

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

The Honorable Doyet A. Early, III, Circuit Court Judge

The Honorable L. Casey Manning, Circuit Court Judge

RECEIVED
OCT 05 2018
S.C. Court of Appeals

Appellate Case No.: 2017-001899

RUSSELL L. BAUKNIGHT, as Trustee of The James Brown 2000 Irrevocable Trust and the James Brown Legacy Trust, as Personal Representative of the Estate of James Brown, and on behalf of Alan Wilson, in his capacity as Attorney General of the State of South Carolina; Tommie Rae Brown, individually and on behalf of her minor child, James B.; Daryl J. Brown, individually and on behalf of his minor child, Janise B.; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor child Sydney L. And Carrington L.; Tonya Brown; Venisha Brown; Larry Brown; and Terry Brown

And

ALAN WILSON, in his capacity as Attorney General of the State of South Carolina; Tommie Rae Brown, individually and on behalf of her minor child, James B.; Daryl J. Brown, individually and on behalf of his minor child Janise B.; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor child Sydney L. and Carrington L.; Tonya Brown; Venisha Brown; Larry Brown; and Terry Brown, Respondents.

v.

Adele J. Pope, and Robert L. Buchanan, Jr. Defendants,

Of whom Adele J. Pope is Appellant.

RETURN TO MOTION TO CORRECT RECORD AND
MOTION TO CONSOLIDATE APPEALS

Respondent Attorney General, though counsel within the office of the Attorney General (OAG), filed a Motion to Correct the Record on Appeal (ROA) in this case. The Attorney General's motion correctly identified a letter which was inadvertently omitted from the ROA of more than 2200 pages. He also asserted the ROA was disorganized, and that certain documents, including the Litigation Retention Agreement for Special Counsel, part of the contract with the law firm of Kenneth Wingate, Esq. (collectively "Wingate") to file this suit, should be stricken.

The Attorney General's OAG counsel, who entered Richland 4900 in 2016 with a self-limiting notice of special appearance, also objects to the designation "Special Appearance" under the title "Attorney for Respondent Attorney General" on the ROA coverpage. The designation is necessary to distinguish OAG counsel from Wingate, who also represents the Attorney General, and has also filed a brief on behalf of the Attorney General in this appeal. (ROA I – V cover)

Wingate was the sole counsel for the Attorney General and all other Respondents when this suit was filed (R., p.176). Wingate remained sole Richland 4900 counsel until 2011, when, at the Attorney General's request, a Newberry County Freedom of Information Act (FOIA) suit seeking a copy of the Wingate Litigation Agreement with the Attorney General was transferred from Newberry County and consolidated with Richland 4900. (R., p.61-69)

From the 2011 consolidation of the Wingate Contract FOIA suit, until it was dismissed in 2016, the Attorney General's OAG counsel limited itself to FOIA matters, and Wingate spoke for the Attorney General and others as to the tort claims and counterclaims. (R., pp.176, 687-761, 943-945, 949-952, Wingate Brief). A 2013 Wingate Motion to be Relieved as counsel to the Attorney General was ignored, and then withdrawn in 2016.

To properly respond to the Attorney General's motion, and to provide a full record as to issues set out in the briefs in this appeal, Appellant respectfully moves this Court to consolidate this Richland 4900 pretrial appeal with South Carolina Court of Appeals Case No. 2016-001708, *Adele J. Pope v. Alan Wilson in his capacity as Attorney General of South Carolina*.

Pope v. Wilson is a 2016 appeal from this case (Richland 4900) of a November 2011 order granting the Attorney General's motion to consolidate a FOIA case seeking a copy of the Wingate contract with the Attorney General (R., p. 1235- 1253) with Richland 4900 (R., p.61-69; PvW R., p.9 - 15), and a subsequent Richland 4900 Order of June 14, 2016 dismissing the FOIA case "[b]ecause the ... documents [Wingate contract and others] may be sought through discovery in the pending litigation ..." and for other reasons. (PvW R., p. 3-5)

Appellant's Motion to Consolidate Appeals and response is supported by the record in this case and in *Pope v. Wilson*; the Appendix attached hereto; and the memorandum which follows.

**MEMORANDUM IN SUPPORT OF CONSOLIDATION OF APPEALS AND
IN RESPONSE TO ATTORNEY GENERAL'S REQUESTS RELATED TO ROA**

Consolidation of the FOIA Wingate Contract Appeal is Beneficial

Consolidation of this appeal and the *Pope v. Wilson* appeal will clarify the Richland 4900 appeal record and help the Court assess other issues raised by the Attorney General's Motion to Correct the Record.

In May 2016, the Richland 4900 FOIA suit seeking the Attorney General's Wingate contract was dismissed without a merits hearing. (PvWR., p. 3-5) The lower court adopted the Attorney General's position that the Wingate contract, including the Attorney General's standard Agreement for Special Counsel (Appendix, A-3 – A-14), could not be produced under FOIA even

though the standard agreement states that “Special Counsel agrees to adhere to South Carolina’s Freedom of Information Act, South Carolina Code of Laws §30-4-10 *et seq...*” (App, A-7).

On August 11, 2016, the Attorney General, through OAG counsel, entered a Notice of Special Appearance for one purpose: “to avoid any dispute regarding who can argue and handle the Motion to be Dropped as a Party.”(R., p. 862) Wingate was not terminated or replaced.

At all times since August 11, 2016 Wingate has continued to represent the Attorney General, along with Respondents Tommie Rae Brown, the James Brown Legacy Trust, and others, in the Richland 4900 tort claims and counterclaims. Today, on behalf of the Attorney General, Wingate is defending against Appellant’s motion for reconsideration of a partial summary judgment order granted to the Attorney General after he was dismissed as a party to Richland 4900. (R., p. 3-24)

The *Pope v. Wilson* appeal was filed August 18, 2016, just days after the OAG’s Notice of Special Appearance. (Notice of Appeal, PvW, 8/18/16)

In 2011 Appellant argued against the Attorney General’s efforts to consolidate the Richland 4900 tort suit with a FOIA suit from another county. She stated that, *on the merits*, they had no common questions. She argued that the consolidation would delay FOIA compliance, and that the seventeen Richland 4900 Plaintiffs would interfere with her FOIA rights. The actions of Wingate and the OAG since 2011 have, however, created common factual and legal questions, including constitutional questions, in the two appeals. They include: the propriety of the public Wingate contract being withheld until 2013, and the propriety of Wingate, who claims the Wingate contract is both private and legal, continuing to speak for the State/Attorney General while representing Respondent Tommie Rae and Respondent clients of Louis Levenson, Esq.

Levenson, speaking for Deanna Brown-Thomas and at least eight other Richland 4900 Plaintiff/Respondents, and counsel for Plaintiff/Respondent Tommie Rae, announced in open court to Judge Early on May 29, 2013 their intention to disregard *Wilson v. Dallas* and reinstate the Attorney General's 2008 settlement. That settlement takes 100% of Brown's "I Feel Good" Charity for Respondent James Brown Legacy Trust. It is not for the benefit of the State of South Carolina. Nor is it for the benefit of the "I Feel Good" Charity James Brown created.

At the heart of the common factual and legal questions in the two appeals is the joint action of Wingate, Bauknight and the Attorney General's OAG counsel to prevent disclosure of the Wingate contract both under FOIA and in discovery.

