

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge
Case No. 2012-CP-40-350

RECEIVED

FEB 01 2017

SC Court of Appeals

Adele J. Pope,

Appellant,

v.

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

Respondents.

INITIAL BRIEF OF RESPONDENT

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COUNTER-STATEMENT OF THE CASE

This is an appeal from the circuit court's grant of the James Brown Legacy Trust's ("Legacy Trust") Motion to Dismiss on June 14, 2016.

Appellant filed a complaint in Newberry County on August 3, 2011, seeking the disclosure of certain documents from Respondents Attorney General and Legacy Trust under the South Carolina Freedom of Information Act, a declaratory judgment that the Legacy Trust is a public body under S.C. Code Ann. § 30-4-10, *et seq.*, South Carolina Freedom of Information Act ("FOIA"), and attorney's fees and costs pursuant to the FOIA. (Compl. 1, 7, 8.)

Appellant sought the following documents pursuant to FOIA from the Legacy Trust: "The final and all drafts, signed and unsigned, of the James Brown Legacy Trust." (Compl. ¶ 18.)

On September 9, 2011, Respondent Legacy Trust filed a motion to dismiss, arguing, *inter alia*, that venue was improper in Newberry County. (Legacy Trust Mot. Dismiss Sept. 9, 2011.) Appellant served its return to the Legacy Trust motion to dismiss on September 12, 2011. (Appellant Return Legacy Trust Mot. Dismiss Sept 12, 2011.) Appellant served a motion for summary judgment on September 29, 2011. (Appellant Mot. Summ. J. Sept. 29, 2011.)

Prior to a January 2012 hearing, Appellant and Respondent Legacy Trust filed memoranda addressing Legacy Trust's motion to dismiss and Appellant's motion for summary judgment. (Legacy Trust Suppl. Mem. Mot. Dismiss Jan. 11, 2012; Appellant's Br. & Return Opp'n Motions to Strike and/or Dismiss and Supporting Summary Judgment Jan. 10, 2012.)

On January 11, 2012, the Newberry County circuit court transferred venue of this action to Richland County, without addressing the remaining motions. (Order Transferring Venue Jan. 11, 2012.)

On March 15, 2013, the Legacy Trust filed a motion to stay pending the resolution of certain issues raised by the South Carolina Supreme Court's opinion in *Wilson, et al. v. Dallas, et*

al., Opinion No. 27227 (Feb. 27, 2013). The South Carolina Supreme Court refiled its opinion in May 8, 2013. (*Wilson v. Dallas*, 403 S.C. 411, 743 S.E.2d 746 (2013)).

On May 17, 2016, the circuit court heard oral argument on Respondent Legacy Trust's motion to dismiss and Appellant's motion for summary judgment. (Hr'g Tr. May 17, 2016.) On June 14, 2016, Judge Early issued an order granting the Legacy Trust's motion to dismiss. (Order Granting Legacy Trust Mot. Dismiss Jun. 14, 2016.) Appellant Pope then appealed.

COUNTER-STATEMENT OF THE FACTS

Singer and entertainer James Brown died in December 2006 and his will was contested. *Wilson*, 403 S.C. at 416-19, 743 S.E.2d at 749-51. The facts surrounding the will contest are discussed in detail in the South Carolina Supreme Court's opinion in *Wilson v. Dallas*. Pertinent to this appeal, the James Brown Legacy Trust ("Legacy Trust") was created as part of the will contest settlement agreement to "receive, hold, manage and be authorized to sell the James Brown Assets." *Id.* at 421, 743 S.E.2d at 752. The Attorney General became involved in the will contest and eventual compromise agreement because a portion of James Brown's estate was dedicated to funding a charitable trust, *id.* at 417, 419, 743 S.E.2d at 750-51, and the Attorney General has a statutory duty to protect the public interest in the administration of charitable trusts, *see* S.C. Code Ann. § 62-7-405; *Wilson*, 403 S.C. at 431, 445, 743 S.E.2d at 757, 765. The Attorney General was permitted, without opposition, to intervene in the case to "represent and protect the interests of the beneficiaries of any charitable trust created by [Brown's 2000 will] and the [2000 Irrevocable Trust] or any other assets of the Estate of James Brown that may be impressed with a charitable trust" *Wilson*, 403 S.C. at 431, 743 S.E.2d at 757 n.13 (modifications in original).

