

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  
Case No. 2012-CP-40-350  
Appellate Case No. 2016-001727

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**RECEIVED**  
AUG 12 2019  
SC Court of Appeals

Adele J. Pope,

Appellant,

v.

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

Respondents.

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RESPONDENT JAMES BROWN LEGACY TRUST'S  
RETURN TO THE PETITION FOR REHEARING

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Appellant's Petition for Rehearing does not assert that the Court overlooked or misapprehended Appellant's arguments but merely seeks another bite at the apple, arguing that the James Brown Legacy Trust ("Legacy Trust") is a public body. In so doing, Appellant has set forth pages of "facts" that extend beyond the record in this case. In fact, two-third of the petition are these expanded "facts" not supported by the record, with the argument (as to the Legacy Trust) only consisting of three pages.<sup>1</sup> These allegations are completely irrelevant to the case and issues

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<sup>1</sup> Appellant is obviously aware that most of her "facts" are not in the record as she fails to cite to the record page number for the majority of her statements.

before this Court and the only apparent reason for Appellant's inclusion of these allegations is an attempt to paint the Respondents in an unflattering light. In addition, Appellant has attempted to introduce matters from a separate FOIA case, App. No. 2016-001708, the Richland County case of Pope v. Wilson, C/A 2010-CP-40-4900; and a U.S. District Court case, Brown v. Pope, 3:08-cv-00014-WOB.<sup>2</sup> The mere fact that Appellant's petition is based on information outside the record is, by itself, grounds for denying the petition.

In order to prevail on a petition for rehearing, Appellant must demonstrate that the Court overlooked or misapprehended her argument. Kennedy v. S.C. Ret. Sys., 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001). The purpose of a petition for rehearing is not "to have the case tried in the appellate court a second time." Id., citing Jean H. Toal, Shahin Vafai & Robert Muckenfuss, *Appellate Practice in South Carolina* 309 (1999) and Arnold v. Carolina Power & Light Co., 168 S.C. 163, 167 S.E. 234 (1933). In addition, a petition for rehearing should not introduce new evidence or arguments, as the court in Kennedy explained:

Appellants had the opportunity to present their arguments and evidence when this case was originally heard by the trial court. Therefore, contrary to the dissent's argument, this Court should not consider appellants' previously unrepresented evidence when deciding whether to grant the petition for rehearing.

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<sup>2</sup> Appellant incorrectly asserts that this Court can take judicial notice of other proceedings. First, a "court can take judicial notice of its own records, files and proceedings...." Freeman v. McBee, 280 S.C. 490, 494, 313 S.E.2d 325, 327 (Ct. App. 1984). The case law does not hold that a court take judicial notice of another court's proceeding. Thus, any proceedings in the United States District Court or the Richland County Court of Common Pleas are not subject to judicial notice. To the extent that documents from those cases have been filed in various appeals, our appellate courts have been "generally reluctant to notice adjudicative facts even when those facts may be absolutely reliable." Masters v. Rodgers Dev. Grp., 283 S.C. 251, 256, 321 S.E.2d 194, 197 (Ct. App. 1984). "Notice of 'facts' for the first time on appeal may deny the adverse party the opportunity to contest the matters noticed; it may also violate the general principle that appellate review should be limited to the record." Id. (holding that original judicial notice of adjudicative facts at the appellate level should be limited to matters which are indisputable).

Kennedy v. S.C. Ret. Sys., 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001). Thus, all of the Appellant's allegations and arguments that exceed the scope of the record on appeal can be disregarded and the petition denied.

Moreover, the thrust of Appellant's petition is that this Court must rule that the Legacy Trust is a public body under FOIA. This Court did not need to reach that issue because it determined the issuance of opinion in Wilson v. Dallas, 403 S.C. 411, 743 S.E.2d 746 (2013), mooted the premise for naming the Legacy Trust as a defendant. Our courts have clearly stated that an appellate court need not review remaining issues when its determination of one issue is dispositive of the appeal. Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999); Miller v. State, No. 2012-UP-436, 2012 WL 10862446, at \*1 (S.C. Ct. App. July 18, 2012). The mere fact that Appellant is dissatisfied with the Court's ruling is not grounds for rehearing.

Furthermore, there is ample evidence in the record that the Legacy Trust was never a public body under FOIA. The South Carolina Freedom of Information Act defines the term:

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

S.C. Code Ann. § 30-4-20(a). The language of the statute is clear on its face and does not include a trust as a body subject to FOIA. Miller v. Doe, 312 S.C. 444, 447, 441 S.E.2d 319, 321 (1994) ("If a statute's language is plain and unambiguous and conveys a clear and definite meaning, there

is no occasion for employing the rules of statutory interpretation. The court has no right to look for or impose another meaning.” (citing *Wynn v. Doe*, 255 S.C. 509, 180 S.E.2d 95 (1971)).

