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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.

BRIEF OF APPELLANT

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Statement of Issues on Appeal

- I. DISMISSAL WAS ERROR AND SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED BECAUSE BOTH THE AG AND THE LEGACY TRUST ARE PUBLIC BODIES UNDER FOIA
- II. THE LOWER COURT ERRED IN RULING THAT FOIA IS CONTROLLED BY DISCOVERY IN CIVIL CASES
- III. THE LOWER COURTS' TRANSFER, DELAY AND DISMISSAL OF A 2011 FOIA SUIT WHERE SUMMARY JUDGMENT WAS APPROPRIATE DENIED APPELLANT'S FOIA, DUE PROCESS AND EQUAL PROTECTION RIGHTS
- IV. APPELLANT IS ENTITLED TO ATTORNEY'S FEES UNDER FOIA BECAUSE PUBLIC BODIES DID NOT COMPLY WITH HER FOIA REQUEST

Statement of the Case

This action, brought by Appellant under the South Carolina Freedom of Information Act, S.C. Code Ann. § 30-4-10, et seq. ("FOIA"), was filed in Newberry County on August 3, 2011. [R. 15]

Appellant is a citizen and resident of Newberry. [R. 15]

Respondent Alan Wilson ("AG Wilson") is the Attorney General of South Carolina.

Respondent James Brown Legacy Trust ("Legacy Trust") is a Trust created by former AG Henry McMaster and others. Its trustee is Russell L. Bauknight. [R. 15]

The complaint asserts that both Respondents are public bodies under FOIA, and both failed to comply with proper FOIA requests made on June 30, 2011. [R. 19-20]

The complaint seeks declaratory and injunctive relief under FOIA, including a declaration that the Legacy Trust is a public body; a direction that Respondents must release the requested documents; and a finding that Appellant is entitled to attorney's fees and costs. [R. 23-24]

The documents sought under FOIA from the AG are:

All correspondence, email and/or other communications between any member of the Office of the South Carolina Attorney General and Russell L. Bauknight between August 1, 2010 and May 4, 2011 related [to] the value of the assets of the Estate of James Brown and/or the James Brown 2000 Irrevocable Trust.

The documents sought under FOIA from both Respondents are:

The final and all drafts, signed and unsigned, of the James Brown Legacy Trust. [R. 20-24]

On September 2, 2011 the AG served a motion to dismiss or strike the complaint. The motion and supporting memoranda referenced Richland County Case 2010-CP-40-4900 [the "Wingate Suit"], a lawsuit filed by the AG and Legacy Trust against Appellant and Robert L. Buchanan, Jr., on May 19, 2010. The AG asserted in part:

Plaintiff is essentially pursuing through the instant suit the same discovery issues that are pending in Case 4900 [the "Wingate Suit"]. Therefore, this case is subject to dismissal under Rule 12(b)(8). [R. 79; R. 411]

On September 6 Appellant served a return and affidavit opposing the motion of the AG to dismiss or strike. Appellant requested an expedited hearing. [R. 81; R. 306]

On September 12 Appellant served a return to the Legacy Trust's motion to dismiss or strike. [R. 79]

On September 29, 2011 Appellant moved for summary judgment. [R. Supp. 1] Appellant's summary judgment motion is supported by various affidavits. [R. 316; R. 368; R. 387; R. 395; R. 393; R. 404]

Prior to a hearing held on January 11, 2012 the parties served various motions, responses and memoranda supporting their respective positions. [R. 91; R. 97; R. R. 352; R. 93; R. 372; R. 411; R. 436; R. 368; R. 299; Aff. Pope, 9/6/11; R. 404; R. 97]

The January 2012 hearing involved both this FOIA case and a separate FOIA suit filed by Appellant. It was attended both by the AG's counsel of record in this FOIA case and the AG's and Legacy Trust's counsel in the Wingate Suit.

Appellant's counsel argued that transfer to Richland and consolidation with discovery in the Wingate Suit would delay FOIA compliance and treat Appellant

differently from other citizens under FOIA because she is being sued by the AG in the Wingate Suit.

When the Court asked the AG to state his position, the AG's FOIA counsel asserted that both FOIA cases, if not dismissed, should be transferred to Richland County and consolidated with the Wingate Suit. [R. 267]

The AG said that the Honorable L. Casey Manning, who was presiding over the Wingate Suit, could decide what Appellant can get under FOIA, in discovery and in any judgment in the Wingate Suit. [R. 268-269]

The AG said that the hurdles to this FOIA litigation had not been added by the AG, but by Appellant by filing the FOIA suit in a county other than Richland. [R. 268-269]

Appellant asserted that it would be unjust to allow the private plaintiffs in the Wingate Suit, who share counsel with the AG, to become involved in Appellant's FOIA rights.