In 2009, Russell Bauknight was appointed by the circuit court to serve as the Personal Representative and Trustee of the James Brown Estate and August 1, 2000 Irrevocable Trust Agreement. (Russell L. Bauknight Aff. May 2, 2016 ¶ 3, hereinafter "Bauknight II".) Russell Bauknight also served as Trustee for the Legacy Trust. (Russell L. Bauknight Aff. January 10, 2012 ¶ 4, hereinafter "Bauknight I".) As Trustee for the Legacy Trust, Bauknight's obligations extended to the beneficiaries of the Legacy Trust, not the Attorney General. (Ex. 9 to Attorney General's Answer March 7, 2013.)

The compromise agreement settling the will contest was approved the by the circuit court in 2009 and was appealed by Appellant to the South Carolina Supreme Court. *Wilson*, 403 S.C.

at 422, 743 S.E.2d at 752. In 2013, the South Carolina Supreme Court overturned the circuit court's approval of the settlement agreement that created the Legacy Trust, finding that the compromise agreement was not just and reasonable. *Wilson*, 403 S.C. at 450, 743 S.E.2d at 767-68. The Court ruled that the settlement agreement could not replace James Brown's estate plan and existing trusts by creating new trusts. *Id.* at 446, 743 S.E.2d at 765.

The Court invalidated the circuit court's approval of the compromise agreement creating the Legacy Trust. *Id.*; *Bauknight II* ¶ 7. Russell Bauknight, in his capacity as Trustee of the Legacy Trust, understood the Court's opinion in *Wilson v. Dallas* to have terminated any potential involvement of the Attorney General (though there had been none other than Attorney General's involvement in the settlement agreement) in the Legacy Trust. (*Bauknight II* ¶ 9.) Consistent with this understanding, the Attorney General has not had any involvement in the Legacy Trust since *Wilson v. Dallas*. (*Bauknight II* ¶ 10.) Russell Bauknight was appointed as the Trustee of the Legacy Trust near the time of its creation and has served continuously in this role, *Bauknight I* ¶ 4; *Bauknight II* ¶¶ 3-4, though as there is no longer a trust in existence, Bauknight has no duties to perform, *Bauknight II* ¶¶ 11, 20.

Following the Court's opinion in *Wilson v. Dallas*, the Legacy Trust ceased to function as a court approved trust. (*Bauknight II* ¶¶ 11, 20.) Had it survived appeal, the Legacy Trust was to be funded from the private property of James Brown. (*Bauknight I* ¶ 9; *Bauknight II* ¶ 5.) The Legacy Trust was never designed to be supported in whole or in part by public funds, to expend public funds, or to hold public assets. (*Bauknight I* ¶¶ 9, 13; *Bauknight II* ¶¶ 19-20.) The Legacy Trust is not a custodian of public records. (*Bauknight I* ¶ 13; *Bauknight II* ¶ 18.)

ARGUMENT

The trial court correctly granted Respondent James Brown Legacy Trust's ("Legacy Trust") motion to dismiss this action brought under the South Carolina Freedom of Information Act ("FOIA") because the private Legacy Trust is not subject to public records requests made under the FOIA, the Legacy Trust no longer exists and functions as it was designed to, and Appellant possesses the documents she seeks through her FOIA request. Accordingly, the circuit court's dismissal should be affirmed.

I. Dismissal of the FOIA Suit Was Appropriate Because the James Brown Legacy Trust Does Not Fall Within the Definition of "Public Body" in the South Carolina Freedom of Information Act.

