

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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

**RECEIVED**

MAR - 9 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.....  
Appellant.

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**RETURN TO REQUEST FOR RESPONSE AS TO MOOTNESS**

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This Court has requested that we advise the Court as to why the appeals in this case are not moot. Respectfully we most strongly maintain that these appeals are not moot.

“A case is moot where a judgment rendered by the Court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the Court.” *S. Carolina Ret. Sys. Inv. Comm'n v. Loftis*, 402 S.C. 382, 384, 741 S.E.2d 757, 758 (2013). These appeals are not moot because no intervening event has rendered relief impossible. Prevailing party as to attorney’s fees and multiple other issues remain live.

Although the Attorney General has produced all documents that the Circuit Court orders directed him to provide, in doing so, he reserved all claims and defenses that he has including appeal rights. *See*, attached Attorney General's Production pursuant to September 19, 2014 Order; Letter from Smith to Thomas Pope, January 26, 2015. Production of these documents under a reservation of rights does not moot this appeal because, among other points at issue, the Circuit Court Judge determined that Plaintiff/ Respondent Summer was a prevailing party entitled to attorneys' fees and deferred setting the amount of fees and costs until appeals are concluded. Order, January 16, 2015, p. 9. The Attorney General contests on appeal the determination that Summer is the prevailing party. When the Attorney General contends that the requirement that he produce documents was in error and reserved his rights with that production, he has preserved the basis for claiming on appeal that Summer was not the prevailing party. With that reservation, the Attorney General anticipates raising the following issues on appeal among other possible issues:

As to the September 19, 2014 Order:

- a. Requiring the production of a three page private agreement of the Wingate firm when that document was the subject of pending motions in another pending case and when Summer already had the document from other sources.
- b. Requiring the production of documents from the FOIA requests to date, but FOIA does not authorize requests with continuing effect.
- c. Requiring production of documents held by the Wingate firm when Summer's FOIA requests did not ask for such documents and when the Office of

the Attorney General did not have a contract or fee agreement with that firm.

As to the January 16, 2015 Order

- a. Requiring the production of all documents claimed to be exempt from disclosure under the common interest doctrine.
- b. Concluding that the exemption included only emails with other counsel when several of the emails at issue were solely intra-office.
- c. Allowing Summer to move for additional documents.
- d. Finding that Summer is the prevailing party.

The Circuit Court, at Summer's urging, has gone beyond the scope of the FOIA and Summer's requests under that Act in ordering relief. The award of fees and costs against the Attorney General should not be based upon erroneous findings of the Circuit Court. All of these issues remain live because of the reservation of rights and because of the finding that Summer is the prevailing party for the purposes of attorney's fees and costs. Many of the errors in the Orders, if left to stand, could be perpetuated by circulation of the Orders in other judicial proceedings.

The Office of the Attorney General, nevertheless complied with the Orders, with a reservation of rights, in an effort to expedite this case except for those issues that needed to be resolved on appeal. This effort of the Office of the Attorney General to expedite while reserving its rights does not moot this appeal.

The instant case presents very different circumstances from those of *Sloan v. Friends of Hunley, Inc.*, 393 S.C. 152, 157, 711 S.E.2d 895, 897 (2011) and *Sloan v. S. Carolina Dep't of Revenue*, 409 S.C. 551, 555, 762 S.E.2d 687, 689 (2014). The appeals

in those cases were found to be moot when the agencies produced the requested documents after litigation was commenced but before a court ruling. Only the requestor appealed in both cases, and in *Hunley*, the agency conceded away the ground on which it had refused to provide documents. *Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 26-27, 630 S.E.2d 474, 478 (2006). Instead, in the instant case, the Office of the Attorney General produced documents after Court rulings and subject to its appeal rights.

Even if this case were, *arguendo*, moot, it would still meet at least one of the exceptions for mootness set forth in the earlier opinion in the *Hunley* case. *Friends of Hunley, Inc.*, 630 S.E.2d at 478. Those exceptions are “1) when the issue raised is capable of repetition, yet evading review, and 2) when the question considers matters of important public interest.”

