

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM RICHLAND COUNTY  
Court Of Common Pleas  
Doyet A. Early, III, Circuit Court Judge

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Appellate Case No. 2016-001727

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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.

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**RESPONDENT ATTORNEY GENERAL'S PETITION FOR REHEARING**

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**RECEIVED**  
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Pursuant to Rule 221, SCACR, the Respondent Attorney General respectfully petitions for rehearing of this appeal. This Court's Opinion of June 19, 2019, included the following conclusion:

In ruling this action was moot, the circuit court stated Pope did not contest the AG's claim that he had given her all the documents responsive to her request. However, the transcript of the May 17, 2016 motions hearing indicates that Pope challenged this claim. Pope also challenges this claim in her appellate brief. Because there still exists an actual controversy concerning the AG's compliance with Pope's FOIA request, this action is not moot. *See Friends I*, 369 S.C. at 26, 630 S.E.2d at 477 ("If there is no actual controversy, this [c]ourt will not decide moot or academic questions.").

This Court reversed the circuit court's order dismissing Pope's Complaint and remanded for further proceedings on the basis of its conclusion in its Opinion in *Pope v. Wilson*, Op. No. 5657 (Ct. App., filed June 19, 2019) which included that "[i]f the government invokes the exemption in section 30-4-40(a)(4), '[m]atters *specifically* exempted from disclosure by statute or law,'[footnote omitted; emphasis as added by Court of Appeals] to seek protection under discovery rules, it must point to the specific language of a discovery rule that expressly prohibits disclosure of a particular type of record." Respectfully, that Opinion in the instant appeal overlooked or misapprehended the following points:

1. Appellant did not raise and preserve any issue that she had not received all the documents that she had requested. Therefore, this action is moot.
2. This Court should have addressed the additional sustaining ground that Appellant failed to submit her Freedom of Information request to the Office of the Attorney General so as to require a response to that request under the terms of that law.

3. The matters that Appellant requested were exempt from disclosure under the Rules of Civil Procedure, and therefore, FOIA, because they were under the control of the Court pursuant to pending motions in civil litigation.

## ARGUMENT

The Respondent Attorney General strongly supports the Freedom of Information Act, and his Office and his predecessors have a long history of advocating the importance of that law. His position in this case is that he has complied with the law as discussed below.

### I

#### **Appellant Has Not Properly Raised And Preserved Any Claim That The Attorney General Has Not Produced All Responsive Documents As To Her FOIA Request**

At the hearing in May 2016, the following exchanges did not dispute that the Attorney General had produced all documents in his possession:

MR. SILVERNAIL: it's clear the Attorney General did in fact have public records that were responsive to our request because he produced them in his amended answer in 2013, those two drafts of the Legacy Trust documents . . .

THE COURT: You want me to order them to, under FOIA to produce it again even though you've already gotten it?

MR SILVERNAIL: We would like a declaration that these are public documents and Mrs. Pope is entitled to them . . . the Supreme Court has found that production of the documents along the way after litigation begins does not moot the question of declaratory relief or attorney's fees . . . The other argument that we take issue with from the Attorney General is that he doesn't have to produce the valuation because he does not possess it.

R. p. 282 , l. 3 – p. 283, l. 18. In other words, Appellant did not contest that the Attorney General had produced all the documents that he had in his Office. Instead, she argued that the Attorney General's Office should have produced any documents in the possession of the

Sweeny, Wingate and Barrow law firm. R. p. 283, ll, 6 – 25. Appellant never made such a request for documents from that firm in her FOIA letter (R. V., I, p. 26) nor did she reference the litigation in that letter. Moreover, Appellant abandoned this circuit court oral argument about the law firm on appeal. *Fields v. Melrose Ltd. P'ship*, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct. App. 1993)(issues not briefed are deemed abandoned). She never once mentioned that argument, contending only generally that “neither Respondent has complied with the FOIA requests.” Brief of Appellant at p. 21. Although the Attorney General’s Brief argued mootness by production of the only responsive document, Appellant did not respond. She instead argued other issues in reply to his Brief. Although she addresses mootness in her reply to the Legacy Trust’s Brief, she does not mention the Sweeny law firm and contends only that document production does not moot a FOIA request.

Although Appellant’s “Statement of Facts” at page 8, states that “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,” she makes no legal argument that he had these documents to produce. As noted in the Attorney General’s Brief at page 6, the Attorney General’s Office provided in his Answer to the Complaint the only document that it had that was responsive to that request. Appellant’s vague references above are insufficient to challenge this representation in the Statement of Facts.

Appellant has not properly raised and preserved any argument that the Attorney General has not produced the documents responsive to her FOIA request. Accordingly, this case is moot. *Sloan v. Friends of Hunley, Inc.*, 630 S.E.2d 474, 478, 369 S.C. 20, 26 (2006) (holding

that once the requested documents are produced, a justiciable controversy no longer exists, and the case is moot).