The trial court correctly dismissed Appellant's FOIA suit against the Legacy Trust—thereby affirming the Legacy Trust's decision not to respond to Appellant's FOIA request. In order for the Legacy Trust to be subject to the FOIA, and amenable to suit for the failure to respond to a FOIA request, it must fall within the Act's definition of a "public body." *Weston v. Carolina Research & Dev. Found.*, 303 S.C. 398, 400, 401 S.E.2d 161, 163 (1991). The South Carolina Freedom of Information Act defines "Public body":

(a) "Public body" means any department of the State, a majority of directors or their representatives of departments within the executive branch of state government as outlined in Section 1-30-10, any state board, commission, agency, and authority; any public or governmental body or political subdivision of the State, including counties, municipalities, townships, school districts, and special purpose districts, or any organization, corporation, or agency supported in whole or in part by public funds or expending public funds, including committees, subcommittees, advisory committees, and the like of any such body by whatever name known, and includes any quasi-governmental body of the State and its political subdivisions, including, without limitation, bodies such as the South Carolina Public Service Authority and the South Carolina State Ports Authority.

S.C. Code Ann. § 30-4-20(a).

The language of the statute is clear on its face that a private trust such as the Legacy Trust is not subject to FOIA. *Miller v. Doe*, 312 S.C. 444, 447, 441 S.E.2d 319, 321 (1994) ("If a

statute's language is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for employing the rules of statutory interpretation. The court has no right to look for or impose another meaning." (citing *Wynn v. Doe*, 255 S.C. 509, 180 S.E.2d 95 (1971)). It is without contention that under the plain language of the FOIA, trusts are not included in the definition of a "public body" and the Legacy Trust is not: a state board, commission, agency, or authority; a county, municipality, township, school district, or special purpose district; or a committee, subcommittee or advisory committee.¹

Appellant's complaint seems to allege that the Legacy Trust is somehow under the "control of" or receives "support" from the Attorney General, and is thereby rendered a public body for purposes of the FOIA.² (Compl. ¶ 28.) Under the definition of "public body," and the South Carolina Supreme Court's interpretation of that term, only those organizations that are supported "in whole or in part by public funds or expending public funds" are subject to FOIA. S.C. Code Ann. § 30-4-20(a); *Disabato v. S.C. Ass'n Sch. Adm'rs*, 404 S.C. 433, 454-55, 746 S.E.2d 329, 340 (2013) ("[T]he application of the FOIA beyond traditional governmental entities is limited to statutorily defined public bodies, which are only those entities supported by public funds." (citing *Weston*, 303 S.C. at 403, 401 S.E.2d at 164)).

¹ Furthermore, not even all "committees," which are explicitly included as a public body under FOIA, are subject to FOIA. Only a committee that "in making its recommendations, [is] performing a governmental function" is subject to the Act. 1984 S.C. Op. Att'y Gen. 159 (1984). See also 1989 S.C. Op. Att'y Gen. 259 (1989) ("Clearly, this Committee is not a department of the State, a state board, commission, agency, governmental body, political subdivision, county, municipality, township, school district, or special purpose district. The fact that the Committee was not created by a provision of the South Carolina Constitution, a statute, ordinance, or resolution supports this conclusion. Additionally, the Committee does not perform exclusive governmental functions or make policy affecting citizens' fundamental rights, factors often considered in terms of the governmental bodies enumerated in the Act.").

² In fact, the Attorney General has no involvement in the Legacy Trust. (Bauknight II ¶¶ 9-11).

“Public funds are, generally, funds belonging to a state or county or other political subdivision, more especially taxes or other such moneys raised by the operation of some general law and appropriated by the government for the discharge of its obligations or for some public or governmental purpose.” 1989 S.C. Op. Att’y Gen. 259 (1989).

The Legacy Trust is not supported by taxes or monies belonging to a political subdivision. (Bauknight II ¶¶ 17, 19.) The Legacy Trust was created to be funded by the private assets of James Brown—before it was functionally struck down by the South Carolina Supreme Court in *Wilson v. Dallas*. (Bauknight II ¶ 20.) Moreover, the Legacy Trust was not designed to expend public funds, it was only set up to be in control of and responsible for disbursing the private assets of the trust.³ (Bauknight II ¶¶ 5, 17.)

A private entity, like the Legacy Trust, is only subject to the FOIA where it “receive[s] government funds *en masse*” or it is “generally supported by public funds.” *Disabato*, 404 S.C. at 456, 746 S.E.2d at 341 (clarifying its holding in *Weston*, 303 S.C. 398, 401 S.E.2d 161, concerning when private organizations are subject to the FOIA); *see also Woods v. Boeing Co.*, 841 F. Supp. 2d 925, 929-30 (D.S.C. 2012) (finding that although Boeing received a “massive amount of public money” it is not subject to a FOIA-like disclosures where it was not acting as state’s agent or expending the funds for the public benefit). Neither of these descriptions fit the Legacy Trust.