Even if this Court looks to other sources, under the definition of “public body,” and the South Carolina Supreme Court’s interpretation of that term, only those organizations that are supported “in whole or in part by public funds or expending public funds” are subject to FOIA. S.C. Code Ann. § 30-4-20(a); *Disabato v. S.C. Ass’n Sch. Adm’rs*, 404 S.C. 433, 454-55, 746 S.E.2d 329, 340 (2013) (“[T]he application of the FOIA beyond traditional governmental entities is limited to statutorily defined public bodies, which are only those entities supported by public funds.” (citing *Weston*, 303 S.C. at 403, 401 S.E.2d at 164)). The Legacy Trust was not under the “control of” or receiving “support” from the Attorney General, to render it a public body for purposes of the FOIA.<sup>3</sup> R.p. 21-22. The evidence in the record shows that the Legacy Trust was not supported by taxes or monies belonging to a political subdivision. R.p. 495-496. The Legacy Trust was created to be funded by the private assets of James Brown—before it was functionally struck down by the South Carolina Supreme Court in *Wilson v. Dallas*. R.p. 496. Moreover, the Legacy Trust was not designed to expend public funds, it was only set up to be in control of and responsible for disbursing the private assets of the trust.<sup>4</sup> R. p. 494-496. A private entity, like the Legacy Trust, is only subject to the FOIA where it “receive[s] government funds *en masse*” or it is “generally supported by public funds.” *Disabato v. S.C. Ass’n Sch. Adm’rs*, 404 S.C. at 456, 746 S.E.2d at 341 (2013); *see also, Woods v. Boeing Co.*, 841 F. Supp. 2d 925, 929-30 (D.S.C. 2012) (finding that although Boeing received a “massive amount of public money” it is not subject

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<sup>3</sup> In fact, the Attorney General has no involvement in the Legacy Trust. R.p. 495.

<sup>4</sup> In contrast, *see Quality Towing, Inc. v. City of Myrtle Beach*, 345 S.C. 156, 161-63, 547 S.E.2d 862, 864-65 (2001) (Committee formed to help determine the award of a City contract that involves the expenditure of city funds is subject to FOIA).

to a FOIA-like disclosures where it was not acting as state's agent or expending the funds for the public benefit).

The Attorney General's involvement in the Legacy Trust was related to his statutory duty to protect the public interest in the administration of charitable trusts. *Wilson*, 403 S.C. at 431, 445-46, 743 S.E.2d at 757, 765-66. There is no legal basis for the notion that the Attorney General's involvement in a private charitable trust transforms the trust's private assets and private trust records into public assets and public records.<sup>5</sup>

Next Appellant claims that the Legacy Trust was in existence for 2 years after the filing of the instant action and prior to the Wilson decision, and therefore, any documents the Legacy Trust had in that two year period must be produced. However, Appellant fails to acknowledge that the documents related to the Legacy Trust are in her possession and have been *for years*. The FOIA directed to Defendant Bauknight sought: "The Final and all drafts, signed and unsigned, of the James Brown Legacy Trust." R.p. 19-20. The Answer of the Attorney General, filed on March 7, 2013, asserted that "he has no documents that could be considered responsive to the Freedom of Information Act request at issue except for an attached draft of the Legacy Trust included in the Record on Appeal in *Wilson v. Dallas*, Op. No. 27227 (S.C. Sup. Ct., filed February 27, 2013), a case in which [Appellant] was a party." R.p. 159, 166 (footnote omitted). The document

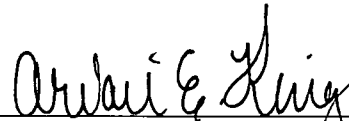
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<sup>5</sup> Appellant appears to argue that because the Attorney General was involved in the initial creation and planned ongoing oversight of the Legacy Trust, that action can somehow be quantified to count as support from public funds so as to be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

referenced was an attachment to the Answer. On March 13, 2013, the Attorney General filed an additional exhibit to the Answer with the clerk of court. This exhibit was another draft of the Legacy Trust, which had also appeared in the Record on Appeal in *Wilson v. Dallas*. As these are the only two documents related to the FOIA request to the Legacy Trust and they have been in Appellant's possession by way of the Record on Appeal and later provided as attachments to the Attorney General's Answer, the FOIA as to Respondent Legacy Trust was moot even prior to the Supreme Court's decision in Wilson.

#### CONCLUSION

In summary, Appellant has set forth no basis for rehearing. This Court's ruling that the Wilson v. Dallas opinion mooted the action against the Legacy Trust was dispositive of the appeal and there was no need for the Court to reach the other issues. Moreover, Appellant's petition improperly raised issues and facts that are not with the record on appeal. The petition for rehearing should be denied in its entirety.



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August 12, 2019

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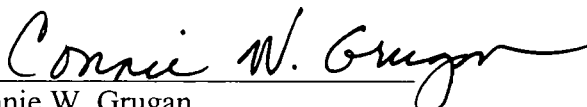
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I, Connie W. Grugan, legal assistant to the law firm of Lewis Babcock L.L.P., hereby certify that I have served **Respondent James Brown Legacy Trust's Return to the Petition for Rehearing** upon opposing counsel by mailing copies of same, first-class postage prepaid and return address clearly indicated, to opposing counsel as follows:

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Connie W. Grugan

This 12<sup>th</sup> day of August, 2019.