On January 11, 2012, the circuit court issued a Form 4 Order transferring venue of this case to Richland County. [R. 273; R. 13]

On February 1, 2012 the AG moved to consolidate this case with the Wingate Suit. [R. R. 103] Appellant opposed the consolidation. [R. 441]

On March 15, 2013 the Legacy Trust filed a motion to stay related to the first opinion in *Wilson v. Dallas*, 403 S.C. 411, 743 S.E.2d 746 (2013) [R. 215]

On March 27, 2013 Appellant filed a status report and memorandum of law asking the lower court to proceed with this FOIA action. [R. 473]

Between May 2013 and May 2016 Appellant made numerous requests for a hearing in this FOIA matter. [R. Supp. 23; R. Supp. 25] During this period the AG, through Wingate Suit counsel, sought to have all James Brown Richland County matters stayed pending the outcome of James Brown litigation in Aiken County. [R. 509] No hearing was held.

On May 17, 2016 a hearing was held before the Honorable Doyet A. Early, III. [R. 274] Between the 2012 and the 2016 hearings, Appellant and Respondents filed various documents in support of their respective positions. [R. 497]

On June 14, 2016 Judge Early issued an order dismissing Appellant's FOIA complaint as to the Legacy Trust and a separate order dismissing the complaint as to the AG. [R. 5; R. 9]

On June 27, 2016, Plaintiff timely served and filed motions to alter, amend or vacate the dismissal orders. [R. 262]

By Form 4 Orders dated July 27, 2016, the motions to alter, amend or vacate the June 14 orders were denied. [R. 1; R. 3]

This appeal followed.

Statement of Facts

Entertainment icon James Brown died on Christmas Day 2006 leaving the bulk of his \$100 million fortune to the "I Feel Good" Foundation to educate needy students. [R. 372; R. 376] Brown's 501(c)(3) "I Feel Good" Trust was given more than 850 copyrights and the right to exploit James Brown's famous persona.

In the fall of 2007 the AG entered the James Brown Aiken proceedings to protect the needy student beneficiaries of the "I Feel Good" Foundation. Since then, at

least six AG attorneys and six AG staff members have worked on James Brown matters. [R. 380]

In February 2008 the AG appeared on WIS-TV. When asked if lawsuits filed by some of Brown's claimed heirs would deplete the "I Feel Good" Foundation, the AG said:

There is a concern some could be whittled away, but we think there is so much money involved because the name is so big and the rights to his image really valuable. We're trying to look at this in the long term. [R. 311]

On August 10, 2008 the AG brokered a settlement which the South Carolina Supreme Court later described as a "total dismemberment of Brown's carefully crafted estate plan." *Wilson* at 445, 746 S.E.2d at 764.

The AG and settling parties agreed to create a new trust called the James Brown Legacy Trust ("Settlement Entity"), which would "receive, hold, manage and be authorized to sell the James Brown assets." The trustee and any successor trustee for the Settlement Entity was to be selected solely by the AG. *Id.* at 421, 743 S.E.2d at 752.

The settling parties agreed to surrender any intellectual property rights to Brown's music or persona created under federal copyright laws or laws for heirs to the Legacy Trust. *Id.* at 421, 743 S.E.2d 752.

The settling parties agreed the settlement would be a binding private agreement whether or not approved by a court. *Id.* at 422, 743 S.E.2d 753. Bauknight became trustee of the Legacy Trust in late 2008 or early 2009. He continues to serve today.

On May 26, 2009 the circuit court approved the AG's settlement and replaced Brown's fiduciaries, Appellant and Buchanan, with Bauknight. Buchanan and Appellant appealed.

On May 19, 2010, the AG and the Legacy Trust sued Buchanan and Appellant in Richland County seeking tens of millions of dollars. As relevant to this and other FOIA matters, the AG claimed Buchanan and Appellant should not have appealed the AG's settlement; should have accepted a \$100 million offer for Brown's assets; and lacked knowledge about copyright law. [R. 17; R. 19]

The AG, Legacy Trust and settling parties share a private lawyer in the Wingate Suit. [R. 33]

In 2010 Bauknight, supported by the AG, told the IRS James Brown's music empire was worth only \$4.7 million at Brown's death, and Brown's gift to the "I Feel Good" Charity under \$3 million. [R. 17; R. 19]

In December 2010 AG McMaster and others secretly amended the Legacy Trust. [R. 478]