Appellant relies on a single South Carolina case from 1991 to support her argument that the Legacy Trust is a public body—*Weston v. Carolina Research & Development Foundation*, 303 S.C. 398, 401 S.E.2d 161 (1991).⁴ In *Weston*, the question was whether a private non-profit

³ In contrast, *see Quality Towing, Inc. v. City of Myrtle Beach*, 345 S.C. 156, 161-63, 547 S.E.2d 862, 864-65 (2001) (Committee formed to help determine the award of a City contract that involves the expenditure of city funds is subject to FOIA).

⁴ Appellant’s reliance on a case from Kansas, *Associated Press v. Sebelius*, 78 P.3d 486 (Kan. Ct. App. 2003), is not persuasive, as that case was concerned with state employees serving in a group

corporation operated for the exclusive benefit of the University of South Carolina could be subject to the FOIA. *Weston*, 303 S.C. at 400, 401 S.E.2d at 162. The court held that it could if the private organization received support in whole or in part from public funds. *Id.* at 403, 401 S.E.2d at 164. The court found that four transactions showed that the private foundation was subject to the FOIA: (1) receiving money from the sale of public real estate; (2) accepting federal grant money earmarked for the University and administering the expenditure of this money; (3) accepting the conveyance of real estate from the City of Columbia along with a cash grant from City of Columbia and a cash grant from Richland County to develop the real estate; and (4) administering research and development contracts made to University employees. *Id.* at 401-03, 401 S.E.2d at 163-64.

In 2013, the South Carolina Supreme Court's opinion in *Disabato v. South Carolina Association of School Administrators*, clarified the limited scope of *Weston*'s holding that private entities can be subject to FOIA. In *Disabato*, the South Carolina Association of School Administrators, a non-profit corporation engaged in public advocacy, sought to dismiss a FOIA suit on first amendment grounds. The Court reiterated its holding in *Weston* that the application of the FOIA "beyond traditional governmental entities is limited to statutorily defined public bodies, which are only those entities supported by public funds." *Id.* at 454-55, 746 S.E.2d 340. Addressing the dissent's concern about the scope of the FOIA reaching private entities, the Court clarified the "limited application of the FOIA to non-governmental entities" as applying only those private entities "who receive government funds en masse" or are "generally supported by public funds." *Id.* at 456, 746 S.E.2d at 341.

organized by the governor-elect to evaluating efficiencies and savings in state government, clearly a public purpose and with meeting times that could be directly traced to specific state employees.

Both *Weston* and *Disabato* clearly place the Legacy Trust outside of the FOIA's reach. There are no facts suggesting that the Legacy Trust ever received public funds to manage or expend, or that it was set up to manage state assets or for the public benefit. The Legacy Trust was created to be funded from private assets and to expend private assets.

The Attorney General's involvement in the Legacy Trust was related to his statutory duty to protect the public interest in the administration of charitable trusts. *Wilson*, 403 S.C. at 431, 445-46, 743 S.E.2d at 757, 765-66. Appellant has presented no legal support for the notion that the Attorney General's involvement in a private charitable trust transforms the trust's private assets and private trust records into public assets and public records.⁵ The fact that the Attorney General may have overstepped his statutory role in the Legacy Trust, *id.* at 445-46, 743 S.E.2d at 765-66, should not be charged against the Legacy Trust and somehow subject the private Legacy Trust to public records requests. Public records of the Attorney General's involvement in the Legacy Trust can be sought from the Attorney General. It is unnecessary to broaden FOIA's application to private entities to now cover private trusts managing private assets. Accordingly, the Legacy Trust should not be subject to FOIA and dismissal was proper.⁶

⁵ Appellant appears to argue that the Attorney General's, or Attorney General's staff, involvement in the creation and planned ongoing oversight of the Legacy Trust can somehow be quantified and then count as support from public funds so as to be attributed to the Legacy Trust and bring it under the FOIA. First, there are no facts in the record showing any quantifiable public support. Second, the South Carolina Supreme Court has made clear that a negligible amount of government funds provided to a private entity for a specific purpose does not subject the private entity to the FOIA. *Disabato*, 404 S.C. at 456, 746 S.E.2d at 341. Third, the Supreme Court's ruling in *Wilson v. Dallas*, that the Attorney General's involvement in the compromise agreement and the Legacy Trust overreached his statutory authority, moots the argument that the Attorney General is controlling the Legacy Trust.

