLINA  
COUNTY OF NEWBERRY  
IN THE COURT OF COMMON PLEAS  
Susan D. Summer

JUDGMENT IN A CIVIL CASE  
CASE NO. 2012 CP 36-00688  
Alan Wilson, Attorney General of SC

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Plaintiff	Attorney for : <input checked="" type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant
	or <input type="checkbox"/> Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  Other
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j), SCRPC;  Bankruptcy;  Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  Affirmed;  Reversed;  Remanded;  Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:  See attached order (formal order to follow)  Statement of Judgment by the Court:

ORDER INFORMATION

This order  ends  does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

 Circuit Court Judge	2154 Judge Code	01/16/2015 Date
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FILED  
NEWBERRY COUNTY  
2015 JAN 16 PM 2

**For Clerk of Court Office Use Only**

This judgment was entered on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ and a copy mailed first class or placed in the appropriate attorney's box on this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ to attorneys of record or to parties (when appearing pro se) as follows:

Thomas H. Pope, III  
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**ATTORNEY(S) FOR THE PLAINTIFF(S)**

J. Emory Smith, Jr.  
P.O. Box 11549  
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**ATTORNEY(S) FOR THE DEFENDANT(S)**  
Jackie Bowers  
**CLERK OF COURT**

**Court Reporter:**

STATE OF SOUTH CAROLINA  
In the Supreme Court

APPEAL FROM NEWBERRY COUNTY  
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

Appellate Case No. 2014-002222

FILED  
NEWBERRY COUNTY  
2015 JAN 16 PM 2:08  
JACQUELINE S. HODGES  
CLERK OF COURT

Applicant for Intervention Russell L. Bauknight, as Personal Representative of the Estate of James Brown and Trustee of the James Brown 2000 Irrevocable Trust... Appellant.

In Re: Susan D. Summer.....Plaintiff,

of whom Susan D. Summer is.....Respondent,

v.

Alan Wilson, in his capacity as Attorney General for South Carolina.....Defendant.

AND

Susan D. Summer.....Respondent

v.

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

and Applicant for Intervention Russell L. Bauknight, as Personal Representative of the Estate of James Brown and Trustee of the James Brown 2000 Irrevocable Trust. Cross-Appellant.

**ORDER DIRECTING THE RELEASE OF DOCUMENTS UNDER FOIA**

This matter, now the subject of appeal<sup>1</sup>, came before the Court for a hearing on December 4, 2014. Present at the hearing were counsel for plaintiff and defendant, as well as counsel for Russell Bauknight, as Personal Representative of the Estate of James Brown and

<sup>1</sup> The proposed intervenor filed a Notice of Appeal dated 9-29-2014, and the Attorney general filed his Notice of Appeal dated 10-16-2014 in the SC Court of Appeals. On 12/17/2014, the Supreme Court issued an Order granting plaintiff's motion to certify, and the Supreme Court, which now has jurisdiction over the appeals used the above caption. For this reason, both captions are utilized in this Order.

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SC-14-002222

Trustee of the James Brown 2000 Irrevocable Trust ("Bauknight"). The Court was presented with three issues to be resolved.

First, on November 21, 2014, the plaintiff filed in this Court a petition to lift any stay pursuant to Rules 205 and 241, SCACR. Secondly, there were two additional issues to be resolved pursuant to this Court's Order of September 19, 2014. In that Order, this Court compelled Defendant Attorney General to produce documents responsive to plaintiff's FOIA requests. The Order further directed that the defendant provide a list of any documents that it considered to be "exempt" from FOIA on a privilege log and to produce said alleged exempt documents under seal. Finally, the Order provided that this Court would consider the issue of attorneys' fees pursuant to SC Code §30-4-100.

For the reasons set forth herein, the Court grants the motion to lift the stay, if any exists, as to both proposed intervenor's and the Attorney General's Notices of Appeal; it orders all documents on the Attorney General's privilege logs to be produced to plaintiff; and it rules that plaintiff is the prevailing party and, thus, entitled to an award under §30-4-100 for fees and costs. The amount of same will be deferred until the conclusion of the appeals.

#### LIFTING OF STAY

The issue of lifting the stay arises by virtue of the fact that on September 29, 2014, Bauknight filed a Notice of Appeal which he asserts stays the Attorney General's compliance under FOIA. In addition, on October 16, 2014, Defendant Attorney General filed his Notice of Appeal. After the first Notice of Appeal was filed, the Court of Appeals issued an Order on October 13, 2014, remanding this case for this Court to proceed with the hearing that it had

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originally scheduled for October 30 to consider plaintiff's list of exempt documents and to consider the issue of attorneys' fees.

