

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Doyet A. Early, III, Circuit Judge

Appellate Case No. 2016-001727

Adele J. Pope.....Petitioner,

v.

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

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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STATE OF SOUTH CAROLINA
In the Court of Appeals

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MAY 11 2017

Appeal from Richland County
Court of Common Pleas

SC Court of Appeals

The Honorable Doyet A. Early, III, Circuit Judge

Appellate Case No. 2016-001727

Adele J. Pope..... Appellant,

v.

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

SUPPLEMENT TO RECORD ON APPEAL

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STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

Adele J. Pope,

Plaintiff,

v.

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

Defendants.

IN THE COURT OF COMMON PLEAS

Civil Action No. 2011-CP-36-00364

PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT

TO: DEFENDANTS AND/OR THEIR COUNSEL.

YOU WILL PLEASE TAKE NOTICE that, ten (10) days after service hereof, or as soon thereafter as counsel may be heard, Plaintiff Adele J. Pope, through her undersigned counsel, will move at the Newberry County Courthouse, 1226 College Street, Newberry, South Carolina, for an order granting her summary judgment on all claims in the complaint herein.

The grounds for this motion are that, viewing the evidence in the light most favorable to Defendants, there is no genuine issue of material fact as to the following:

**The Office of the Attorney General and the Legacy Trust are
Public Bodies for the Purposes of the Freedom of Information Act**

1. It is undisputed that the Office of the South Carolina Attorney General is a public body under the South Carolina Freedom of Information Act ("FOIA").

2. The James Brown Legacy Trust (the "Legacy Trust") is a public body as defined in FOIA because it is supported by the State in the following ways:

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- a. It was created by South Carolina Attorney General ("AG McMaster"), who in his Official Capacity as AG, was designated as both a Settlor and Beneficiary thereof.
- b. AG Alan Wilson, as successor in office to AG McMaster, has all of the privileges and obligations of his office with respect to the Legacy Trust.
- c. The State, through the Office of the AG, actively supports the Legacy Trust through the salaries of State employees and other resources of the State.
- d. The Legacy Trust's funding source is, on information and belief, public because it was accomplished solely by AG McMaster's assertion of his *parens patriae* authority by contracting on August 10, 2008 to place the private assets of the Estate of James Brown and the James Brown 2000 Irrevocable Trust in the Legacy Trust.¹
- e. AG Wilson controls the Legacy Trust by the unfettered right to remove and replace Russell Bauknight, selected by AG McMaster, and Bauknight's successors.
- f. All major actions of the Legacy Trust require a vote of the AG, and the method of voting – or losing the right to vote – on significant events requires constant vigilance on the part of AG Wilson's Office.
- g. AG Wilson has a further statutory duty to enforce the proper operation of The James Brown "I Feel Good" Private Foundation, transferred to the Legacy Trust by AG McMaster,
- h. The "I Feel Good" Foundation, after payment of 47 1/2 % of taxes and expenses of the Legacy Trust, and after further reduction of \$2 Million, will receive 47 1/2 % of the income of the Legacy Trust.
- i. AG Wilson controls the "I Feel Good" Foundation through Bauknight, its trustee, who was appointed by AG McMaster and may be removed or replaced at will by the AG.
- j. On information and belief, having taken control of both Brown's

¹ McMaster's agreement to fund the Legacy Trust was objected to by all of Brown's claimed and acting PR/Trustees, some of whom have appealed. No stay is in place, however, and the Legacy Trust is now in active operation.

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private assets and his foundation for the Legacy Trust through the exercise of public authority and placed them in the Legacy Trust, the AG may not now shield them from public scrutiny.

- k. The AG has delegated to Bauknight, Trustee of the Legacy Trust, and his advisors certain essential public functions of the Office of the AG, including oversight of the "I Feel Good" private foundation and defense of the appeal described below,
- l. The AG has, since 2009, dedicated considerable State resources to defending the May 26, 2009 Aiken County Order which approved AG McMaster's takeover of James Brown's private property, and transfer of same to the Legacy Trust.
- m. The AG has allowed the current Trustee of the Legacy Trust to purport for more than 1 year to speak for the State in pending litigation.

The Attorney General has Approved the FOIA Request

3. On June 30, 2011, Plaintiff sent to AG Wilson and the Legacy Trust separate requests under FOIA for public records related to the Legacy Trust. Plaintiff requested copies of:

The Final and all drafts, signed and unsigned,
of the James Brown Legacy Trust

4. The request to AG Wilson, in addition, sought:

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

5. The AG's office declined to provide the requested documents but did not allege that any such document was exempt from being disclosed under FOIA. As a result of the failure to produce requested documents, Plaintiff filed this action on August

3, 2011.

6. S.C. Code Ann. § 30-4-30(b) provides as follows:

If written notification of the determination of the public body as to the availability of the requested public record is neither mailed nor personally delivered to the person requesting the document within the fifteen days allowed herein, the request must be considered approved.

7. The AG did not respond to Plaintiff's request within 15 days. Although a member of the AG's office asserted on August 5, 2011 that the AG had not received the June 30, 2011 request, that request was attached to the complaint herein, which was served on the AG on August 5, 2011. Plaintiff has not to date received any response to her June 30, 2011 FOIA request.

8. Far more than 15 days have now passed since Plaintiff made her June 30, 2011 FOIA request, and, pursuant to S.C. Code Ann. § 30-4-30(b), the request must now be considered approved.

The Requested Documents are Public

9. On September 14, 2011 *The State* newspaper ran an article entitled "Wilson, Loftis Spar Over Hiring Law Firms," a copy of which is attached hereto as Exhibit A which included the following language:

Wilson's office said it is transparent. Contingency agreements with outside law firms are available to members of the public who request them. The office [is] in the process of posting all such agreements on its Web site, said an agency spokesman.

10. Additionally, an article in the September 21, 2011 edition of the *Newberry Observer* entitled "AG's Promise to Release Contracts May Resolve Newberry James

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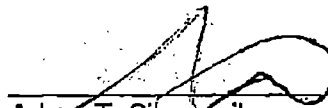
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Brown FOIA Case" told that the article's author had received an email from a member of Defendant's staff agreeing to send the author a copy of the fee agreement requested herein. A copy of the article is attached hereto as Exhibit B.

11. It is clear from the Attorney General's statements to the press that his office is aware and believes that the requested documents are public.

For the reasons stated above, Plaintiff asks that the Court issue its order granting her summary judgment on all claims in the complaint herein. This motion is based on the South Carolina Rules of Civil Procedure, applicable case and statutory law, the affidavit of Adele J. Pope filed herewith, all earlier affidavits of Plaintiff on file herein, and such additional documentation as shall properly come before the Court prior to the hearing on this matter.

Respectfully submitted,



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September 29, 2011

Attorney for Plaintiff

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The State
South Carolina's Homepage™

EXHIBIT A

[Back](#)

Wednesday, Sep 14, 2011

Posted on Wed, Sep. 14, 2011

Wilson, Loftis spar over hiring law firms

Being 'proactive' or 'pay for play'?

By GINA SMITH

gsmith@thestate.com

State Attorney General Alan Wilson wants two law firms, accused of making pay-to-play political contributions in other states, to monitor transactions in South Carolina's multi-billion-dollar retirement system.

Wilson received \$12,000 in campaign contributions from one of the firm's partners in 2010 although he says that money played no role in his recommendation.

State Treasurer Curtis Loftis opposes Wilson's proposal, saying its unnecessary. Their disagreement also is a sign of friction between two rising stars in S.C. Republican politics.

At issue is an announcement last month by Wilson, elected the state's top lawyer in November, that he wants to hire the two firms, one in Charleston and one in New York, to monitor transactions in the state's retirement system for fraud.

That system has \$26 billion in assets.

Wilson said he has been in talks with Loftis to hire the firms to ensure the investments are watched closely. "In other states, we've seen problems with fraud," Wilson said. "I'm trying to be proactive here in South Carolina."

Loftis said monitoring by outside attorneys is not needed.

"As treasurer, I am the custodian of the state's funds," Loftis said in a statement. "It is important that these large-dollar contracts be without political involvement or interference. Campaign contributions have no place in the decision process of protecting our \$26 billion trust fund.

"We currently monitor for fraud, waste and abuse utilizing several entities and a variety of methods," he said. "Our custodial bank has extensive abilities to monitor our securities, as well as the Retirement System Investment Commission and the State Treasurer's office."

The state recently sued a New York bank, saying it sold the retirement fund improperly risky investments.

Wilson says the S.C. Retirement System Investment Commission has the final say on whether the firms are hired, not Loftis. He plans to pitch the idea to commissioners during a Thursday meeting.

Wilson said the campaign contributions did not affect his recommendation of the firms. Instead, he said it was based on the firms' experience in monitoring pension plans and rooting out fraud.

"All a contribution gets you is my gratitude," he said, adding, if the commission would rather work with other firms instead of the two he is recommending, he will engage them instead.

"I don't care who does the work," Wilson said. "What matters to me is they do it well."

"I'm looking at their ability to perform a free service to protect the system," he added.

Under Wilson's proposal, the attorneys of Labaton Sucharow of New York, whose partners have contributed to Wilson, and Motley Rice in Charleston, who did not contribute, would review pension fund transactions free of charge for signs of fraud. They would be paid legal fees only if subsequently hired by the state to recover money.

Both law firms have been accused of taking part in pay-to-play arrangements in other states, contributing to

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the election funds of public officials who award them contracts.

In 2010, partners of Labaton Sucharow contributed nearly \$43,000 to New York Comptroller Thomas DiNapoli, who is in charge of the state's pension fund, according to media reports. The contributions came after DiNapoli tapped Labaton Sucharow to represent his office in litigation against a mortgage lender.

And after Jack McConnell Jr. opened a Motley Rice branch in Providence, R.I., becoming one of that state's top political contributors for the 2000 elections, that state's attorney general hired Motley Rice to conduct Rhode Island's highly-publicized lawsuit against lead paint manufacturers.

Efforts to reach both firms for comment Tuesday were unsuccessful.

Wilson said accusations are not proof of anything.

However, the relationship between some politicians and some law firms is the subject of increasing scrutiny.

Lisa Rickard, president of the U.S. Chamber Institute for Legal Reform, a national campaign founded by the U.S. Chamber of Commerce to clamp down on litigation, said her organization is speaking out against state attorney generals taking contributions from law firms and awarding them contracts.

"The reality is that these plaintive firms are traveling around the country, visiting with the state attorney generals and selling them on ideas for lawsuits," Rickard said, adding attorney generals should not use outside counsel.

"It's an appearance of impropriety," she said. "If they (attorney generals) are taking contributions and then giving contracts out without going through some kind of process where they're looking at other firms who can also do the work, then there's a problem. It looks like a quid pro quo is going on. These are elected officials who should have a transparent process for bidding out this work."

Wilson's office said it is transparent. Contingency agreements with outside law firms are available to members of the public who request them. The office in the process of posting all such agreements on its Web site, said an agency spokesman.

Reech Smith at (803) 771-8558.

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EXHIBIT B

[print](#)

AG's promise to release contracts may resolve Newberry James Brown FOIA case

by Sue Summer
For The Observer
09.21.11 - 08:07 am

In Newberry on Sept. 12, Attorney General (AG) Alan Wilson filed a motion to dismiss a Freedom of Information Act (FOIA) lawsuit in which he was asked to release copies of public documents related to the James Brown music empire.

Among the requested documents was a contingency-fee agreement between former AG Henry McMaster and outside counsel, Columbia attorney Ken Wingate. Wingate represents the State and about 15 private plaintiffs in a Brown suit in Richland County.

Other Brown cases are pending in the Aiken County Circuit Court, the S.C. Court of Appeals, and the S.C. Supreme Court.

The FOIA lawsuit was filed by Newberry resident Adele Pope in August. She and Aiken attorney Robert Buchanan, former Brown trustees, have repeatedly attempted to obtain the fee agreement and other documents for 10 months.

Only two days after Wilson's motion to dismiss the Newberry FOIA suit, on Sept. 14, The State newspaper reported Wilson had announced, through an agency spokesperson, that contingency agreements with outside law firms are available to members of the public who request them and that the AG's office is in the process of posting all such agreements on its website.

"We hope this announcement means that the AG will release the public documents which Pope and Buchanan have been trying to obtain for almost a year, first from McMaster and now from Wilson," said Adam Silvernail, Pope's attorney.

The unreleased contingency-fee contract between McMaster and Wingate authorized Wingate to sue Buchanan and Pope on behalf of the state while simultaneously representing about 15 private plaintiffs.

In a hearing scheduled for Richland County Sept. 14, Pope and Buchanan sought to disqualify Wingate from representing both the state and the private individuals.

In a brief filed last week, Pope also asked that current Brown trustee, Columbia CPA Russell Bauknight, be enjoined from asserting that he acts for the state or the AG. Bauknight replaced Pope and Buchanan as trustee and serves at the AG's pleasure.

Bauknight and AG Wilson have both refused to produce the contingency-fee contract and other documents requested by Pope's two FOIA lawsuits, including documents related to the value of Brown's assets and a copy of McMaster's "Legacy" trust.

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In 2008 McMaster forged an agreement with some of Brown's claimed heirs, all of whom were disinherited from his worldwide music empire, and gave them more than half of Brown's assets.

In late 2008 or early 2009, McMaster set up the "Legacy" trust with Bauknight as trustee. To date, no signed complete copy of the Legacy trust has been produced, but at least two incomplete drafts are on file in Aiken County.

Before the McMaster agreement, Brown's estate plan gave his music empire to the "I Feel Good" trust to provide scholarships for needy and deserving students.

Brown's music empire—with royalties to about 850 songs, as well as publicity rights—was widely reported to have a value of \$100 million at his death, less a \$15 million debt. At about \$80 million, the "I Feel Good" trust would have been South Carolina's largest private foundation dedicated solely to scholarships for needy and deserving students.

In December 2010, however, Bauknight filed documents with the Internal Revenue Service placing a \$4.7 million value on Brown's worldwide music empire at his death in 2006.

According to J. David Black of the Columbia law firm Nexsen/Pruet, which represented Bauknight in the IRS filing, Bauknight's \$4.7 million value for Brown's music empire at death is based upon an independent professional appraisal, authorized by Bauknight. When reached by email, Black failed to disclose the name of the New York appraiser.

In Black's email, he claimed Brown's music empire was worth \$4.7 million "because of outstanding debt and bond issues as well as Mr. Brown's prior advisors' mismanagement of his assets." He said further that all of Brown's assets, including the music, had a value of only \$5.7 million.

In 2007 David Cannon, one of three original trustees appointed by Brown, resigned after Pope and Buchanan discovered he had taken \$900,000 from Brown's Trust the previous year. Cannon was indicted in 2010 for felony breach of trust with respect to Brown's assets between 1999 and 2006. He was also indicted for a 2008 forgery related to Brown.

Cannon has not yet been tried, but in November 2010 he was placed, along with former trustee Albert "Buddy" Dallas, on Wingate's witness list in the Richland County case.

Pope and Buchanan, who valued Brown's music assets at about \$85 million, have challenged McMaster's agreement and Bauknight's valuation.

When asked by email when the Wingate contract would be available on the AG's website, spokesperson Mark Plowden responded Tuesday morning, "I am on medical leave, but will have someone send it to you."

Judge Casey L. Manning continued the Richland County hearing to consult with Chief Administrative Judge Alison Renee Lee.



Pope vs. Wilson, et al, Case No. 2012-CP-40-0350; Pope v. Wilson 10-CP-40-4900

Mon, Oct 13, 2014 at 5:40 PM

Cc: "Ariail E. King" <aek@lbglegal.com>, "kmb@lbglegal.com" <kmb@lbglegal.com>, "mvg@swblaw.com" <mvg@swblaw.com>

Page 1 of 2

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2 attachments

 **Pope II Judge 11.27.13 (00263968xD2C78).pdf**
84K

<https://mail.google.com/mail/u/0/?ui=2&ik=a44d3d1901&view=pt&ms...&q=ESmith%40scag.gov&q=true&search=query&siml=1490b756396ff18c>

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EXHIBIT F

**In Support of Rule 12(b)(8) Motion to Dismiss
and proposed Amended Motion to Dismiss
Pope v. Wilson 2012-CP-40-350**

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STATE OF SOUTH CAROLINA,
COUNTY OF RICHLAND

) IN THE COURT OF COMMON PLEAS

) Case No. 2010-CP-40-4900

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

and

HENRY DARGAN MCMASTER, in his
capacity as Attorney General of the State of
South Carolina; TOMMIE RAE BROWN,
individually and on behalf of her minor child,
JAMES BROWN II; DARYL J. BROWN,
individually and on behalf of his minor child
JANISE VANISHA BROWN; LINDSEY
DELORES BROWN; DEANNA J. BROWN
THOMAS; JASON BROWN - LEWIS;
YAMMA N. BROWN, individually and on
behalf of her minor children, SYDNEY
LUMAR, CARRINGTON LUMAR, and
TONYA BROWN; VENISHA BROWN;
LARRY BROWN; and TERRY BROWN,
Plaintiffs.

v.

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

MOTION TO COMPEL
PRODUCTION OF CONTINGENCY-
FEE CONTRACT AND RELATED
DOCUMENTS PRIOR TO HEARING
ON MOTION FOR INJUNCTION

TO: THE PLAINTIFFS, DEFENDANT ROBERT L. BUCHANAN, JR. AND/OR THEIR
COUNSEL.

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YOU WILL PLEASE TAKE NOTICE that ten (10) days after service hereof, or as soon thereafter as counsel may be heard, Defendant Adele J. Pope, through her undersigned counsel, will move for an order compelling the above-named Plaintiffs to produce the following documents before this Court hears Defendant Pope's pending Motion for Injunctions against Plaintiff Russell L. Bauknight and Kenneth B. Wingate and Sweeny Wingate & Barrow, P.A. (collectively, "Wingate") from attempting to act for the Attorney General ("AG") and/or the State of South Carolina (collectively, the "State") while serving all private plaintiffs ("Private Plaintiffs"):

1. The James Brown Legacy Trust under which Bauknight asserts status in the complaint;
2. Any authorization under which Bauknight is authorized to act for the current or former AG;
3. Wingate's contingency-fee contract with Private Plaintiffs and/or the AG/State.

The Grounds of this motion are as follows:

1. That Defendants have sought these and other relevant documents since October 12, 2010.
2. Wingate, Bauknight and Private Plaintiffs have refused to produce these and other documents and 8 Private Plaintiffs have refused to appear at depositions, obstructing Defendant's efforts to obtain these critical documents.
3. Plaintiffs' refusal to produce these critical documents is wholly inconsistent with the policy of the AG as stated in Public Official's Guide to the Freedom of Information Act (FOIA) in which he states that the AG's Office uses and recommends the following FOIA guidelines:

When in doubt, disclose requested information
...When in doubt, release the document

4. Issues of the use of the name and power of the State in violation of Defendant Pope's constitutional rights are at issue in this case, and Plaintiffs should not be allowed to conceal the authority under which Bauknight and Wingate purport to act for the State

4. On or about May 18, 2011, Defendant Pope moved to enjoin Russell L. Bauknight from attempting to act as agent for the State of South Carolina and to enjoin Wingate from representing the State jointly with the dozen-or-more Private Plaintiffs. Defendant Pope does not challenge, and has never challenged, Wingate's representation of Private Plaintiffs in this action.

5. On or about June 30, 2011, Defendant Pope made a FOIA request for these documents from Bauknight as Trustee of the James Brown Legacy Trust and also of the AG. Counsel for Defendant Pope sent a courtesy copy of the requests to Wingate. The time for the AG to respond has not elapsed, but on or about July 15, 2011, Pope received the response attached as Exhibit A from David Black, who represents Bauknight in other matters.

6. On July 13, 2011 a status conference was held before the Honorable Allison Renee Lee, wherein Judge Lee indicated that she would seek to schedule the motion for injunctions against Wingate and Bauknight for hearing as soon as possible and, in any event, before other pending motions in this action.

This motion is based on the United States Constitution; the Affidavit of Nathan Crystal on behalf of the Plaintiff in the case of *AstraZeneca vs. Wilson, as Attorney General*, Spartanburg County Case No. 2011-CP-42-1213, and the entire file in that action, of which the Court is asked to take judicial notice; the entire record herein; and

such additional documentation as shall come before the Court prior to the hearing on this matter.

Respectfully submitted,

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July 26, 2011

Attorneys for Defendant Adele J. Pope

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State of South Carolina	)	In the Court of Common Pleas
County of Newberry	)	Civil Action No. 2011-CP-36-364
	)	
Adele J. Pope,	)	Affidavit of Sue Summer
	)	Opposing Striking or Disregarding
	)	Affidavits
	)	
Plaintiff	)	
v.	)	
	)	
Alan Wilson, in his capacity as	)	
Attorney General of South Carolina	)	
And James Brown Legacy Trust, by	)	
Russell Bauknight, its Trustee	)	
Defendants	)	

Personally appeared before me, Sue Summer, who being duly sworn, deposes and says:

1. This affidavit is based on my personal knowledge and belief.
2. I am informed and believe that the Court should not strike or refuse to consider my earlier affidavit or those of Vic MacDonald, Deborah Spence, W. Jeffrey Smith, Rep. Tom Young and Tom Pope, because all demonstrate the importance of the public's right to public documents "at a minimum cost or delay," as well as the public's interest in matters related to music legend James Brown.
3. I am informed and believe that the transparency in government which is encouraged by the FOIA is essential to our free society.
4. I am informed and believe that the McMaster-created Legacy Trust, now controlled by AG Alan Wilson through Mr. Russell Bauknight, is a public body under the FOIA and should comply with all FOIA requests, including mine. Former AG McMaster, after all, created the Trust while serving as a representative of—and being paid by—the people of South Carolina.
5. AG Wilson's office has repeatedly refused to answer important questions related to James Brown. (See exchange of emails, Exhibit A.)
6. After several weeks of my making requests for documents and information, AG Wilson's office refused to release to me the McMaster/Wingate contingency fee contract—again, a public document created by McMaster while being paid by the taxpayers of South Carolina—and stopped responding to my emails altogether. Now, AG Wilson's office has failed to comply with my formal request under the FOIA, made December 6, 2011. (Exhibit B.)
7. Mr. Bauknight, through attorney David Black, has refused to provide me with a copy of the at-death appraisal of Mr. Brown's music empire, nor would he release the name of the appraiser so that I might independently verify what he said to me in a telephone interview.
8. I believe the public has a right to see documents that will shed some light on the magnitude of the gift Brown made to poor children for the purpose of education.

