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SC Court of Appeals

**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. 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 Bauknight, its Trustee..... Respondents.

REPLY BRIEF OF APPELLANT

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Argument on Reply¹

I. The McMaster Legacy Trust is a public body.

Respondent McMaster Legacy Trust argues that it is not a “public body” as defined in S.C. Code Ann. §30-4-20(a) of the South Carolina Freedom of Information Act (“FOIA”), because it is a trust, rather than “a state board, commission, agency, or authority; a county, municipality, township, school district, or special purpose district; or a committee, subcommittee or advisory committee.” (Legacy Trust Brief at 6) Respondent does not acknowledge the additional language in that same statute which provides that “the like of any such body by whatever name known” is also included within the definition of a “public body” under S.C. Code Ann. §30-4-20(a).

The McMaster Legacy Trust’s argument that a trust cannot be a public body is thus specious. The statute, by its plain language, requires the Court to look beyond the name of an entity.

The McMaster Legacy Trust was created by the South Carolina Attorney General (Complaint). The Attorney General was given the authority to control the McMaster Legacy Trust by his power to remove and replace its fiduciary at will. Additionally, the lower court had before it the Confirmation and Amendment to the McMaster Legacy Trust (referred to therein as the “settlement entity”), which was signed by Attorney General McMaster *without the Legacy Trust’s fiduciary*. (R. 478)

¹ Appellant incorporates the arguments made in her Brief.

Respondent relies heavily on *DiSaboto v. S.C. Ass'n Sch. Adm'rs*, 404 S.C. 433, 746 S.E.2d 329 (2013), for the proposition that the McMaster Legacy Trust is not a public body. Its reliance on *DiSaboto* is misplaced, as the Court found therein that the issue of whether SCASA was a public body was not properly before it. That case touched only on the First Amendment challenge, which is not at issue in this case. *Id.* at 443, 746 S.E.2d at 334.

Although Respondent minimizes the impact of *Weston v. Carolina Research & Development Foundation*, 303 S.C. 398, 401 S.E.2d 161 (1991), that case holds that even indirect public support of an organization could cause that organization to be treated as a public body. Likewise, Appellant has cited *Associated Press v. Sebelius*, 31 Kan.2d 1107, 78 P.3d 486 (2003), in which the Kansas Court held that an organization's use of state employees (who were not paid outside their state salaries) meant that it was a public body for FOIA purposes.

Respondent does not dispute that the McMaster Legacy Trust was supported by the use of multiple members of the Attorney General's office in defending its creation, funding and continued existence. *See Wilson v. Dallas*, 743 S.E.2d 746, 768.²

None of the cases cited by Respondent deals with an entity *created by the State* and whose very existence was defended in Court proceedings by the staff of the Attorney General. Appellant submits that the Attorney General's role in creating and

² "The AG has taken unprecedented action in this case. After effecting a total takeover of Mr. Brown's estate by excluding its trustees and banding together with parties who stand only to gain from the invalidation of the testator's devise, the AG disposed of the court-appointed trustees, created a new settlement entity, and inserted himself into the day-to-day operations of a newly created charitable trust, the Legacy Trust." *Id.*

controlling the McMaster Legacy Trust, which role was called “unprecedented” by our Supreme Court in *Wilson*, compels a finding that Respondent is a public body under FOIA. Respondent cites the Supreme Court’s finding in *DiSabato* that a non-governmental entity is a public body where it is “generally supported by public funds.” *Id.* at 456, 746 S.E.2d at 341. The creation of the McMaster Legacy Trust by the Attorney General and his subsequent defense of its creation and funding during protracted proceedings in the lower court and the Supreme Court clearly show general support by public funds.

Appellant further notes that the lower court *dismissed* this action, rather than hearing and determining whether the McMaster Legacy Trust was a public body for the purposes of FOIA. As set forth and supported in Appellant’s Initial Brief, South Carolina case law requires the Court to view all well-pled facts as true and to view any inferences drawn therefrom in the light most favorable to Appellant. *See* Appellant’s brief at 10-11.

Plaintiff alleges in her Complaint that the McMaster Legacy Trust was created by the Attorney General; that it was supported by public funds; and that the Attorney General controls the McMaster Legacy Trust by virtue of his right to remove and replace its fiduciary at will. (R. 16, 17, 21, 22)

The Supreme Court’s findings in *Wilson* support Appellant’s assertions, and it was error for the lower court to dismiss Appellant’s FOIA case with a finding that the McMaster Legacy Trust is not a public body for the purposes of FOIA.

II. The Legacy Trust exists, and invalidation of the settlement agreement in *Wilson* does not allow secreting of public documents.