In April 2011, Wm. Jeffrey Smith and Appellant circulated a draft of *Private Foundation, Copyright Heirs, and Musical Millionaires: Why the James Brown "I Feel Good" Trust doesn't...* for review by professionals. *Private Foundations* explored how the AG's misreading of the Sections 203 and 304 of the Federal Copyright Act, the "Termination Rights" provisions, combined with a devaluation of Brown's music empire, would leave the "I Feel Good" Charity with almost nothing. [R. 372-384]

In May 2011 the AG and Bauknight began making the public claim that Buchanan and Appellant had intentionally overstated the value of Brown's assets to

the IRS by \$79 million for the improper purpose of securing a \$5 million commission for their service under Brown's estate plan. [R. 19]

The AG's claimed \$4.7 million value was less than 1/15 the true value of Brown's assets. If the AG's claims had been true, they could have ended Buchanan's and Appellant's legal careers and exposed them to being charged with a federal felony. *See* 26 U.S.C.A. § 7206.

On June 30, 2011, without knowing of the Legacy Trust amendment, Appellant made the FOIA requests which are the subject of this appeal. Appellant seeks the \$4.7 million appraisal and related documents. These are the documents used by the AG in making the claim to the Supreme Court in 2011 that Brown's "I Feel Good" Charity, after \$2 million to educate some of Brown's own grandchildren, had a value of only about \$1 million when Brown died-- not the \$80 million shown on Brown's estate tax return as filed. [R. 16-21]

From both Respondents Appellant seeks all signed and unsigned copies of the Legacy Trust, its 2011 amendment, and any other amendments.

On July 15, 2011 the Legacy Trust declined to comply with the FOIA request. Counsel for the Legacy Trust responded in part:

In the event that you continue to file unnecessary discovery and/or FOIA requests, please be advised that the Trust and Estate will have no other choice than to file an action against you for abuse of process or sanctions. [R. 48]

The AG failed to timely produce the requested documents.

Appellant filed this suit on August 3, 2011. She incorporates the Statement of the Case herein.

In the six years between the FOIA requests and the dismissal order, the AG did not release the \$4.7 million appraisal; the Legacy Trust documents, or the related documents to support his \$4.7 million claim. Nor has the Legacy Trust released the requested documents.

On May 8, 2013 the South Carolina Supreme Court found that there was no reasonable basis for the undue influence claims asserted by Brown's will contestants other than as a means to dismantle Brown's estate plan. They found that the result of the AG's settlement was to enable those who were disinherited to obtain Brown's assets to the detriment of the charitable entity Brown so fervently desired. The Court found that the AG's settlement was an "unprecedented misdirection of the AG's authority in estate cases." *Wilson* at 445, 743 S.E.2d at 764.

The Court found that Brown's oft-repeated intent was to leave the bulk of his estate to charity for the education of needy children, as well as to provide up to \$2 million for the education of his own family members. It found that the AG's plan subverted that stated desire.

The Supreme Court found that Brown had gone to "remarkable lengths to protect his right to designate the appropriate legacy for his life's work, including having numerous provisions in his estate documents and informing family members of his intentions in advance." *Wilson* at 439, 743 S.E.2d at 762.

The Supreme Court did not, however, void the Legacy Trust. The Legacy Trust continues to act, and to hold the Termination Rights and other assets of the settling parties.

Since May 8, 2013, the AG and Legacy Trust have continued the Wingate Suit with and for the benefit of the parties to the AG's settlement.

In 2015 a sale of three of the approximately 850 copyrights Brown devised to the "I Feel Good" Charity was conducted. From the sale, \$1 million was distributed to Legacy Trust beneficiary Tommie Rae, even though her claim to be Brown's spouse is disputed by James Brown's estate. Another \$1 million was distributed to other will contestants. The AG continues to support Bauknight's actions, despite these payments. [R. 263]

Ten years after James Brown's death, not a single James Brown "I Feel Good" scholarship has been awarded. The AG and Legacy Trust formed to dismember the "I Feel Good" Charity are still jointly pursuing Richland 4900. A sale of just three of Brown's 850+ songs has put \$2 million in the pockets of will contestants. Yet the AG and Bauknight continue to assert that Brown's music empire was worth less than \$4.7 million when Brown died.

For more than half of the ten years since Brown died the media and public, along with Appellant, have been denied access under FOIA to the public documents used by the AG to value the James Brown assets he controlled, through his public office, from 2009 until 2013.

Argument

I. DISMISSAL WAS ERROR AND SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED BECAUSE BOTH THE AG AND THE LEGACY TRUST ARE PUBLIC BODIES UNDER FOIA.

- a. Summary Judgment in favor of Appellant, not dismissal, was appropriate as to both Respondents.**

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.