In assessing how important the Attorney General's FOIA position in *Pope v. Wilson* is to this appeal, the Court is asked to take notice of, and compare, a properly authorized public suit filed by the State of South Carolina in 2010 against the Bank of New York Mellon, Richland County Case No. 2011-CP-40-00533. The Mellon case uses the standard "Agreement for Legal Services" referenced by now-Governor McMaster in his letter to Russell Bauknight the day before Richland 4900 was filed by Wingate against Robert Buchanan, Jr. and Adele Pope. (R, p. 793, App., A-1) The Mellon suit was filed shortly after Richland 4900.

In each case, the standard Attorney General's Litigation Retention Agreement for Special Counsel was used. (Add., A-3- A-24; R., p 1235-1253) The standard Litigation Agreement states that the office of the State official bringing the suit will get 10% of the legal fee. (Addendum, A-8; R.,p. 1243) The Litigation Agreement says Special Counsel must adhere to South Carolina's Freedom of Information Act, South Carolina Code of laws §30-4-10. (Addendum, p.A-7; R., p.1242) The standard Litigation Agreement states that a State official is given "final authority over all aspects of the litigation." (Appendix, R., p. 1239)

The differences between the Mellon and Richland 4900 cases are many. The Mellon case was brought for the benefit of the State, while Richland 4900 was brought for the benefit of Respondent Legacy Trust (R., p. 1328). In 2010 Wingate described Respondent Legacy Trust as the “Charitable Trust Settlement Entity.” (R.,p.1328) Its beneficiaries are: The Attorney General’s (New) Charity, 47 ½%; Tommie Rae, 23 ½%; and former clients of Louis Levenson, Esq., 23 ½%. (R., p. 1328) James Brown’s “I Feel Good” Charity is not a beneficiary.

The Mellon contract is signed and available in public. (Add.) Its legality was ratified in writing by both Governor McMaster and Attorney General Wilson (Addendum, A-22 – A-23). The Wingate Contract was not signed by Governor McMaster. (R., 1237). A document incorporating it was signed by Russell Bauknight for Respondent James Brown Legacy Trust and others. (R., p. 1237) Governor McMaster stated under oath in 2016 that he did not authorize Wingate to bring Richland 4900 in the name of the State/Attorney General.(R., p. 985,989, 993)

Wingate and the OAG worked together until after the *Wilson v. Dallas* decision in 2013 to assure that the Wingate Contract was not disclosed. Even after the Wingate contract was declared public by a Federal Judge, over Bauknight’s objection, in late 2013, the resistance to its disclosure did not stop.¹

The following brief chronology contrasts the FOIA noncompliance and failure to properly authorize the Wingate contract to bring Richland 4900 with the properly-authorized Mellon suit.

March 2010	Tommie Rae’s lawyer and Bauknight threaten that AG will sue
------------	---

¹ Wingate and the Attorney General also sought to prevent release either under FOIA or in discovery of documents related to the \$4.7 million claimed value of Brown’s assets; the Legacy Trust’s January 2011 amendment giving Terry Brown the right to begin seeking a purchaser; and the handwritten admissions of Respondent Tommie Rae that her ceremony with James Brown was bigamous. (R., p. 2203 – 2206)

if Buchanan/Pope do not drop *Wilson v. Dallas* appeal. (R., p.1027)

May 18, 2010 AG Henry McMaster writes Bauknight about Wingate Suit. References, but **does not sign** “Agreement for Legal Services” (R., p. 793, Appendix, A-1)

May 19, 2010 AG named Plaintiff in Richland 4900; Bauknight also sues “on behalf of” AG in Wingate Complaint. (R., p. 176)

June 15, 2010 AG McMaster writes State Treasurer about outside counsel in Mellon case. Requests proposed contract. (App., A-2)

June 18, 2010 Public Mellon Contract signed by Willoughby/State Treasurer (Addendum, A-3 – A-14)

June 23, 2010 AG/Chief Deputy approve signed Mellon Contract. (A-15)

2010 & later Buchanan/Pope assert Wingate’s representation unconstitutional, improper because Wingate sole counsel to AG and others.(R., p. 616, 990, 993)

August 2010 Wingate introduces AG Jones to Judge Manning as “client.” Wingate tells court Respondent Legacy Trust is “Charitable Settlement Entity.” (R., p.1122)

2010 – 2018 Wingate refuses to produce “private” Richland 4900 contract.

2010 – 2015 Judge Manning declines to dismiss Richland 4900; relieves AG and others from default. (R., p.47 - 69)

2011 AG has FOIA suit seeking Wingate contract transferred to Richland County and consolidated with Richland 4900.

Feb. 2013 Order of Judge Newman rejects constitutional challenges to Mellon contract based on Attorney General’s active participation; suit for benefit of State; etc. Richland 2011-CP-40-00533. (App. A- 16 – A-24)

May 29, 2013 Tommie Rae’s counsel & Levenson announce intention to ignore May 8 *Wilson v. Dallas* decision, reinstate AG’s 2008 settlement

August 2013 Bauknight’s music manager, Afterman, helps Tommie Rae and Respondent James B. file Termination Notices in effort to take U.S. royalties from 90+ “I Feel Good” Charity’s copyrights by 2023.

2013 – 2016 Wingate, for AG, asks that no hearings be held in Richland 4900.

- 2016 AG succeeds in having FOIA suit seeking Wingate contract dismissed. *Pope v Wilson* appeal filed. AG exempted from deposition. Claims he has no knowledge of Richland 4900 suit.
- 2017 Attorney General dropped as party to Richland 4900 under Rule 21. (R., p. 19 – 24)
- 2018 Wingate continues to represent Attorney General in Richland 4900, including in summary judgment as to counterclaims.

These two Richland 4900 appeals are from the same case; are both pre-trial appeals; and now share material common questions of fact and law. The consolidation of these two appeals will clarify why the Attorney General should not be allowed to speak, generally, both through the OAG and Wingate in this appeal. It will clarify that the designation “Special Appearance Counsel” is appropriate for the limited role the Attorney General’s OAG counsel has played since 2016, and the expansive role the Attorney General’s Wingate counsel has played from 2010 until today. It will promote judicial economy and justice, and may prevent possible inconsistent rulings by this Court.

OAG Counsel Was Correctly Identified as Special Appearance Counsel to Distinguish from the Attorney General’s Private Wingate Counsel.

The Attorney General’s motion asserts that Appellant should not have designated the Attorney General’s OAG counsel as “Special Appearance Counsel.” The designation was appropriate to the facts of this highly unusual case. In this appeal, Respondent Attorney General has submitted two briefs – one through Special Appearance counsel and one through his general counsel in this case, Wingate, a private law firm. Wingate has represented the Attorney General, with others, in the complaint and all matters related to the tort suit and counterclaims for eight years.

In August 2016 AG Jones, for the OAG, made a special appearance for the limited purpose of arguing that the Attorney General should be dropped as a party under Rule 21 SCRC. Wingate continued as the Attorney General's counsel.

If the Attorney General had terminated Wingate, this matter would be easy. That did not happen. Wingate filed a brief for the Attorney General. A material issue in this appeal is the Attorney General's claim that Wingate may continue to represent the Attorney General while representing Respondents Legacy Trust and Tommie Rae.

Respondents are not normally allowed to file two briefs in an appeal. In this case the OAG Special Appearance counsel was allowed, based on its limited role, to file a brief, while Wingate filed the general brief for all Respondents, including the Attorney General. Clarifying this unusual circumstance in a brief notation on the ROA cover is appropriate.

The Attorney General asserts that Appellant has violated Rule 209 and 210. Appellant did not. The Attorney General chose his counsel eight years ago. It was the private Wingate firm. He has never chosen to terminate them, and has defended for eight years his claimed right to speak in Richland 4900 through a private law firm which represents others, including nonresidents and minors with no GAL. He has been allowed to speak with two voices and with two separate counsels in this appeal. The fact that one of them confirms the Attorney General's continued alliance with those committed to ignoring *Wilson v. Dallas* is material to this appeal.