⁶ Furthermore, as noted in Mr. Bauknight's affidavit, Appellant herself has admitted in other litigation that trusts such as the one at issue are not public entities. (Bauknight II ¶ 16.) In an appeal of the settlement that created the Legacy Trust, Appellant wrote that "[p]rivate foundations such as the 'I Feel Good' foundation/trust are not public charities." (Bauknight II ¶ 16). These previous statements further cut against Appellant's position in this litigation.

II. Dismissal Was Appropriate Because Following the South Carolina Supreme Court's opinion in *Wilson v. Dallas*, the Legacy Trust No Longer Exists.

The essence of Appellant's contention in the underlying FOIA suit against the Legacy Trust is that the Legacy Trust is subject to the FOIA because of the South Carolina Attorney General's involvement in Legacy Trust's creation and anticipated continuing oversight. (Compl. ¶¶ 3, 4, 18, 28, 33; Br. Appellant 16-19.) This precise issue, whether the Attorney General's involvement in the Legacy Trust subjects the Legacy Trust to FOIA, is moot following the South Carolina Supreme Court's 2013 decision in *Wilson v. Dallas*, when the Court invalidated the "compromise agreement," effectively terminating any potential involvement of the South Carolina Attorney General's Office in the newly created Legacy Trust. *Wilson*, 403 S.C. at 450, 743 S.E.2d at 767-78. This intervening event moots Appellant's argument that the Legacy Trust is subject to the FOIA because of the Attorney General's potential oversight. *See Seabrook v. Knox*, 369 S.C. 191, 197, 631 S.E.2d 907, 910 (2006) ("A moot case exists where a judgment rendered by the court will have no practical legal effect upon an existing controversy because of an intervening event renders any grant of effectual relief impossible for the reviewing court."); *Bauknight II* ¶ 9 ("It is my understanding that *Wilson v. Dallas* effectively terminated any potential involvement of the South Carolina Attorney General's Office in the Legacy Trust."), ¶ 10 ("Since the Supreme Court's order in *Wilson v. Dallas*, the Attorney General has had no involvement in the Legacy Trust.")

In *Wilson v. Dallas*, the South Carolina Supreme Court reviewed the "compromise agreement" approved by the circuit court to settle the James Brown trust dispute. One aspect of the compromise agreement was the creation of the Legacy Trust to manage James Brown's assets for the beneficiaries, which included a new charitable trust, Tommie Rae Brown, and the Brown Family. *Wilson*, 403 S.C. at 420-21, 743 S.E.2d at 751-52. The plan was to fund the Legacy Trust with a future interest. Prior to the Legacy Trust ever being funded and the compromise agreement

taking effect, the circuit court issued an order prohibiting distributions during the appeals process, and, thus, the Legacy Trust was never funded and no distributions were ever made. (*See* *Bauknight II* ¶ 20.)

In the South Carolina Supreme Court's review of the compromise agreement, it held that the agreement was not just and reasonable and it reversed the lower court's approval of the compromise. *Wilson*, 403 S.C. at 450, 743 S.E.2d at 767. The court ruled that the settlement agreement could not replace James Brown's estate plan and existing trusts by creating new trusts. *Id.* at 446, 743 S.E.2d at 765. In so holding, the court explicitly invalidated the existence of the Legacy Trust. *Id.* at 450, 743 S.E.2d at 767-68; *Bauknight II* ¶ 7.

It follows, that Appellant's argument that the Attorney General's control and influence make the Legacy Trust subject to the FOIA fails. The Legacy Trust was never funded and the Attorney General's potential involvement in the Legacy Trust never materialized because it was invalidated by the Supreme Court. (*Bauknight I* ¶¶ 8-9; *Bauknight II* ¶¶ 7, 9, 10, 11.) The South Carolina Supreme Court's intervening opinion in *Wilson v. Dallas* during the pendency of this action effectively terminated the Attorney General's potential oversight of any of James Brown's assets that were planned to be placed in the Legacy Trust, and thus, Appellant's entire argument underpinning its FOIA case against the Legacy Trust is moot and was appropriately dismissed.