Despite the AG's seeking judgment on the pleadings and the Legacy Trust's seeking dismissal under Rule 12, substantial evidence was presented to the Circuit Court outside the pleadings, including affidavits.

Under FOIA, dismissal was inappropriate. Summary judgment with legal fees and costs should have been granted. Further, it should have been granted years ago when first requested.

The FOIA's importance is clear from Section 1 of the Act.

The General Assembly finds that it is vital in a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and the formulation of public policy. Toward this end, provisions of this chapter must be construed so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their public officials at a minimum of cost or delay to the persons seeking access to public documents or meetings. S.C. Code Ann. § 30-4-15.

The AG's own interpretation of the FOIA supports the relief sought in the complaint: when in doubt, release the document. *Public Official's Guide to Compliance with South Carolina's Freedom of Information Act*, S.C. Press Ass'n.

"Public body" under the FOIA includes "... any organization supported in whole or in part by public funds or expecting public funds..." The AG does not deny he is a public body under FOIA. As set out more fully below, and stated in the complaint, the Legacy Trust is a public body. [R. 16].

Appellant is clearly a "person" under FOIA. Under FOIA any person has a right to inspect or copy any public record of a public body. S.C. Code Ann. §30-4-30(a). The complaint and attached FOIA requests make clear that Appellant properly requested inspection of the public documents at issue.

A public body, upon written request for records made under FOIA shall within fifteen days (excepting Saturdays, Sundays and legal and public holidays) of the receipt of a FOIA request notify the person making such request of its determination and the reasons therefor. S.C. Code Ann. §30-4-30(c).

The Legacy Trust notified Appellant it would not comply because it claimed it was not a public body. The AG failed to timely respond. As the complaint states, the AG violated FOIA by not responding, and the Legacy Trust misinterpreted FOIA.

Under S.C. Code Ann. §30-4-40, a public body may, but is not required to, exempt from disclosure certain information such as trade secrets, correspondence or work products of legal counsel for a public body and any other material that would violate attorney-client relationships.

In this case, there is no evidence in the complaint or the record that either the AG or the Legacy Trust took appropriate action to assert such exemptions. On the contrary, the AG's and Legacy Trust's continuing to be Co-Plaintiffs in Richland 4900 with Tommie Rae and other will contestants seeking to set aside the "I Feel Good" Charity for more than three years after *Wilson v. Dallas* makes clear the AG and his Legacy Trust waived any privilege that may have existed.

As the complaint states, when the AG failed to comply with Appellant's valid FOIA request, and the AG's Legacy Trust refused, Appellant's statutory remedy was clear:

Any citizen of the State may apply to the circuit court for either or both a declaratory judgment and injunctive relief to enforce the provisions of this chapter in appropriate cases as long as such application is made no later than one year following the date on which the alleged violation occurs ... The court may order equitable relief as it considers appropriate, and a violation of this chapter must be considered to be

an irreparable injury for which no adequate remedy at law exists. S.C. Code Ann. §30-4-100. [Emphasis supplied.]

The complaint states that Appellant is a citizen of South Carolina. She made her application to the circuit court in the county where the FOIA request was made. The relief she sought was ripe at the time the complaint was filed.

The transfer to Richland County, the five-year delay, and the dismissal have increased the irreparable injury to Appellant, which FOIA acknowledges. The transfer also continues to cause injury to others interested in seeing documents under FOIA which show how the AG concluded five years after Brown's death that the \$80 million James Brown "I Feel Good" Charity over which the AG had assumed control in 2009 was really worth about \$1 million when Brown died.

While the facts of this case are unique because the AG has never answered the complaint, summary judgment is nevertheless appropriate. Under Rule 56 summary judgment should be granted where, viewing the facts in the light most favorable to the non-moving party, the moving party is entitled to judgment as a matter of law. Rule 56, *South Carolina Rules of Civil Procedure*. That is the case here.

Allowing public bodies or public officials to decline to respond to FOIA requests and then deflect a FOIA noncompliance complaint with a series of motions intended to further delay FOIA compliance would violate both the letter and spirit of FOIA. It would be particularly troublesome where the delaying tactics were employed by the public official charged with the enforcement of FOIA.

Because of the involvement of the AG, this appeal touches all citizens who rely on FOIA as a means to assure the transparency in government which is fundamental to our democratic society. FOIA compliance is essential for a strong press and honest

government. It is vital to our democracy. The lower court's orders do not work to that end.

The traditional role of the press has been to serve as a watchdog of government, thereby ensuring government transparency. The precedent established by the lower court's dismissal orders would render the watchdog toothless.