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9. I believe the public has a right to see documents that might explain why AGs McMaster and Wilson have not recovered one dime of the \$12+ million David Cannon took from Brown and the students who would benefit from the "I Feel Good" Foundation.
10. I am informed and believe I should not be required to bring a FOIA lawsuit to obtain a public document, certainly not when that document is in the custody of the public body responsible for enforcing compliance with FOIA.
11. I do not believe I should be required to bring a separate FOIA lawsuit to get a public document when Mrs. Pope is already seeking that document in her FOIA lawsuit.
12. The Newberry Observer is a non-daily newspaper that serves a small town, not a major media market. Still, it has a proud history of promoting "sunshine" laws and a strong record of defending the FOIA. One of its former editors, Vic MacDonald, won a S.C. Press Association award for his vigorous defense of the FOIA, and other reporters on staff have pursued the release of public documents at the local and state level.
13. The weakened condition of newspapers over the past 10-15 years has placed the FOIA in great peril, in my opinion. Many no longer have the staff to pursue compliance, nor do they have the resources for legal action. Yet, the FOIA is critical to maintaining our democracy: if government officials make it impossible for the people to know what they are doing, we will find it impossible to hold those officials accountable for bad decision-making.
14. While public relations director at Newberry College, I advised the student newspaper and attended student conferences of the S.C. Press Association. I worked closely with students to lobby for the passage and the strengthening of the "sunshine law" in South Carolina, and I want to do whatever I can to make sure their efforts were not in vain.
15. Scholarships for needy children are a public concern in a state where we rank near the bottom in education, and \$12+ million would be most helpful in that regard. I believe the public has a right to see documents that may explain why AGs McMaster and Wilson have never recovered one dime of the \$12 million David Cannon took from Brown and the needy and deserving students who are beneficiaries of the "I Feel Good" foundation.
16. With a Supreme Court hearing related to the Cannon case next week, the public interest (and mine) will be heightened regarding Cannon's relationship with the AG's office, Bauknight and Legacy Trust beneficiary Terry Brown.
17. I became interested in Terry Brown's attempts to lower the price at which he might buy Brown's music empire—a right given to Terry by AG McMaster—when I read the April 2011 draft of W. Jeffrey Smith's article, "Private Foundations, Copyright Heirs, and Musical Millionaires: Why the James Brown 'I Feel Good' Trust Doesn't...."
18. According to filed documents, Terry Brown, Bauknight and AG Wilson told the courts that Brown's music empire—which Terry's group had tried to buy for \$100 million in 2008—was worth less than \$4.7 million at James Brown's death, even though it was bringing in between \$4-5 million in royalties annually.
19. In the summer of 2011 I learned that the counsel for the Legacy Trust, David Black, had threatened to seek sanctions against Mrs. Pope for exercising her FOIA rights. This threat chilled me, as it should have every journalist in the state. When one is denied FOIA rights, it sets a precedent for all to be denied.

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20. In the fall of 2011, Mr. Black told me that Mr. Bauknight's \$4.7 million at-death value was correct, but that the supporting appraisal could not be released to me as it was under lock and key.
21. On Nov. 1, 2011, I heard another of Mr. Bauknight's attorneys tell the Supreme Court that Brown's Estate/Trust had "no corpus" to speak of. Again, this was related to intellectual property that had been bringing in \$4-5 million annually, and I knew the Observer's readers—especially those interested in education—would want to know how that could be.
22. Also on Nov. 1, 2011, I heard AG Sonny Jones tell the Supreme Court that in 2008, when McMaster agreed to give more than half of Brown's assets to disinherited heirs, he knew nothing about termination rights under the Federal Copyright Act.
23. According to Smith's article, this ignorance of the AG's office related to termination provisions of the Copyright Act—and the AG's agreement to call certain non-heirs Brown's "heirs"—was the first step in the destruction of the "I Feel Good" Trust.
24. The next step, according to Smith, was for the newly-created "heirs"—who are not Brown's true heirs under the Copyright Act—to acquire Brown's assets at a reduced price, thereby completely dismantling the "I Feel Good" Foundation.
25. In a recent telephone interview, Mr. Buddy Dallas informed me that in 2007, he provided Judge Early with a copy of the \$100 million offer to buy Brown's assets, and that the \$4.7 million value was incorrect.
26. Mr. Dallas also provided me with a recording in James Brown's own voice, in his own words, during which he speaks in 1999 with his estate planning attorney and others about how important it was to give back what God had given him by leaving his music empire to the "I Feel Good" foundation for needy and deserving students.
27. It confirmed for me how important it was for the public to see the McMaster/Wingate contract that I am seeking under the FOIA when, in the winter of 2011, Mr. Wingate's firm, representing Terry Brown and others, asked the Court to sanction Mrs. Pope for seeking the same document in her FOIA lawsuit.
28. After Mr. Wingate, representing Terry Brown, sought to sanction Mrs. Pope, Forlando Brown told me his father Terry did not know Mr. Wingate was seeking sanctions against Mrs. Pope, and he further said:

After my father (Terry Brown) refused to join the fight (to contest the Will and Trust) they called us to South Carolina to the Attorney General's office. They said they could settle without us, and they'd make sure we got nothing. We were given an ultimatum.
29. I have recently learned that the lawyers who helped Mr. Cannon and Mr. Dallas enforce the "I Feel Good" Trust and protect Brown's estate plan in 2007 are now helping Mr. Bauknight to keep public documents from being released under the FOIA. Why?
30. I believe the public has a right to know if political contributions influence policy decisions, and in the James Brown matter, there appear to be questions about certain contributions to McMaster's gubernatorial campaign from the battalion of high-powered lawyers involved.

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31. I believe the public has a right to know what is going on with the valuation of Brown's music empire, which he wanted to use for education. How can the AG's office acknowledge a \$100 million offer to buy Brown's assets in 2007, and then say in 2011 that the music empire is worth only \$4.7 million?
32. I believe the public has a right to know why James Brown's wishes, as he recorded them, were ignored by the AG's office. Also, the public has a right to know if AG McMaster read the diaries of Mr. Brown's companion, which confirm she knew she was not married to Mr. Brown when he died, according to Mr. Dallas.
33. I believe the public has a right to know why AG Wilson is going along with giving away over half of Brown's music empire to those he specifically disinherited—and with the reduced value of that music empire—when neither decision is serving the interest of needy and deserving students in South Carolina.
34. I believe the public has a right to know why neither the AG nor Bauknight recommended a sentence for David Cannon or spoke on behalf of the "I Feel Good" student victims during his sentencing hearing in October of 2011.
35. The AG is charged with the enforcement of the FOIA, but he has gone to great lengths to resist his own office's compliance. Perhaps if I were writing for a large daily newspaper, the AG would have been more cooperative and more helpful in providing documents and information, but I submit that small town newspapers have FOIA rights, too, as do individuals in the public. My most recent list of questions for the AG's office is attached. (Exhibit C.)
36. The consolidation of a FOIA lawsuit with a civil tort action is a dangerous course, in my opinion. The governmental body can hide behind the private plaintiffs' right to privacy, and public documents may very well never see the light of day. It is difficult to hold public bodies accountable, as it is. Allowing FOIA suits to be consolidated with private actions may very well render the Act useless by giving public bodies an escape route by which documents that may prove embarrassing can be hidden.

FURTHER DEPONENT SAYETH NOT.

Sue Summer
Sue Summer

SWORN TO before me this
5th day January, 2012.

Larry A. Law (L.S.)
Notary Public for South Carolina
My Commission expires: 10-27-13

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April 21, 2015

The Honorable L. Casey Manning
Post Office Box 192
1701 Main Street, Room 214
Columbia, South Carolina 29202-0192

Re: *Pope vs. Wilson, et al*
Richland County Case No. 2012-CP-40-0350
Pope vs. Wilson
Richland County Case No. 2010-CP-40-4900

Dear Judge Manning:

I represent Plaintiff Adele J. Pope in the above referenced actions, both of which are brought under the South Carolina Freedom of Information Act.

I have previously written your Honor on the following dates to request that these matters be set for a hearing on the pending motions and the merits as soon as possible:

1. February 8, 2013;
2. March 15, 2013;
3. November 22, 2013;
4. April 17, 2014;
5. April 29, 2014;
6. May 7, 2014;
7. May 28, 2014;
8. October 8, 2014;
9. November 13, 2014;
10. December 2, 2014;
11. February 25, 2014 and
12. March 20, 2015

I renew that request today, and I respectfully remind the Court that no hearing has been held in these matters since 2012.

For the Court's information, I note that the Newberry County FOIA matter captioned *Summer v. Wilson* has now reached a final result, after the Supreme Court dismissed the Wingate firm's appeal of Judge Griffith's denial of Russell Bauknight's attempt to intervene on behalf of the Estate of James Brown and the James Brown 2000 Irrevocable Trust.

As your Honor may recall, Mr. Bauknight and others have moved to intervene in the

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Page 2
April 21, 2015

above-referenced FOIA matters. We believe that the conclusion of the *Summer* case shows that intervention to be inappropriate.

Again, I ask that your Honor schedule a hearing on these matters at the Court's earliest convenience, so that these nearly four-year-old FOIA matters can move toward a conclusion.

Thank you for your consideration.

Very truly yours,



Adam T. Silvernail

cc: J. Emory Smith, Esquire
Keith M. Babcock, Esquire
A. Camden Lewis, Esquire
Ariail E. King, Esquire
Adele J. Pope, Esquire
Mark V. Gende, Esquire

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January 29, 2016

By e-mail and U.S. Mail:

The Honorable Alison Renee Lee
Chief Administrative Judge for the Fifth Circuit (CP)
Post Office Box 192
1701 Main Street, Room 324
Columbia, South Carolina 29202-0192

Re: *Pope vs. Wilson, et al*
Richland County Case No. 2012-CP-40-0350

Dear Judge Lee:

I represent Plaintiff Adele J. Pope in the above-referenced matter, brought pursuant to the South Carolina Freedom of Information Act, in which your Honor held a telephone status conference on July 22nd. I write to follow up on my November 20, 2015 and December 17, 2015 letters to your Honor requesting that the pending motions in this matter be set for a hearing at the Court's earliest convenience.

It has now been four (4) years since this matter was transferred to Richland County, and it has not progressed toward resolution. I respectfully renew my request that a hearing be set in this matter at the Court's earliest convenience. If needed, I remain available to assist in coordinating dates for that hearing.

As always, thank you for your consideration.

Very truly yours,



Adam T. Silvernail

cc: Adele J. Pope, Esquire
J. Emory Smith, Esquire
Keith M. Babcock, Esquire
Ariail E. King, Esquire
A. Camden Lewis, Esquire
Mark V. Gende, Esquire

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RECEIVED

**STATE OF SOUTH CAROLINA
In the Court of Appeals**

APR 14 2017

SC Court of Appeals

**Appeal from Richland County
Court of Common Pleas**

The Honorable Doyet A. Early, III, Circuit Judge

Appellate Case No. 2016-001727

Adele J. Pope..... Appellant,

v.

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

BRIEF OF APPELLANT

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Counsel for Appellant

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Statement of Issues on Appeal

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

Statement of the Case

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

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

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

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

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

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

The documents sought under FOIA from the AG are:

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

The documents sought under FOIA from both Respondents are:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

This appeal followed.

Statement of Facts

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The AG failed to timely produce the requested documents.

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

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

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

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

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

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

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

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

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

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

Argument

- I. DISMISSAL WAS ERROR AND SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED BECAUSE BOTH THE AG AND THE LEGACY TRUST ARE PUBLIC BODIES UNDER FOIA.**
 - a. Summary Judgment in favor of Appellant, not dismissal, was appropriate as to both Respondents.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Our Supreme Court held in *Weston v. Carolina Research and Development Foundation*, 303 S.C. 398, 401 S.E.2d 161 (1991), that even indirect public support of an organization could cause that organization to be treated as a public body. In *Associated Press v. Sebelius*, 31 Kan.2d 1107, 78 P.3d 486 (2003), the Kansas Court held that an organization's use of state employees (who were not paid outside their state salaries) meant that it was a public body for FOIA purposes. This is particularly instructive, since many attorneys within the AG's office paid for by the taxpayers of South Carolina have expended considerable time in defending the Legacy Trust's existence and pursuing its goals. Even before the Legacy Trust took direct control of

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

Respectfully submitted,



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April 14, 2017

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APR 14 2017

SC Court of Appeals

**STATE OF SOUTH CAROLINA
In the Court of Appeals**

**Appeal from Richland County
Court of Common Pleas**

The Honorable Doyet A. Early, III, Circuit Judge

Appellate Case No. 2016-1727

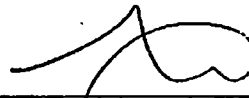
Adele J. Pope..... Appellant,

v.

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

CERTIFICATE OF COUNSEL

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



Adam T. Silvernail

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge
Case No. 2012-CP-40-350

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APR 04 2017

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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COUNTER-STATEMENT OF THE CASE

This is an appeal from the circuit court's grant of the James Brown Legacy Trust's ("Legacy Trust") Motion to Dismiss on June 14, 2016. R.p. 5

Appellant filed a complaint in Newberry County on August 3, 2011, seeking the disclosure of certain documents from Respondents Attorney General and Legacy Trust under the South Carolina Freedom of Information Act, a declaratory judgment that the Legacy Trust is a public body under S.C. Code Ann. § 30-4-10, *et seq.*, South Carolina Freedom of Information Act ("FOIA"), and attorney's fees and costs pursuant to the FOIA. R.p. 16-18.

Appellant sought the following documents pursuant to FOIA from the Legacy Trust: "The final and all drafts, signed and unsigned, of the James Brown Legacy Trust." R.p. 18.

On September 9, 2011, Respondent Legacy Trust filed a motion to dismiss, arguing, *inter alia*, that venue was improper in Newberry County. R.p. 79-80. Appellant served its return to the Legacy Trust motion to dismiss on September 12, 2011. R.p. 81-84. Appellant served a motion for summary judgment on September 29, 2011. R.p. 316.

Prior to a January 2012 hearing, Appellant and Respondent Legacy Trust filed memoranda addressing Legacy Trust's motion to dismiss and Appellant's motion for summary judgment. R.p. 436-440; R.p. 97-102.

On January 11, 2012, the Newberry County circuit court transferred venue of this action to Richland County, without addressing the remaining motions. R.p. 107-108.

On March 15, 2013, the Legacy Trust filed a motion to stay pending the resolution of certain issues raised by the South Carolina Supreme Court's opinion in *Wilson, et al. v. Dallas, et al.*, Opinion No. 27227 (Feb. 27, 2013). The South Carolina Supreme Court refiled its opinion in May 8, 2013. (*Wilson v. Dallas*, 403 S.C. 411, 743 S.E.2d 746 (2013)).

On May 17, 2016, the circuit court heard oral argument on Respondent Legacy Trust's motion to dismiss and Appellant's motion for summary judgment. R.P. 274. On June 14, 2016, Judge Early issued an order granting the Legacy Trust's motion to dismiss. R.p. 5-8. Appellant Pope then appealed.

COUNTER-STATEMENT OF THE FACTS

Singer and entertainer James Brown died in December 2006 and his will was contested. *Wilson*, 403 S.C. at 416-19, 743 S.E.2d at 749-51. The facts surrounding the will contest are discussed in detail in the South Carolina Supreme Court's opinion in *Wilson v. Dallas*. Pertinent to this appeal, the James Brown Legacy Trust ("Legacy Trust") was created as part of the will contest settlement agreement to "receive, hold, manage and be authorized to sell the James Brown Assets." *Id.* at 421, 743 S.E.2d at 752. The Attorney General became involved in the will contest and eventual compromise agreement because a portion of James Brown's estate was dedicated to funding a charitable trust, *Id.* at 417, 419, 743 S.E.2d at 750-51, and the Attorney General has a statutory duty to protect the public interest in the administration of charitable trusts, *see* S.C. Code Ann. § 62-7-405; *Wilson*, 403 S.C. at 431, 445, 743 S.E.2d at 757, 765. The Attorney General was permitted, without opposition, to intervene in the case to "represent and protect the interests of the beneficiaries of any charitable trust created by [Brown's 2000 will] and the [2000 Irrevocable Trust] or any other assets of the Estate of James Brown that may be impressed with a charitable trust" *Wilson*, 403 S.C. at 431, 743 S.E.2d at 757 n.13 (modifications in original).

In 2009, Russell Bauknight was appointed by the circuit court to serve as the Personal Representative and Trustee of the James Brown Estate and August 1, 2000 Irrevocable Trust Agreement. R.p. 494. Russell Bauknight also served as Trustee for the Legacy Trust. R.p. 412. As Trustee for the Legacy Trust, Bauknight's obligations extended to the beneficiaries of the Legacy Trust, not the Attorney General. R.p. 176.

The compromise agreement settling the will contest was approved the by the circuit court in 2009 and was appealed by Appellant to the South Carolina Supreme Court. *Wilson*, 403 S.C. at 422, 743 S.E.2d at 752. In 2013, the South Carolina Supreme Court overturned the circuit court's approval of the settlement agreement that created the Legacy Trust, finding that the

compromise agreement was not just and reasonable. *Wilson*, 403 S.C. at 450, 743 S.E.2d at 767-68. The Court ruled that the settlement agreement could not replace James Brown's estate plan and existing trusts by creating new trusts. *Id.* at 446, 743 S.E.2d at 765.

The Court invalidated the circuit court's approval of the compromise agreement creating the Legacy Trust. *Id.*; R.p. 495. Russell Bauknight, in his capacity as Trustee of the Legacy Trust, understood the Court's opinion in *Wilson v. Dallas* to have terminated any potential involvement of the Attorney General (though there had been none other than Attorney General's involvement in the settlement agreement) in the Legacy Trust. R.p. 495. Consistent with this understanding, the Attorney General has not had any involvement in the Legacy Trust since *Wilson v. Dallas*. R.p. 495. Russell Bauknight was appointed as the Trustee of the Legacy Trust near the time of its creation and has served continuously in this role, R.p. 412; R.p. 494, though as there is no longer a trust in existence, Bauknight has no duties to perform, R.p. 495-496.

Following the Court's opinion in *Wilson v. Dallas*, the Legacy Trust ceased to function as a court approved trust. R.p. 495-496. Had it survived appeal, the Legacy Trust was to be funded from the private property of James Brown. R.p. 413; R.p. 494. The Legacy Trust was never designed to be supported in whole or in part by public funds, to expend public funds, or to hold public assets. R.p. 413; R.p. 496. The Legacy Trust is not a custodian of public records. R.p. 413; R.p. 496.

ARGUMENT

The trial court correctly granted Respondent James Brown Legacy Trust's ("Legacy Trust") motion to dismiss this action brought under the South Carolina Freedom of Information Act ("FOIA") because the private Legacy Trust is not subject to public records requests made under the FOIA, the Legacy Trust no longer exists and functions as it was designed to, and Appellant possesses the documents she seeks through her FOIA request. Accordingly, the circuit court's dismissal should be affirmed.

I. Dismissal of the FOIA Suit Was Appropriate Because the James Brown Legacy Trust Does Not Fall Within the Definition of "Public Body" in the South Carolina Freedom of Information Act.

The trial court correctly dismissed Appellant's FOIA suit against the Legacy Trust—thereby affirming the Legacy Trust's decision not to respond to Appellant's FOIA request. In order for the Legacy Trust to be subject to the FOIA, and amenable to suit for the failure to respond to a FOIA request, it must fall within the Act's definition of a "public body." *Weston v. Carolina Research & Dev. Found.*, 303 S.C. 398, 400, 401 S.E.2d 161, 163 (1991). The South Carolina Freedom of Information Act defines "Public body":

(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 that a private trust such as the Legacy Trust is not 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)). It is without contention that under the plain language of the FOIA, trusts are not included in the definition of a "public body" and the Legacy Trust is not: a state board, commission, agency, or authority; a county, municipality, township, school district, or special purpose district; or a committee, subcommittee or advisory committee.¹

Appellant's complaint seems to allege that the Legacy Trust is somehow under the "control of" or receives "support" from the Attorney General, and is thereby rendered a public body for purposes of the FOIA.² R.p. 21-22. 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)).