## II

### **Appellant Had No Claim Under FOIA Because Her Request Was Not Received By Mail Or Delivery**

This case also may be completely resolved if this Court would address and adopt this additional sustaining ground. Section 30-4-30(c) is quite plain in limiting duties to respond to FOIA requests to receipt of a written request. (“(c) Each public body, upon written request for records made under this chapter, shall within fifteen days (excepting Saturdays, Sundays, and legal public holidays) of the receipt of any such request notify the person making such request of its determination and the reasons therefor.” As recounted in the Statement of Facts in the Attorney General’s Brief, the Office of the Attorney General never received the FOIA request by mail or delivery. This Office advised Appellant in writing on August 5, 2011, that the Office had not received the request which she had referenced in a motion, and that if she would forward it a response would be expedited. R. p. 170. The Office supplied an affidavit supporting that it never received the FOIA request other than as an attachment to the complaint. R. p. 141. Appellant’s attaching the request as an exhibit to the Complaint alleging failure to respond, is not sufficient to require a response under FOIA. In fact, she concedes that responding to the request after the Complaint was served might not avoid her claim for attorney’s fees. She is only willing to say that his responding then “might have been relevant to avoidance of attorneys’ fees.” Reply Brief at page 4 (emphasis added). Appellant’s unwillingness to concede that a response to a written FOIA request first received by Complaint avoids attorney’s fees,

underscores the importance that a written response be transmitted to the public body before a response may be demanded in litigation.

### III

#### **The Requested Documents Were Exempt From Disclosure Because Of Pending Motions Before The Court Regarding Ongoing Civil Discovery**

The documents requested in the Freedom of Information Act request of the Attorney General were the subject of pending Motions in the main part of case 2010-CP-4900. See, R. V. I, p. 33 (Exhibit D to Complaint, ¶2b); R. p. 66, ¶ 3 (Motion to Compel,); R. pp. 70-78 (Motion for Protective Order and exhibits D & E thereto). Through the pending motions, the documents came under the control of the circuit court in case 4900, and that court would then determine whether the documents must be released. The motions had not been heard as of the date of the hearing in this case in May, 2016. As discussed in his Petition for Rehearing in Appeal 2016-001708, the documents are now exempt from discovery, and therefore, FOIA, as a matter under the control of the court because their production has been under consideration by the court pursuant to Rules of Civil Procedure 26, 34, and 37, *supra*. These rules make clear that the court presiding over discovery makes the decision about the disclosure of documents under pending motions. These provisions constitute exemptions under Rule FOIA, and the circuit court's consideration of these motions constitutes "the rule of law", which must be observed. *In re Anonymous Member of S. Carolina Bar*, 346 S.C. 177, 194, 552 S.E.2d 10, 18 (2001); *see also, Palmetto Alliance, Inc. v. S. Carolina Pub. Serv. Comm'n*, 282 S.C. 430, 436, 319 S.E.2d 695, 698 (1984). "It is well-settled that 'the scope and conduct of discovery are within the sound discretion of the trial court . . . .'"

Moreover, recognition of these exemptions is consistent with the May 19, 2017, amendments to FOIA that allow a public body to “file a request for hearing with the circuit court to seek relief from unduly burdensome, overly broad, vague, repetitive or otherwise improper requests . . .” §30-4-110(A). Although this provision was adopted after the circuit court dismissed Appellant’s suit, it is consistent with that action. Appellant’s attempt to use FOIA to bypass motions pending before the court is burdensome and improper given the controlling effect of the discovery rules. Given this legislative amendment, civil discovery objections can readily be asserted under §30-4-110, without argument about whether they fall under the rule of law exemption. Accordingly, less need exists for future guidance on the relationship of civil discovery to FOIA, and this case may be decided on the basis of mootness and the failure of Appellant to submit her request in writing to the Office of the Attorney General.

### **CONCLUSION**

The Attorney General has supplied Appellant with the only document responsive to her request. This Court should affirm the circuit court’s decision on grounds of mootness and/or affirm on the basis that Appellant failed to submit her request to the Attorney General’s Office so as to require a response. This case has been pending for nearly eight years despite pendency of discovery motions about those documents in civil litigation and despite the Attorney General’s supplying the only responsive document it had more than 6 years ago. The Record on Appeal consists of two volumes and over 500 pages of documents. Remanding the case for further proceedings with another appeal thereafter is unnecessary on this Record and under this case law. This matter should be concluded, and the decision of the circuit court affirmed.

Respectfully submitted,

ALAN WILSON  
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S.C. Bar No. 1373

J. EMORY SMITH, JR.  
Deputy Solicitor General  
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BY: 

ATTORNEYS FOR RESPONDENT  
ATTORNEY GENERAL

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**CERTIFICATE OF SERVICE**

I hereby certify that I have served the Petition for Rehearing of Respondent Attorney General upon counsel for the other parties by mailing copies to each of them at the addresses below via the United States Mail this July 16, 2019.

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ALAN WILSON  
ATTORNEY GENERAL

July 16, 2019

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JUL 16 2019  
SC Court of Appeals

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
HAND DELIVERED

Re: Pope v. Wilson Appellate Case No. 2016-001727

Dear Ms. Kitchings:

Enclosed for filing with your Office are the original and six copies of the Attorney General's Petition for Rehearing together with a certificate of service. Please confirm filing by stamping the enclosed copy of the Petition.

Thank you for your assistance.

Respectfully submitted,

J. Emory Smith, Jr.  
Deputy Solicitor General

cc: Adam T. Silvernail, Esquire  
Keith M. Babcock, Esquire  
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