FOIA provides that public documents are to be made available by public officials and public bodies to citizens or to the media at a minimum cost and minimum delay. The media, upon which many citizens depend for information about government proceedings, use the "teeth" of FOIA to investigate and monitor the actions of public officials and public bodies.

Five years cannot be considered a minimum delay, nor can maneuvering through discovery in a tort suit filed by the AG in 2010 to find documents requested under FOIA be considered anything but costly. If the lower court FOIA dismissal orders stand, neither citizens nor newspapers, with their reduced news staffs, will have the means to obtain information under FOIA.

Where FOIA has no teeth, there is no government transparency. Without FOIA and the light of public scrutiny, public officials are allowed to conduct their business in the shadows, where corruption thrives.

When Appellant filed her 2011 FOIA complaint she was entitled to summary judgment. To remand this 5-year-old case for the AG and Legacy Trust to answer and further delay FOIA compliance would continue the irreparable harm to Appellant and erode public confidence in FOIA.

Under the unique facts of this case, reversal of dismissal, a grant of summary judgment in favor of Appellant, and remand for a determination of attorneys' fees and costs as set out below is the appropriate and just remedy.

b. The Legacy Trust is a public body under FOIA and must comply with FOIA requests.

In the Legacy Trust dismissal order, the lower court gave three reasons for its dismissal of Appellant's FOIA complaint under Rule 12(b):

1. The lower court said the Legacy Trust is not subject to FOIA because it was created as a private trust and does not meet the statutory definition of a public body under FOIA.
2. The lower court said the Legacy Trust no longer exists.
3. The lower court said the controversy is moot because Appellant is in possession of the documents requested under FOIA. [R. 5; R. 9]

None of the lower court's holdings is found within the complaint, as required by Rule 12(b), or supported by the record. Each is discussed below.

1. The Legacy Trust is a public body under FOIA.

The Legacy Trust was created by AG McMaster in his official capacity. Six AG lawyers and six AG staff members paid by the taxpayers of South Carolina were involved in its creation. In 2009 the AG and other settlors of the Legacy Trust assured the court that the AG had taken control of the Legacy Trust and would continue to control it. [R. 381]

The Legacy Trust, with the AG, filed Wingate Suit in 2010. The Wingate Suit is a civil suit in which the AG's and Legacy Trust's complaint asserts that they have a right to recover damages against Appellant and Buchanan for alleged breaches of duty. [R. 33]

Just days before AG McMaster left office, an amendment to the Legacy Trust, also known as the Settlement Entity, was signed. The Legacy Trust amendment was not produced under the FOIA requests. It was filed by a third party long after this FOIA suit.

It is noteworthy that the Legacy Trust amendment was not signed by the AG's trustee, Bauknight. It was signed by the AG himself. [R. 478] This important amendment, signed by AG McMaster, confirms that the AG with others:

...created an entity (the "Settlement Entity") to hold all of the assets related to James Brown... [R. 478; R. 481]

Without even acting through his Legacy Trust trustee, the AG himself amended the Legacy Trust during the pendency of the *Wilson* appeal. He did so to allow Brown's son Terry to exercise an exclusive right to conduct due diligence related to "the sale of all or substantially all" of the "James Brown Assets." [R. 478]

It was during Terry Brown's six-month due diligence period that the AG and Legacy Trust began to claim that James Brown's music empire was worth less than \$4.7 million.

Documents related to this dramatic public devaluation by the AG of the Legacy Trust he had just amended in connection with a proposed right of first refusal held by a beneficiary of the AG's Legacy Trust are public documents. They relate to public action taken by two public bodies. Public scrutiny under FOIA is required and critical where, as here, the AG has effective control of both James Brown's "I Feel Good" Charity and the Legacy Trust the AG has created to dismember it.

In January 2011 when AG McMaster left office, AG Wilson took control of the Legacy Trust, acting under the amendment AG McMaster had signed just days earlier.

When Appellant made her FOIA request a few months later, neither the AG nor his Legacy Trust produced either the McMaster amendment; the original signed Legacy Trust; or additional amendments and drafts.

Since January 2011 AG Wilson and the Legacy Trust he controls have continued to pursue the Wingate Suit. AG Wilson, as AG, has the unfettered right to remove and replace Bauknight as the Legacy Trust's trustee. It is he who condones the Legacy Trust's continuing alliance in the Wingate Suit with Tommie Rae and other will contestants in the Wingate Suit. It is the AG who approves Bauknight's service as agent for Tommie Rae and her son in the Wingate Suit. This state support for an organization designed to hold James Brown's dismembered "I Feel Good" Charity may be unprecedented. It is nevertheless real and direct.