The Circuit Court noted in its Order that Respondent AG had moved for judgment on the pleadings. Nonetheless, the Order subsequently dismissed the entire action without clarifying whether the ruling is based on Rule 12(b)(6) or Rule 12(c).

A trial court's grant of a motion to dismiss will be sustained only if the facts alleged in the complaint do not support relief under any theory of law. If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper. *Brazell v. Windsor*, 384 S.C. 512, 515, 682 S.E.2d 824, 826 (2009). In deciding whether the trial court properly granted the motion to dismiss, the appellate court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief. *Id.* "The trial court and [the appellate Court] on appeal must presume all well pled facts to be true." *Morrow Crane Co. v. T.R. Tucker Constr. Co.*, 296 S.C. 427, 429, 373 S.E.2d 701, 702 (Ct.App. 1988). "[P]leadings in a case should be construed liberally so that substantial justice is done between the parties. Further, a judgment on the pleadings is considered to be a drastic procedure by our courts." *Russell v. City of Columbia*, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991).

The complaint alleges that Appellant is a citizen of South Carolina. It alleges that the AG and the Legacy Trust are both public bodies under FOIA. It further alleges that Appellant made a proper request for certain public documents; that the Legacy Trust refused compliance; and that the AG did not timely comply. Five years after the complaint was filed there is nothing in the record to show that either the AG or the Legacy Trust ever complied.

The McMaster Legacy Trust concedes that it was created (Resp. Brief at 3, R. 412). Today, it continues to participate in a lawsuit it instituted in 2010. (R. 16) It nonetheless argues that this case became moot when the Supreme Court invalidated the settlement agreement which would have funded the McMaster Legacy Trust, as the McMaster Legacy Trust was no longer under the control of the Attorney General.

Although Respondent cites several cases for the proposition that courts cannot decide matters which are moot, it cites no case finding that a public body which ceases to exist is thereafter relieved of maintaining its public records. The South Carolina Public Records Act, S.C. Code Ann. §30-1-10, *et seq.*, instead requires that public bodies maintain their public records. Further, the chief administrative officer of any public body is required, if he has no successor, to deliver public documents in his possession to the Archives. *See* S.C. Code Ann. §30-1-40. The statutory scheme for maintaining and preserving public records cannot be reconciled with Respondent's argument that any obligations it had to maintain or release public records was extinguished by the Supreme Court's holding in *Wilson*.

Appellant would further note that the FOIA request at issue herein was made in June 2011, and this suit was filed in August 2011. *Wilson* was not decided until 2013. It thus appears that Respondent's position is that this case could have been decided differently if it had been resolved prior to the *Wilson* decision.

This case is not moot. The Legacy Trust is a public body, and Appellant is entitled to the requested public documents, regardless of whether and how the McMaster Legacy Trust continues to operate. The Supreme Court specifically found that the Attorney General had "day-to-day control" over the McMaster Legacy Trust

at the time its decision was rendered. To assert that the public records requested nearly 2 years before *Wilson* are now shielded from FOIA defies logic.

3. Action by the Attorney General or others cannot satisfy the McMaster Legacy Trust's FOIA obligations.

Respondent argues that the Attorney General's production of some of the documents responsive to the FOIA request well into this litigation moots the FOIA claim for documents from the McMaster Legacy Trust. In support of its argument, Respondent cites *Sloan v. Friends of the Hunley, Inc.*, 369 S.C. 20, 630 S.E.2d 474 (2006).

Sloan is distinguishable from this case, as the public body at issue therein *produced the requested records*. Here, the McMaster Legacy Trust does not dispute that it has never produced a single document to Appellant under FOIA.

In *Sloan v. S.C. Dept. Rev.*, 409 S.C. 551, 762 S.E.2d 687 (2014), the South Carolina Supreme Court held that even production *by the public body from whom documents were requested* during the FOIA litigation did not moot the FOIA plaintiff's claim for attorneys' fees and costs.

The production of certain documents by the Attorney General more than a year after this case was filed did not moot the FOIA claim against the Legacy Trust. Still, it is clear from *Sloan* that at least Appellant's claim for attorneys' fees and costs should not have been dismissed.

Conclusion

For the reasons set out above, Appellant asks that this Court to find that Appellant's FOIA, Due Process and Equal Protections rights have been violated in the five (5) years since Respondents failed to comply with her proper FOIA requests. The court is requested to reverse the dismissal orders of the lower court; remand the case to the circuit court for entry of summary judgment in favor of Appellant, including a finding that the James Brown Legacy Trust is a public body as defined in FOIA; and direct that all relief sought in the complaint be granted. The lower court should also be directed to determine and direct an award of reasonable attorney's fees and costs against both Respondents for Appellant's pursuit of this FOIA suit and the appeal for more than five years.

Respectfully submitted,



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