¹ Furthermore, not even all "committees," which are explicitly included as a public body under FOIA, are subject to FOIA. Only a committee that "in making its recommendations, [is] performing a governmental function" is subject to the Act. 1984 S.C. Op. Att'y Gen. 159 (1984). See also 1989 S.C. Op. Att'y Gen. 259 (1989) ("Clearly, this Committee is not a department of the State, a state board, commission, agency, governmental body, political subdivision, county, municipality, township, school district, or special purpose district. The fact that the Committee was not created by a provision of the South Carolina Constitution, a statute, ordinance, or resolution supports this conclusion. Additionally, the Committee does not perform exclusive governmental functions or make policy affecting citizens' fundamental rights, factors often considered in terms of the governmental bodies enumerated in the Act.").

² In fact, the Attorney General has no involvement in the Legacy Trust. R.p. 495.

“Public funds are, generally, funds belonging to a state or county or other political subdivision, more especially taxes or other such moneys raised by the operation of some general law and appropriated by the government for the discharge of its obligations or for some public or governmental purpose.” 1989 S.C. Op. Att’y Gen. 259 (1989).

The Legacy Trust is 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.³ 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*, 404 S.C. at 456, 746 S.E.2d at 341 (clarifying its holding in *Weston*, 303 S.C. 398, 401 S.E.2d 161, concerning when private organizations are subject to the FOIA); *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 to a FOIA-like disclosures where it was not acting as state’s agent or expending the funds for the public benefit). Neither of these descriptions fit the Legacy Trust.

Appellant relies on a single South Carolina case from 1991 to support her argument that the Legacy Trust is a public body—*Weston v. Carolina Research & Development Foundation*, 303 S.C. 398, 401 S.E.2d 161 (1991).⁴ In *Weston*, the question was whether a private non-profit

³ 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).

⁴ Appellant’s reliance on a case from Kansas, *Associated Press v. Sebelius*, 78 P.3d 486 (Kan. Ct. App. 2003), is not persuasive, as that case was concerned with state employees serving in a group

corporation operated for the exclusive benefit of the University of South Carolina could be subject to the FOIA. *Weston*, 303 S.C. at 400, 401 S.E.2d at 162. The court held that it could if the private organization received support in whole or in part from public funds. *Id.* at 403, 401 S.E.2d at 164. The court found that four transactions showed that the private foundation was subject to the FOIA: (1) receiving money from the sale of public real estate; (2) accepting federal grant money earmarked for the University and administering the expenditure of this money; (3) accepting the conveyance of real estate from the City of Columbia along with a cash grant from City of Columbia and a cash grant from Richland County to develop the real estate; and (4) administering research and development contracts made to University employees. *Id.* at 401-03, 401 S.E.2d at 163-64.

In 2013, the South Carolina Supreme Court's opinion in *Disabato v. South Carolina Association of School Administrators*, clarified the limited scope of *Weston*'s holding that private entities can be subject to FOIA. In *Disabato*, the South Carolina Association of School Administrators, a non-profit corporation engaged in public advocacy, sought to dismiss a FOIA suit on first amendment grounds. The Court reiterated its holding in *Weston* that the application of the FOIA "beyond traditional governmental entities is limited to statutorily defined public bodies, which are only those entities supported by public funds." *Id.* at 454-55, 746 S.E.2d 340. Addressing the dissent's concern about the scope of the FOIA reaching private entities, the Court clarified the "limited application of the FOIA to non-governmental entities" as applying only those private entities "who receive government funds en masse" or are "generally supported by public funds." *Id.* at 456, 746 S.E.2d at 341.

organized by the governor-elect to evaluating efficiencies and savings in state government, clearly a public purpose and with meeting times that could be directly traced to specific state employees.

Both *Weston* and *Disabato* clearly place the Legacy Trust outside of the FOIA's reach. There are no facts suggesting that the Legacy Trust ever received public funds to manage or expend, or that it was set up to manage state assets or for the public benefit. The Legacy Trust was created to be funded from private assets and to expend private assets.

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. Appellant has presented no legal support 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.⁵ The fact that the Attorney General may have overstepped his statutory role in the Legacy Trust, *id.* at 445-46, 743 S.E.2d at 765-66, should not be charged against the Legacy Trust and somehow subject the private Legacy Trust to public records requests. Public records of the Attorney General's involvement in the Legacy Trust can be sought from the Attorney General. It is unnecessary to broaden FOIA's application to private entities to now cover private trusts managing private assets. Accordingly, the Legacy Trust should not be subject to FOIA and dismissal was proper.⁶

⁵ Appellant appears to argue that the Attorney General's, or Attorney General's staff, involvement in the creation and planned ongoing oversight of the Legacy Trust can somehow be quantified and then 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.

⁶ Furthermore, as noted in Mr. Bauknight's affidavit, Appellant herself has admitted in other litigation that trusts such as the one at issue are not public entities. R.p. 495. In an appeal of the settlement that created the Legacy Trust, Appellant wrote that "[p]rivate foundations such as the 'I Feel Good' foundation/trust are not public charities." R.p. 495. These previous statements further cut against Appellant's position in this litigation.

II. Dismissal Was Appropriate Because Following the South Carolina Supreme Court's opinion in *Wilson v. Dallas*, the Legacy Trust No Longer Exists.

The essence of Appellant's contention in the underlying FOIA suit against the Legacy Trust is that the Legacy Trust is subject to the FOIA because of the South Carolina Attorney General's involvement in Legacy Trust's creation and anticipated continuing oversight. R.p. 16-17, 19, 21-23; Br. Appellant 16-19.) This precise issue, whether the Attorney General's involvement in the Legacy Trust subjects the Legacy Trust to FOIA, is moot following the South Carolina Supreme Court's 2013 decision in *Wilson v. Dallas*, when the Court invalidated the "compromise agreement," effectively terminating any potential involvement of the South Carolina Attorney General's Office in the newly created Legacy Trust. *Wilson*, 403 S.C. at 450, 743 S.E.2d at 767-78. This intervening event moots Appellant's argument that the Legacy Trust is subject to the FOIA because of the Attorney General's potential oversight. *See Seabrook v. Knox*, 369 S.C. 191, 197, 631 S.E.2d 907, 910 (2006) ("A moot case exists where a judgment rendered by the court will have no practical legal effect upon an existing controversy because of an intervening event renders any grant of effectual relief impossible for the reviewing court."); R.p. 495. ("It is my understanding that *Wilson v. Dallas* effectively terminated any potential involvement of the South Carolina Attorney General's Office in the Legacy Trust."), R.p. 495, ("Since the Supreme Court's order in *Wilson v. Dallas*, the Attorney General has had no involvement in the Legacy Trust.").

In *Wilson v. Dallas*, the South Carolina Supreme Court reviewed the "compromise agreement" approved by the circuit court to settle the James Brown trust dispute. One aspect of the compromise agreement was the creation of the Legacy Trust to manage James Brown's assets for the beneficiaries, which included a new charitable trust, Tommie Rae Brown, and the Brown Family. *Wilson*, 403 S.C. at 420-21, 743 S.E.2d at 751-52. The plan was to fund the Legacy Trust with a future interest. Prior to the Legacy Trust ever being funded and the compromise agreement

taking effect, the circuit court issued an order prohibiting distributions during the appeals process, and, thus, the Legacy Trust was never funded and no distributions were ever made. R.p. 496.

In the South Carolina Supreme Court's review of the compromise agreement, it held that the agreement was not just and reasonable and it reversed the lower court's approval of the compromise. *Wilson*, 403 S.C. at 450, 743 S.E.2d at 767. The court ruled that the settlement agreement could not replace James Brown's estate plan and existing trusts by creating new trusts. *Id.* at 446, 743 S.E.2d at 765. In so holding, the court explicitly invalidated the existence of the Legacy Trust. *Id.* at 450, 743 S.E.2d at 767-68; R.p. 495.

It follows, that Appellant's argument that the Attorney General's control and influence make the Legacy Trust subject to the FOIA fails. The Legacy Trust was never funded and the Attorney General's potential involvement in the Legacy Trust never materialized because it was invalidated by the Supreme Court. R.p. 413, R.p. 495. The South Carolina Supreme Court's intervening opinion in *Wilson v. Dallas* during the pendency of this action effectively terminated the Attorney General's potential oversight of any of James Brown's assets that were planned to be placed in the Legacy Trust, and thus, Appellant's entire argument underpinning its FOIA case against the Legacy Trust is moot and was appropriately dismissed.

III. Appellant Is in Possession of All Responsive FOIA Documents, Mooting Its FOIA Action Against the Legacy Trust.

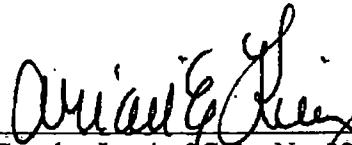
The FOIA directed to Defendant Bauknight sought "The Final and all drafts, signed and unsigned, of the James Brown Legacy Trust." R.p. 19-20. The Answer of the Attorney General, filed on March 7, 2013, asserted that "he has no documents that could be considered responsive to the Freedom of Information 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 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 now also provided as attachments to the Attorney General’s Answer, the FOIA as to Respondent Legacy Trust is moot and the complaint was properly dismissed on such grounds. *See Sloan v. Friends of the Hunley, Inc.*, 369 S.C. 20, 630 S.E.2d 474 (2006) (justiciable controversy no longer exists once documents subject to FOIA are produced).

CONCLUSION

The trial court properly ruled that the Legacy Trust does not meet the statutory definition of “public body,” because it is a private trust created to hold and expend private assets and as such, the Legacy Trust is not subject to the FOIA. The trial court also correctly determined that the Legacy Trust no longer exists following the South Carolina Supreme Court’s ruling in *Wilson v. Dallas* and that all FOIA documents sought from the Legacy Trust are in Appellant’s possession, making this case moot. For these reasons, the circuit court’s grant of dismissal should be affirmed.



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Columbia, South Carolina
April 4, 2017.

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge
Case No. 2012-CP-40-350

RECEIVED

APR 04 2017

SC Court of Appeals

Adele J. Pope,

Appellant,

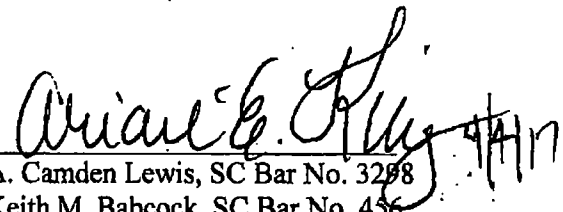
v.

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

Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Brief of Respondent complies with Rule 211(b), SCACR and the South Carolina Supreme Court's order of April 15, 2014 regarding personal identifying information.


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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

RECEIVED

Appellate Case No. 2016-001727

APR 12 2017

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 Bauknight, its Trustee, ... Respondents.

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STATEMENT OF ISSUES

1. Whether the circuit court properly dismissed this case because Appellant's Freedom of Information Act (S.C. Code Ann. §30-4-10, et seq.) request sought documents that were potentially discoverable in pending civil litigation?
2. Whether FOIA exempts matters covered by the Rules of Civil Procedure and whether this Court or the circuit court would have subject matter jurisdiction to address the merits of such matters?
3. Whether FOIA may be used to bypass civil discovery in a pending civil case?
4. Whether this Court or the circuit court could address the merits of Appellants claims and would have subject matter jurisdiction to do so when Appellant failed to accomplish mailing or delivery of her request to the Office of the Attorney General?
5. Whether this case is moot when the Office of the Attorney General has supplied Appellant with the only documents that could be considered responsive to her request?
6. Whether this case was subject to dismissal under Rule 12 (b)(8), because the related 4900 case was pending when the instant suit was commenced.
7. Whether Appellant is entitled to attorney's fees and whether she has properly documented her claim?
8. Whether Appellant is entitled to summary judgment when the case was properly dismissed by the circuit court, a decision that is also supported by the additional sustaining grounds discussed in this brief?
9. Whether Appellant's constitutional claims are before this Court when she did not raise them below.

10. Whether Appellant's affidavits should be disregarded for reasons set forth in Respondents' Motions to Strike including irrelevance and hearsay.

11. Whether venue change was within the discretion of the circuit court?

STATEMENT OF THE CASE

Appellant brought this action by a Complaint filed in Newberry County on August 3, 2011. Record (R.), Volume (V.) I, p. 16. The Complaint requested, in part, that the Court declare public documents that she sought by a June 30, 2011, Freedom of Information Act request and that they be made available for inspection and copying. See Statement of Facts, *infra*. The Respondent Attorney General (AG) filed a Motion to Dismiss and Alternative Motion to Strike the Affidavit of Appellant attached to the Complaint. R.V. I, p. 53. Under SCRCRCP, Rules 12(b)(3) and (8), the Motion contended that venue was improper and that it should be in Richland County where the related litigation was pending. *Bauknight etc. v. Pope*, 2010-CP-40-4900. The Motion also contended that another action was pending between the parties, *Bauknight, supra*, and that Appellant was pursuing through the instant suit the same discovery issues pending in case 4900.

Appellant filed a Motion for Summary Judgment dated September 29, 2011. R. Supp., p. 1. She filed numerous affidavits that were the subject of several Motions to Strike filed by the Respondent. (R. V. I, pp. 33, 53, 85, 87, 89, 91, 93, 95, 229, 231; V. II, p. 299, 316, 334, 368, 395, 404, 406).

Following a hearing, the circuit court issued a Form 4 Order on January 11, 2012, transferring venue of this case to Richland. R. V. I, p. 13. On February 1, 2012, the Respondent AG moved to consolidate this case with case 4900. R. V. I, p. 103.

On December 20, 2012, the Respondent AG moved to amend his Motion to Dismiss to

assert lack of subject matter jurisdiction and to drop improper venue. R. V. I, p. 135. The Respondent AG maintained the Rule 12(b)(8) ground for dismissal in the original Motion and the motion to strike therein.

Subject to his pending Motions, the Respondent AG filed an Answer dated March 7, 2013. The Answer included the defenses asserted in the Motion to Dismiss and Motion to Amend Motion to Dismiss, and added the defense of lack of subject matter jurisdiction because Appellant failed to accomplish mailing or delivery of her FOIA request as required by §30-4-30(c) and because the items requested were exempt from disclosure under FOIA because they are subject to the rules regarding discovery in the Rules of Civil Procedure for which Appellant was seeking the documents. R. V. I. p. 159. The Answer also included the defense that the Office of the Attorney General had no documents that could be considered responsive to the FOIA request except for a draft of the Legacy Trust attached thereto and included in the Record on Appeal in *Wilson v. Dallas*, 403 S.C. 411743 S.E.2d 746 (2013). R. V. I, pp. 166, 175, 176. The Respondent AG also filed a Motion for Judgment on the Pleadings on March 7, 2013. R. V. I. p. 210.

The Supreme Court gave the Honorable Doyet Early, III, jurisdiction of this case by Order dated March 24, 2016. Counsel for Respondent AG had written letters and sent emails to the previously assigned Judge, expressing a willingness for this case to be heard. R. V. II. pp. 484, 505, 515 and 517; R. Supp. p. 10. (letter, Smith to Judge, 3.28.13; emails, 5.8.13; 10.13.14; 11.13.14; 1.29.15).

Judge Early heard pending motions in this case on May 17, 2016. R.V. I, p. 9. (Order of June 14, 2016, p. 1.). He issued an Order dated June 14 dismissing this case. R. V. I., p. 9. He

found that the documents at issues are potentially discoverable in pending litigation in Richland / Aiken counties and will be governed by the Rules of Civil Procedure. He found that the documents were exempt from disclosure under FOIA for this reason and that FOIA could not be used to bypass civil discovery. The Court denied Appellant's Motion to Alter or Amend (R. V. I., p 3) by Form 4 Order dated August 11, 2011. This appeal then followed.

STATEMENT OF FACTS

Appellant asked for the following documents in a June 30, 2011, letter addressed to the "Custodian of Records of the Office of the Attorney General":

1. The final and all drafts, signed and unsigned, of the James Brown Legacy Trust.
2. All correspondence, email and/or other communications between any member of the Office of the . . . Attorney General and Russell L. Bauknight between August 1, 2010, and May 4, 2011 related to the value of the assets of the Estate of James Brown and / or the James Brown 2000 Irrevocable Trust.

Tracy Meyers of the Office of the Attorney General (OAG) wrote Appellant on August 5, 2011, that the Office had not received that request, which Appellant had referenced in a motion in another case, and that if she would forward the request a response would be expedited. R. V. I. p. 170. According to Ms. Meyers' affidavit of October 20, 2011, records of the OAG did not show that the letter had ever been mailed or delivered to that Office. R. V. I. p. 168.¹ Without proper

¹ As stated in Ms. Meyers' Affidavit (R. p. 168):

3. . . . She never received from Ms. Pope the June 30 letter Ms. Pope claims to have sent to the Office of the Attorney General. She requested checks of Office mail logs, none of which showed that the letter had been mailed or delivered to the Office of the Attorney General by Ms. Pope or her attorney which is necessary to require a response from this

mailing or delivery of the FOIA request to the OAG, the requirements of FOIA were never triggered. §30-4-30(c) (“[e]ach public body, upon written request for records made under this chapter shall within fifteen days . . . of the receipt of any such request notify the person making such request of its determination . . .”).

The instant action is directly related to *Bauknight* case 4900. Appellant’s complaint and other documents frequently refer to that suit, and she acknowledges that she is the defendant in that Richland County suit. Appellant contends that the Richland suit alleges that she caused millions of dollars in damage to the Legacy Trust and that her and her co-defendant’s valuation of the trust was incorrect and improper. The Court issued a ruling in case 4900 that stated that venue of that case was proper in Richland County because it was the principal place of administration of the trusts at issue in that case. R. V. I. p. 57 (Order, The Honorable L. Casey Manning, November 8, 2010). Appellant seeks information about Brown trusts in this FOIA suit, and the documents requested in the FOIA request at issue in the instant appeal were the subject of pending Motions in case 4900 as Appellant acknowledges. R. V. I., pp. 82 (¶6) (Plaintiff’s Return to Motion to Dismiss, p. 2, ¶6; *See, also*, R. V. I., pp. 33-34 (Exhibit D to Complaint, ¶2b [signed copy of James Brown Trust]); R. Supp., p. 12 (MTD Exhibit F [Motion to Compel, including “the James Brown Legacy Trust under which Bauknight asserts status in the complaint”]); R.V. I., p. 66 (MTD Exhibit B, Motion to Compel, p. 3, ¶ 3, June 7, 2011 “[a]ny and all documents which support any position you may have as to the value of the James Brown assets as of December 25,

Office under FOIA.”

4. Attachment of the June 30, 2011 letter to the complaint in the [instant] suit does not constitute a request under FOIA to which the Office of the Attorney General must respond.

2006.”](attachments to Motion omitted)); R. V. I. pp. 70, 74, and 76 (MTD Exhibit C, Motion for Protective Order and including Exhibits D [appraisals] & E [objections to appraisals] thereto (exhibits B & C (including Exhibits D & E)).

Although the OAG never received the FOIA request and the matters sought therein were subject to case 4900 motions, Respondent AG's Answer to the Complaint reserved its defenses and attached the only document that could be responsive to Appellant's Request No. 1, *supra*, the unsigned Legacy Trust draft. R. pp. 175 – 193 and 194 – 209. As to Request 2, the Order of January 16, 2015, in the *Summer v. Wilson* FOIA case in Newberry County, (R. V. I. p. 257), concluded that the OAG did not have to produce the appraisal because it did not have it. *See also* R. V. I. p. 173, (Answer Exs. p 6, item 4) (Ms. Summer's June 10, 2012, request for “any documents related to the \$4.7 million at-death valuation of James Brown's music empire”) and R. V. I. p. 174 (Exs. p. 7(July 10, 2012, response stating that “[t]here are no documents responsive” to that request). Appellant would have access to the filings in the *Summer* case through the Court, and subject to Respondent's Motion to Strike, Ms. Summer executed an affidavit about the same matter which Appellant filed in the instant case. R.V. I. p. 95 and R. Supp. p. 17 (Aff. of Summer, January 5, 2012, Motion to Strike dated January 9, 2012). In other words, Appellant already had access to the same information provided by the referenced attachments to the Answer before receiving the Answer. Finally, the appraisal Appellant seeks herein is confidential pursuant to a Court order in a Federal case involving her, but she would have access to it through that proceeding. *Brown v. Pope*, 3:08-cv-14-WOB (D.S.C., November 15, 2013, the Honorable J. Gregory Wehrman, Magistrate Judge).

Therefore, although Appellant's FOIA request was never received by mail or delivery by

the Respondent AG so as to require a response, Appellant received the only document that could be considered responsive, and she had had access to that document and others through other means.

ARGUMENT

The circuit court properly dismissed this case because it found that Appellant could not use her FOIA request to bypass the discovery process in related litigation governed by the Rules of Civil Procedure. Nevertheless, she was provided the only document responsive to her request and would have access to the others even though Appellant's FOIA request was never received by mail or delivery so as to trigger a duty to respond under that law.

Appellants brief includes numerous irrelevant statements and baseless accusations about or related to the James Brown litigation, in which she is a party, and in most instances fails to include citations to the record. Respondent AG does not attempt to reply to all of those statements because they are distractions not pertinent to the issues in this case.