When Appellant made her FOIA request for Legacy Trust documents, neither the AG nor the Legacy Trust produced them.

Our Supreme Court held in *Weston v. Carolina Research and Development Foundation*, 303 S.C. 398, 401 S.E.2d 161 (1991), that even indirect public support of an organization could cause that organization to be treated as a public body. In *Associated Press v. Sebelius*, 31 Kan.2d 1107, 78 P.3d 486 (2003), 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. This is particularly instructive, since many attorneys within the AG's office paid for by the taxpayers of South Carolina have expended considerable time in defending the Legacy Trust's existence and pursuing its goals. Even before the Legacy Trust took direct control of

Brown's assets in May 2009, at least six AG lawyers and six staff members were already advancing the AG's agenda in the James Brown cases. [R. 380]

In 2006, AG McMaster – citing *Weston* and *Sebelius* – opined that “‘indirect’ or ‘in kind’ public funding, such as by virtue of an entity’s use of public employees or governmental resources, is sufficient to invoke FOIA.” (See AG Opinion dtd. 5/19/06) Following the case law and the AG’s own opinion, the vast state resources dedicated to the Legacy Trust confirm its status as a public body. [R. 380-382]

In 2011 AG McMaster, without the Legacy Trust trustee, amended the Legacy Trust. [R. 478] Days later, McMaster's successor AG stepped into AG McMaster's shoes with respect to the Legacy Trust.

The Legacy Trust was created by one AG and has been controlled since 2011 by a second AG. A trust should be found to be a public body under FOIA where, as here: a public official created the trust by the exercise of the power of his office; the public official and his successor in office retain control of that trust; and the public official, in his official capacity, has an absolute right to remove and replace the trustee at will.

Appellant has been able to find no reported South Carolina case in which a Court held that an entity *created by an officer of the State in his official capacity*, was not a public body.

Because the complaint alleges that the Legacy Trust was a public body, and FOIA supports this allegation, dismissal of the complaint on this ground was not appropriate.

2. The Legacy Trust exists and is subject to FOIA.

Even if the Legacy Trust had gone out of existence with the *Wilson v. Dallas* decision in 2013, which is inconsistent with known facts, its obligations under a 2011 FOIA request would not have ceased.

The Legacy Trust did not, however, go out of existence in 2013. The Legacy Trust was an active, public body subject to FOIA at its creation in late 2008 or early 2009. [R. 17] It remains so today.

On March 18, 2013, between the first *Wilson* decision and the final May 8, 2013, decision, the Legacy Trust claimed in this FOIA action that if the final *Wilson* decision was consistent with the first ruling, the Legacy Trust would not exist. After the final decision, however, the Legacy Trust continued to function in the Wingate Suit and elsewhere.

In the nearly four years since the first *Wilson* decision, the Legacy Trust has pursued the Wingate Suit with and for the AG, Tommie Rae and others the AG chose as beneficiaries of the Legacy Trust. In addition, its trustee, Bauknight, has remained an agent for Tommie Rae and other will contestants in the Wingate Suit. The AG had done nothing to curb Bauknight's alliance with those seeking to dismember Brown's "I Feel Good" Foundation.

In 2016 the AG and Legacy Trust were actively seeking partial summary judgment as to counterclaims in the Wingate Suit, as well as consolidation of the Wingate Suit discovery with this FOIA case.

Importantly, the Legacy Trust was 47 1/2% charitable on the day of the *Wilson* decision. If -- contrary to the evidence -- the Legacy Trust did cease to exist, Bauknight

would have been required under S.C. Code Ann. §62-7-413 and the Internal Revenue Code to take certain actions to protect the charitable assets. The AG is the state's official charged with assuring such actions are taken. There is no evidence in the record to suggest that a charitable dissolution took place.

The Legacy Trust was created and is controlled by the AG. It was active for nearly four years before the *Wilson* decision. It has continued to litigate for nearly four years since. Nothing in the complaint or record supports dismissal of this FOIA compliance action on the ground that the Legacy Trust does not exist.

3. The controversy is not moot and summary judgment should have been granted because the Legacy Trust has not produced public documents sought under FOIA.

The lower court's third ground for dismissal under Rule 12(b) of Appellant's complaint was the court's finding that the matter is moot because the Legacy Trust has produced the public documents sought under FOIA. There is nothing either in the complaint or the record to support this conclusion.

A case becomes moot when a judgment, if rendered, will have no practical, legal effect on the existing controversy. *Linda Mc Co. v. Shore*, 390 S.C. 543, 703 S.E. 2d 499 (2010); *Sloan v. Friends of Hunley, Inc.* 369 S.C. 20, 630 S.C.2d 474 (2006). That is not the case.