This Court believes that it may not be legally necessary to do so, but because the proposed intervenor asserted at the December 4, 2014 hearing that he took the position that the appeals "stayed everything," this Court will grant the motion to lift the stay. It may be redundant to do so, but plaintiff's counsel is correct that motions to lift stays originate, pursuant to Rule 241, SCACR, with the lower court; thus, there is authority for this motion to be granted. Any stay by virtue of the two Notices of Appeal should be lifted to proceed with FOIA compliance.

#### "EXEMPT" DOCUMENTS

This Court has reviewed the documents presented under seal in Attachment G and Attachment I. The Court did not find it necessary to consider the affidavits of Susan D. Summer in its findings and its order herein. The Attorney General's privilege logs show that all of the documents produced under seal in both attachments are listed as being emails among attorneys representing diverse parties in the James Brown litigation. The basis asserted by Attorney General for his position that the documents on the two privilege logs are exempt from FOIA is that they are "work product." It was argued at the hearing by the Attorney General that because the emails on both privilege logs are among attorneys involved in the James Brown cases, they are protected because of the "common defense" doctrine. The Attorney General relies on Tobacoville USA, Inc. v. McMaster, 387 S.C. 287, 692 S.E.2d 526 (2010) to support his argument on the common interest doctrine. The Supreme Court recognized the doctrine only in that case's "narrow factual scenario". The facts of that case, where the

attorneys general of several states had an agreement to work together in a joint effort, are a far cry from the instant case where lawyers for antagonistic parties are communicating about public issues with the Attorney General. This Court believes that the common defense doctrine as applied to work product is only available when a plaintiff is suing multiple defendants, and the defendants' attorneys are communicating about how to defeat the plaintiff's claims – i.e., they have a common purpose. In the instant case the emails are among (a) lawyers who are supposed to protect the estate plan (Russell Bauknight as Personal Representative and Trustee); (b) attorneys who sought to orchestrate a settlement (the Attorney General); (c) attorneys for those challenging the will (Louis Levenson, et al.); (d) attorneys for a claimed spouse (Robert Rosen and Alan Medlin); and, (e) attorneys for one of the heirs who claims a right to purchase the assets Brown gave to his charitable foundation (Matt Bodman). This Court finds that there is no “common” defense privilege available in this instance.

The applicable law, S.C. Code §30-4-40(a)(7), is that portion of FOIA which defines exempt documents to include:

“(7) Correspondence or work products of legal counsel for a public body and any other material that would violate attorney-client relationships.”

For the reasons set forth herein, none of these documents qualify as “work product” or as “any other material that would violate attorney-client relationships<sup>2</sup>,” therefore, they should be produced as public, non-exempt documents.

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<sup>2</sup>To the extent the Attorney General contends that the emails on the privilege logs are protected by the attorney-client privilege, this privilege is a rule of evidence applicable to confidential communications within the representation of a client. The sharing of information with adverse parties, as is the case here, abrogates the claim of confidentiality and privilege.

**(a) Privilege Log Designated As Attachment G**

This privilege log is identified by the Attorney General as emails relating to the McMaster-Wingate Retention Agreement. It consists of a series of emails in the time period May 14, 2010 through May 17, 2010 (plus two draft letters of the Attorney General to Russell Bauknight). The emails are by and among persons who are attorneys for various parties in the James Brown litigation.<sup>3</sup>

The McMaster-Wingate Retention Agreement was sought by Summer in her FOIA requests (and in this suit). The contract on its face confirms that it is a public document and subject to FOIA. The Office of the Attorney General released it only after a federal judge summarily declared it to be a public document in a one paragraph order, acknowledging that it was public because of the Attorney General's involvement. The Wingate Agreement authorized and approved a suit to be brought by private counsel for the Attorney General representing the Attorney General and the Legacy Trust created by the Attorney General. This suit was commenced on May 19, 2010.

Plaintiff asserts that the emails in Attachment G, dated immediately before the suit was commenced, are public.

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- <sup>3</sup>
- (a) David Black and Freddie Kingsmore - attorneys for Russell Bauknight, the trustee and the PR of the James Brown Estate, who has a duty to uphold the estate plan and enforce Brown's "I Feel Good" Trust;
  - (b) Alan Medlin, Robert Rosen and Chris Paton - attorneys for a woman named Tommie Rae Hynie who claims to be James Brown's wife and therefore entitled to an outright share of the estate;
  - (c) Rett Kendall and Kenneth Wingate - attorneys with the Wingate firm who represent the Attorney General, the Legacy Trust, Russell Bauknight and others in a law suit against the James Brown Estate's former trustees;
  - (d) Louis Levenson and Lori Christman - attorneys for children who are contesting the James Brown will;
  - (e) Matt Bodman and David Bell - attorneys for Terry Brown and Forlando Brown who assert ownership rights to assets in the Brown Estate;
  - (f) Sonny Jones, Mary Frances Jowers and Bob Cook - attorneys in the Office of the Attorney General

In his production response of October 15, 2014, the Office of the Attorney General asserted that "no such contract [in case 4900] exists." This is belied by the Retention Agreement and the Complaint in case 4900. Because of the Attorney General's involvement, it is clear that emails among the Attorney General and the other lawyers with adverse interests to the "I Feel Good" Trust, are public documents. Further, FOIA requires that for a document to be exempt, it must "violate attorney-client relationships." This is not the case here.