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. Subject to all of our pending motions and defenses including lack of receipt of the FOIA request, the OAG has responded to the request at issue in this case by providing copies of the only documents that could be considered responsive to that request which are unsigned draft of the Legacy Trust which have long been of public record in *Wilson v. Dallas, supra*, a case in which Appellant was a party. See, exhibits attached to Answer. The other exhibits to the Answer, which are of record in another suit, make clear that the OAG does not have documents responsive to the other documents at issue. Although the OAG has responded to the FOIA, this

case must be dismissed for other reasons that deprive this Court of subject matter jurisdiction. FOIA must be applied in accordance with the law, and that law, as explained below, exempts documents that are governed by the Rules of Civil Procedure such as those at issue here which are subject to pending judicial proceedings in, *Bauknight v. Pope*, 2010-CP-40-4900, and the discovery process in that case. Under FOIA and the Rules of Civil Procedure, Appellant cannot use FOIA in this case to make an end-run around discovery procedure in other ongoing litigation.

I

THE CIRCUIT COURT PROPERLY DISMISSED THIS FOIA CASE BECAUSE IT SEEKS DOCUMENTS SUBJECT TO CIVIL DISCOVERY

The circuit court properly dismissed this case for reasons that included the following: “[t]hese documents [that Appellant seeks] are potentially discoverable documents under pending litigation in Richland /Aiken counties and will be governed by the South Carolina Rules of Civil Procedure. FOIA is not a tool that may be used to bypass civil discovery in a pending case.” R. V. I., p. 10 (Order at p. 2).

Nothing in FOIA, the Rules of Civil Procedure or the Court system of this State would permit Appellant to make and enforce a FOIA request outside a pending judicial proceeding involving discovery related to many of the same documents. See exhibits referenced, *supra*. Clearly she was attempting to use FOIA as a discovery tool because the Complaint contains her account of the pending Richland litigation from her perspective, and she attaches a motion in the Richland litigation seeking some of the same documents. R. V. I. pp. 18 and 33. She cannot avoid the Rules of Civil Procedure regarding discovery by this process, and the Court lacks subject matter of this action

Even if discovery motions were not pending in Richland, legal authority suggests that Appellant would not be permitted to use FOIA as a discovery tool regarding those proceedings. The Order of the late Marc Westbrook submitted by the Respondent AG (*Lominack v. Myers*, 2002-CP-32-1890, October 25, 2002) stated that "it is well settled case law that the FOIA is not intended as a substitute for discovery and was not enacted to provide procedures for obtaining information during litigation or to benefit private litigants." R. p. 260. Although our Supreme Court has not expressly addressed the issue in the civil context, it has recognized that FOIA is not to be used to bypass limits on discovery in criminal proceedings. *State v. Robinson*, 305 S.C. 469, 476-77, 409 S.E.2d 404, 409 (1991); *Evening Post Pub. Co. v. City of N. Charleston*, 363 S.C. 452, 459, 611 S.E.2d 496, 500 (2005). Moreover, our Supreme Court has also noted that "[i]n construing the federal FOIA, the United States Supreme Court has held that the FOIA does not supplement or displace the applicable rules of discovery. *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 153 (1989)²; *National Labor Relations Board v. Robbins Tire and Rubber Co.*, 437 U.S. 214 (1978)." *State v. Robinson*, 305 S.C. 469, 476-77, 409 S.E.2d 404, 409 (1991). Although *Robinson* involved criminal proceedings, the State Supreme Court's recitation of the federal rule suggests that it would apply the same limitation on the use of FOIA as a discovery tool as Judge Westbrook did.

Moreover, FOIA, itself, exempts matters covered by the Rules of Civil Procedure via S.C. Code Ann. §30-4-40 which states, in part, that "(a) [a] public body may but is not required to

² "[A] court must be mindful of this Court's observations that the FOIA was not intended to supplement or displace rules of discovery. See *Robbins Tire*, 437 U.S., at 236-239, 242; *id.*, at 243, . . . (STEVENS, J., concurring). See also *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 801-802 (1984). Indeed, the Court of Appeals acknowledged that this was not a principal intention of Congress. 850 F.2d, at 108." *Id.*

exempt from disclosure the following information: . . . (4) [m]atters specifically exempted from disclosure by statute or law.” (emphasis added). These exemptions under law would include discovery which is strictly controlled by the Rules of Civil Procedure because court rules of procedure are “law.” *Magnuson v. Billings*, 152 Ind. 177, 52 N.E. 803, 804 (1899)³; *United States v. Hvass*, 355 U.S. 570, 575 (1958)⁴; *State ex rel. Beacon Journal Publ'g Co. v. Waters*, 67 Ohio St. 3d 321, 323, 617 N.E.2d 1110, 1113 (1993).⁵ These rules include limitations on the scope of discovery in Rule 26(b) to “matter, not privileged, which is relevant to the subject matter involved in the pending action”

To allow a FOIA request to bypass the Rules of Civil Procedure would be contrary to §30-4-40(a)(4) and Rule 26(c), SCRCP, which provide for judicial involvement in the discovery process through protective orders and discovery conferences. “It is well-settled that ‘the scope and conduct of discovery are within the sound discretion of the trial court’” *Palmetto Alliance, Inc. v. S. Carolina Pub. Serv. Comm'n*, 282 S.C. 430, 436, 319 S.E.2d 695, 698 (1984). “Our judges must use their authority to make sure that abusive deposition tactics and other forms of discovery abuse do not succeed in their ultimate goal: achieving success through abuse of the discovery rules rather than by the rule of law.” *In re Anonymous Member of S. Carolina Bar*, 346

3 “[Rules of court] have the force and effect of law, and are obligatory upon the court, as well as upon parties to causes pending before it. . . A rule of court is a law of practice, extended alike to all litigants who come within its purview, and who, in conducting their causes, have the right to assume that it will be uniformly enforced by the court, in conservation of their rights . . . ,” *Id.*

4 “The phrase ‘a law of the United States,’ as used in the perjury statute, is not limited to statutes, but includes as well Rules and Regulations which have been lawfully authorized and have a clear legislative base” *Id.*

5 “[E]xception [under Ohio discovery statute] for other ‘state law’ may include procedural court rules, and does include [Ohio] Crim.R. 6(E).” *Id.*

S.C. 177, 194, 552 S.E.2d 10, 18 (2001). To allow a FOIA request to escape this authority would tie the hands of the Court from controlling the discovery process including permitting a party to bypass scheduling orders and motions hearings. FOIA was not intended to work this way nor were our Rules of Civil Procedure intended to be so limited.

In her Brief, Appellant cites *North v. Walsh*, 881 F. 2d 1088 (D.C. Cir. 1988) and *Hoover v. United States*, 611 F. 2d 1132 (5th Cir. 1980) for the proposition that Federal Freedom Information Act rights are not controlled by discovery limitations. *North* does not apply here because it addressed a limitation related to records compiled for law enforcement purposes under 5 U.S.C. §552 (b)(7). *Hoover*, is inapplicable because it considered a federal FOIA exception for "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." §552(b)(5). Neither federal exemption is similar to the exemption at issue in the instant case nor does the federal FOIA (§552(b)) appear to contain such a limitation. S.C. Code Ann. § 30-4-10(a)(4) ("(a) [a] public body may but is not required to exempt from disclosure the following information: . . . (4) [m]atters specifically exempted from disclosure by statute or law"). As explained above, this exemption under South Carolina law would include discovery which is strictly controlled by the Rules of Civil Procedure because court rules of procedure are law. Moreover, a more recent United States Supreme Court decision cited by our own South Carolina Supreme Court (*State v. Robinson*, 305 S.C. 469, 476-77, 409 S.E.2d 404, 409 (1991)) and quoted by the Fourth Circuit Court of Appeals (*Neely v. F.B.I.*, 208 F.3d 461, 464 (4th Cir. 2000)) supports a broader limitation on the use of federal FOIA as to matters related to ongoing litigation. *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 153 (1989) ("a court must be mindful of this Court's observations that

the FOIA was not intended to supplement or displace rules of discovery”).

The above authority strongly supports the circuit court’s ruling. Its dismissal of this case should be affirmed.

II

APPELLANT RAISES ISSUES THAT ARE IRRELEVANT TO THIS APPEAL OR NOT BEFORE THE COURT AND SHE IS NOT ENTITLED TO SUMMARY JUDGMENT

A

The Public Body Definition Was Not Raised As A Defense, Appellant Is Not Entitled to Summary Judgment, And Her Affidavits Should Be Disregarded

Appellant argues that judgment should have been granted because she contends that the Attorney General is a public body under FOIA. The Attorney General did not raise that defense in the circuit court so it has no application to this appeal.

Appellant weaves into this “public body” argument her claim that she is entitled to summary judgment. Instead, she has failed to show that she is entitled to judgment as a matter of law under Rule 56, SCRCP, for the reasons set forth above and for the other reasons discussed below including the additional sustaining grounds. Her affidavits in support of her motion should be disregarded for reasons set forth in Respondent AG’s Motions to Strike including irrelevance, hearsay, speculation and lack of basis in personal knowledge. R. V. I pp. 53, 85, 87, 89, 91, 93, 95.

Respondent AG moved to strike at least 14 affidavits filed by Appellant in this case, one of which is attached to the Complaint, and some of which are attached to other affidavits, and some

related exhibits of Appellant. R. V. I pp. 53, 85, 87, 89, 91, 93, 95. At least six of these affidavits were executed by Appellant, herself, and many of her affidavits contain vitriolic and baseless speculation. All of the affidavits should be struck because they are irrelevant and also because many of them are not based upon personal knowledge, contain hearsay, and are speculative. Examples abound of these violations by Appellant of the basic rules for affidavits some of which are set forth below:

1. Affidavit attached to Complaint

p.2, ¶ 5 "agent [of party not involved in instant proceeding] advised that if Bob and I did not drop a pending James Brown appeal AG . . . [note omitted] would to[sic] sue us" [hearsay, irrelevant]

p. 3, ¶ 7 Augusta Chronicle cite [hearsay]

p. 3, ¶8, "I believe the Retention Agreement will show whether AG McMaster . . . was in fact acting to punish Bob and me" [lack of personal knowledge; speculation]

2. Affidavit Opposing MTD, September 6, 2008 [sic]

p. 1, ¶2 "public documents, which, I believe, will tell the scandalous story" [lack of personal knowledge, irrelevant, speculative]

p. 4, ¶28, "I still wonder, and believe the public documents AG . . . is withholding will tell me" [lack of personal knowledge, irrelevant, speculative, hearsay]

p. 4, ¶30, "I believe the public documents will show" [lack of personal knowledge; speculative]

- p. 3, ¶16 On April 30, 2010, . . . attorney for Brown's companion . . . threatened that . . . had already hired contingency-fee lawyer" [hearsay, irrelevant]
3. Supplemental Affidavit, September 16, 2011
- Directed to earlier affidavit applying to other Defendant
- p. 3, ¶5 quotations from *The Enquirer* which she acknowledges in paragraph 6 is not entirely accurate [lack of personal knowledge, hearsay, irrelevant]
4. Affidavit in Further Support, October 6, 2011
- p. 4, ¶10, speculation about what requested documents will show [speculative, lack of personal knowledge, irrelevant]
- p. 4, ¶11, chronology including some hearsay such as April 10 statement of agent for person not involved in instant litigation[hearsay, irrelevant]
- p. 8, ¶¶15 and 16 speculation about what requested documents will show.
5. Affidavit and exhibits attached to Motion for Summary Judgment
- p. 3, ¶¶ 7-9 speculation about documents and other matters [lack of personal knowledge, speculative, irrelevant]
- Exhibit F to MSJ, p. 15 quotations from persons not involved in the instant suit [hearsay, irrelevant]
6. Affidavit of Summer, December 8, 2011, attached to Smith affidavit, December 9, 2011
- ¶¶ 16– 18 references to what others have said in readings or elsewhere [hearsay, lack of personal knowledge]
7. Affidavit of Summer, January 5, 2012
- ¶25 "Dallas informed me" (hearsay)

¶28 "Brown told me" (hearsay)

8. Affidavit of Smith, December 9, 2011

¶6, attachment of draft article [hearsay]

9. Affidavit of Pope, January 6

p. 3 "Bauknight secretly tells IRS" [hearsay]

"The rule governing summary judgment provides that '[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.'" Rule 56(e), SCRCP (emphasis added). *Dawkins v. Fields*, 354 S.C. 58, 64, 580 S.E.2d 433, 436 (2003). Because all of the affidavits appear to be directed to summary judgment, they must meet this standard of Rule 56(e) rather than Rule 11(c) which provides that affidavits and verifications may include matters stated on information and belief.

In numerous respects, the affidavits clearly fail to meet standards of being based upon personal knowledge and containing admissible evidence. They contain inadmissible hearsay and refer to news articles⁶ which are not admissible. In particular, all of the affidavits are irrelevant. Many of them contain Appellant's account of litigation related to the James Brown estate and the Legacy Trust and allegations about why she needs the documents, but all of those statements are irrelevant to whether she is entitled to the documents under FOIA. All that is relevant to her request is whether Appellant is entitled to the documents at issue under the terms of FOIA. That statute does not contain standards of disclosure based upon alleged importance or need. S.C. Code Ann. §§30-4-30 through 30-30-4-50, *et seq.* Appellant's lack of entitlement to the

⁶ *Trustees of Erskine Coll. v. Cent. Mut. Ins. Co.*, 241 S.E.2d 160, 162-63 (1978).

documents is discussed *infra* regarding her motion for summary judgment, but those grounds have nothing to do with the alleged need for or importance of the documents.

B

**Appellant Did Not Raise And Preserve Any Constitutional Claims
And Is Not Entitled To Relief Based Upon Allegations Of Delay**

Appellant complains of delays in this suit. The Office of the Attorney General is not responsible for the time taken to decide this case. The OAG regularly informed the court below that its motions were ready to be heard (*see* Statement of the Case, *supra*) and ultimately prevailed.

Appellant, herself, contributed to the time frame of this case by filing numerous irrelevant affidavits containing hearsay or other inappropriate matter which required the filing of Motions to Strike them. Her memoranda were similarly filled with irrelevant arguments based upon other James Brown related litigation rather than the simple issues in this FOIA case. Appellant claims violations of due process and equal protection as a result of the time taken to decide this case, but she did not amend her complaint to raise such claims so as to preserve them for judicial review now. *McGee v. Bruce Hosp. System*, 468 S.E.2d 633, 637, 321 S.C. 340, 346 (1996) ("issue was not raised below and is procedurally barred."). She did not raise those constitutional claims in her Motion to Alter or Amend, so they are not before this Court now for that reason. *Degenhart v. Knights of Columbus*, 420 S.E.2d 495, 497, 309 S.C. 114, 118 (1992) ("[a]n issue on which the master-in-equity never ruled and which was not raised in post-trial motions is not properly before this Court.")

C

Venue Change Was Within The Discretion Of The Court

Appellant complains of the change of venue to Richland County but cites no error of law or abuse of discretion. "A motion to change venue is addressed to the sound discretion of the trial judge and will not be disturbed on appeal absent a manifest abuse of discretion." *Mathis v. Brown & Brown of South Carolina, Inc.*, 698 S.E.2d 773, 784, 389 S.C. 299, 321 (2010). Although the trigger for the change of venue in the instant case was the Motion to Dismiss rather than a motion to change venue, the same standard would apply to the change in this instance. Appellant has failed to show any basis for setting aside the venue change.

D

Appellant Is Not Entitled To Attorneys Fees

Appellant has no right to attorney's fees. Under FOIA, such fees are awarded only to the prevailing party, and Appellant did not prevail. §30-4-100(b). Even if she had prevailed, she seeks fees at the shockingly high and unsupported respective amounts of \$30,950 and \$1128.10 and fails to document her claims.⁷ A fee "award . . . must be reasonable and supported by adequate findings." *Burton v. York County Sheriff's Dept.*, 594 S.E.2d 888, 898, 358 S.C. 339, 357-58 (Ct. App., 2004). Appellant's claims are certainly not reasonable, and in fact, are so high as to shock the conscience of this Court and warrant barring fees altogether under substantial

⁷ Appellant filed a conclusory affidavit on January 9, 2012, which does not appear to have been updated, asking for \$9,000.00 in attorney's fees for this case at a rate of \$100.00 per hour and \$300.00 in costs. These amounts undermine her more than tripling that attorney's fee claim, including the now \$250.00 hourly rate, and her nearly quadrupling her costs. Moreover, she cannot testify by affidavit as to the hours expended by her attorney. Only he can do so.

Federal precedent.⁸ She also could not claim time for the numerous irrelevant, inadmissible affidavits that she has filed and arguments that she has made. She is the party that has turned a simple case into one filled with the numerous, unnecessary documents that she has filed.

III

THE FOLLOWING ADDITIONAL SUSTAINING GROUNDS ALSO SUPPORT THE CIRCUIT COURT'S DISMISSAL OF THIS CASE

Although not reached by the circuit court judge, the following additional sustaining grounds support the court's decision.

A

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

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 above in the Statement of Facts, the Office of the Attorney General never received the FOIA request by mail or delivery. Attaching the request to this lawsuit over alleged failure respond to the request, is not sufficient to require a response under FOIA.

The authority to sue under FOIA is limited to actions "to enforce the provisions of this

⁸ *Fair Hous. Council of Greater Washington v. Landow*, 999 F.2d 92, 96 (4th Cir. 1993), citing *Sun Pub. Co. v. Mecklenburg News, Inc.*, 823 F.2d 818, 819 (4th Cir. 1987), (a request for attorneys' fees, which is so exorbitant as to shock the conscience of the court, may be denied . . .); *Plunkett v. Stephens*, No. C.A. 3:93-0304-19, 1997 WL 907958, at *1 (D.S.C. Dec. 18, 1997)(denying fee request in its entirety quoting *Landow* and *Sun Publishing*).

chapter in appropriate cases" §30-4-100. Therefore, no basis exists for enforcement when no "receipt of written request" has occurred (§30-4-30(c)), and subject matter jurisdiction is lacking. *Gasparutti v. U.S.*, 22 F.Supp.2d 1114, 1116 (C.D.Cal.,1998).⁹

B

**This Case Is Moot Because The OAG Has Supplied Appellant
With The Only Document Responsive To Her Request**

Subject to all of the other grounds above, the Office of the Attorney General has responded to the FOIA at issue in this case by providing copies of the only documents that could be considered responsive to that request which are unsigned draft of the Legacy Trust which have long been of public record in *Wilson v. Dallas*, *supra*, a case in which Appellant was a party. See, Statement of Facts, *supra*. Therefore, this case is moot. *Sloan v. Friends of Hunley, Inc.*, 630 S.E.2d 474, 478, 369 S.C. 20, 26 (2006)(case moot when requested documents provided). Of course, as noted above, the FOIA request at issue was not received by mail or delivery by the Office of the Attorney General. Accordingly, the OAG had no duty to respond to a request it did not receive, and therefore, Appellant is not entitled to attorneys fees when the documents were supplied during the course of this litigation.¹⁰

9 "In order to maintain a judicial action under FOIA, a plaintiff must first request documents from an administrative agency and if his request for documents is refused must exhaust his administrative remedies before filing a court action Where a plaintiff has not complied with these procedures, district courts lack jurisdiction over the claim under the exhaustion doctrine and will dismiss the claim for lack of subject matter jurisdiction." *Gasparutt, supra*

10 In *Sloan v. Friends of Hunley, Inc.*, 711 S.E.2d 895, 898, 393 S.C. 152, 158 (2011). In that case Plaintiff "Sloan's complaint prompted [Defendant] Friends to do what a series of FOIA letter-requests could not accomplish—produce the requested documents. Accordingly, Sloan prevailed and is entitled to an award of attorney's fees." *Hunley* does not apply to this case when the Attorney General's Office never received the FOIA request.

C

Another Action Is Pending Among The Same Parties

Another action is pending among the same parties as to the same or substantially the same claim under Rule 12(b)(8).¹¹ *Bauknight, etc., et al, supra*. Although the claims in the complaints are not identical, that suit is the subject of a number of allegations in and a lengthy exhibit to the instant complaint. *See, eg.* R. pp. 17, 18 and 33 (Complaint at paragraphs, 7-11 and Exhibit D to Complaint (all references to this exhibit are subject to Motion to Strike, *infra*)). Moreover, the documents requested in the Freedom of Information Act request of the Attorney General are the subject of pending Motions in case 4900, as set forth above. Appellant is essentially pursuing through the instant suit the same discovery issues that are pending before the Court in Case 4900. Therefore, this case is subject to dismissal under Rule 12(b)(8).

¹¹ The Newberry County Court of Common Pleas has ruled against application of Rule 12(b)(8) in the similar *Pope* case 2011-CP-36-379 (Order filed November 30, 2011), now consolidated with case 4900, dismissed on other grounds and now pending on appeal. That decision is not binding on this Court.

CONCLUSION

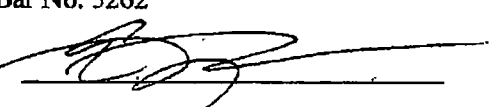
For the foregoing reasons, Respondent Attorney General respectfully requests that the decision of the circuit court be affirmed.

Respectfully submitted,

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Attorney General

ROBERT D. COOK
Solicitor General
S.C. Bar No. 1373

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Deputy Solicitor General
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BY: 

ATTORNEYS FOR RESPONDENT
ATTORNEY GENERAL

February 3, 2017

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Appellate Case No. 2016-001727

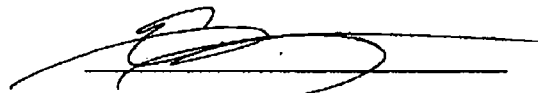
Adele J. Pope. Appellant,

v.

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

CERTIFICATE OF COMPLIANCE WITH RULE 211 (b)

I hereby certify that the Final Brief of the Respondent State of South Carolina complies
with Rule 211(b), SCACR.