Under the second exception, the issues in this case meet the test of presenting “a question of imperative and manifest urgency requiring the establishment of a rule for future guidance in ‘matters of important public interest.’” *Id.* The issues raised concerning the scope of the Orders below in pushing beyond the limits of the Freedom of Information Act need to be resolved for future guidance of both agencies responding to FOIA requests and those persons making the requests.

Under the first exception, the issues are certainly capable of repetition. They are also evading review in that agencies faced with copies of the Griffith Orders will be faced with the dilemma of following the Orders, and, *arguendo*, evading review, or declining to follow the non-binding rulings with the risk that the agencies could be subject to attorney’s fees. Although the 2006 *Hunley* Opinion found that an opportunity would exist for review in the future, it was looking at the issue from the perspective of the

requestor rather than an agency trying to decide whether to follow an erroneous order.

For the foregoing reasons the Office of the Attorney General respectfully requests that this Court find that these appeals are not moot.

Respectfully submitted,

ALAN WILSON  
Attorney General

ROBERT D. COOK  
Solicitor General  
S.C. Bar. No. 1373

J. EMORY SMITH, JR.  
Deputy Solicitor General  
S.C. Bar No. 5262

Office of the Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3680

BY: 

ATTORNEYS FOR THE APPELLANT  
ATTORNEY GENERAL

March 9, 2015

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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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 other parties with the Attorney General's  
Return to Request for Response as to Mootness by mailing copies to each of their  
attorneys at the addresses below via the United States Mail this March 9, 2015.

Thomas H. Pope, III, Esquire  
Pope and Hudgens, P.A.  
P.O. Box 190  
Newberry, SC, 29108

Jay Bender, Esquire  
Baker Ravenel & Bender, LLP  
P.O. Box 8057  
Columbia, SC 29202

**RECEIVED**

MAR - 9 2015

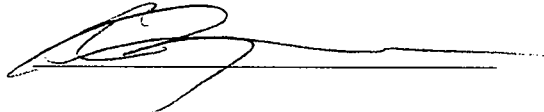
**S.C. Supreme Court**

CERTIFICATE OF SERVICE

March 9, 2015

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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

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF NEWBERRY )  
 )  
Susan D. Summer, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
Alan Wilson, in his capacity as )  
Attorney General of South Carolina, )  
 )  
Defendant. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS

Case No. 2012-CP-36-688

**Attorney General Alan Wilson's  
Production pursuant to  
Court Order filed  
September 19, 2014**

Subject to all of his claims, defenses and objections, including but not limited to, his Motion to Alter or Amend, Motion for Judgment on the Pleadings and right to appeal the Order of September 19, 2014 and any other orders in this action, Alan Wilson, in his capacity as Attorney General of South Carolina, respectfully submits this production of documents under the South Carolina Freedom of Information Act (FOIA) pursuant to the Court's Order dated September 19 Order. This action relates to four FOIA requests of Plaintiff Sue Summer to the South Carolina Attorney General. Each of the requests and the responsive documents are outlined below. We do not concede that all documents produced are, in fact, responsive as some may be produced in an abundance of caution.

Only 4 documents, some with attachments, are submitted herewith which are not marked as non-responsive, exempt, post – FOIA or otherwise not subject to production except for the notation that Attachment A does not appear to be what Plaintiff is seeking. **Attachments A – D.** They have not been previously produced and an explanation is provided as to why they were not provided previously. Other documents are grouped as non-responsive, post-FOIA, or exempt or

beyond the scope of the FOIAs at issue. Privilege logs are attached as to the exempt documents that are separately provided to this Court under seal.

### REQUEST OF JANUARY 29, 2012

Plaintiff Summer asked for the following in this FOIA Request, the Responses to which follow

**(1): Legacy Trust**

**Response:** There is no signed Legacy Trust so no documents are responsive.

Copies of the draft, unsigned Legacy Trusts that were also in the Record on Appeal in *Wilson v. Dallas*, 403 S.C. 411, 743 S.E. 2d 746 (2013), and have been previously provided to Plaintiff. The draft Trusts were not clearly subject to Plaintiff's FOIAs, which did not appear to seek drafts, and they were already in the record for the *Wilson v. Dallas*, 403 S.C. 411, 743 S.E. 2d 746 (2013) appeal that was argued in 2011. *See*, Plaintiff's June 10, 2012 FOIA and Defense Counsel's April 29 and 30, 2013 letters to the Court. In a hearing in this case in July, 2014, Plaintiff referred to an amendment to the Trust, but that document was an amendment to the August 10, 2008 settlement agreement, not to the Trust and was provided to the Court following the hearing.