In this Court's Order of July 9, 2014, it was specifically ordered that

"[d]ocuments in the Wingate firm's possession that were prepared, owned, used, possessed or retained in whole or in part for the Attorney General was subject to this Order and must be produced." (emphasis added).

Since the Wingate firm brought the suit in case 4900 on behalf of the Attorney General and the Legacy Trust (as well as for Russell Bauknight), and since the Attorney General contends that he has never seen the agreement, these emails are particularly important as a matter of public interest. See Wilson v. Dallas, 743 S.E.2d 746 (2013) (where the Supreme Court rebuked the actions of the Attorney General for his role in orchestrating an improper settlement which torpedoed the wishes of testator James Brown and was critical of the Attorney General's role in creating the Legacy Trust to do so).

Accordingly, this Court finds and concludes that the documents listed on the privilege log in Attachment G, which include 14 emails and 2 draft letters, are public and should be produced to the plaintiff.

**(b) Privilege Log Designated As Attachment I**

The documents listed on this privilege log by the Attorney General are identified as being a series of emails relating to "gag orders" on the Tommie Rae Hynie diary. These

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documents are also a series of emails among persons who are attorneys for various adverse parties in the James Brown litigation which were exchanged during the time period June 3, 2012 through June 6, 2012.

This Court initially ruled in its Order dated September 19, 2014, that the document referenced as the Hynie "diary" was not to be produced under FOIA, based on the Attorney General's position that there was a 2008 gag order which prevented its release under FOIA. At the time of this Court's Order, it was not known that the Attorney General had the emails listed on Attachment I.

Based on these facts, including that the gag orders have been largely ignored for five years and based on the public interest in these diaries as evidenced by numerous recent national articles, including articles in the *New York Times*<sup>4</sup> and the *Columbia Journalism Review*, this Court finds that the emails surrounding said diaries are public and should be produced.

Once the additional context and contents of the emails in Attachment I are produced under this Order, this Court will entertain a motion, if made by the plaintiff, to assert whether, based on these emails and other facts, the diaries should be produced as public. If necessary, this Court will conduct another hearing regarding the issue of whether the Attorney General should produce his copy of the Hynie diaries under FOIA.

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<sup>4</sup> See [www.nytimes.com/2014/12/14/us/downbeat-legacy-for-james-brown-godfather-of-soul-a-will-in-deep-dispute](http://www.nytimes.com/2014/12/14/us/downbeat-legacy-for-james-brown-godfather-of-soul-a-will-in-deep-dispute). In that article, reporter Larry Rohter wrote that Hynie married Brown in 2001, that Brown filed for an annulment in 2004 when he learned Hynie was already married to another man, and that later she signed a document that she was "not the common law wife." Rohter reported that she also signed a prenuptial agreement that she was renouncing her interest in Brown's estate. Given this public article about this public matter, which involves the Attorney General, her "diary" may be relevant on the issue of her current claim to be his wife. As a journalist, Summer and the general public have "a right to know."

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**DOCUMENTS NOT PRODUCED PURSUANT TO SEPTEMBER 19 ORDER**

The Attorney General did not produce two categories of documents which were requested by Summer and which appear to be public. These documents have been used and are referred to by the Attorney General in various court proceedings. These documents include: the \$4.7 million appraisal and the document creating the Legacy Trust and its amendments. In its production filed with the Court on October 15, 2014, the Attorney General asserts that his office never reviewed the \$4.7 million appraisal and that there are no Legacy Trust documents. This Court takes judicial notice of the fact that in the case Bauknight v. Pope and Buchanan (case 4900) which was filed on May 19, 2010, Bauknight brought the suit both as trustee, on behalf of the Legacy Trust and Attorney General Henry Dargan McMaster. Even though the Attorney General (through Bauknight) is a named plaintiff in that suit, the Attorney General asserts that no member of the Attorney General's staff has seen the \$4.7 million appraisal or the Legacy Trust documents and that it has no documents to produce. It appears to this Court that the appraisal has been referred to in court filings. It, and Legacy Trust documents, were requested by plaintiff but not produced. The Order of September 19, 2014 required their production, but they were not produced. Because the Attorney General claims that he does not have them, there is nothing further this Court can do on the state of this record. If, on remand, the Supreme Court issues any directives on this issue, this Court will make whatever rulings are needed at that time.