The designations of the Attorney General's two attorneys in this appeal was both modest in light of the facts, and appropriate.

The Inadvertently Omitted May 25, 2013 Letter Will be Corrected by Supplement

By clerical error Appellant included a letter of the OAG dated May 23, 2017, rather than a letter dated May 25, 2013. Unless otherwise directed by the Court, Appellant will file a Supplemental ROA with the missing letter and any other inadvertent omissions in the ROA called to the attention of Appellant.

4. No Documents Should be Stricken from the Record

Appellant relies on her Returns to Motions to Strike, incorporating them by reference. The requested consolidation of the Richland 4900 FOIA appeal with this Richland 4900 appeal should help clarify for the Court how all documents designated by Appellant were properly presented to the lower court. This is especially true of the Special Counsel Litigation Retention Agreement, part of the Wingate contract. (R., 1235-1253) *Pope v. Wilson* can provide the Court with a more detailed explanation of the history of the Wingate contract, including its October 2013 release by a federal court.

5. The Record is Organized In Accordance With Appellate Rules

The Attorney General, through OAG counsel, asserts that the Record on Appeal (ROA), lacks organization and clarity. Appellant has met the requirements of SCACR while making an effort not to duplicate in the ROA documents which appear multiple times. A few documents, such as R. 2053 – 2053, were located in Volume V, and indexed there, either because they could not be located, or were inadvertently omitted, from earlier volumes.


CONCLUSION

With the exception of Appellant's filing of a Supplemental ROA with the May 25, 2016 letter, all relief sought in the Attorney General's Motion to Correct Record should be denied. This Honorable Court should grant Appellant's Motion to Consolidate this appeal with *Pope v. Wilson*, Appellate Case No. 2016-001708

Respectfully submitted,

W.H. Bundy, Jr., Esq.
M. Brent McDonald, Esq.
Bundy McDonald, LLC
1516 Old Trolley Road, 2nd Floor
Summerville, South Carolina 29485
888-552-1559
walter@bundymcdonald.com
brent@bundymcdonald.com

and



Adam T. Silvernail, Esq.
Law Office of Adam T. Silvernail, LLC
1905 Marion Street (29201)
Post Office Box 7995
Columbia, South Carolina 29202
Telephone: (803) 779-1770
adam@silvernaillawfirm.com
Attorneys for the Appellant Adele J. Pope

October 5, 2018

EXHIBIT A



HENRY McMASTER
ATTORNEY GENERAL

May 18, 2010

Mr. Russell Bauknight
Bauknight, Pietras & Stormer, P.A.
1517 Gervais Street
Post Office Box 1330
Columbia, South Carolina 29202

Re: James Brown Litigation

Dear Mr. Bauknight:

I have met with Ken Wingate and Everett Kendall of Sweeney Wingate & Barrow of Columbia, South Carolina, regarding the action to be filed against Adele J. Pope and Robert L. Buchanan, Jr., in the Richland County Probate Court in connection with the James Brown Estate and Trust. I am writing to confirm our understanding that you will be retaining Mr. Wingate and Mr. Kendall to file this action on behalf of the beneficiaries of the James Brown Estate and Trust, including the charitable interests. As you know, by law this office has a duty to protect charitable trusts. Also, per your conversation with Senior Assistant Attorney General C.H. Jones, Jr., in connection with the charitable trust portion of this matter, you have agreed to use the terms and conditions as outlined in the attached "Agreement for Legal Services" which references and incorporates the Attorney General's standard Litigation Retention Agreement. Of course, this office has no authority over your agreement with Messrs. Wingate and Kendall concerning the other portions of this matter.

Yours very truly,

Henry McMaster

Enclosures

HMCM/mfj



HENRY McMASTER
ATTORNEY GENERAL

June 15, 2010

The Honorable Convers A. Chellis, III, CPA
Treasurer, State of South Carolina
P. O. Box 11778
Columbia, SC 29211

Dear Treasurer Chellis:

I have received your letter of June 14, 2010 requesting the Attorney General's Office approve your request to employ outside counsel. It is my understanding that you conducted a review showing that the Bank of New York (now known as The Bank of New York Mellon) may have violated its March 24, 2000 Securities Lending Agreement with the State Treasurer of South Carolina.

This is to approve your request to employ outside counsel using the contract agreement that I have used for the State of South Carolina. Please forward me a copy of the proposed contract at your convenience. I will review both the proposed contract and your selection of counsel before approval can be granted.

Yours very truly,

Henry McMaster

HMCM/jwm

**LITIGATION RETENTION AGREEMENT
FOR SPECIAL COUNSEL APPOINTED BY THE
SOUTH CAROLINA STATE TREASURER**

This litigation retention agreement ("Agreement") is by and between the South Carolina State Treasurer Converse Chellis, III, CPA ("State Treasurer") and the below-signed attorney(s) ("Special Counsel").

RECITALS

WHEREAS, the State Treasurer has concluded that it is in the best interest of the State of South Carolina to retain Special Counsel specifically for this litigation matter; and

WHEREAS, the State Treasurer hereby engages Special Counsel to provide legal representation including, but not limited to, all preparation for, settlement of and/or actual litigation arising from the State Treasurer's securities lending arrangement with the Bank of New York (now known as The Bank of New York Mellon) ("Bank"), the Bank's mismanagement of funds and/or violations of its Securities Lending Agreement with the State Treasurer, and the losses suffered in funds entrusted to the Bank by the State Treasurer for certain accounts of the State Treasurer and the South Carolina Retirement Systems pursuant to the March 24, 2000 Securities Lending Agreement with the State Treasurer; and

WHEREAS, Special Counsel specifically represents that he has the skill, experience, expertise, and competence necessary for the meaningful prosecution of this matter;

NOW THEREFORE, in consideration for the mutual promises and covenants set forth herein, and for other valuable consideration, the State Treasurer and Special Counsel hereby agree to the following terms and conditions:

Article I. TERM

This Agreement, which shall serve as the appointment of the attorneys whose signatures are affixed below as Special Counsel to the State Treasurer, commences on June 18, 2010, and terminates when the case has been fully and finally resolved by settlement, litigation or otherwise, including appeals, unless the State Treasurer or Special Counsel terminate the appointment earlier pursuant to Article VI of this Agreement. The State Treasurer shall not be liable to compensate Special Counsel for any services rendered after termination of the Agreement.

A-3

Article II. SERVICES

A. Scope of Appointment

Special Counsel shall provide legal services, advice, and consultation to the State Treasurer for this litigation in a manner consistent with accepted standards of practice in the legal profession. In view of the personal nature of the services to be rendered under this appointment, the State Treasurer shall be the judge of the adequacy of those services, with the advice and consent of the Attorney General of South Carolina. The parties agree:

1. The State Treasurer shall have final authority over all aspects of this litigation. The litigation may be commenced, conducted, settled, approved, and ended only with the express approval and signature of the State Treasurer. The State Treasurer at his sole discretion has the right to appoint a designated assistant ("designated assistant") to oversee the litigation, which appointment the State Treasurer may modify at will.
2. Special Counsel shall provide legal services to the State Treasurer subject to the approval of the State Treasurer for the purposes of seeking injunctive relief, monetary relief, and other relief against all entities in this litigation.
3. The State Treasurer may provide attorneys and other staff members to assist Special Counsel with this litigation. The identity and responsibilities of such personnel so assigned shall be determined solely by the State Treasurer. All pleadings, motions, briefs, formal documents, and agreements must bear the signature of the State Treasurer or his designated assistant.
4. Special Counsel shall coordinate the provision of the legal services with the State Treasurer or his designated assistant, other personnel of the Office of the State Treasurer, and such others as the State Treasurer may appoint as Special Counsel. All pleadings, motions, briefs, and other material which may be filed with the court shall first be approved by the State Treasurer and provided to his office in draft form in a reasonable and timely manner for review. Regular status meetings may be held as requested by the State Treasurer.
5. Special Counsel shall communicate with state entities through the Office of the State Treasurer unless otherwise authorized by the State Treasurer.
6. Special Counsel shall provide sufficient resources, including attorney time, to prosecute this litigation in accordance with Rule 407, Rules of Professional Conduct, South Carolina Appellate Court Rules.