The complaint alleges that neither Respondent complied with the FOIA request. The AG's FOIA noncompliance was based on inaction. The Legacy Trust documented its refusal to comply with the FOIA request in writing.

Years later neither Respondent has complied with the 2011 FOIA request.

The lower court's conclusion that the matter is moot seems to be based on a copy of a single Legacy Trust amendment produced by a third party months after this case was filed. [R. 478]. The Legacy Trust has, however, never wavered from the claim that it is not subject to FOIA and will not produce the requested documents.

FOIA requires the public body to deliver the requested document. The fact that a citizen obtains a copy from a third person long after the FOIA action is commenced does not relieve the public body -- in this case both the AG and the Legacy Trust -- of its duty to comply with FOIA.

This matter is not moot because neither Respondent has complied with the FOIA requests. Nor has there been a proper determination of the status of the Legacy Trust as a public body during the relevant period. Reversal is the appropriate means to vindicate Appellant's FOIA rights. It will also protect the media and the public through an instruction to the AG regarding the relationship between FOIA and the SCRCF. Finally, it will confirm that the Legacy Trust and other trusts and organizations controlled by the AG and public officials must comply with FOIA requests, including the request made by Appellant.

c. Summary Judgment in favor of Appellant as to both Respondents is appropriate.

While it would be unusual to grant Appellant's motion for summary judgment before the AG has answered, under the extraordinary facts of this case it is appropriate.

FOIA, like Due Process, is essential to our free society. For FOIA to serve its purpose, the public body must produce the requested documents in a manner which is both inexpensive and speedy. A failure by a public body to comply with FOIA is

considered to be an irreparable injury for which there is no adequate remedy at law. S.C. Code Ann. § 30-4-100(a).

To give the AG and Legacy Trust more time to file additional pleadings after they have used motions, transfers and requests for delays would violate both the letter and spirit of FOIA.

A reversal of the dismissal and grant of summary judgment in favor of Appellant is the appropriate, fair remedy.

II. THE LOWER COURT ERRED IN RULING THAT FOIA IS CONTROLLED BY DISCOVERY IN CIVIL CASES.

The AG takes the position that Plaintiff's FOIA rights were suspended in 2010, when the AG sued Buchanan and Pope in the Wingate suit. The lower court agreed, based primarily on an Order of the Honorable Marc H. Westbrook, dated October 25, 2002, in *Lominack vs. Myers*, Case No. 2002-CP-32-1890. That two-page Order was never reviewed by an Appellate Court and made a finding that the FOIA did not expand discovery available in a criminal case.

There are no reported South Carolina cases which hold that the Rules of Civil Procedure applicable to discovery in a pending civil case can be used to stem a citizen's rights under the FOIA.

The Federal Courts have addressed that issue, and the D.C. Circuit held:

An attempt to interject FOIA "does not extend the scope of discovery under Rule 16" when done as part of criminal discovery. *DeLorean*, 717 F.2d at 480; accord *Murdock*, 548 F.2d at 602. Discovery limitations, civil or criminal, however, do not apply when FOIA requests are presented in a discrete civil action. The **plaintiff's rights in a FOIA action do not depend on his or her identity**; " '[t]he Act's sole concern is with what must be made public or not made public.' " *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, --- U.S. ----, 109 S.Ct. 1468, 1481, 103 L.Ed.2d 774 (1989) (citation

omitted); see *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 n. 23, 98 S.Ct. 2311, 2327 n. 23, 57 L.Ed.2d 159 (1978) (stating that person's **rights under FOIA are neither diminished nor enhanced by his "litigation-generated need"** for agency documents); accord *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 143 n. 10, 95 S.Ct. 1504, 1513 n. 10, 44 L.Ed.2d 29 (1975); see also *United States v. Buckley*, 586 F.2d 498, 506 (5th Cir.1978) (stating that **"FOIA provides an independent basis for obtaining information potentially useful in a criminal trial"**), cert. denied, 440 U.S. 982, 99 S.Ct. 1792, 60 L.Ed.2d 242 (1979); *Comstock Int'l (U.S.A.), Inc. v. Export-Import Bank of the United States*, 464 F.Supp. 804, 805 n. 2 (D.D.C.1979) (noting that FOIA plaintiff presumably sought documents for use in an arbitration proceeding, but holding that **"a party's rights under the FOIA are neither enhanced nor diminished by its status as a private litigant"**); see generally Toran, *Information Disclosure in Civil Actions: The Freedom of Information Act and the Federal Discovery Rules*, 49 GEO.WASH.L.REV. 843, 861 (1981) ("**[A] party's desire to use information obtained under the FOIA in subsequent litigation is not a basis for denying an otherwise legitimate FOIA request.** Indeed, there are situations in which FOIA will permit access to information that would not be available through discovery.") (footnote omitted); Tomlinson, *Use of the Freedom of Information Act for Discovery Purposes*, 43 MD.L.REV. 119, 121 (1984) (same).