**ATTORNEYS' FEES AND COSTS UNDER §30-4-100**

Pursuant to this Court's Order of September 19, 2014, counsel for plaintiff filed his Affidavit in Support of Application for Attorneys' Fees under S.C. Code §30-4-100(b), said

affidavit being dated October 20, 2014. The defendant has not filed any opposition to that affidavit. Plaintiff's counsel has advised the Court that, in view of the pending Notice of Appeal by the Attorney General that it may be premature to issue a final award of fees and costs.

This Court finds and concludes that the plaintiff is the prevailing party in this action and is entitled to an award of attorneys' fees and costs under the statute. In the case of Sloan v. SC Department of Revenue, 409 S.C. 551, 762 S.E.2d 687 (2014), the Supreme Court recently ruled that the plaintiff was entitled to attorneys' fees where the DOR was late in providing the documents requested. In that case, the DOR did not render a final opinion within the 15-day determination period of S.C. Code §30-4-30(c). Even though the DOR did ultimately respond by producing the documents requested, Sloan was found by the Supreme Court to be the prevailing party and entitled to reasonable attorneys' fees and costs. In that case, even though Sloan's request for declaratory judgment was mooted by the production of documents by DOR, Sloan was still entitled to recover attorneys' fees and costs. The Court finds that Sloan is compelling in this case where (a) some documents were produced 11 months after this FOIA suit was commenced<sup>5</sup> in another proceeding by an out-of-state judge who found the documents to be "public" and ordered them produced, and (b) after this Court ordered the production of documents in its September 19, 2014 Order, the defendant did produce additional documents pursuant to that Order.

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<sup>5</sup> Summer's case was filed in December 2012. On November 14, 2013, United States Magistrate Judge J. Gregory Wehrman ruled in a federal case captioned Brown v. Pope (Case No. 3:08-cv-14-WOB) that the retention agreement between Brown trustee Bauknight and the Attorney General "is a public document due to the involvement of the South Carolina Attorney General." This agreement is one of the public records sought by plaintiff in this case, and it should have been produced pursuant to plaintiff's letter request many months before her suit was brought.

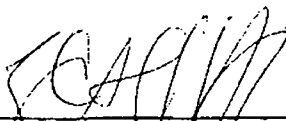
9  
sebj

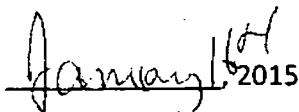
This Court finds and concludes that the plaintiff is entitled to attorneys' fees and costs under the statute, and this Court will hold in abeyance its ruling on the specific monetary amount of such fees and costs until all appeals relative to this case are concluded.

**THEREFORE IT IS ORDERED** as follows:

1. The plaintiff's petition to lift stay is granted.
2. The documents listed on the Attorney General's privilege log, Attachment G, (14 emails and 2 draft letters) shall be produced to plaintiff within 10 days of this Order.
3. The documents listed on the Attorney General's privilege log, Attachment I, (12 emails) shall be produced to plaintiff within 10 days of this Order.
4. After plaintiff has reviewed the documents produced, she shall have 10 days after receipt of same to file a motion to request the production of any additional documents sought in her Complaint, based on her review of the documents produced.
5. Plaintiff is the prevailing party in this action under FOIA and is entitled to an award of attorneys' fees and costs; the Court will determine the amount of fees and costs after all FOIA appeals are concluded.

**AND IT IS SO ORDERED.**

  
\_\_\_\_\_  
Eugene C. Griffith, Jr.  
Circuit Court Judge

  
January 16, 2015

Newberry, SC

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM NEWBERRY COUNTY  
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

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Appellate Case No. 2014-002222

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Estate of James Brown and Trustee of the James Brown 2000 Irrevocable  
Trust. . . . . Respondent.

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CERTIFICATE OF SERVICE

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I hereby certify that I have served the Respondents with the Appellant's Notice of Appeal by mailing copies to each of their attorneys at the addresses below via the United States Mail this February 12, 2015.

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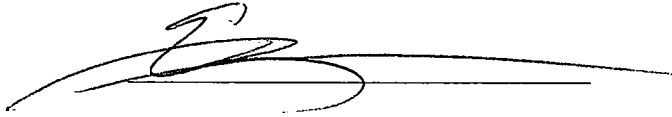
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FEB 12 2015

**S.C. Supreme Court**

CERTIFICATE OF SERVICE  
February 12, 2015  
Page 2

Mark V. Gende, Esquire  
Sweeny Wingate & Barrow, P.A.  
P.O. Box 12129  
Columbia, SC 29211

A handwritten signature in black ink, appearing to read "J. Emory Smith, Jr.", is written over a horizontal line. The signature is stylized and cursive.

J. EMORY SMITH, JR.  
Deputy Solicitor General  
Bar No. 5262  
Attorney for the Attorney General