A-4

B. Delegation of Work

Special Counsel may delegate work to other attorneys or paralegals within the firm with which the Special Counsel is affiliated but may not, without express approval of the State Treasurer, delegate any work whatsoever to any attorney in any other firm. Special Counsel agrees to accept full responsibility and liability for the work of any delegate.

C. Attorney-Client Relationship

Special Counsel will render services pursuant to this Agreement as an independent contractor. Neither Special Counsel nor any employee of Special Counsel shall be regarded as employed by, or as an employee of, the State Treasurer or the State of South Carolina.

An attorney-client relationship shall exist between the State Treasurer and Special Counsel.

Article III. CASE MANAGEMENT

A. Status Reports, Time Records

The State Treasurer may at any time request status reports from Special Counsel regarding any aspect of this litigation. Within twenty days after the request is received, Special Counsel shall submit such status reports to the State Treasurer. Failure to timely provide such status reports may result in forfeiture of a portion of Special Counsel's compensation at the sole discretion of the State Treasurer.

At a minimum, status reports must include a description of the current status of the matter, any significant events that have occurred since the previous status report, and a prospective analysis of any significant future events.

B. Notices and Correspondence

All notices, demands, requests, consents, approvals, and other instruments required to be given pursuant to the terms of this Agreement shall be in writing and shall be deemed to have been properly given when: (1) hand delivered; (2) sent by U.S. Registered or Certified mail, return receipt requested, postage prepaid; (3) if certified or registered mail is either refused or unclaimed, then by regular U.S. Mail; (4) by overnight delivery service with receipt (Airborne, FedEx, UPS, etc.); (5) by email; or (6) by fax, followed by one of the other methods of delivery described herein. Fax delivery shall be deemed to be on the date of receipt of the fax, and the parties hereto agree that a fax with confirmation shall be adequate proof of receipt of the fax.

Both Special Counsel and the State Treasurer may designate a representative to receive such instruments and correspondence as described herein. While both parties recognize this designation may be changed at any time, and without consent of the other party by giving written notice of the new designated representative, until further notice, such instruments and/or correspondence should be addressed to:

- 1. Pleadings
- 2. Dispositive motions
- 3. Hearings
- 4. Rulings
- 5. Trials

Special Counsel shall give timely written notice to the State Treasurer of any and all of the following legal events in this litigation:

Special Counsel agrees to consult in advance, by telephone, fax machine, or in writing, with the State Treasurer promptly on all matters that may be precedential, controversial, of particular public interest, or otherwise noteworthy or important, and to keep the State Treasurer fully informed at all times.

C. Communication

Name: Mitchell Willoughby
 Shareholder and President
 WILLoughBY & HOEER, P.A.
 930 Richland Street
 P.O. Box 8416
 Columbia, SC 29202
 Phone: (803) 252-3300
 Fax: (803) 256-8062
 E-mail: mwilloughby@willoughbyhoerer.com

[Special Counsel's information]

Name: Converse Chellis, III, CPA
 State Treasurer
 P.O. Box 11778
 Columbia, SC 29211
 Phone: 803-734-2016
 Fax: 803-734-2690
 E-mail: treasurer@sto.sc.gov

Name: Frank Rainwater
 Deputy State Treasurer
 P.O. Box 11778
 Columbia, SC 29211
 Phone: 803-734-2655
 Fax: 803-734-3677
 E-mail: frank.rainwater@sto.sc.gov

6. Settlement negotiations
7. Appeals or Notice of Appeals
8. Briefs filed by any party or entity
9. Appellate arguments or decisions
10. Enforcement efforts

Special Counsel agrees to meet with State Treasurer's Office personnel when and where requested by the State Treasurer in furtherance of this litigation.

D. Settlement

The State Treasurer must approve in advance all aspects of this litigation and shall be included in any settlement discussions. Special Counsel agrees that any settlement in this case must receive the State Treasurer's express prior approval in writing. Special Counsel shall confer with the State Treasurer as early as practicable in any settlement negotiation process.

E. Appeals

It is important that the State Treasurer receives early notice of any potential appellate litigation in any way affecting the State. Therefore, Special Counsel agrees to give prompt oral and written notice to the State Treasurer when receiving: (1) any dispositive decision by any appellate court affecting the litigation in any way; or (2) a Notice of Appeal from a court's decision filed by any party to this litigation.

F. Public Records

Any material, data, files, discs, or documents created, produced, or gathered by Special Counsel, or in Special Counsel's possession in furtherance of this litigation, or which fulfills an obligation of this appointment, shall be considered the exclusive property of the State of South Carolina. Special Counsel agrees to adhere to South Carolina's Freedom of Information Act, South Carolina Code of Laws §30-4-10 *et. seq.*, and maintain all public records in accordance with State law; provided, however, that Special Counsel shall consult with, and obtain the approval of, the State Treasurer before responding to any public records request. Special Counsel agrees to comply with the State Treasurer's policy on document retention and to refrain from destroying documents unless otherwise permitted under this policy. Special Counsel agrees to comply with Rule 417 of the South Carolina Appellate Court Rules. Special Counsel agrees to request written confirmation from the State Treasurer's Office prior to destroying any documents. This Agreement shall be considered a public document.

Article IV. COMPENSATION

A. Fee Schedule

This is a contingent fee case. Special Counsel shall receive no compensation for any services rendered unless the State of South Carolina receives a settlement or damage award in connection

with this litigation. If the State receives such an award, Special Counsel will be compensated for his services pursuant to this Article, as follows:

1. Special Counsel shall be reimbursed all reasonable, normal, and verified "out of pocket" costs and expenses as specified in Article V below.

These costs and expenses necessary for conducting this litigation, as defined in Article V of this Agreement, shall initially be advanced by Special Counsel and shall be deducted from the litigation's gross or total recovery, if any, before any further distribution is made.

Provided, however, that civil penalties, if any, shall not be included in calculating the gross or total recovery, and Special Counsel shall not receive any fees or costs from awards of civil penalties with such penalty payments to be made to the Office of the State Treasurer for the State of South Carolina.

2. At least 77% of the remaining or net settlement or judgment proceeds (but not including punitive or exemplary damages, if any) shall be paid or applied to or for the State or the people of South Carolina or the victims in a manner to be determined by the State Treasurer in his sole discretion; and

3. Special Counsel shall be paid the remaining 23% or less in fees of said remaining or net settlement or judgment proceeds (but not including punitive or exemplary damages), as follows:

Amount of net proceeds of judgment or settlement (in millions)	Contingent percentage
First \$0 to \$5	23%
Excess over \$5 up to \$10	19%
Excess over \$10 up to \$25	15%
Excess over \$25 up to \$50	11%
Excess over \$50 up to \$100	7%
Excess over \$100	4%

Provided, however, that the State Treasurer shall retain 10% of Special Counsel's fees awarded under this section 3.