J. EMORY SMITH, JR.
Deputy Solicitor General
Counsel for Respondent Attorney General

April 12, 2017

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SC Court of Appeals

**STATE OF SOUTH CAROLINA
In the Court of Appeals**

**Appeal from Richland County
Court of Common Pleas**

The Honorable Doyet A. Early, III, Circuit Judge

Appellate Case No. 2016-001727

Adele J. Pope..... Appellant,

v.

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

REPLY BRIEF OF APPELLANT

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Argument on Reply¹

I. The McMaster Legacy Trust is a public body.

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

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

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

¹ Appellant incorporates the arguments made in her Brief.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

Respectfully submitted,



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April 14, 2017

STATE OF SOUTH CAROLINA
In the Court of Appeals

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APR 14 2017

SC Court of Appeals

Appeal from Richland County
Court of Common Pleas

The Honorable Doyet A. Early, III, Circuit Judge

Appellate Case No. 2016-001727

Adele J. Pope..... Appellant,

v.

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

**REPLY BRIEF OF APPELLANT
TO BRIEF OF ATTORNEY GENERAL**

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Argument on Reply¹

I. Appellant's FOIA rights are not affected by civil discovery in a separate civil action.

Respondent Alan Wilson, in his capacity as Attorney General for South Carolina ("Respondent AG") argues that dismissal was appropriate, because potentially similar documents are being sought in a 2010 Richland County tort suit brought by Respondent AG, Respondent Legacy Trust and others against Appellant nearly 7 years ago. Appellant has presented her argument and supporting authority in her brief-in-chief and will not recite the same on reply.

Respondent AG supports his argument primarily by citation to the a 2002 circuit court order in *Lominack v. Myers*, Case No. 2002-CP-32-1890 (October 25, 2002). The *Lominack* order is related to a criminal case; has never been reviewed by an appellate Court; and contains minimal legal analysis in reaching its conclusion. *Lominack* dealt with a FOIA request for documents related to an ongoing criminal matter, which are specifically exempted by a provision of FOIA not at issue in this case.

Respondent AG also relies on *Evening Post Pub. Co. v. City of N. Charleston*, 363 S.C. 469, 409 S.E.2d 404 (1991), in which the Supreme Court found that the entity making a FOIA request was entitled to receive material which was available through discovery to the parties to a criminal matter. Although, as Respondent AG

¹ Appellant incorporates the arguments made in her Brief.

acknowledges, that case is not on point with this one, Appellant submits that the implied logic for the decision therein would support *Appellant's* argument.

The remainder of Respondent AG's argument regarding discovery is composed of citations to authority on the trial court's discretion and control over discovery matters. Simply put, these authorities are red herrings in this case, where the lower court was tasked simply with deciding FOIA claims. The lower court did not undertake any analysis of the discoverability of any document requested, although Respondent AG's argument would appear to require the FOIA court to analyze and determine that issue. Further, the fact that discovery in Respondent AG's 2010 case has been pending for more than 6 years makes clear the inconsistency of civil discovery and the purposes of FOIA.

The lower court did not endeavor to look further than its finding that the documents requested might also be exchanged in discovery in this long-ago-filed civil tort suit, instead dismissing Appellant's FOIA claims on that basis alone.

Appellant submits that FOIA and the discovery process are separate and distinct, even when documents might be obtainable through either or both. This matter should therefore not have been dismissed. The delays in the AG's civil suit confirm its inconsistency with the purposes of FOIA.

II. Respondent AG never disputed that it is a public body under FOIA, and Appellant is entitled to rely on that admitted fact.

Respondent AG argues that it never raised the defense that it is not a public body, and Appellant may not raise that fact on appeal. Beyond that general statement, Respondent AG proceeds to address at length its various motions to strike affidavits filed by Appellant during the course of this matter.

Respondent AG admitted in its answer that it is a public body, and Appellant is unable to discern how the lack of controversy regarding this fact could preclude her from relying on it in her argument. Because Respondent AG's argument on this point appears to focus exclusively on motions to strike affidavits, Appellant responds to the subject matter of Respondent AG's argument.

Appellant presented her own affidavits, as well as affidavits from members of the press and the community in support of her positions below. Respondent AG moved to strike nearly every affidavit filed herein, but none of those motions was ever decided by the lower court. Each affidavit cited by Appellant thus remained before the lower court at the time it rendered its decision. As set out in Appellant's brief-in-chief, however, the complaint stated sufficient facts to overcome dismissal under Rule 12(b)(6) or Rule 12(c).

III. Appellant did raise constitutional arguments to the lower court, and her argument on appeal should be considered.

Respondent AG argues that Appellant did not address violations of her due process and equal protection rights below, but the record contradicts Respondent AG's assertion. Appellant's Motion to Alter, Amend or Vacate the dismissal order sets forth in plain terms her argument that the lower court violated her constitutional rights in dismissing the case. (R. 264)

IV. The lower court did not consider or determine the reasonableness of Appellant's attorneys' fees and costs, and Respondent AG's argument is irrelevant to this appeal.

Although Appellant should be granted attorneys' fees and costs for this action, the issue of the amount or reasonableness thereof is not before this Court. At the hearing on Respondent AG's motion to dismiss, the AG took issue with the claim for

attorneys' fees. When Appellant's counsel suggested that was a matter to be taken up after the lower court's ruling on the FOIA claims, the circuit court agreed.

Because the lower court did not consider the amount or reasonableness of attorneys' fees and costs, that issue should be taken up by the lower court if and when this matter is remanded. Respondent AG's harsh argument on this point does not advance the analysis of the important principles before the Court in this FOIA matter.

V. Respondent AG undisputedly received Appellant's FOIA request no later than August 2011, and continued his refusal to respond.

Respondent AG argues as an additional sustaining ground that his office did not receive the FOIA request Appellant sent in June 2011. The AG was undisputedly served with the complaint herein in August 2011, which included a copy of the FOIA request. (R. 26) The AG nonetheless answered and refused to produce any documents for more than a year after this action was commenced.

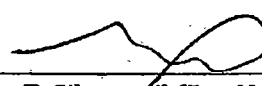
Only in 2013 did Respondent AG deliver some of the responsive documents in its possession. (R. 159)

Had the AG appeared after the filing of this suit and immediately produced the responsive documents, his alleged non-receipt of the FOIA request might have been relevant to avoidance of attorneys' fees. Instead, the AG refused to release any documents for more than a year, still insisting that his production was subject to his claim that Appellant had no right to request documents under FOIA. (R. 159)

Conclusion

For the reasons set out above, Appellant asks that this Court to reverse the dismissal orders of the lower court; remand the case to the circuit court for entry of summary judgment in favor of Appellant; and direct that all relief sought in the complaint be granted. The lower court should also be directed to determine and direct an award of reasonable attorney's fees and costs against both Respondents for Appellant's pursuit of this FOIA suit and the appeal for more than five years.

Respectfully submitted,



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April 14, 2017

RECEIVED

APR 14 2017

SC Court of Appeals

**STATE OF SOUTH CAROLINA
In the Court of Appeals**

**Appeal from Richland County
Court of Common Pleas**

The Honorable Doyet A. Early, III, Circuit Judge

Appellate Case No. 2016-1727

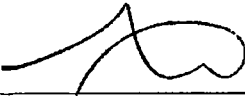
Adele J. Pope..... Appellant,

v.

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

CERTIFICATE OF COUNSEL

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



Adam T. Silvernail

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The 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.

Appellate Case No. 2016-001727

Appeal From Richland County
Frank R. Addy, Jr., Circuit Court Judge
Doyet A. Early, III, Circuit Court Judge

Opinion No. 2019-UP-219
Heard February 12, 2019 – Filed June 19, 2019

REVERSED AND REMANDED

Adam Tremaine Silvernail, of Law Office of Adam T.
Silvernail, of Columbia, for Appellant.

Keith M. Babcock, Ariail Elizabeth King, and David Lee
Paavola, all of Lewis Babcock L.L.P., of Columbia, for
Respondent James Brown Legacy Trust, by Russell L.
Bauknight, its Trustee.

Solicitor General Robert D. Cook and Deputy Solicitor General J. Emory Smith, Jr., both of Columbia, for Respondent Alan Wilson.

PER CURIAM: In this action seeking relief under the Freedom of Information Act (FOIA), Appellant Adele Pope seeks review of the circuit court's two separate orders dismissing her complaint.¹ We reverse these orders and remand for an order dismissing the Legacy Trust as a defendant and for further proceedings consistent with this opinion.²

FACTS/PROCEDURAL HISTORY

This FOIA action has a procedural history similar to a second FOIA action filed by Pope (involving a separate FOIA request dated July 19, 2011) and addressed by this court in a published opinion issued simultaneously with this opinion. *See Adele J. Pope v. Alan Wilson, in his capacity as Attorney General of South Carolina*, Op. No. 5657 (S.C. Ct. App. filed Jun 19, 2019). Unique to the present action is Pope's FOIA request dated June 30, 2011, in which Pope requested the following documents from Respondent Alan Wilson, in his capacity as Attorney General of South Carolina (AG):

1. The final and all drafts, signed and unsigned, of the James Brown Legacy Trust[; and]
2. All correspondence, email and/or other communications between any member of the Office of the [AG] and Russell L. Bauknight between August 1, 2010[,] and May 4, 2011[,] related to the value of the assets of the Estate of

¹ Included in Pope's assignments of error is the argument that the circuit court should have granted her summary judgment motion. However, "the denial of a motion for summary judgment is not appealable, even after final judgment." *Olson v. Faculty House of Carolina, Inc.*, 354 S.C. 161, 168, 580 S.E.2d 440, 444 (2003).

² With the exception of mootness, we decline to address the Attorney General's additional sustaining grounds. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) ("It is within the appellate court's discretion whether to address any additional sustaining grounds.").

James Brown and/or the James Brown 2000
Irrevocable Trust.

Pope also requested from Respondent James Brown Legacy Trust (Legacy Trust) the "final and all drafts, signed and unsigned, of the James Brown Legacy Trust." This letter was also dated June 30, 2011, and both letters referenced FOIA.

In a letter dated August 5, 2011, in which the AG was responding to Pope's July 19, 2011 FOIA request, the AG referenced Pope's June 30, 2011 letter, stating,

I have also been notified by attorneys in the Civil Division of the [AG] that you refer to a request dated June 30, 2011[,] in a motion filed by you in a South Carolina circuit court case. Please be advised the only direct requests I have received from you during the June to August 2011 time period are the six referenced above. If there is a request dated in June 2011 that was not received by this Office, but that you represent you drafted and sent on June 30, 2011, if you will forward it to me within the next five (5) business days, I will expedite the response to it.

After having received no direct response to her June 30, 2011 letter, Pope filed this FOIA action in Newberry County on August 3, 2011, seeking the records referenced in her letters to the AG and the Legacy Trust and attaching copies of these letters to her complaint. The AG and the Legacy Trust then filed respective motions to dismiss this action, and Pope subsequently filed a motion for summary judgment. After conducting a hearing on January 11, 2012, the circuit court issued a Form 4 judgment transferring venue to Richland County. The AG later filed a motion for judgment on the pleadings.

In an order dated June 14, 2016, the circuit court granted the AG's motion to dismiss. In its order, the circuit court referenced the pending fiduciary litigation involving the parties (*Bauknight v. Pope*)³ and concluded that FOIA "is not a tool that may be used to bypass civil discovery in a pending case." The circuit court also concluded that the requested documents were exempt under FOIA because the South Carolina Rules of Civil Procedure constitute "law" for purposes of the exemption in section 30-4-40(a)(4) of the South Carolina Code (2007), which

³ Civil Action No. 2010-CP-40-4900.

allows a public body to exempt from disclosure "[m]atters specifically exempted from disclosure by statute or law." Pope filed a motion to alter or amend the circuit court's order, but the circuit court denied the motion.

On June 20, 2016, the circuit court granted the motion to dismiss filed by the Legacy Trust. In its order, the circuit court concluded (1) Pope's complaint failed to allege facts sufficient to characterize the Legacy Trust as a "public body" under FOIA; (2) the Legacy Trust no longer existed because it was invalidated by the supreme court's opinion in *Wilson v. Dallas*;⁴ and (3) Pope's action was moot because she was in possession of the records requested from the Legacy Trust and the AG. Pope filed a motion to alter or amend the circuit court's order, but the circuit court denied the motion. This appeal followed.

LAW/ANALYSIS

I. Mootness

Pope assigns error to the circuit court's conclusion that her FOIA action is moot. Both the AG and the Legacy Trust argue this action is moot because the AG provided copies of the only documents responsive to Pope's request,⁵ which were two unsigned drafts of the Legacy Trust attached to the AG's answer to Pope's complaint. The AG also asserts that these drafts "have long been of public record in *Wilson v. Dallas*, . . . a case in which [Pope] was a party." The AG states that he has no other documents that are responsive to Pope's request. However, Pope asserts that neither the AG nor the Legacy Trust complied with her request.

"A moot case exists where a judgment rendered by the court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the reviewing court." *Sloan v. Friends of Hunley, Inc. (Friends I)*, 369 S.C. 20, 26, 630 S.E.2d 474, 477 (2006). "If there is no actual controversy, this [c]ourt will not decide moot or academic questions." *Id.* In *Friends I*, our supreme court addressed the question of mootness as it pertained to a FOIA action and affirmed the circuit court's ruling that the case was moot because the defendant provided the requested documents.

⁴ 403 S.C. 411, 450–51, 743 S.E.2d 746, 767–68 (2013).

⁵ The circuit court made this conclusion in its order granting the motion to dismiss filed by the Legacy Trust. Also, the AG asserted mootness as an additional sustaining ground for the order granting his separate motion to dismiss.

Id. at 26, 630 S.E.2d at 477–78.⁶ The court held, "Because the information Sloan sought has been disclosed, there is no continuing violation of FOIA upon which the trial court could have issued a declaratory judgment." *Id.* at 26, 630 S.E.2d at 478.

In *Sloan v. South Carolina Department of Revenue*, our supreme court once again addressed the question of mootness in a FOIA action. 409 S.C. 551, 554–55, 762 S.E.2d 687, 688–89 (2014). The court affirmed the circuit court's finding that the plaintiff's request for a declaratory judgment was mooted when the defendant produced the requested information, but the court also held that the defendant's initial response was incomplete. *Id.* Further, after concluding the action was moot, the court added, "*This . . . does not end the case*, for [the plaintiff] further sought to recover his attorney's fees and costs as provided in section 30-4-100(b)." *Id.* at 555, 762 S.E.2d at 689 (emphasis added). We will address Pope's request for attorney's fees in another section of this opinion.

In determining whether this case is moot, we begin our analysis with the foundation on which Pope bases her claim: "Any person has a right to inspect or copy any public record of a public body, except as otherwise provided by § 30-4-40, in accordance with reasonable rules concerning time and place of access." S.C. Code Ann. § 30-4-30(a) (2007).⁷ 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.").

⁶ Therefore, the defendant was able to temporarily avoid the question of whether it was a public body for purposes of FOIA. *See id.* at 24, 630 S.E.2d 476–77 (noting the defendant "sought summary judgment arguing that [the plaintiff's] cause of action for a declaratory judgment finding [the defendant] a public body subject to FOIA was moot because they had fully complied with [the plaintiff's] FOIA request"). On appeal, the defendant finally admitted it was a public body for purposes of the plaintiff's FOIA action. *Sloan v. Friends of Hunley, Inc. (Friends II)*, 393 S.C. 152, 155, 711 S.E.2d 895, 896 (2011).

⁷ We are citing to the version of the statute in effect at the time Pope sent her FOIA request to the AG.

II. Existence of Legacy Trust

Pope asserts the circuit court erred by concluding that the Legacy Trust was no longer in existence due to the supreme court's opinion in *Wilson v. Dallas*, which invalidated the compromise agreement creating the Legacy Trust. She argues that after the opinion in *Wilson v. Dallas* was issued, the Legacy Trust continued to litigate in *Bauknight v. Pope* and there is no evidence in the record showing that a dissolution of the entity as a charitable organization has taken place.

On the other hand, the Legacy Trust argues that the premise to Pope's FOIA action against it was that the Legacy Trust was subject to FOIA because of the AG's involvement in the creation of the trust and his anticipated continuing oversight of the trust. Pope's August 3, 2011 complaint states, in pertinent part, that the Legacy Trust

is, on information and belief, a public body under [FOIA], with Russell L. Bauknight as its current trustee. The Legacy Trust is under the continuing and direct control of [the AG] through the AG's unfettered right at any time and from time to time to remove and replace the trustee of the Legacy Trust with such person as [the AG] shall select, with all trustees to serve at the AG's pleasure.

The Legacy Trust further asserts that the *Wilson* opinion mooted the premise for this action against the Legacy Trust because *Wilson* effectively terminated the AG's involvement in the Legacy Trust. Russell Bauknight's May 2, 2016 affidavit indicates that the AG has had no involvement in the Legacy Trust since the *Wilson* opinion was filed.

Based on the foregoing, we agree that the issuance of the *Wilson* opinion mooted the premise for naming the Legacy Trust as a defendant in this action. However, rather than merely dismissing the Legacy Trust as a defendant, the circuit court granted the Legacy Trust's motion to dismiss Pope's complaint based on the court's erroneous conclusion that the entire action was moot. *See supra* section I. Therefore, we reverse this order. On remand, the circuit court shall issue an order dismissing merely the Legacy Trust as a defendant.⁸

⁸ Because we are ordering the circuit court to dismiss the Legacy Trust as a defendant, we need not reach the issue of whether the Legacy Trust is a public

III. FOIA Exemption

Pope argues the circuit court erred in concluding her FOIA request was subordinate to discovery rules. She asserts that her status as a defendant in pending fiduciary litigation does not affect her rights under FOIA.

We note the circuit court's order granting the AG's motion to dismiss was virtually identical to its order dismissing Pope's complaint in *Adele J. Pope v. Alan Wilson, in his capacity as Attorney General of South Carolina*, Op. No. 5657 (S.C. Ct. App. filed Jun 19, 2019). For the reasons discussed in section I of our published opinion in that case, we reverse the circuit court's order granting the AG's motion to dismiss the present action and remand for further proceedings.

IV. Attorney's Fees

Pope argues she is entitled to attorney's fees because the AG violated FOIA by refusing to provide the requested records. Because we are remanding the case for further proceedings, the question of attorney's fees is premature. *See* S.C. Code Ann. § 30-4-100(B) (Supp. 2018) ("If a person or entity seeking relief under this section prevails, he may be awarded reasonable attorney's fees and other costs of litigation specific to the request. If the person or entity prevails in part, the court may in its discretion award him reasonable attorney's fees or an appropriate portion of those attorney's fees.").

CONCLUSION

Based on the foregoing, we reverse the circuit court's two orders dismissing Pope's complaint and remand for an order dismissing the Legacy Trust as a defendant and for further proceedings consistent with this opinion. In light of this disposition, we need not address Pope's remaining issue. *See Futch*, 335 S.C. at 613, 518 S.E.2d at 598 (providing that an appellate court need not address remaining issues when resolution of a prior issue is dispositive).

REVERSED AND REMANDED.

body. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (providing that an appellate court need not address remaining issues when resolution of a prior issue is dispositive).

WILLIAMS, GEATHERS, and HILL, JJ., concur.

90158

**STATE OF SOUTH CAROLINA
In the Court of Appeals**

**Appeal from Richland County
Court of Common Pleas**

The Honorable Doyet A. Early, III, Circuit Judge

Appellate Case No. 2016-001727

Adele J. Pope..... Appellant,

v.

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

APPELLANT'S PETITION FOR REHEARING

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SC Court of Appeals

Appellant respectfully requests, pursuant to Rule 221, SCACR, a rehearing of the decision rendered on June 19, 2019. This petition is presented to provide the Court with information within the record needed to accurately assess the continuing role of Respondents James Brown Legacy Trust (Legacy Trust) and the Attorney General of South Carolina (AG) in delaying and denying Appellant and other citizens of South Carolina access to public documents to which they are entitled under the South Carolina Freedom of Information Act (FOIA)¹ related to the estate of entertainer James Brown and his "I Feel Good" Trust.

The Court is asked to consider the facts and applicable law presented herein as well as matters related to the actions of the AG and Legacy Trust in *Wilson v. Dallas*, 403 S.C. 411, 743 S.E.2d 746 (2013) and Richland County Case 2010-CP-40-4900 (Richland 4900) of which the Court may take proper judicial notice.²

Appellant respectfully requests that the Court modify its opinion to declare that Respondent Legacy Trust, like the AG, is a public body as defined in FOIA, and that Appellant is entitled to summary judgment and immediate FOIA compliance by both the AG and Legacy Trust as to all documents requested under FOIA. The matter should be remanded to the circuit court for enforcement of the Court's ruling, a determination of the award of attorney's fees and costs to Appellant, and the allocation of those fees and costs between the AG and the Legacy Trust.

In this extraordinary FOIA case the Court has acknowledged Appellant's FOIA rights eight years after her FOIA request was made. If the Court fails to find that the Legacy Trust is a public body and direct immediate FOIA compliance, costs will be increased and Appellant may have to wait for a decade to obtain documents from the State official charged with the enforcement of FOIA

¹ S.C. Code Ann. §30-4-10, et seq.