**(2) "McMaster Settlement Deal"**

**Response:** We have no such document.

Although we do have a copy of the August 2008, settlement agreement that was approved by the Circuit Court, a decision the Supreme Court reversed in *Wilson*, that document was in the public domain long before Plaintiff made her FOIA requests, and it does not appear to be responsive to her request. Nevertheless, it is attached along with

the Addendum to that agreement. The Plaintiff's counsel indicated in Court that she has "Confirmation and Amendment" to the Agreement which the Defendant's Office subsequently attached, for the record, to its July 28, 2014 Reply to Memorandum in Opposition.

**(3) Documents related to the AG's decision not to seek restitution from David Cannon**

**Response:** As stated in the original response, there are no documents related to "the AG's decision not to seek restitution from David Cannon."

Attached is an email exchange between Robert McNair of this Office and Sherri Lydon, Plaintiff's counsel on August 30, 2011. **Attachment B.** Although not previously provided Ms. Summer because we did not believe at the time it was responsive or overlooked it, in reviewing the files again we are providing the email exchange now in an abundance of caution. We do not concede that the exchange is responsive.

This Office has previously provided Plaintiff and this Court a courtesy copy of the May 1, 2014 "Order Granting Restitution." *See*, letter to Justice Griffith, May 19, 2014. Although this Order is not responsive to this request, and we maintain that supplementation of FOIA responses is not required, the letter shows that this Office did seek restitution.

**(4) Documents related to the AG's decision to delay the dismissal of David Cannon's \$6 million claim against the James Brown estate**

**Response:** We have no such documents. *See also*, Restitution response, *supra*.

**(5) The \$4.7 million at-death value of the "James Brown music empire"**

**Response:** Regarding the \$4.7 million at-death value of the James Brown music empire, enclosed is a Motion to Supplement the Record, filed with the Supreme Court on May 6,

2011, which includes information filed with the IRS related to the at-death value of \$4.7 million. **Attachment C.** Although not previously provided Ms. Summer because we did not believe at the time it was responsive, in reviewing the files again we are in an abundance of caution providing it now. We note that this document has been in the public domain and accessible to Plaintiff since before she made her FOIA requests.

**(6) A copy of the McMaster - Wingate contract**

**Response:** As explained below, Plaintiff already has all non-exempt documents. Although the Office contends there is not a fee contract between McMaster and Wingate, copies of all non- exempt documents responsive to the request were provided. See January 5 and 20<sup>1</sup> and July 3 and 10, 2012 letters from SAAG Meyers to Plaintiff (Exs. 8, 9, 21 and 25 to State's Answer) and letter of November 27, 2013 to Court.

Subject to our objection, the unsigned 3 page Wingate retention agreement is attached. **Attachment D.** That document had been withheld because it was the subject of a Motion for Protective Order as to that document in the Richland County Court of Common Pleas. The Office of the Attorney General did not sign this retention agreement. This document is the same as the signed version that Plaintiff already has except for the writing of the names on the documents.

The Office of the Attorney General did not have the signed agreement until counsel for Adele Pope sent it to undersigned counsel by letter dated November 21, 2013 long after Plaintiff submitted her FOIA requests. That letter and attachments to it, including the agreement, are in **Attachment E** and submitted subject to objection as

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<sup>1</sup> Although the letter of Henry McMaster dated May 18, 2010 and an accompanying public document were provided with the January 20, 2012 letter to Plaintiff, the copy of those documents attached to the Answer is apparently a two sided copy, only one side of which was copied. The copy provided to Plaintiff had all pages copied. An extra copy of it is enclosed.

beyond the scope of Plaintiff's requests and the FOIA statute. Plaintiff received or had access to the signed version of that document as a result of other litigation in the United States District Court. See November 22, 2013 letter of Plaintiff's Counsel; Letter of Defense Counsel to Court, November 27, 2013. The Defendant Attorney General has not failed to comply with FOIA by not giving Plaintiff a copy of a document that she already has and that is still under review by the Richland County Court of Common Pleas. See Letter to Judge Griffith May 23, 2014. In our Amended Motion to Alter or Amend, we stated that if Plaintiff no longer has the document, we would provide her a copy of it. Subsequently, she never asked that we send it to her.