III. Appellant Is in Possession of All Responsive FOIA Documents, Mooting Its FOIA Action Against the Legacy Trust.

The FOIA directed to Defendant *Bauknight* sought "The Final and all drafts, signed and unsigned, of the James Brown Legacy Trust." (Compl. ¶ 18.) The Answer of the Attorney General, filed on March 7, 2013, asserted that "he has no documents that could be considered responsive to the Freedom of Information Act request at issue except for an attached draft of the Legacy Trust included in the Record on Appeal in *Wilson v. Dallas*, Op. No. 27227 (S.C. Sup. Ct., filed February

27, 2013), a case in which [Appellant] was a party.” (Answer of Attorney General, p. 1, 8 ¶ 36 (footnote omitted).) The document referenced was an attachment to the Answer.

On March 13, 2013, the Attorney General filed an additional exhibit to the Answer with the clerk of court. This exhibit was another draft of the Legacy Trust, which had also appeared in the Record on Appeal in *Wilson v. Dallas*. As these are the only two documents related to the FOIA request to the Legacy Trust and they have been in Appellant’s possession by way of the Record on Appeal and now also provided as attachments to the Attorney General’s Answer, the FOIA as to Respondent Legacy Trust is moot and the complaint was properly dismissed on such grounds. *See Sloan v. Friends of the Hunley, Inc.*, 369 S.C. 20, 630 S.E.2d 474 (2006) (justiciable controversy no longer exists once documents subject to FOIA are produced).

CONCLUSION

The trial court properly ruled that the Legacy Trust does not meet the statutory definition of “public body,” because it is a private trust created to hold and expend private assets and as such, the Legacy Trust is not subject to the FOIA. The trial court also correctly determined that the Legacy Trust no longer exists following the South Carolina Supreme Court’s ruling in *Wilson v. Dallas* and that all FOIA documents sought from the Legacy Trust are in Appellant’s possession, making this case moot. For these reasons, the circuit court’s grant of dismissal should be affirmed.

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Trustee

Columbia, South Carolina
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STATE OF SOUTH CAROLINA
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APPEAL FROM RICHLAND COUNTY
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Doyet A. Early, III, Circuit Court Judge
Case No. 2012-CP-40-350
Appellate Case No. 2016-001727

Adele J. Pope,

Appellant,

v.

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

Respondents.

PROOF OF SERVICE

I, Connie W. Grugan, legal assistant to the law firm of Lewis Babcock L.L.P., hereby certify that I have served **Initial Brief of Respondent and Designation of Matter to be Included in the Record on Appeal** upon opposing counsel by mailing copies of same, first-class postage prepaid and return address clearly indicated, to opposing counsel as follows:

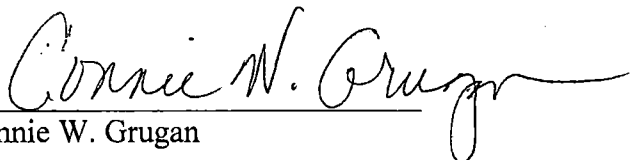
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SC Court of Appeals



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This 1st day of February, 2017.



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SC Court of Appeals

HAND DELIVERED

Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: Adele J. Pope v. Alan Wilson (James Brown Legacy Trust)
Case No. 2012-CP-40-350; Appellate Case No. 2016-001727
Our File No. 11-150

Dear Ms. Kitchings:

Enclosed please find the original and one copy of Initial Brief of Respondent and Designation of Matter to be Included in Record on Appeal in regard to the above-referenced matter for filing with your office. Please provide our courier with clocked copies.

By copy of this letter, we are hereby serving a copy of same upon opposing counsel.

Very truly yours,

LEWIS BABCOCK L.L.P.

David L. Paavola

DLP:cg

Enclosure

cc: Adam T. Silvernail, Esquire
J. Emory Smith, Jr., Esquire