4. Special Counsel shall be paid 10% or less of any punitive or exemplary damage proceeds as follows, with the remaining 90% or more to be paid or applied to or for the State or the people of South Carolina or the victims in a manner to be determined by the State Treasurer at his sole discretion:

Amount of punitive or exemplary proceeds (in millions)	Contingent percentage
First \$0 to \$10	10%
Excess over \$10 to \$100	5%
Excess over \$100	3%

Provided, however, the State Treasurer shall retain 10% of Special Counsel's fees awarded under this section 4.

5. All settlement or judgment proceeds shall be paid by or on behalf of the defendant(s) to the State Treasurer's office, which shall distribute them or have them distributed.

6. It is strictly agreed and understood by Special Counsel that if the proposed or actual defendants in this matter agree to a settlement or resolution prior to or upon commencement of the action or shortly thereafter, upon negotiation or consultation or upon only initial responses, then Special Counsel's compensation shall be one-half of that specified in sections 3 and 4 above.

7. This distribution and compensation calculation shall be included in a final order in the case.

B. Settlement or Judgment

The above Fee Schedule applies to any settlement or judgment, whether the settlement or judgment is entirely monetary in nature or is combined with non-monetary relief. Should the litigation be resolved by settlement or judgment involving a combination of monetary and non-monetary relief (such as injunctive relief, non-monetary payment, the provision of goods and/or services or any other "in kind" terms, or any combination of those), the State Treasurer shall determine the monetary value to the State.

C. Payment of Fees, Costs and Expenses

Neither the State of South Carolina nor the State Treasurer shall be required under this Agreement, or otherwise, to compensate or reimburse Special Counsel for his work in this matter, other than as set forth in Articles IV (A), and IV(B), and V herein. Accordingly, except for the fee schedule, expenses, and costs enumerated and outlined herein, Special Counsel shall not be entitled to and shall not accept compensation or reimbursement from any other source.

Article V. EXPENSES AND COSTS

A. Advancement of Expenses and Costs

Special Counsel shall advance all costs, expenses, and disbursements, including expert witness fees and costs, deposition costs, and costs of document production. Special Counsel's agreement

to advance all litigation expenses and costs, as well as its agreement to defer fees while any and all litigation (including appeals and enforcement actions) is pending has been taken into consideration in establishing the fee schedule above.

B. Expenses and Cost Reimbursement

Special Counsel shall be reimbursed solely from the litigation's gross recovery as approved by the State Treasurer for certain reasonable expenses and costs enumerated below. Proper documentation by receipts or otherwise shall be submitted with all invoices and all documentation shall be retained by Special Counsel for at least one full year following this Agreement's termination. All expenses must be itemized and no reimbursement may be applied for or requested for "miscellaneous" listings. The State Treasurer in his sole discretion may decline to reimburse Special Counsel for improperly documented, unnecessary, or unreasonable costs or expenses.

1. Experts

Special Counsel shall be reimbursed for retention of experts, including fees and other reasonable costs, only when expressly authorized by the State Treasurer.

2. Lodging

Receipts are required. In-state overnight lodging shall be reimbursed at actual cost up to a maximum of \$75.00 plus tax per day. Any expenses incurred due to out-of-state lodging greater than \$75.00 plus tax per day shall be approved in advance by the State Treasurer. If circumstances render Special Counsel unable to obtain the prior approval of the State Treasurer in this situation, as soon as thereafter practicable, Special Counsel shall notify the State Treasurer of the location, the hotel, the daily rate, and the reasons for not obtaining prior approval. Failure to follow these procedures shall result in such lodging costs being borne by Special Counsel.

3. Meals

There is no reimbursement for meals.

4. Travel

Receipts are required. Airfare shall be reimbursed at actual cost based on coach fares.

5. Mileage

Automobile travel shall be reimbursed at the maximum state mileage rate of the State of South Carolina in effect at the time. Travel by car shall not exceed

The State Treasurer reserves the right to terminate this Agreement at any time, in his discretion with the advice and consent of the South Carolina Attorney General, and without cause or duty of explanation. Special Counsel may terminate its duties and obligations under the Appointment and this Agreement upon thirty (30) days written notice to the State Treasurer. Termination on

A. Termination by the Parties

Article VI. TERMINATION

At the conclusion of the litigation, Special Counsel agrees to submit one original invoice to the State Treasurer for expenses and costs.

C. One Invoice

Actual costs shall be reimbursed for certain routine expenses including transcripts, deposition costs, witness fees, subpoena service, postage, printing, cab and bus fares, parking, and long-distance telephone calls when itemized and receipts are provided. Expenses for office space, word processing, secretarial, and paralegal costs are not reimbursable. Westlaw expenses shall be reimbursed only when authorized in advance by the State Treasurer.

9. Other Expenses

There shall be no reimbursement for secretarial or staff overtime unless expressly authorized in writing by the State Treasurer prior to invoicing.

8. Secretarial or Staff Overtime

Charges for priority or overnight mail services shall be reimbursed only if a justifiable basis exists for using the service. In no event shall the Special Counsel be reimbursed for the cost of sending invoices or status reports to the State Treasurer by overnight or priority mail services.

7. Priority/Overnight Mail

In-house photocopying (including color copies) shall be reimbursed at the Special Counsel's actual expense, not to exceed 15 cents (\$0.15) per copy and is to be itemized on the invoice as "Photocopies" (number of copies @ rate per copy). Reasonable amounts for outside photocopying shall be reimbursed at actual cost if receipts are provided.

6. Photocopying

coach fares on commercial airlines. Mileage is to be itemized on the invoice as "Mileage" (number of miles @ rate per mile).

the part of the Special Counsel shall not be effective if the State Treasurer finds in his sole discretion that such termination prejudices or has a material adverse effect on the State of South Carolina. Upon termination, all material, data, files, discs, or documents created, produced, or gathered by Special Counsel, or in Special Counsel's possession in furtherance of this litigation, or which fulfills an obligation of this appointment shall be immediately delivered to the State Treasurer as directed by him, and without encumbrance or lien or any cost or charge to the State Treasurer.

B. Compensation Upon Termination

In the event this Agreement is terminated by Special Counsel, Special Counsel shall be reimbursed only from the litigation's gross recovery and only for all properly documented expenses and costs, as defined in Article V of this Agreement, rendered prior to termination; there shall be no payment of any attorneys' fees unless the State Treasurer agrees in writing to the payment of fees for work performed under such terms and conditions as may be set by him in his informed and reasonable discretion with the advice and consent of the South Carolina Attorney General. In the event the State Treasurer terminates this Agreement without cause, Special Counsel shall be reimbursed only from the litigation's gross recovery for all properly documented expenses and costs, as defined in Article V of this Agreement, rendered prior to termination, and Special Counsel shall be awarded appropriate attorneys fees on a quantum meruit basis as determined by the State Treasurer, with the advice and consent of the South Carolina Attorney General. If this Agreement is terminated for cause, Special Counsel will not be reimbursed for any expenses and costs or paid any fees or other compensation for any services relating to the litigation.

Article VII. OTHER TERMS AND CONDITIONS

A. Media Statements

The parties agree that neither Special Counsel nor any partner, associate, employee, or any other person assisting with the legal work contemplated by this Agreement shall speak to any representative of a television station, radio station, newspaper, magazine, or any other media outlet concerning the work outlined or contemplated by this Agreement without first obtaining approval of the State Treasurer. This Agreement specifically prohibits Special Counsel from speaking on behalf of the State Treasurer or the State of South Carolina to any representative of the news media.