(7) **Emails and Documents related to the purported McMaster - Wingate contract**

**Response:** No documents are responsive because no such contract exists. See above. Plaintiff did not allege in her Complaint a failure to provide emails or other communications related to the purported contract, but because of the above production, the emails in **Attachment F** are being provided in addition to those documents in **Attachment E** regarding the purported contract.

Subject to this objection, exempt documents that, *arguendo*, might relate to such a contract if one exists, are referenced in the attached privilege log, **Attachment G**, and those documents are provided to this Court in Envelope marked Exempt documents re purported McMaster – Wingate contract. Those documents are exempt as containing attorney work product which is exempt under S.C. Code Ann. §30-4-40(7) that specifically exempts “[c]orrespondence or work products of legal counsel for a public body and any other material that would violate attorney-client relationships.”

### REQUEST OF MARCH 1, 2012

Ms. Summer asked for “a copy of Tommie Rae Hynie Brown’s diary” in this FOIA request. Because the Court ruled that the diaries are not public records, there is no further response to this request.

### REQUEST OF JUNE 10, 2012

Ms. Summer asked for the following in this FOIA request the responses to which follow each item:

- (1) **Copy of McMaster/Wingate Contract (Same as January 29, 2012 FOIA)**

**Response:** *See* response, above, to January 29 letter.

- (2) **Legacy Trust (Same request as in January 29, 2012 request)**

**Response:** *See* response to Item 1 of January 29 letter.

- (3) **Hynie Diaries (same request as March 1, 2012 FOIA)**

**Response:** Same as response above to March 1 FOIA.

- (4) **Documents related to the \$4.7 million at-death valuation of “James Brown’s music empire” (Same as January 29 FOIA)**

**Response:** *See* Response (5) to January 29, FOIA, *supra*

- (5) **Electronic and other written communication regarding why the AG’s Office sought no restitution from David Cannon (essentially the same request as in Plaintiff’s January 29, 2012 FOIA)**

**Response:** Same as to January 29 FOIA.

### REQUEST OF SEPTEMBER 6, 2012

Plaintiff asked for the following in this FOIA request:

**(1) Documents related to AG's position at May 22 hearing that "gag orders" on the Hynie diary should not be lifted**

**Response:** The Supplemental Return to Petitioner was provided to Plaintiffs with our 2012 response to this FOIA. We have no other non-exempt documents that are responsive, but we do provide a set of forwarding emails as to the Return in Attachment H for the information of counsel subject to our position that they are not responsive. A set of emails related to the "gag" orders are referenced in the Privilege log at Attachment I and are exempt under §30-4-40(7) as attorney work product.

**(2) The two \$3,500 campaign contributions made to the AG Wilson's campaign by Nexsen Pruet LLC and Nexsen Pruet PAC on May 21 and May 22**

**Response:** We have no such documents.

**(3) The amount of money the Nexsen Pruet law firm has been paid or is expecting to be paid from the James Brown assets for its legal representation of Bauknight in any fiduciary capacity related to the James Brown assets**

**Response:** We have no documents responsive to the FOIAs. Provided among the post-FOIA documents, subject to our objection, are documents attached to an April 2, 2014, letter from Adele Pope. **Attachment J.**

**(4) The amount of money that any attorney for Tommie Rae Hynie has been paid or is expecting to be paid from the James Brown Assets**

**Response):** As stated in the original FOIA response, the Office does not have such documents.

## **Wingate Documents**

This Court's Order of September 19, 2014, directed the Office of the Attorney General to produce documents in the Wingate firm's possession that were prepared, owned used, possessed or retained in whole or in part for the Attorney General. Subject to the objections in this action that the Wingate firm documents are beyond the scope of the FOIAs at issue, the Office of the Attorney General has requested such documents from that Firm except for duplicates of documents that Office already has. In response to that request the Office of the Attorney General has received several documents which appear to be duplicates of documents either previously provided to Plaintiff or provided with this response under one or more attachments referenced above. Those documents consist of the following:

- i. Agreement for legal services – Wingate Firm and Bauknight, May 18, 2010(Two copies)
- ii. Confirmation, Approval and Acknowledgement (3 signed documents Levenson, Medlin and Bell (two copies of all)
- iii. Signature page from 2008 settlement agreement
- iv. Exhibit A – Litigation Retention Agreement
- v. Letter, McMaster to Bauknight, May 18, 2010.

## **CONCLUSION**

The Defendant respectfully requests that this Court take the following action:

1. Accept the documents in **Attachments A- D** and the explanations of them.
2. Determine that the documents originating after the FOIA requests are not subject to FOIA production. **Attachments E and J.**

3. Determine that the documents in the envelopes under seal are exempt and file the documents as sealed exhibits. **Attachments G and I.**
4. Determine that the documents in **Attachments F and H** are not responsive and do not have to be produced.
5. Determine that the Defendant is in compliance with FOIA and that he has been in compliance in that no additional documents are produced as a result of the September 19, 2014 order other than those that are in **Attachments A – D** and that reasonable grounds have been given as to why they have not been produced before now. **Attachments E – J** are non-responsive, beyond the scope of FOIA or exempt.
6. Deny attorney's fees because Plaintiff did not prevail in this case under §30-4-100.

Respectfully submitted,

ALAN WILSON  
Attorney General

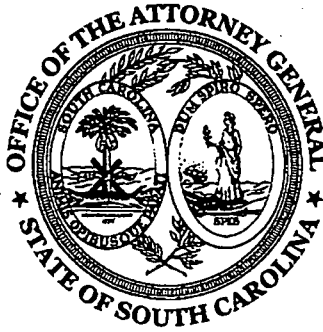
ROBERT D. COOK  
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esmith@scag.gov  
S.C. Bar No. 5262

BY: 

ATTORNEYS FOR THE ATTORNEY GENERAL

October 15, 2014



ALAN WILSON  
ATTORNEY GENERAL

January 26, 2015

Thomas H. Pope, III, Esquire  
Pope and Hudgens, P.A.  
P.O. Box 190  
Newberry, SC, 29108

Re: Summer v. Wilson 2012-CP-36-00688

Dear Mr. Pope:

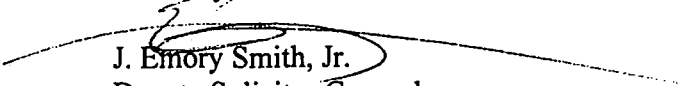
Subject to all claims and defenses in this case including our pending appeal and our right to appeal the January 16, 2015, Order of Judge Griffith and without waiving any applicable privileges including work product material, we are providing you with the exempt documents in this case as directed by that Order. Those documents are listed in privilege logs G and I to the Defendant's Production Response of October 15, and were produced for review by the Court under seal. Subject to our reservations, privileges and non-waivers above, and respectfully as to the Court's Order, despite the error in identifying all of the documents as including attorneys for other parties, we are willing to provide these documents to you in order to comply with the Court's Order.

Please note that when some documents were printed for submission under seal, they printed the date of printing rather than the creation date because they were date coded to reflect the current date.

Regarding the Order of January 16, I enclose a copy of Judge Early's January 13, 2015, Order reserving for future determination a motion to modify the protective order as to the Tommie Rae Brown diaries. *In re Estate of James Brown*, 2013-CP 02-02850, pp. 4 and 46. Therefore, the Court in the instant case lacks authority to direct that the diaries be produced.

We stand by our letter to you of January 21, 2015.

Sincerely,

  
J. Emory Smith, Jr.  
Deputy Solicitor General  
Counsel for Defendant Attorney General

Thomas H. Pope, III, Esquire  
January 26, 2015  
Page 2

cc: Jay Bender, Esquire (without enclosures)  
Mark V. Gende, Esquire (without enclosures)  
Honorable Jackie S. Bowers, Clerk of Court (without enclosures)