² Specifically, Appellant asks that the Court take judicial notice of its own files for Appellate Case Nos. 2017-1899 and 2018-2229 arising from Richland 4900, as well as Appellate Case No. 2019-0362, arising from Aiken 1337 (discussed below).

which should have been delivered in 2011. The same would be true if counsel who is holding the AG's documents which are subject to FOIA, and has itself agreed to comply with FOIA, can continue to help the AG evade its statutory obligations under FOIA. Such further delay would harm Appellant and fly in the face of both the letter and spirit of FOIA.

The Attorney General Creates and Controls the Legacy Trust

James Brown died on Christmas Day 2006 leaving all of his assets except his personal and household effects to a trust he established in 2000. At his death, by a "fractional share" formula related to Brown's final estate tax proceeding, a fraction of Brown's assets and income is placed in a taxable trust for the education of seven specific grandchildren to age thirty-five (35). Everything else goes to Brown's "I Feel Good" Trust, a private charitable foundation dedicated solely to providing scholarships for needy students studying in South Carolina and Georgia.

In October 2007 AG Henry McMaster, now Governor of South Carolina, officially entered the James Brown proceedings to protect James Brown's "I Feel Good" Charity.

Brown's Inventory & Appraisalment (I&A) filed the following month valued Brown's music empire at \$100 million, less Brown's \$15 million debt to the New York Teacher's Assn. (TIAA). The value was based on a letter of intent from TJBL to buy the music empire.

A February 2008 WIS-TV interview in which the AG and Brown's grandson Forlando Brown (Forlando) participated states:

...[Brown's] assets contain his 6-acre Beech Island home and even more importantly, rights to James Brown's image and music. Altogether, the estimated worth is more than \$100 million. "So the children", McMaster says, "the needy children stand to gain a lot." [R., p. 311]

As to the possibility that litigation might diminish the "I Feel Good" Charity, Governor McMaster said:

There is a concern some could be whittled away, but we think there

is so much money involved because the name is so big and the rights to his image – really a valuable thing. We’re trying to look at this long term. [R., p. 311]

In 2008 TJBL made two additional attempts to purchase the James Brown assets for between \$90 million and \$102 million. [R., p. 311]

On July 30, 2008 the AG approved Robert Buchanan, Jr. and Appellant Pope, who had been serving as Brown’s PR/Trustees since November 2007, as permanent trustees of Brown’s 2000 Trust. Eleven days later, however, the AG contracted to replace them. That day, August 10, 2008, the AG brokered a settlement deal which dismembered Brown’s estate plan and threatened the 900 copyrights James Brown had given his “I Feel Good” Charity. [R., p. 312]

The AG asserted the right to “stipulate” who would be James Brown’s heirs under the U.S. Copyright Act, 17 U.S.C. §§ 101 *et seq.* (Copyright Act) and thus be entitled to certain “Termination Rights” under Sections 304 and 203 of the Copyright Act to some of Brown’s U.S. royalties. He stipulated that Tommie Rae Hynie Brown (Tommie Rae), her son James Brown II (James) and five clients of Louis Levenson, Esq., would be Brown’s heirs “for all purposes.”

Tommie Rae, James and the Levenson clients, with knowledge of each other’s potential impediments, agreed to “stipulate” that Tommie Rae was Brown’s spouse under the Copyright Act and that they were Brown’s only children. They agreed to pool all of their Termination Rights proceeds, and certain other assets, in Respondent Legacy Trust; put the AG in effective control by the right to appoint and replace the trustee at will; and give Tommie Rae and the AG 75% voting control (50% to the AG and 25% to Tommie Rae). They even agreed that half of the income and assets of the Legacy Trust would go to a charity controlled by the AG.

The AG overlooked two critical factors. First, Termination Rights stand apart from Brown’s estate plan. No attempt by Brown to exclude heirs in his will or attempt of the AG to stipulate heirs would prevent Brown’s half dozen or more claimed heirs – some already DNA- proven – from

sharing in a proper Termination Rights election.

Second, the AG and “stipulated” heirs ignored, or concealed, that Termination Rights proceeds, which would slowly mature beginning in 2012, apply only to U.S. royalties, and U.S. royalties make up only about half of James Brown’s \$4 million annual worldwide royalty stream. Thus \$2 million a year of the “I Feel Good” Charity’s income; half the copyrights; all of Brown’s image and likeness (right of publicity); and all of the remainder of the assets Brown gave the “I Feel Good” Charity will never be threatened or diminished by Termination Rights. Further, multiple strategies are available to the “I Feel Good” Charity, and others, to lessen the impact of Termination Rights elections.

Despite these factors, the AG claimed that it had conducted proper due diligence when he decided to put all of James Brown’s assets in the Legacy Trust; give Tommie Rae and the Levenson clients about \$2 million a year of income; and use their Termination Rights and James Brown’s fortune to defend his plan. The AG continued this position in his March 2013 Petition for Rehearing in *Wilson v. Dallas*. At page 16 the AG said:

As the contribution agreement states: “The parties hereunder recognize that it may be difficult at this time to value accurately the interests and rights being contributed hereunder to the Legacy Trust. However, the parties are reasonably informed that a large portion of the value of the assets and interests contributed hereunder resides in the rights granted to heirs under the federal copyright act. Accordingly, the parties recognize that the beneficial interest received hereunder by Mrs. Brown and/or the Levenson clients may be of lesser value than the interests they are contribution to the Legacy Trust ... [Emphasis supplied]

In September 2008 Buchanan and Pope filed Brown’s estate tax return. Schedule F of the return reported Brown’s worldwide music empire, consisting of this 900 copyrights; claims against David Cannon and others for the \$17 million Cannon took; Brown’s right of publicity (image and persona), his valuable tangible personal property (TPP) and other miscellaneous assets at \$84

million – about \$99 million less the TIAA debt. Based on information then available, and available now, the \$84 million valuation was reasonable and conservative. The valuation of the copyrights and right of publicity was consistent both with a formula presented to Judge Early in 2007 and unopposed by the AG and the non-professional valuation formula accepted by the IRS in 2002 for the valuation of the copyrights of songwriter Harlan Howard. *In re Estate of Harlan Perry Howard*, No. M2008-00540-COA-R3-CV (Tenn. App. 2009).

The estate tax return was promptly made public, and no objections were made to the value.

By January 2009 Russell Bauknight was serving at the pleasure of the AG as trustee of the Legacy Trust, a position he holds today. Tommie Rae, James and the Levenson clients had placed their Termination Rights proceeds in the Legacy Trust.

On or about January 17, 2009, the AG filed an unsigned, incomplete copy of the Legacy Trust in Aiken County. [R., p. 312] It did not show that Bauknight was trustee.

On January 30, 2009 Terry Brown (Terry) joined the settlement and placed his Termination Rights proceeds in the Legacy Trust. The AG and Tommie Rae maintained their 75% voting control of the Legacy Trust, but the ownership was modified slightly as follows: AG's Charity, 47.5%; Tommie Rae, 23.75%; Terry, 4.79%; Venisha Brown (Venisha), 4.79% and four other Levenson clients 4.79% each.

Immediately after Terry joined the settlement, Bauknight, without disclosing his role as trustee of the already-funded Legacy Trust, recommended that Judge Early approve the AG's settlement. [R. p. 300]

On March 26, 2009 a second, modified, incomplete, unsigned copy of the Legacy Trust was filed in Aiken County. [R., p. 312] The Legacy Trust document make clear the AG's control. Assets may not be sold other than in the ordinary course of business without his agreement. Nor can a modification or dissolution of the Legacy Trust occur without the AG's consent.

On April 6, 2009 Senior Assistant Attorney General Havird "Sonny" Jones, who has overseen the AG's involvement in James Brown matters since 2007, assured Judge Early:

THE ATTORNEY GENERAL IS GOING TO...MAKE SURE
IT IS TAKEN CARE OF AND WE HAVE CONTROL OVER [THE]
CHARITABLE TRUST AND SETTLEMENT ENTITY [Legacy
Trust], SO WE'LL MAKE SURE THIS CHARITABLE TRUST
SET UP UNDER THIS SETTLEMENT WILL BE CARRIED
FORTH PROPERLY.... [R., p. 300]

On May 26, 2009 Judge Early, persuaded that the AG had conducted extensive due diligence, approved the AG's settlement, as modified.

In the fall of 2009 Judge Early lifted the automatic stay imposed by the appeal by Buchanan and Appellant which would become *Wilson v. Dallas*.

From 2009 until 2013 Buchanan, Pope and a small legal team were the only persons working to protect the "I Feel Good" Charity. Under the direction of two AGs, at least five taxpayer-paid lawyers were working for Respondent Legacy Trust. Another dozen lawyers, under the control and with the approval of the AG, were using Brown's "I Feel Good" Charity's funds to defeat the claims of anyone who opposed the AG's heirs "stipulation" or the Legacy Trust.

The AG and Legacy Trust Sue Buchanan and Pope in Richland 4900

In April 2010 an attorney for Tommie Rae advised that Sr. Assistant AG Jones had hired the law firm of Kenneth Wingate, Esq., (Wingate), and Wingate would sue if Buchanan and Pope did not drop their appeal of the AG's settlement. [R., p. 301]

On May 18, 2010 Bauknight signed the 23% - 40% Wingate contract for the Legacy Trust, and Wingate agreed to a contract which made clear that the documents it was holding were subject to FOIA and that the AG controls all litigation related to the charity. AG McMaster did not sign the Wingate contract, but this was not known until the fall of 2013.

On May 19, 2010 the AG and the Legacy Trust sued Buchanan and Pope for tens of millions

of dollars in Richland 4900 for the benefit of the Legacy Trust and its beneficiaries, including the AG. [R. pp. 33-4]

In Richland 4900, Bauknight, in addition to suing as trustee of the Legacy Trust, has for nine years claimed to act "on behalf of" the AG, Tommie Rae, James, and other Legacy Trust beneficiaries to whom Buchanan and Pope owed no duty. [R. 34]

Richland 4900 and the \$79 Million Devaluation of the Music Empire

The AG and Legacy Trust claim in the Richland 4900 complaint that Buchanan and Pope should have accepted TJBL's \$100 million offer in 2007. They also claimed Buchanan and Pope overstated the value of James Brown's assets in James Brown's IRS proceeding in order to get a big commission. The complaint, which is being pursued by the AG and Legacy Trust today, asserts that as a result of the failure of Buchanan and Pope to accept the \$100 million offer, the James Brown assets in 2010 were worth tens of million of dollars less than in 2007. The complaint also asserts that Buchanan and Pope knew nothing about the Copyright Act or its impact on the value of the James Brown assets.

On August 23, 2010 the AG and other Legacy Trust beneficiaries told the Court of Appeals in *Wilson v. Dallas*:³

6. Respondents dispute Appellants' assertion that the settlement agreement has the potential to divert "tens of millions of dollars" from the [2000] Trust. Presumably this representation to the Court is based on Appellants numerous under oath representations about the date-of-death value of the Trust, ranging anywhere from approximately Eighty-Five Million (\$85,000,000.00) Dollars on the federal estate tax return to approximately One Hundred Million (\$100,000,000.00) Dollars⁴,

³ The representation was made in a return by the AG, Bauknight and others to a request of Buchanan's and Pope's *pro bono publico* appellate counsel James Richardson, Jr., for an extension to file their initial brief in *Wilson v. Dallas*. [R., p.337]

⁴ The difference between \$100 million and \$85 million is the \$15 million TIAA debt.

in affidavits, pleadings, and testimony...

Valuation assertions by Appellants' predecessors were similarly without any underlying appraisal.⁵ By contrast Bauknight has pursued the appropriate fiduciary route and engaged a nationally renowned and respected appraisal firm to value the Estate and Trust. Although expected completion date for the appraisal is a couple of weeks away, a preliminary report indicates that the date-of-death value of the Estate and Trust will not exceed Twelve Million (\$12,000,000.00) Dollars. [R., p. 336]

In response to the claimed devaluation from about \$84 million to \$12 million or less Wm. Jeffrey Smith, Esq., and Appellant Pope circulated a draft of *Private Foundations, Copyright Heirs and Musical Millionaires: why the James Brown "I Feel Good" Trust doesn't...*⁶ [R. pp. 1335-1338; R. pp. 1581-1600]

The claimed \$4.7 million valuation arrived in September 2010, but the AG, Bauknight and others agreed to withhold it from the *Wilson v. Dallas* Court for eight months.

Buchanan and Pope moved to dismiss the Richland 4900 complaint or change venue to Aiken County. They also claimed that Richland 4900 was unconstitutional.

In response, Bauknight stated under oath that he managed the Legacy Trust and kept its assets, books and records at his Columbia office. [R., p. 59]

Subject to the motion to dismiss, Buchanan and Pope answered, counterclaimed and sought discovery, including:

Any and all documents which support any position you may have as to the value of the James Brown assets as of December

⁵ This statement was incorrect. There was a professional appraisal of approximately 800 of Brown's 900 copyrights, including the major copyrights, in 2006 conducted by the Royal Bank of Scotland (RBS). RBS valued the royalty stream from the 800 copyrights at \$42 million or more.

⁶ The draft of *Private Foundations* was circulated in April 2011 to peers and the AG. It explains how the combined devaluation of Brown's music empire from about \$99 million (less a \$15 million debt to TIAA) to \$12 million, and sale to Terry at that reduced value, would leave the "I Feel Good" Charity with almost nothing. [R.p. 372]

25, 2006. [R., p. 66, L 2 – 5]

In December 2010 the AG and Bauknight filed their initial brief in *Wilson v. Dallas* and did not disclose the claimed \$4.7 million valuation.

The AG and the Legacy Trust did not produce the requested documents in Richland 4900 in 2011, and they have not been produced today. [R. pp. 66-67].

In December 2010 Bauknight filed documents in James Brown's IRS estate tax proceeding claiming Brown's worldwide music empire (estate tax return Schedule F) was worth only \$4.7 million. That year alone Brown's royalties brought in \$5.4 million. [R., p. 303]

The damage caused by Bauknight's \$79 million devaluation to \$4.7 million, and the shifting of 31% of assets out of the "I Feel Good" Charity was immediately apparent in 2011 by a reading of Brown's 2000 Trust.

On or about January 4, 2011 the AG amended the Legacy Trust to allow Terry to begin due diligence on his right of first refusal (ROFR) to buy the music empire. Terry then transferred his 4.79% interest in the Legacy Trust to Forlando. [R., pp. 223 - 227] Terry and Forlando were both part of two of the three TJBL attempts to buy the music empire at \$90 - \$100 million.

On May 3, 2011, Bauknight filed a supplemental I&A in the Aiken Probate Court, changing the value of the music empire (Schedule F) from nearly \$85 million to under \$4.7 million. [R., p. 66, ¶6]

On or about May 6, 2011, Bauknight, the AG, and other Legacy Trust beneficiaries asked the Supreme Court to supplement the record on appeal (ROA) in *Wilson v. Dallas* to show that Brown's music empire was worth only \$4.7 million when he died. The AG and Legacy Trust beneficiaries claimed Bauknight had engaged a "nationally known firm to conduct the valuation and appraisal of the Estate and Trust." The appraisal was not attached. [R., pp. 66,67]

Buchanan and Pope opposed the motion and cited voluminous evidence that Brown's assets

were worth \$100 million or more. They continued efforts to obtain the claimed \$4.7 million value in Richland 4900. [R., p. 67]

The AG and Bauknight "on behalf of" the AG began making the false claim to the Supreme Court that Buchanan and Pope had intentionally overstated James Brown's asset to the IRS by \$79 million in order to secure a \$5 million commission on a \$5 million estate. If true, this false claim would have been a federal felony. *See* 18 U.S.C. § 1001.

Pope's position in the face of these accusations in 2011 was the same as it is today:

I am informed and believe that when such false accusations are made on behalf of the State's chief law enforcement officer, who also enforces tax and fraud laws, they are clearly intended to threaten and intimidate [Buchanan] and me, and we are entitled to know if AG McMaster authorized them and AG Wilson condoned them.
[R., pr. 41]

The Role of FOIA Noncompliance in Advancing the Legacy Trust's Agenda

In 2011, as today, a handful of public documents were all that was needed to show that the AG's 2008 settlement and the Legacy Trust's claims were inaccurate. Those documents are:

1. The AG's Litigation Retention Agreement with Wingate to sue Buchanan Pope in Richland 4900 in 2010 to try to stop the appeal which became *Wilson v Dallas* (Wingate contract);
2. The authorization, if any, by which Bauknight has claimed in Richland 4900 since 2010 that he speaks for the State/AG;
3. The handwritten admissions of Tommie Rae that she was married; living with her husband; and possibly pregnant before conducting a marriage ceremony with James Brown in 2001;
4. The Legacy Trust and amendments, including the January 2011 amendment and transfer of the 4.79% interest of Terry to Forlando in the month Forlando planted the false Grammy © story noted by the Supreme Court in 2013.
5. The September 2010 claimed \$4.7 million valuation of James Brown's worldwide Music empire (Schedule F, Estate Tax Return) used by the AG and Legacy Trust for 8 years to suggest that Buchanan and Pope are greedy, incompetent felons who falsified IRS filings to get a \$5 million commission from a \$5 million estate.

The AG, Wingate and Bauknight have worked in concert in FOIA proceedings since 2011 to prevent the dissemination of these critical public documents.

As discussed later, Between February 2013 and March 2015 Appellant's counsel made twelve separate requests for a hearing in each of her two 2011 FOIA cases. No hearing was held.

Appellant's FOIA Requests for the \$4.7 Million and Legacy Trust Documents

In June 2011 Pope made a FOIA request for the \$4.7 million valuation, the Legacy Trust documents, and related documents. The request was sent to the AG, the Legacy Trust and Wingate.

On June 30, 2011, David Black, Esq., counsel for the Legacy Trust, wrote Pope. Claiming the Legacy Trust was not a public body, he stated:

In the event that you continue to file unnecessary discovery and/or FOIA requests, please be advised that the Trust and Estate will have no choice other than to file an action against you for abuse of process and sanctions. [ROA, pp. 48, 49]

On July 1, 2011 the AG and Legacy Trust, through Wingate, moved in Richland 4900 for a protective order as to the documents sought under FOIA. [R., pp. 70, 71]

On August 3, 2011, Pope filed this FOIA action in Newberry County, and on August 10, 2011, she filed a second FOIA suit, also in Newberry County. Taken together, the relief sought in the two FOIA suits was:

1. That the AG produce the Litigation Retention Agreement between the State/AG and Wingate;
2. That the AG produce any documents which would show whether Bauknight was authorized to act "on behalf of the Attorney General of South Carolina" in Richland 4900.
3. That the AG produce the \$4.7 million appraisal and related documents;
4. That the AG and Respondent Legacy Trust produce finals and drafts signed and unsigned, of the Legacy Trust and all amendments;

5. That the AG require Wingate, over which it has effective control, to comply with the FOIA requests.

6. That both the AG and Legacy Trust be declared public bodies under FOIA and bear the legal fees and costs necessary to secure FOIA compliance by the Legacy Trust and AG.

The August 3 complaint explained the relationship of the false claims being lodged against Buchanan and Pope in Richland 4900:

9. AG McMaster and Bauknight did not attach or provide a signed copy of the Legacy Trust, although AG and Bauknight as his agent in Case 4900 assert Plaintiff caused tens of millions of dollars damage to the Legacy Trust.

10. AG McMaster and the Legacy Trust, among other false allegations, asserted that Plaintiff's and Buchanan's approximately \$85 Million valuation of James Brown's assets was incorrect and improper. They asserted Plaintiff intentionally overstated Brown's assets on the estate tax return for the improper purpose of obtaining a large commission. [R., p. 18]

An affidavit of Pope filed on August 3, 2011, supports the FOIA requests and asserts the importance of obtaining the claimed \$4.7 million appraisal before a hearing in Richland 4900 to enjoin Wingate from representing both the AG and Terry, who was seeking to buy the James Brown assets. [R. pp. 33- 43] The affidavit asserted that FOIA compliance would help answer the following questions:

- a. Did either the Legacy Trust or a separate document give Bauknight legal authority to assert he speaks for AG McMaster?
- b. If not, is Bauknight's assertion that he speaks on behalf of the AG improper?
- c. If so, is either the State or AG liable for Bauknight's actions, including the default and any counterclaim judgment?
- d. Can Bauknight continue to speak on behalf of the AG/State after filing sworn documents with the Court and IRS asserting Brown's

worldwide music empire was worth less than \$4.7 million⁷ ? [R., p. 34]

The affidavit advised the court of the substantial evidence that some or all of the beneficiaries of the Legacy Trust, or their agents, were actively involved in the manipulation of the value of Brown's assets.[R., pp. 37, 38] It noted that Terry, supporting the \$4.7 million value claim, had been part of two \$90 - \$100 million offers for Brown's music empire, and that Tommie Rae had asserted that the 900 copyrights alone might be worth \$100 million. [R, p. 5, Fn. 11] It explained how the AG, Terry and others stopped a 2-year "publicity rights" contract negotiated by Buchanan and Pope with GreenLight, a company which had earned tens of millions annually by exploiting the images and personas of Einstein, Steve McQueen and others. [R., p. 36, Fn. 11]

Pope's affidavit stated that in 30 years of practice she had never known an "AG to be a co-Plaintiff using joint private counsel in a tort suit for money damages against a South Carolina citizen;" where neither the AG (nor an associate) was counsel of record. Nor had she seen a suit where a private citizen purported to act "on behalf of" the AG, as Bauknight was doing. [R., pp. 38, 39]

The affidavit cited the AG's October 20, 2006 litigation retention agreement with private counsel in the AstraZeneca (AZ) litigation, which did not involve private co-Plaintiffs, and suggested the undisclosed Wingate contract should contain a provision:

... as found in other AG Contracts, to allow the AG to end a case without merit and to protect Bob [Buchanan] and me from the use of the State's power to support the abusive acts of private counsel and Private Plaintiffs [See AstraZeneca agreement AG McMaster... [R., p. 39]

The August 3, 2011 affidavit recited some of the many public policy questions raised by

⁷ Footnote 7 stated that on May 4, 2011, 4 years and 4 months after Brown's death, Bauknight revealed that he had used a \$4.7 million valuation for Brown's worldwide music empire, even though 2 months earlier he had confirmed that Brown's royalty receipts for 2010 were approximately \$5.4 million. [R., p. 36, Fn.7]

the extraordinary Richland 4900:

1. Is Bauknight's assertion that he speaks on behalf of the AG in Richland 4900 legal?
2. Did all Private Plaintiffs sign the Wingate contract (as is required for a contingent fee) to bring Richland 4900?
3. Did the AG violate his own policy and/or the Wingate contract by not maintaining control over the Richland 4900 litigation and signing the contract?
4. How is the Buchanan/Pope counterclaim judgment against the Richland 4900 Plaintiffs, if any, to be paid?
5. Did the AG approve seeking money damages against Buchanan and Pope for not signing an agreement not to criticize him?
6. Does the Wingate Agreement designate Bauknight to speak on behalf of, or bind, the AG and State?