B. Jurisdiction and Choice of Law

This Agreement shall be administered in the State of South Carolina and shall be interpreted under the laws of the State of South Carolina. Special Counsel consents to complete jurisdiction in the appropriate courts of the State of South Carolina. This Agreement and any claims arising in any way out of it shall be governed by the laws of the State of South Carolina. Any litigation arising out of or relating in any way to this Agreement or the performance thereunder shall be

brought in state courts of appropriate jurisdiction in the State of South Carolina, and Special Counsel hereby irrevocably consents to such exclusive jurisdiction.

C. Code of Professional Responsibility

If, during the appointment as Special Counsel, a complaint is filed against Special Counsel or Special Counsel's firm, alleging a violation of Rule 407, Rules of Professional Conduct, South Carolina Appellate Court Rules, or the applicable rules governing the state bar in which Special Counsel has been admitted, or the Code of Professional Responsibility, Special Counsel shall give prompt written notice of such complaint to the State Treasurer. The State Treasurer retains the right, in his sole discretion, to immediately terminate this Agreement if he deems the complaint to adversely affect in any way Special Counsel's ability to perform his duties required herein, or to adversely affect this litigation, the State Treasurer, or the State of South Carolina.

D. Insurance

Special Counsel agrees to carry adequate professional liability insurance and to provide proof of same to the State Treasurer promptly upon request.

E. Conflict of Interest

Special Counsel represents that neither he nor his firm has any conflict of interest with the State of South Carolina, its agencies, or subdivisions at this time, except as may be disclosed in a separate writing. Special Counsel agrees that if a conflict of interest, potential or otherwise, arises, as defined by Rule 407, Rules of Professional Conduct, South Carolina Appellate Court Rules, during the term of this litigation, then Special Counsel will give timely written notice to the State Treasurer. Special Counsel must request and obtain a written authorization from the State Treasurer prior to undertaking any representation against or adverse to the State of South Carolina, its offices, boards, departments, or institutions during the term of this appointment.

F. Equal Opportunity

Special Counsel hereby represents that neither he nor his law firm discriminates on the basis of race, religion, color, sex, age, national origin, or disability against any person in the employment of personnel in their offices.

G. Entire Agreement/Integration

This Agreement constitutes the entire understanding of the parties. Both parties agree that there is no other understanding or agreement other than the terms expressly stated herein.

H. Severability of Terms and Conditions

If any provision of this Agreement shall be held invalid, illegal, or unenforceable in any respect, said provision shall be severed. The validity, legality, and enforceability of all other provisions

of this Agreement shall not in any way be affected or impaired unless such severance would cause this Agreement to fail of its essential purpose.

I. Amendment or Modification

No amendment or modification of this Agreement shall be effective against either party unless such amendment or modification is set forth in writing and signed by both parties.

J. Headings

The headings herein are for reference and convenience only. They are not intended and shall not be construed to be a substantive part of this Agreement or in any other way to affect the validity, construction, interpretation, or effect of any of the provisions of this Agreement.

K. Counterparts

This Agreement may be executed in one or more counterparts, each of which shall be an original and all of which constitute one and the same instrument.

[Signatures follow on the next page.]

State Treasurer of South Carolina

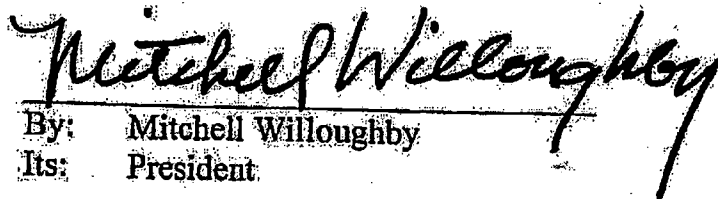

Converse A. Chellis, III, CPA

Date: June 18, 2010

Special Counsel

[Special Counsel's signature(s)]

WILLOUGHBY & HOEFER, P.A.


By: Mitchell Willoughby
Its: President

Date: June 18, 2010



RECEIVED

JUN 25 2010

Willoughby & Hoefler, P.A.

HENRY McMASTER
ATTORNEY GENERAL

June 23, 2010

The Honorable Converse Chellis
Treasurer, State of South Carolina
Post Office Box 11778
Columbia, South Carolina 29211

Re: Claims against the Bank of New York (now known as The Bank of New York Mellon) for violations of the March 24, 2000 Securities Lending Agreement with the State Treasurer and all statutory and common law claims connected therewith.

Dear Treasurer Chellis:

We have reviewed your letter of June 18, 2010, requesting the Attorney General's Office approve the selection of Willoughby and Hoefler, P.A. to serve as special counsel in representing the State of South Carolina and the State Treasurer's Office in the above captioned matter.

You have forwarded a copy of the Attorney General's contract that has been used by this office with the necessary minor changes for your engaging the services of Willoughby and Hoefler. We find this to be appropriate and approve the engagement of Willoughby and Hoefler in accordance with the contract you forwarded to this office.

Sincerely yours,

John W. McIntosh
Chief Deputy Attorney General

JWMcl/gf

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)
)
)
THE STATE TREASURER OF)
THE STATE OF SOUTH CAROLINA,)
 Plaintiff,)
)
 vs.)
)
THE BANK OF NEW YORK MELLON)
CORPORATION and THE BANK OF)
NEW YORK MELLON, f/k/a THE)
BANK OF NEW YORK,)
 Defendants.)

IN THE COURT OF COMMON PLEAS
 FOR THE FIFTH JUDICIAL CIRCUIT

Civil Action No. 2011-CP-4010533

**ORDER DENYING DEFENDANTS
 MOTION TO DISMISS FOR LACK
 OF STANDING**

DEAN STE W. MOYLAN
 S.C.P. & G.S. JUDGE
 2013 FEB 19 PM 2:36
 RICHLAND COUNTY
 FILED

This matter came before the Court on January 23, 2012, upon the Motion to Dismiss the complaint pursuant to Rule 12(b)(6) and Rule 17 of the South Carolina Rules of Civil Procedure filed by defendants The Bank of New York Mellon Corporation and The Bank of New York Mellon, f/k/a The Bank of New York (collectively "Bank"). Plaintiff, the State Treasurer of the State of South Carolina ("Treasurer"), opposed the Motion to Dismiss, and in response filed a Motion to Amend the Complaint pursuant to Rule 15(a) S.C.R.C.P. which was heard contemporaneously. The Court heard oral arguments and received memoranda from both parties. The Treasurer is represented by Attorney General Alan M. Wilson, Chief Deputy Attorney General John W. McIntosh, Mr. Mitchell Willoughby and Ms. Elizabeth Zeck of Willoughby & Hoefler, P.A. and Mr. Michael H. Montgomery of Montgomery Willard, L.L.C. The Bank is represented by Mr. Marshall Winn, Mr. Wallace K. Lightsey, Mr. Theodore Gentry and Mr. John C. Moylan, III of Wyche, P.A. and Mr. Damien Marshall of Boies Schiller & Flexner, LLP of New York, New York, appearing *pro hac vice*.

Defendants base their motion to dismiss on four grounds: (1) that the Plaintiff does not have standing to pursue this action; (2) that the initiation of this lawsuit is an unconstitutional violation of the separation of powers doctrine because it usurps the constitutionally protected, inherent powers of the Attorney General to control and manage litigation on behalf of the State of South Carolina; (3) that the Attorney General is the only constitutional officer empowered to initiate lawsuits to protect the State's interests, and his recent appearance as co-counsel for the Plaintiff fails to cure Plaintiff's lack of standing; and (4) that the Plaintiff's fee agreements with his private counsel further violate the constitutional separation of powers doctrine by infringing upon the Legislature's sole authority to appropriate public funds.