North v. Walsh, 881 F.2d 1088 (D.C. Cir. 1989) [emphasis supplied]

In addition, the Court in *Hoover v. United States Dept. Of the Interior*, 611 F.2d 1132 (5th Cir. 1980), specifically held that a FOIA plaintiff's status as a defendant in civil litigation filed by the government **does not affect his rights under FOIA:**

The appellant landowner's right under the FOIA, where he is in effect asserting the rights of the public to obtain such appraisals, is inherently different than his particularized status as the landowner in the condemnation proceeding. He is entitled to vindicate his public rights in the instant FOIA suit in accordance with the requirements of the FOIA. *Id.*

The AG's position that FOIA is subordinate to discovery in a civil suit in which the AG is sharing a private lawyer with Plaintiffs who are non-public bodies poses a grave threat to FOIA.

III. THE LOWER COURTS' TRANSFER, DELAY AND DISMISSAL OF A 2011 FOIA SUIT WHERE SUMMARY JUDGMENT WAS APPROPRIATE DENIED APPELLANT'S FOIA, DUE PROCESS AND EQUAL PROTECTION RIGHTS.

The FOIA requests were properly made from Newberry County. Newberry County is where Appellant lives; has her office; and made the FOIA requests. The AG is a statewide official who conducts state business in Newberry County. The Legacy Trust is under his control.

None of the AG's and Legacy Trust's co-plaintiffs in the Wingate suit has a right to have a hand in denial of anyone's FOIA rights.

There was no basis for the lower court to comply with the AG's request to transfer venue to Richland County. There is no basis for the AG's consolidation motion. There was no basis for repeated delays other than to advance the AG's and the Legacy Trust's position in the Wingate Suit.

Five years is too long for any FOIA case. As the state official charged with the enforcement of FOIA, the AG must set an example for all public bodies. The AG did not do so in this case. He, instead, suppressed the FOIA rights of Appellant and others to advance his control over the James Brown assets.

The suppression of Appellant's FOIA rights allowed the appellate courts to be left with the false impression that Appellant and Buchanan had committed a federal felony. It has permanently damaged their careers and reputations.

The Court should find that citizens have a right to file FOIA enforcement cases brought against a statewide official in the county where they reside, work and make the FOIA request.

The Court should find that the AG targeted Appellant for FOIA denial, venue transfer and to advance the AG and the AG's Legacy Trust's position in a civil suit they chose to bring against Appellant and Buchanan six years ago. These actions, and the lower court's support of them, were manifestly unjust to Appellant, and violate Appellant's Due Process and Equal Protection rights. *Village of Willowbrook v. Olech*, 528 US 562, 564; 120 S Ct 1073; 145 L Ed 2d 1060 (2000).

IV. APPELLANT IS ENTITLED TO ATTORNEY'S FEES UNDER FOIA BECAUSE PUBLIC BODIES DID NOT COMPLY WITH HER FOIA REQUEST.

The award of attorneys' fees under FOIA is an essential part of the enforcement mechanism. FOIA rights must not be limited to those who can, at their own expense, sue when their FOIA rights are denied.

The need for attorney's fees is especially important where the FOIA request has been denied by the AG, the constitutional officer charged with the enforcement of FOIA, and a trust which he created and controls.

Plaintiff's final cause of action is a request for the attorneys' fees and costs incurred in filing and pursuing this action. S.C. Code Ann. §30-4-100 authorizes this Court to award reasonable attorneys' fees and costs to a plaintiff who prevails in whole or in part. See *Sloan v. Friends of the Hunley, Inc.*, 393 S.C. 152, 157, 711 S.E.2d 895, 897 (2011) ("When a public body frustrates a citizen's FOIA request to the extent that the citizen must seek relief in the courts and incur litigation costs, the public body should not be able to preclude prevailing party status to the citizen by producing the documents after litigation is filed." (internal citations omitted)).

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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April 14, 2017

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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. 2016-1727


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.

CERTIFICATE OF COUNSEL

The undersigned counsel for the Appellant hereby certifies that the Brief of Appellant; Appellant's Reply Brief; and Appellant's Reply Brief (Attorney General) comply with Rule 211(b).



Adam T. Silvernail