On August 9, 2011, the AG and Legacy Trust served a Motion for Protective Order Concerning Fee Agreement and/or Motion to Strike Defendant Pope's Motion to Compel Plaintiffs' fee agreement in Richland 4900. Wingate claimed the AG's public contract was the "epitome of privileged communication[s]." [R., pp. 343 – 345, 344]

In September 2011 the Legacy Trust moved to dismiss this FOIA suit, claiming venue in Newberry was improper. The Legacy Trust stated:

Dismissal under Rule 12(b)(6) should be granted, as venue is improper in that, in related litigation, the Honorable Casey Manning has already determined that venue should be in Richland County because it is the principal place of administration for the trusts at issue in that case which are also the subject of the instant suit. [R., p. 79]

On September 11, 2011, an affidavit opposing the motion to dismiss and requesting an expedited hearing was filed. [R., pp. 299 – 315]

On September 12, 2011, Appellant filed a Return to Motion of Defendant James Brown

Legacy Trust to Dismiss. [R., pp. 81 – 84] Appellant asserted that the FOIA requests were properly made in Newberry, and that there was no basis for this FOIA suit to be transferred to Richland County or consolidated with Richland 4900. Appellant asserted that her rights to receive documents under FOIA are entirely distinct from discovery in Richland 4900, and that the transfer would only result in delaying a hearing of the FOIA case on the merits. [R., p. 83]

On October 6, 2011 Appellant filed in this FOIA case the AG's and Legacy Trust's Richland 4900 motion to prevent release of the public Wingate contract in which the AG made the following claim about his public contract which Governor McMaster had not signed:

Fee agreements are the epitome of privileged communication, Plaintiffs. . . therefore request that this court issue a Protective Order prohibiting the efforts of Defendant Pope from discovering the Fee Agreement. [R., p. 335]

That fall the AG posted other Contingency Fee Litigation Retention Agreements with outside counsel, but excepted those whose disclosure was "currently under review by a court." The AG did not disclose that it was his own motion which had placed the Wingate contract "under review." [R., p. 342] The AG's public website stated:

Below are all active, contingency fee litigation retention agreements that the Attorney General has executed, except matters in which disclosure is currently under review by a court. The Attorney General often retains private counsel for matters that require specialized expertise or involve an extensive commitment of financial resources and personnel. By retaining private counsel, the Attorney General is able to pursue effective enforcement of state statutes in large, important cases that the Attorney General's office itself would otherwise be unable to pursue. [R., p. 342]

It would be late 2013, after *Wilson v. Dallas*, before a Federal Court, over Bauknight's objection, directed that the Wingate contract be made public. The Wingate contract showed that AG McMaster never signed the Wingate contract. Three years later, in sworn 2016 testimony, now-Governor McMaster stated emphatically that he never sued Buchanan and Pope as AG in

Richland 4900; that he did not authorize Richland 4900 to be brought in the name of the State/AG; that he did not authorize Bauknight to act on behalf of the State/AG in Richland 4900; and that he did not know he was a Richland 4900 Plaintiff until after leaving office in January 2011.

In September 2011 Appellant filed a motion for summary judgment, including a determination that the Legacy Trust is a public body. It was supported with an affidavit dated September 29, 2011 which outlined in detail the structure and operation of the Legacy Trust, including the AG's control of the day-to-day functions of the Legacy Trust [R. pp. 316 – 326] The September 29, 2011 affidavit stated in part:

39. The State/AG continues to support the Legacy Trust – now paying its own attorneys and allowing the Legacy Trust to hire distinguished outside counsel to fight this FOIA request so that the public will be prevented from knowing:

b. What members of the AG's Office were involved in the fabricated \$4.7 Million valuation of Brown's assets?

c. Why did the State authorize the Wingate Firm/Legacy Trust Trustee to accuse Bob Buchanan and [Appellant] of causing tens of millions of dollars of damage to Brown's music empire while at the same time the trustee (Bauknight) presented to the IRS a fabricated \$4.7 million valuation of the music empire?

d. Why did AG Wilson not fire Bauknight and admonish his staff for presenting the \$4.7 Million to the Supreme Court when public documents make clear it was outrageous? [R., p. 9]

The section of the September 29, 2011 affidavit entitled "The Valuation is public and should be disclosed" set out in detail that Brown had earned more than \$5 million a year between 2003 and 2006, and that the income since his death made clear that the \$4.7 million, which reduced scholarships to needy students by about \$3 million a year, was wrong. [R., pp. 324 – 326, and Chart I, Exhibit C, D, E & F, pp. 327 - 333]

On October 6, 2011 Appellant filed an Affidavit of ... Pope in Further Support of All Relief

Requested in the Complaint, Expedited Hearing and *In Camera* Review. [R., p. 334 – 342]

On October 14, 2011, the AG moved to strike Appellant's affidavit supporting summary judgment and the attachments to the summary judgment motion. [R., p. 91]. This was one of a number of motions to strike. [R., p. 98] Appellant opposed the motions to strike. [R., pp. 352, 353]

On October 25, 2011 the AG filed a memorandum in opposition to summary judgment and in support of his motions to strike the affidavits of journalists, experts, and others which support Appellant's requests for FOIA compliance. [R., p. 354 – 367] The affidavits and attachments were not stricken.

By affidavit of Wm. Jeffrey Smith dated December 9, 2011, and related affidavits of Thomas R. Young, Jr., and others, Appellant urged the FOIA court to consider the public importance of the damage being done both to FOIA and the "I Feel Good" Charity by the FOIA noncompliance related to Bauknight's \$79 million devaluation and claimed \$4.7 million value. [R., pp. 369 – 400. Affidavits of Smith; Young, Spence, T. Pope, Summer, and *Private Foundations, Copyright Heirs and Musical Millionaires: why the James Brown "I Feel Good" Trust doesn't...*, pp 372 – 384]

On January 10, 2012 Pope moved for expedited consideration of her summary judgment motion; opposed all motions to strike; and asserted that there was no basis for the dismissal motions of the AG and Legacy Trust. She reiterated that the AG, the Legacy Trust and other Richland 4900 Plaintiffs had still refused to produce anything other than a 2-page witness list in Richland 4900. The motion stated:

1. The Defendants, which are public bodies, should have complied with FOIA in July [2011].
2. The media, writers and members of the general public believe that FOIA is important to our free society.

3. There is great public interest in James Brown matters.
4. Attorney's fees and costs are appropriate under the facts of this case. [R., p.98]

In defense of the affidavits of journalists and others supporting the FOIA requests, which the AG was seeking to strike, Pope's motion stated:

Where, as here, public bodies have vigorously resisted compliance with FOIA, it is appropriate for Plaintiff and others to explain to the Court, through affidavits and documents, what has happened and what effect the delays caused by Defendants have had on both Plaintiff and the general public. [R., p. 98]

On January 11, 2012 a hearing was held in Newberry County on the AG's motion to transfer this FOIA case to Richland County and consolidate it with Richland 4900. [R., pp. 266 – 291] The circuit court stated:

I ordered the other case consolidated. Once this matter is transferred to Richland County, in terms of venue – and that's the grounds that I'm using to transfer this case – either party may seek consolidation; either party may seek an expedited hearing with the judge. And I hope you get the information sooner, rather than later.

But that's what I feel is appropriate to do under the circumstances and based upon everything that has transpired with the – this case, Case 4900, and Case 379. I've consulted with some other judges on this very issue, and I have yet to hear one of them remark to me that they think that this is a bad idea. There seems to be a consensus, so that's what I'm doing. [R., p. 273]

By order dated January 11, 2012 the Honorable Frank Addy changed venue of this FOIA case from Newberry County to Richland County, where it became Case No. 2012-CP-40-350. [R., p 103]

On February 1, 2012, the AG moved to consolidate this FOIA case with Richland 4900. [R. pp. 103 -105].

I

On December 30, 2012 the AG began claiming that the complaint in this action should be denied because Appellant's FOIA request, which was properly made to the AG, the Legacy Trust and Wingate, as well as attached to the complaint, was not properly presented to the AG. The AG alleged:

Plaintiff has failed to serve her FOIA request on the Defendant by mail or delivery so as to trigger the application of the statute, and because the items demanded in the FOIA requests at issue in this proceeding are subject to the rules regarding discovery in the Rules of Civil Procedure applicable to *Bauknight v. Pope*, 2010-CP-40-4900, and exempt from disclosure under FOIA § 30-4-40(a)(4) for that reason. [R., p. 135]

The Legacy Trust and FOIA Noncompliance Continue after *Wilson v. Dallas*

On February 27, 2013 the Supreme Court issued its first *Wilson v. Dallas* decision. The Supreme Court admonished the AG to conclude Richland 4900 and the FOIA suits "in the first instance."

On March 6, 2013 Appellant Pope obtained a meeting with the AG to discuss the tax problems and damage done to the "I Feel Good" Charity Bauknight had caused by the \$79 million devaluation and \$4.7 million claimed value. She and counsel had a second meeting with the AG's senior staff to the same effect. [*Wilson* did not correct the substantial income tax problem Bauknight caused by his shifting of 3/10 of the assets and \$1 million a year of income out of the "I Feel Good" Charity by the \$4.7 million value, with no corresponding estate tax benefit.]

At the March 2013 meeting the AG and his staff had been in possession of *Private Foundations* for two years, and the Copyright Act was clear that neither James Brown himself, nor the AG, had the right to declare Brown's heirs. Yet the AG, Legacy Trust which he controlled, and Bauknight acting "on behalf of" the AG have continued to try to reinstate the AG's 2008 settlement.

For six years the AG, the Legacy Trust and Bauknight have actively disrupted FOIA cases and discovery in Richland 4900 and elsewhere to conceal documents which show that the May 29,

2013 announced intention to Judge Early by Tommie Rae and the Levenson to disregard *Wilson v. Dallas* will severely damage Brown's "I Feel Good" Charity.

The AG, allowing Bauknight to continue to speak for the State/AG and the Legacy Trust in Richland 4900, is not only ignoring *Wilson v. Dallas* but preventing the return of to the "I Feel Good" Charity of 3/10 of its assets, and \$1 million or more of income a year.

On March 7, 2013 the AG served his answer in this FOIA case. [R., pp: 159 – 167] The AG attached a draft of the Legacy Trust which had been included in the ROA in *Wilson v. Dallas*. He stated in part:

Because most of the allegations of Plaintiff in the instant Complaint regarding the Legacy Trust are irrelevant to that complaint, this Answer is not intended to address how the Opinion in *Wilson etc. et al v. Dallas* may apply, if at all, to the allegations in the instant complaint.

The AG's answer repeatedly referenced the Richland 4900 Complaint and craved reference to it; repeated the claim that the FOIA request was not properly mailed or delivered and asserted he was without sufficient knowledge or information to know whether it was properly mailed to the Legacy Trust; [R., p. 162] The AG admitted that the AG had not responded to the FOIA request, but claimed he was not required to do so; [R., p. 162] As to the Legacy Trust, the AG stated in part:

23. The allegations in paragraph 26 regarding the Legacy Trust do not apply to the Defendant Attorney General or the FOIA directed to the OAG. The OAG was not properly served with the FOIA at issue so as to trigger a requirement to respond thereto.

On March 7, 2013 the AG also moved for judgment on the pleadings in this FOIA case. [R., p.] The AG referenced the case of *Summer v. Wilson* a 2012 Newberry County FOIA case in which a journalist following the progress of Pope's 2011 FOIA requests had made her own FOIA requests for some of the same documents. In addition, the journalist sought the so-called "Hynie

diary," long-public handwritten admissions by Tommie Rae which show that she was married; living with her husband; and possibly pregnant before concealing her marriage and conducting a 2001 ceremony with Brown.

On March 14, 2013 the AG told the Supreme Court in its petition for rehearing in *Wilson v. Dallas* that he was getting out of Richland 4900 and hoped to complete the FOIA cases within a short time. At page 5 of the AG's Petition for Rehearing in *Wilson v. Dallas* the AG stated:

Accordingly, we now advise this Court that, it is our plan, that, having completed our function in intervening in this case, the Attorney General will, upon the appointment of a new trustee, assume a posture of monitoring the action, as we typically do in many charitable trust matters. Chief Justice Toal is correct that "the AG's involvement [is] no longer necessary to stave off maladministration."

The AG continued its support for the Legacy Trust in its impassioned, but incorrect, claim in its Return to Petitions for Rehearing filed March 25, 2013:

The valuable James Brown music rights, obtained in the settlement for the charitable trust, was a boon in effectuating Brown's laudable purpose. The circuit court served as the ultimate protector of that desire which was so important to Mr. Brown. . .

On March 15, 2013 the Legacy Trust filed a motion to stay this FOIA case. [R., p. 1215, 216]. The Legacy Trust claimed it did not exist. Yet for the next six years it has actively pursued Richland 4900 for the benefit of the AG, Tommie Rae and other Legacy Trust beneficiaries in accordance with the announced intention of May 29, 2013 to disregard *Wilson v. Dallas* discussed below. The Legacy Trust asserted incorrectly that [i]f the status of the Legacy Trust continues as presently determined by the South Carolina Supreme Court, the Legal [Legacy] Trust will not exist after remittitur.[R, pp. 215, 2016]

On March 18, 2013 the Honorable L. Casey Manning requested a status report in light of the Supreme Court's first *Wilson v. Dallas* decision. [R., p. 218] Appellant, through counsel, stated

in part:

As is clear from the Supreme Court's opinion, the Court did not declare the Legacy Trust void. Instead, the Court reversed the approval of the *settlement agreement*. Although the decision may have some effect on the management and funding of the Legacy Trust, nothing in the opinion suggests the Supreme Court eradicated the Legacy Trust *ab initio*.

Furthermore, the Legacy Trust's argument that it has no assets is incorrect. Since May 19, 2010 the Legacy Trust has pursued a multi-million dollar claim against Plaintiff [Pope] for alleged breaches of fiduciary duty and trust. Indeed, the Legacy Trust is still one of the lead Plaintiffs in Case 4900, where it has indicated no doubt of its existence. [R., p. 220]

Appellant referenced and attached documentation from the January 2011 Legacy Trust amendment, signed by Attorney General McMaster without the participation of Bauknight. [R., p. 221] Appellant stated:

The Legacy Trust asks this Court to find that the Attorney General can create an entity which does not have to produce its own public documents if the Supreme Court later finds that the Attorney General's actions were improper. The Court should decline to do so and set a hearing on this matter at its earliest convenience. [R., p. 222]

On May 8, 2013 the Supreme Court issued its decision in *Wilson v. Dallas*. The Supreme Court voided the AG's settlement and voided Bauknight's appointments as SA/ST and PR/Trustee. It made no statement about his role as trustee of the Legacy Trust, which provided that its existence did not depend on court approval.⁸

Within two days the AG, Tommie Rae and Levenson had secured Bauknight's appointment

⁸ In six years there has been no evidence of any action on the part of the AG to dissolve the Legacy Trust, or disburse its Termination Rights proceeds, including the 47.5 % Tommie Rae and others placed in the Legacy Trust and agreed to give to the "I Feel Good" Charity in exchange for the AG's action on behalf of Brown's estate/2000 Trust not to challenge their status as Brown's heirs under the Copyright Act.

as SA/ST for Mr. Brown's estate and 2000 Trust.

That same day, May 10, 2013, the AG, Legacy Trust, and Bauknight on behalf of the AG and other Legacy Trust beneficiaries, told the Richland 4900 Court, through their private counsel:

... [T]he Supreme Court, in substituting the new opinion has completely eliminated Footnote 29 of the prior opinion. Footnote 29, while only dicta in the now replaced opinion, addressed, among other items, the FOIA matters and called for them to be heard "in the first instance" without any clear definition of what that meant. Such language is totally absent from the new order. While the court does recognize that the Attorney general is contesting releasing some documents pursuant to FOIA, the court no longer puts any primacy or priority on any court hearing these matters. We believe that such position is entirely appropriate, because the documents requested under FOIA are subject to a claim of privilege which is the subject of a motion for protective order before this court in Case 4900. The claim of privilege must be decided before any court can make a determination of the application of any FOIA claim.

Therefore, the Case 4900 Plaintiffs and Proposed FOIA Intervenor respectfully request that Richland 4900 be held in abeyance in its entirety until all the underlying issues related to the Plaintiffs are resolved by the Aiken Court. Should you deem it best for Plaintiffs to make a formal motion to stay, I would be pleased to do so.

In the fall of 2013, over objection of Bauknight, a Federal Judge in S.C. District Court Case 3:08-cv-00014- WOB denied an attempt to impose a confidentiality order of the Wingate litigation retention agreement. When released, it showed that Wingate's 23% - 40% contingency contract to sue Buchanan and Pope was not signed by the AG or most of the Legacy Trust beneficiaries, but by Bauknight and three lawyers for Legacy Trust beneficiaries.

On November 22, 2013 Appellant requested a FOIA hearing on the two FOIA cases. None was held. [Supp. R. p. 23]

On April 17 and 29, 2014 Appellant requested a hearing on the two FOIA cases. Wingate

objected for the AG and Legacy Trust. They were not held.

On May 7 and 28, 2014 Appellant requested a FOIA hearing on the two cases. No hearing was held. [Supp. R. p. 23]

By order dated September 14, 2014 the AG was directed in a journalist's 2012 FOIA case to release many of the documents Appellant had been seeking since June 2011. [R., p. 250]

On October 8, 2014 Appellant requested a hearing in the two FOIA cases. [Supp. R. p. 23] No hearing was held. Another request was made on November 13, 2014, and another on December 2, 2014. No hearing was held. [Supp. R. p. 23]

On January 14, 2015 the Honorable Eugene C. Griffith ruled in the journalist's case that the AG had to produce all of the document on the AG's privilege log. He also lifted the stay imposed by the appeals filed by Bauknight and the AG, and ruled:

5. Plaintiff is the prevailing party in this action under FOIA and is entitled to an award of attorneys' fees and cost; the Court will determine the amount of the fees and costs after the FOIA appeals are concluded.

Despite the FOIA rulings about the same documents sought in this FOIA case, the AG and Legacy Trust continued to refuse to produce the documents.

On March 20, 2015 Appellant requested a hearing in the two FOIA cases. No hearing was held. [Supp. R. p. 23]

The AG, through counsel, claimed that the FOIA cases must be delayed and subjected to the mediation, which took place on October 12, 2015 in a joint mediation ordered in Richland 4900 and Aiken 1337 by both Judge Early and Judge Manning.

On March 2, 2016, the circuit court officially ordered the stay in Case 4900 which had been *de facto* in effect since 2013. On March 24, 2016 Judge Early was assigned to this FOIA case [R.

12] and lifted the Richland 4900 stay.

On May 17, 2016 Judge Early heard the motions of the AG and the Legacy Trust to dismiss the 2011 FOIA complaints in this case and the FOIA case seeking the Wingate contract. [R., p. 274 – 291] Of the \$4.7 million appraisal the AG had used to accuse Buchanan and Pope of a federal felony, and which Appellant asked that he secure from his Richland 4900 counsel, where, under the Wingate contract, it was subject to the FOIA, if he did not have it within his office, the AG said:

As to the appraisal, we don't have that. And so we can't produce what we don't have which is what Judge Griffith ruled in the *Summer v. Wilson* case about the request for the same document.

She tries to argue that we should pull in Sweeny Wingate firm documents but she did not make a request for documents from the Sweeny Wingate firm. She made the request from our custodian of records. And that is not enough to pull in lawyer files. And so therefore we believe she is not entitled to it. [R. 277]

The Court, assigned to the 5-year-old FOIA case and 6-year-old Richland 4900 had the following discussion with the AG:

THE COURT: But isn't the end result we are going to end up in 4900 which I'm now having to resolve or rule on and preside in, and discovery is going wide open in 4900 and all of this stuff is going to be discoverable; is it not? Aren't we just wasting our time?

MR. SMITH: I believe that this case is a waste of time, Your Honor, and it's inappropriate.