A. The Bank's Motion to Dismiss Does not Implicate this Court's Subject Matter Jurisdiction.

Defendants' first three grounds for dismissal all essentially complain of the Treasurer's alleged lack of standing. As our Supreme Court has noted, "[t]he right of a plaintiff to maintain a suit, while frequently treated as going to the question of jurisdiction, goes, in reality, to the right of the plaintiff to relief rather than to the jurisdiction of the court to afford it." *Bardoon Properties, NV, v. Eidolon Corp.*, 326 S.C. 166, 169; 485 S.E.2d 371, 373 (citing 21 C.J.S. Courts § 16 (1990)). In contrast, subject matter jurisdiction "refers to the court's power to hear and determine cases of the general class to which the proceedings in question belong. *Id.*, citing *Dove v. Goldkist*, 314 S.C. 235, 442 S.E.2d 598 (1994); *Watson v. Watson*, 319 S.C. 92, 460 S.E.2d 394 (1995). The question in *Bardoon* was whether standing and real-party-in-interest objections could be raised after default or whether such objections survived default because they implicated the court's subject matter jurisdiction. However, South Carolina case law states that "real party in interest" objections could be waived. See *WeSavFinancial Corp. v. Lingefelt*, 316

S.C. 442, 450 S.E.2d 580 (1994). In addition, Rule 17(a),¹ SCRCP, specifically allows ratification by or substitution of the real party in interest. These factors led our Supreme Court to conclude that questions of standing or real-party-in-interest do not involve subject matter jurisdiction.

Whether or not a party is the "real party in interest" simply does not involve the court's power to hear a case of the general class (in this instance, a breach of contract claim).

We hold the issue of whether a party is a "real party in interest" does not involve subject matter jurisdiction. . . . To the extent previous case law has indicated to the contrary, it is overruled.

Id. at 171 & n.4, 485 S.E.2d at 374 & n.4. Here, as in *Bardoon*, the contract and tort claims advanced against the Bank fall squarely within this Court's power². Thus, the issue of the Treasurer's standing does not implicate this Court's subject matter jurisdiction over this dispute, which exists independent of the named party plaintiff.

B. The Bank's Motion to Dismiss is Denied, because the Treasurer has Standing to Bring this Action.

Contrary to Defendants' contentions, South Carolina law clearly invests the Treasurer with standing to bring this action arising from a statutorily approved contract, and therefore this Court must deny Defendants' motion to Dismiss.

This action alleging four common law causes of action arises out of a relationship created by a contract between Defendants' predecessor, The Bank of New York, and the Treasurer. The

¹ "No actions shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed, after objection, for ratification of commencement of the action by, or ... substitution of the real party in interest...."

² Unlike federal courts, which have but limited jurisdiction, South Carolina circuit courts are courts of general jurisdiction. S. C. Constitution Article V, §11. Thus, defendants' citation of federal authorities on the question of subject matter jurisdiction are inapposite.

contract is captioned "Securities Lending Agreement and Guaranty" ("SLA"). Article II of the SLA states that "[the Treasurer] hereby appoints Bank as its agent to lend Securities in the Account to Borrowers from time to time"

The Treasurer is one of eight constitutional officers of the State of South Carolina:

There shall be elected by the qualified voters of the State a Secretary of State, an Attorney General, a Treasurer, a Superintendent of Education, Comptroller General, Commissioner of Agriculture, and an Adjutant General who shall hold their respective offices for a term of four year, coterminous with that of the Governor. The duties and compensation of such offices shall be prescribed by law and their compensation shall neither be increased nor diminished during the term for which they have been elected.

S.C. Constitution, Article VI §7 (emphasis added). Thus, while the Constitution creates the office of the Treasurer, his duties are those set forth in the laws passed by the General Assembly.

Among the express "duties [of the Treasurer] prescribed by law" in the statutes of this State is the authority to enter into securities lending contracts. The Legislature expressly authorized the Treasurer to enter into such contracts: "[t]he State Treasurer may contract to lend securities invested pursuant to this section [entitled Investment of Funds]." S.C. Code Ann. § 11-9-660(B). Since the Constitution requires only that the Treasurer's duties be as "prescribed by law," that constitutional requirement is met by Section 11-9-660(B) of the Public Finance Code.

The public finances statute does not in express language recite the remedies available to the Treasurer to enforce contracts he may enter. However, our State Supreme Court has long held that contracts with the State confer standing upon the contracting parties to bring and prosecute common law actions arising out of those contracts. In *Chesterfield County v. State Highway Department of South Carolina*, 181 S. C. 323, 187 S.E. 548 (1936), the Court held:

The statutes of the state (Code 1932, § 5937 et seq.) authorize the county and the highway commission to enter into what are called reimbursement agreements, of

cw
4 79

A-19

the nature of that made between Chesterfield county and the highway commission. In other words, the parties are authorized to enter into a contract. ***It is true that the statutes which authorize the making of the contract do not in express language confer upon EITHER contracting party the power to sue the other for breach of contract. But that right is one of necessary implication; it is a common-law right.***

Id. at 187 S.E.550 (emphasis added). The Court continued:

Where a statute or the Constitution creates a right, but is silent as to the remedy, the party entitled to the right may resort to any common-law action which will afford him adequate redress. State v. Taylor 224, Mo. 393, 123 S.W. 892, 895.

Id. [emphasis added]

These principles in were reaffirmed in *Kinsey Construction Company, Inc. v. South Carolina Department of Mental Health*, 272 S.C. 168, 249 S.E.2d 900 (1978). There, the Court applied *Chesterfield, supra*, and held:

[W]here the legislature has by statute authorized the State to enter into certain contracts, the State, by entering such a contract, thereby consents to be sued if it breaches the contract to the damage of the other contracting party.

Thus, when a State secures to itself the benefits of a contract, it implicitly assumes the corresponding liabilities.

Id. at 249 S.E. 2d 902.

The public finance statute expressly authorizing the Treasurer to enter into securities lending contracts like the SLA therefore creates “by necessary implication” the right to assert common-law claims arising out of such contracts. To hold otherwise would result in the nonsensical situation warned against by the the *Kinsey* Court: *Neither the State nor its citizens can be bound, yet not bound, by a single contract.* *Id.* at 249 S.E.2d 903. If accepted, Defendants’ standing objection would create just this absurdity – that the Treasurer is bound by the contract and yet not bound because he would lack the ability to enforce it. Such a holding would result in a deviation from centuries of contract jurisprudence. In granting the Treasurer

aw
599

A-20

the express statutory right to contract, the General Assembly simultaneously granted the implicit right to enforce rights under the contract by any and all common law means including the right to sue, such that the Treasurer was and is a proper party to this litigation.

Moreover, Defendants filed this motion pursuant to Rule 17(a), which expressly provides, *inter alia*,

Every action shall be prosecuted in the name of the real party in interest. [A] party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought

All parties agree that the SLA was made for the benefit of the State of South Carolina. Therefore, the Treasurer clearly qualifies as “a party with whom a contract has been made for the benefit of another.” On this basis alone, he is a real party in interest and has standing for the purpose of filing and prosecuting this action. The Treasurer is an interested party with an official stake in the subject matter of the lawsuit. *See, e.g. Baird v. Charleston County*, 333 S.C. 519, 530; 511 S.E. 2d 69, 75 (S.C. 1999). Such an interest provides him a basis for standing.

Both the Rules of Civil Procedure and the Treasurer’s legislative authorization to enter into securities lending contracts confer standing upon the Treasurer to enforce all rights emanating from his lawfully executed contracts, here, the SLA. As the Treasurer has standing in every legal sense, he is entitled to proceed as the party plaintiff in this action.

C. The Treasurer’s Fee Agreements with Counsel do not violate the Constitution or Statutes

Defendants’ fourth ground for dismissal is “that the Plaintiff’s fee agreements with his private counsel further violate the constitutional separation of powers doctrine by infringing upon the Legislature’s sole authority to appropriate public funds.” In essence, the Defendants

cw
699

A-21

wish to challenge the manner in which counsel was selected and engaged by the Treasurer.³ These arguments fail because they misconstrue the proper role of the Attorney General and ignore his active involvement in this matter pursuant to *S.C. Code Ann.* §§1-7-80 and 1-7-170 (2011). These statutes authorize the Attorney General to conduct litigation for the State and to hire and approve outside counsel (and their fee agreements) to represent State officials, like the Treasurer, in such litigation.

Evidence presented to the Court demonstrates that two different Attorneys General have approved the hiring of and contracts with counsel to represent the interests of the State of South Carolina in this matter. On June 15, 2010, then Attorney General Henry McMaster wrote then Treasurer Converse Chellis as follows:

Dear Treasurer Chellis:

I have received your letter of June 14, 2010 requesting [that] the Attorney General's Office approve your request to employ outside counsel. It is my understanding that you conducted a review showing that the Bank of New York (now known as The Bank of New York Mellon) may have violated its March 24, 2000 Securities Lending Agreement with the State Treasurer of South Carolina.

This is to approve your request to employ outside counsel using the contract agreement that I have used for the State of South Carolina. Please forward me a copy of the proposed contract at your convenience. I will review both the proposed contract and your selection of counsel before approval can be granted.

On June 23, 2010, Chief Deputy Attorney General McIntosh wrote as follows:

Dear Treasurer Chellis:

We have reviewed your letter of June 18, 2010 requesting the Attorney General's office approve the selection of Willoughby and Hoefer, P.A. to serve as special counsel in representing the State of South Carolina and the State Treasurer's Office in the above captioned matter.

³ The Court notes without deciding the objections raised by plaintiff Treasurer and his counsel (including the Attorney General) to the Bank's standing to raise an issue contesting the validity of the Treasurer's contractual arrangements with counsel. The Court notes that this is a relationship to which the Bank is a mere stranger and an adversary. Due to the patent nature of the Attorney General's involvement in and approval of this litigation, as contained in the record, the Court denies defendants' motion on this ground without addressing plaintiff's objection to the Bank's standing to even raise this issue.

You have forwarded a copy of the Attorney General's contract that has been used by this office with the necessary minor changes for your engaging the services of Willoughby and Hoefer. We find this to be appropriate and approve the engagement of Willoughby and Hoefer in accordance with the contract you forwarded to this office.

On January 20, 2011, current Attorney General Alan Wilson wrote the following letter to current Treasurer Curtis Loftis:

Dear Treasurer Loftis:

I have received your letter of January 20, 2011 requesting that you and Special Counsel Mitch Willoughby be allowed to add Michael H. Montgomery as Special Counsel to the above-captioned matter. I recognize the importance and complexity of this litigation and hereby approve the addition of Michael H. Montgomery, as evidenced by the attached Addendum to Litigation Retention Agreement for Special Counsel Appointed by the South Carolina State Treasurer.

Should any need arise to make any additional revisions, additions or changes to the Litigation Retention Agreement, please notify me for my consideration and approval.

By copy of this letter, I am asking Special Counsel to keep my office informed of developments in this litigation.

The requirement that the Attorney General "conduct" litigation for the State is met if the Attorney General appears as a named party, if he serves as the attorney for the State in actions brought in the name of the affected agency or officer, if he appears as attorney of record on the pleadings for the State or agency or officer, even though other counsel are appearing and acting for the state entity, or even if he merely hires and supervises other lawyers to handle civil litigation on behalf of the State or its agencies or officers. As the Attorney General himself stated, here, the Attorney General initially chose to "conduct" this litigation by hiring other lawyers to represent the State Treasurer as the affected state officer.

The involvement of the Attorneys General and their approvals of both the hiring of counsel to pursue this litigation and of the relevant fee agreements satisfies every statutory,

cw
899

A-23


constitutional and common-law requirement for the Attorney General's involvement in and approval of this litigation. This is true even without consideration of the Attorney General's active role as counsel and potential party plaintiff in this action. The Attorney General has conducted this litigation, which chose to be brought in the name of the State Treasurer. Consequently, there has been no unconstitutional infringement of the Legislature's sole authority to appropriate funds in the engagement of outside counsel to pursue this litigation as contemplated by *inter alia* S.C. Code Ann. §1-7-80 and §1-7-170.⁴

Based upon the foregoing findings and conclusions, **IT IS THEREFORE ORDERED:**

- (1) That the Bank's Motion to Dismiss is denied on all grounds.
- (2) That the fee agreements with Plaintiff's Counsel are legally entered with the express approval of the Attorney General and do not violate any constitutional provision.

AND IT IS SO ORDERED:

February 14, 2013
Columbia, South Carolina



Clifton B. Newman
Circuit Court Judge

⁴ The Court notes that the Bank's stated concern for "public funds" is at odds with its denials that any money is owed to the State for losses in the securities lending program. The Court further notes that until a trier of fact determines that funds are owed and that such funds are in fact recovered – no public funds are involved in this matter.

STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
OCT 05 2018
SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Doyet A. Early, III, Circuit Court Judge
The Honorable L. Casey Manning, Circuit Court Judge

Appellate Case No.: 2017-001899

RUSSELL L. BAUKNIGHT, as Trustee of The James Brown 2000 Irrevocable Trust and the James Brown Legacy Trust, as Personal Representative of the Estate of James Brown, and on behalf of Alan Wilson, in his capacity as Attorney General of the State of South Carolina; Tommie Rae Brown, individually and on behalf of her minor child, James B. II; Daryl J. Brown, individually and on behalf of his minor child, Janise B.; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor child Sydney L. And Carrington L.; Tonya Brown; Venisha Brown; Larry Brown; and Terry Brown

And

ALAN WILSON, in his capacity as Attorney General of the State of South Carolina; Tommie Rae Brown, individually and on behalf of her minor child, James B. II; Daryl J. Brown, individually and on behalf of his minor child Janise B.; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor child Sydney L. and Carrington L.; Tonya Brown; Venisha Brown; Larry Brown; and Terry Brown, Respondents.

v.

Adele J. Pope, and Robert L. Buchanan, Jr. Defendants,

Of whom Adele J. Pope is Appellant.

PROOF OF SERVICE

I certify that I have served the Return to Motion to Correct Record and Motion to Consolidate Appeals on October 5, 2018, addressed to their attorneys of Record as follows:


VIA HAND DELIVERY

Kenneth B. Wingate, Esquire
Mark V. Gende, Esquire
Joseph O. Thickens, Esquire
Sweeny, Wingate & Barrow, P.A.
1515 Lady Street
Columbia, SC 29201

VIA HAND DELIVERY

C. Harvid, Jones, Esquire
Emory Smith, Esquire
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

W. H. Bundy, Jr.
M. Brent McDonald
Bundy McDonald, LLC
1516 Old Trolley Road, 2nd Floor
Summerville, South Carolina 29485
888-552-1559
walter@bundymcdonald.com
brent@bundymcdonald.com
and


Adam T. Silvernail
Law Office of Adam Silvernail, LLC
Post Office Box 7995
Columbia, South Carolina 29202
Telephone: (803) 779-1770
adam@silvernaillawfirm.com
**ATTORNEYS FOR APPELLANT ADELE
J. POPE**

October 5, 2018