THE COURT: I don't mean a waste of time, but isn't it duplicative? 4900 is going to open to discovery in the James Brown case, everything that's gone on. Why are we fussing about jurisdiction? And why are we fussing About ---

MR SMITH: Because the Plaintiff continues to press this

FOIA case and is asking for attorney's fees. That's why – and is not willing to drop it. That's why we're here.

We agree that the documents that she is seeking, the efforts to obtain documents, should be made in 4900.

... And that's where it should be, not here in an independent Freedom of Information Act action. [R., pp. 278, 279]

Appellant's counsel stated that both the AG and Legacy Trust:

The Legacy Trust has never notified the Court in that action [Richland 4900] that it has any doubt about its continued existence, and it's never sought to change anything in that case as far as I am aware...

I'm not aware of any proceeding that's been brought to terminate the Legacy Trust and it's identified none...

This trust was also funded, ...with contributions that had already been made or were being made at the time [2008 and 2009] of copyright termination interests by some of the parties to the settlement. [R., p. 289]

Appellant also argued that the AG and his staff spent years defending the Legacy Trust's existence in the Supreme Court, and that Appellant is entitled to a declaration that it is a public body, and the documents. [R., pp. 290, 291]

On June 14, 2016 the AG signed orders dismissing the AG and Legacy Trust. They were filed on June 20 and received by Appellant on June 24, 2016. [R., p. 252]

On June 27, 2016 Appellant served a motion to alter, amend or vacate the order granting the Legacy Trust's motion to dismiss. [R., pp. 262 – 265] Among other issues, Appellant said:

3. The Court overlooked or misapprehended that the...Legacy Trust at all times since the commencement of this action has been an active party in Richland...4900...; has moved to intervene in another FOIA case; and has, through its Trustee, Russell Bauknight, taken action confirming its existence. [R., p. 262]

Argument

I. The Court Erred in Directing that the Legacy Trust be Dismissed on Remand.

In its opinion, this Court made no finding on whether the Legacy Trust was a public body subject to FOIA. Instead, the Court reversed the Order appealed from and remanded with a direction that the circuit court dismiss the Legacy Trust as a party to this action. This instruction is based on the Court's finding "that the issuance of the Wilson opinion mooted the premise for naming the Legacy Trust as a defendant in this action." No further explanation is given for this finding, and Appellant respectfully submits that it is in error.

First, the record and law cited by Appellant herein fully support a finding that the Legacy Trust is a public body. *Weston v. Carolina Research & Development Foundation*, 303 S.C. 398, 401 S.E.2d 161 (1991), holds that even indirect public support of an organization could cause that organization to be treated as a public body. Likewise, *Associated Press v. Sebelius*, 31 Kan.2d 1107, 78 P.3d 486 (Kan. 2003), holds that an organization's use of state employees (who were not paid outside their state salaries), meant that it was a public body for FOIA purposes.

Importantly, the Legacy Trust did not dispute that it was supported by the use of multiple members of the Attorney General's office in defending its creation, funding and continued existence. See *Wilson*, 743 S.E.2d 746, 768.⁹

Even if the *Wilson* decision had somehow terminated the Legacy Trust (which is inconsistent with the record herein, including the Legacy Trust's own positions), the Court appears

⁹ "The AG has taken unprecedented action in this case. After effecting a total takeover of Mr. Brown's estate by excluding its trustees and banding together with parties who stand only to gain from the invalidation of the testator's devise, the AG disposed of the court-appointed trustees, created a new settlement entity, and inserted himself into the day-to-day operations of a newly created charitable trust, the Legacy Trust." *Id.*

to have overlooked that *Wilson* was not decided until nearly two years after the FOIA request was made in June 2011. At that time, both the Legacy Trust and the AG were defending the Legacy Trust's funding and the propriety of the AG's actions in creating the Legacy Trust in the appeal which would later result in *Wilson* and also pursuing Richland 4900.

If *Wilson* did affect the continued existence of the Legacy Trust or its status as a public body, any documents possessed or controlled by the Legacy Trust during the period during which the AG had unfettered control over it would have remained public and must have been preserved for FOIA compliance.

The South Carolina Public Records Act, S.C. Code Ann. §30-1-10, *et seq.*, requires that public bodies maintain their public records. Further, the chief administrative officer of any public body is required, if he has no successor, to deliver public documents in his possession to the Archives. *See* S.C. Code Ann. §30-1-40. The statutory scheme for maintaining and preserving public records cannot be reconciled with a finding that the obligations the Legacy Trust had to maintain or release public records was extinguished by the Supreme Court's holding in *Wilson*.

Further, the record in this case demonstrates that the Legacy Trust does exist and is a public body. The Legacy Trust was an active, public body subject to FOIA at its creation in late 2008 or early 2009. [R. 17] It remains so today.

On March 18, 2013, between the first *Wilson* decision and the final May 8, 2013, decision, the Legacy Trust claimed in this FOIA action that if the final *Wilson* decision was consistent with the first ruling, the Legacy Trust would not exist. After the final decision, however, the Legacy Trust continued to function in Richland 4900 and elsewhere.

In the six years since the first *Wilson* decision, the Legacy Trust has pursued Richland 4900 with and for the AG, Tommie Rae and others the AG chose as beneficiaries of the Legacy Trust.

In addition, its trustee, Bauknight, has remained an agent for Tommie Rae and other will contestants in Richland 4900. The AG had done nothing to curb Bauknight's alliance with those seeking to dismember Brown's "I Feel Good" Foundation.

The Legacy Trust moved for and received summary judgment on Appellant's counterclaims against it in Richland 4900, and it continues to this day to defend that result on appeal before this Court.

Importantly, the Legacy Trust was 47 1/2% charitable on the day of the Wilson decision. If -- contrary to the evidence -- the Legacy Trust did cease to exist, Bauknight would have been required under S.C. Code Ann. §62-7-413 and the Internal Revenue Code to take certain actions to protect the charitable assets. The AG is the state's official charged with assuring such actions are taken. There is no evidence in the record to suggest that a charitable dissolution took place.

The Legacy Trust was created and is controlled by the AG. It was active for nearly four years before the *Wilson* decision. It has continued to litigate for six years since. Nothing in the record supports dismissal of the Legacy Trust as a defendant.

Given all of the above, this Court's finding that the circuit court erred in dismissing the claims against the Legacy Trust as moot, but that the Legacy Trust should nonetheless be dismissed in light of the later-decided *Wilson*, should be reversed. Because the issue of whether the Legacy Trust is public is not moot, the Court should proceed with deciding this issue which was briefed extensively by the parties.

II. The Court Erred in not Directing the AG to Turn Over all Responsive Documents.

Although the Court determined that Appellant's FOIA claims against the AG were not moot, it stopped short of finding that she is entitled to all responsive documents from the AG. Appellant respectfully submits that, particularly in a now 8-year-old FOIA matter, it is error for this Court to remand that question for further proceedings.

Section 1 of the FOIA states:

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

This Court in its opinion quotes¹⁰ the above passage, with the same portion emphasized. Further, in Footnote 9 of the published opinion, the Court cites and quotes from four reported South Carolina FOIA cases to support its acknowledgment that FOIA is taken very seriously by the courts. It nonetheless remands this 8-year-old case for further proceedings.

Based on the record before this Court and the law cited in the Court's opinion herein, Appellant submits that this Court is in a position to direct the AG's production of responsive documents to the FOIA request. The only basis ever advanced by the AG for nondisclosure of documents to Appellant was that her FOIA requests were subordinate to discovery in Richland 4900. [R. 239] The Court held on that point:

In sum, we decline to depart from precedent by imposing a blanket prohibition on disclosure whenever the person seeking public records is simultaneously being sued by the public body in possession of those records. *Opinion* at 10.

Having dispensed with the AG's sole argument regarding an alleged exemption, this Court should promote the stated purposes of FOIA by directing that the AG must fully respond and produce all

¹⁰ While this is quoted in the separate, published opinion in *Adele J. Pope v. Alan Wilson, in his capacity as Attorney General of South Carolina*, Op. No. 5657 (S.C. Ct. App. filed Jun 19, 2019), the Court incorporates Section 1 of the published opinion into its opinion in this case.

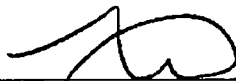
requested documents, leaving only the issue of attorneys' fees and costs for determination on remand.

Conclusion

For the foregoing reasons, Appellant respectfully petitions this Court to grant a rehearing on the points above or, alternatively, to substitute this Court's June 19, 2019 opinion with one which:

1. Eliminates the direction that the Legacy Trust be dismissed on remand;
2. Finds based on the record herein that the Legacy Trust is a public body subject to FOIA;
3. Directs the AG and the Legacy Trust to fully respond to the FOIA requests, and produce all requested documents; and
4. Remands the matter for a final determination of attorneys' fees and costs.

Respectfully submitted,



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June 27, 2019

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Appellate Case No: 2016-001727

Adele J. Pope. Appellant,

v.

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

RESPONDENT ATTORNEY GENERAL'S PETITION FOR REHEARING

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JUL 16 2019
SC Court of Appeals

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

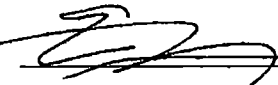
The Attorney General has supplied Appellant with the only document responsive to her request. This Court should affirm the circuit court’s decision on grounds of mootness and/or affirm on the basis that Appellant failed to submit her request to the Attorney General’s Office so as to require a response. 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,

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Deputy Solicitor General
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BY: 

ATTORNEYS FOR RESPONDENT
ATTORNEY GENERAL

July 16, 2019

STATE OF SOUTH CAROLINA
In the Court of Appeals

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

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.

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

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.¹ These allegations are completely irrelevant to the case and issues

¹ 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.² 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.

² 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.³ 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.⁴ 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

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

⁴ 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.⁵

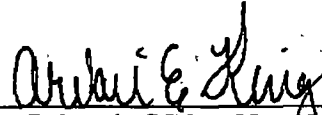
Next Appellant claims that the Legacy Trust was in existence for 2 years after the filing of the instant action and prior to the Wilson decision, and therefore, any documents the Legacy Trust had in that two year period must be produced. However, Appellant fails to acknowledge that the documents related 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

⁵ 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 can 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

Columbia, SC

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Appellate Case No. 2016-001727

Adele J. Pope. Appellant,

v.

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

**RESPONDENT ATTORNEY GENERAL'S RETURN TO
APPELLANT'S PETITION FOR REHEARING**

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AUG 09 2019
SC Court of Appeals

The Attorney General believes that this litigation should be brought to a close, but opposes Appellant's Petition as a means of doing so.¹ Her Petition should be denied as to the Attorney General because this matter is moot in that she has received all of the documents that are responsive to her Freedom of Information Request, and she does not identify any documents that have not been produced. Further, her Petition should also be denied because it contains lengthy, irrelevant allegations most of which lack citations to appropriate documents in the Record on Appeal which further underscores why this litigation should end.

INTRODUCTION

Appellant's 32 page Petition consists of 25 pages of her alleged version of a history of James Brown events and proceedings in various cases most of which are not supported by citations to the record. Most of the scattering of citations to the record are to Appellant's own numerous affidavits and memoranda that she filed in this proceeding, and they contain hearsay and unsupported statements about the actions of others. *See, eg.* Petition at pp 3-7, 13 & 14. The Attorney General filed motions to strike most of Appellant's affidavits (R. pp. 85-96, 229-232), but the circuit court did not address the motions before dismissing the case altogether. R. p. 9. The Court of Appeals should not rely on the affidavits and memoranda now and should strike Appellant's undocumented statements from her Petition.² Appellant also addresses matters in her separate FOIA case, No. 2016-001708, which are not before this Court

1 The Attorney General has also filed his own Petition for Rehearing which he maintains. Although some of his arguments in this Return may overlap with those in his Petition, this Return is not intended to supplement or reiterate the arguments in his Petition.

2 Because the Petition's numerous pages of allegations and characterizations are also irrelevant to the issues before the Court, the Respondent Attorney General does not attempt to address them herein. His not addressing them does not mean that he agrees with them.

in the instant appeal. *See, eg*, Petition at pp. 12 and 16. Contrary to her allegations of delay as to the Office of the Attorney General, counsel for his Office wrote and emailed the Court multiple times that this FOIA case should be heard. R. pp. 484(letter 3.28.13: "hearing of motions involving the Attorney General should not be stayed and should be heard"), 505(email 5.8.13: "Our position is that the FOIA cases should NOT be held in abeyance and that they should be scheduled as soon as is convenient for the Court"), 513 (email 5.7.14: "We have no objection to a hearing at your Honor's convenience although, as stated in previous correspondence and filings, we believe that Plaintiff has all documents that could be considered responsive to her FOIA request at issue in this proceeding"), and 515 – 517.

As discussed below, Appellant's Petition shows no basis for relief against the Attorney General.

**Appellant's Petition Does Not Request Any Documents
Other Than Those She Has Already Received**

Appellant's Petition only asks that this Court "direct[] that the AG must fully respond and produce all requested documents leaving only the issue of attorneys' fees and costs for determination on remand" Petition at pp. 31 & 32. Appellant never once identifies any documents that she claims that the AG has not produced which are responsive to her request. Her brief on appeal contains no legal arguments that the Attorney General did not supply all responsive documents nor does her reply brief respond to his argument that this matter is moot.

Appellant asked for the following documents in a June 30, 2011, letter addressed to the "Custodian of Records of the Office of the Attorney General":

1. The final and all drafts, signed and unsigned, of the James Brown Legacy Trust.

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

R. p. 26. The Attorney General never received that letter other than as an attachment to the Complaint. Brief of Attorney General at pp. 4, 5 and 18; R. p. 168. Nevertheless, the Attorney General attached to his answer the only document responsive to Request No. 1, an unsigned copy of the Legacy Trust draft. R. pp. 175-193 and 194-209. He did not have documents responsive to Request 2. R. pp. 173, 174 and 257; Brief of Attorney General at p. 6.

Appellant's Petition does not identify any responsive documents that have not been produced. Although her Statement of Facts" in her Brief on Appeal 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," the Argument section of her brief contains no legal argument that he had these documents to produce or any others.³ Appellant's Reply Brief did not respond to the Attorney General's mootness argument in his Brief. Therefore, because Appellant has received the only responsive document in the Attorney General's possession, this matter is moot. *Sloan v. Friends of Hunley, Inc.*, 630 S.E.2d 474, 478, 369 S.C. 20, 26 (2006)(case moot when requested documents provided).

3 At the motions hearing in this case in May 2016, Appellant 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 addressed to the Custodian of Records (R. 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 by not briefing it. *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).

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.⁴ He respectfully requests that this Petition be denied.

Respectfully submitted,

ALAN WILSON
Attorney General

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J. EMORY SMITH, JR.
Deputy Solicitor General
S.C. Bar No. 5262

BY: 

ATTORNEYS FOR RESPONDENT
ATTORNEY GENERAL

August 9, 2019

⁴ The Attorney General maintains all defenses to this Petition which are set forth in his Final Brief on Appeal including his additional sustaining ground that the Office of the Attorney never received Appellant's FOIA request by mail or delivery so as to trigger a duty to respond.

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Richland County
Court of Common Pleas

The Honorable Doyet A. Early, III, Circuit Judge

Appellate Case No. 2016-001727

RECEIVED
AUG 16 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 Bauknight, its Trustee.....Respondents.

**APPELLANT'S REPLY TO JAMES BROWN LEGACY TRUST'S RETURN TO
PETITION FOR REHEARING**

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Counsel for Appellant

Appellant submits this reply to the return on the James Brown Legacy Trust ("Legacy Trust") to her Petition for Rehearing in this matter.

As an initial matter, Appellant submits that the facts set out in her Petition were properly cited and found in the record. Because the Legacy Trust identifies no specific fact(s) which are alleged to be outside the record, Appellant does not undertake to reiterate or rehash the facts, but does incorporate her Petition herein where relevant.

The Legacy Trust's argument against rehearing appears to be two-fold. First, that this Court should not reach the question of whether the Legacy Trust is a public body under the FOIA and, second, that the Attorney General's production of documents moot's the Legacy Trust's obligation to do so. Appellant respectfully submits that both of the Legacy Trust's arguments are erroneous.

The matter of whether the Legacy Trust is a public body for FOIA purposes was fully briefed by Appellant and the Legacy Trust. *See* Appellant's brief at 15-20, Brief of Legacy Trust at 5-10. As set out in Appellant's Petition for Rehearing, this Court made a finding, without specific analysis, that *Wilson v. Dallas* negated the need for the Legacy Trust as a party. That finding did overlook or misapprehend that the Court had before it and fully briefed the question of whether the Legacy Trust was a public body and, if so, whether it's status had changed after *Wilson*. In either event, the Legacy Trust's current or historical status as a public body affects Appellant's right to a full response under the FOIA. Appellant incorporates her arguments made in the Petition for Rehearing on this matter and submits that this Court should grant her Petition on that ground.

As to the Legacy Trust's argument that the AG's production of documents somehow relieves another public body of producing documents, Appellant is unable to find any statutory or case law which limits any person's FOIA rights by what that person has or may obtain from

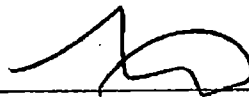
another source. By the Legacy Trust's logic, persons seeking information under the FOIA would be burdened with demonstrating that they do not already have the documents which might be produced and/or being forced to attempt FOIA requests from other bodies before getting a response from the body in question. Both of these possibilities fly in the face of the FOIA's stated purposes – allowing the speedy and inexpensive production of public documents and information. *See* S.C. Code Ann. §30-4-15.

Should it turn out that the Legacy Trust has only documents identical to those already in Appellant's possession, there is information to be gained from knowing that. Under the FOIA, however, she remains entitled to a response from any public body to which she has directed a proper FOIA request.

Conclusion

For the foregoing reasons and those set forth in her Petition for Rehearing herein, Appellant respectfully moves this Court to grant a rehearing on the points above or, alternatively, to substitute this Court's June 19, 2019 opinion with one which finds the Legacy Trust to be a public body under the FOIA and directs that it fully respond to the FOIA request and produce all requested documents, and remand the matter for a final determination of attorneys' fees and costs.

Respectfully submitted,



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Counsel for Appellant

August 16, 2019

STATE OF SOUTH CAROLINA
In the Court of Appeals

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Appeal from Richland County
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SC Court of Appeals

The Honorable Doyet A. Early, III, Circuit Judge

Appellate Case No. 2016-001727

Adele J. Pope..... Appellant,

v.

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

**APPELLANT'S REPLY TO ATTORNEY GENERAL'S RETURN TO
PETITION FOR REHEARING**

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Counsel for Appellant

Appellant submits this reply to the return on the South Carolina Attorney General ("AG") to her Petition for Rehearing in this matter.

As an initial matter, Appellant submits that the facts set out in her Petition were properly cited and found in the record. Because the AG identifies no specific fact(s) which are alleged to be outside the record, Appellant does not undertake to reiterate or rehash the facts, but does incorporate her Petition herein where relevant.

Instead, the AG argues that this Court should find the entire case mooted in light of its assertion that it has produced all responsive documents. The AG argues that Appellant should have to specifically identify documents to be produced, a suggestion which is completely unsupported by statutory or case law regarding the FOIA (as is apparent by the AG's failure to cite a single statute or case in support of its position). The AG appears to acknowledge in footnote 3 of its Return that it has not produced any responsive documents in possession of its counsel, Sweeny, Wingate and Barrow, P.C. ("SWB"), because Appellant did not specifically request documents from that firm. Appellant respectfully submits that the FOIA does not place upon her the burden of knowing or alleging where each responsive document is held, and in fact, appears to place the burden on the public body of producing responsive documents beyond those in the direct possession of the public body. S.C. Code Ann. §30-4-20(c) sets forth:

"Public record" includes all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body.

Appellant submits that the AG has the obligation of producing documents "prepared, owned, [or] used" by the AG, even if same are in the current possession of SWB, which it employs. The AG's position, as set out in its Return, appears to indicate that any person requesting documents or information from a public body is tasked with instructing the public body on where to find its

own public documents. This conflicts with the plain language of the FOIA statutes, and Appellant submits that the AG's argument in its Return gives a non-hypothetical example of why her Petition should be granted.

Because the AG has never given a proper response to the 2011 FOIA request, setting out what documents he possessed and what documents would be withheld under a *specific* exemption, it would be impossible for Appellant to have to go fishing for each specific document, including its location. Appellant again asks that this Court grant her Petition for Rehearing and direct the AG to fully respond as set out in S.C. Code Ann. §30-4-30(c).

Conclusion

For the foregoing reasons and those set forth in her Petition for Rehearing herein, Appellant respectfully moves this Court to grant a rehearing on the points above or, alternatively, to substitute this Court's June 19, 2019 opinion with one which directs that the AG fully respond to the FOIA request, and produce all requested documents and remand the matter for a final determination of attorneys' fees and costs.

Respectfully submitted,



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June 27, 2019

The South Carolina Court of Appeals

Adele J. Pope, Appellant,

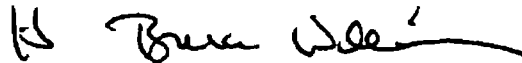
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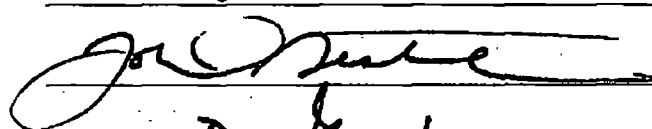
Alan Wilson, in his capacity as Attorney General of
South Carolina, and James Brown Legacy Trust, by
Russell L. Bauknight, its Trustee, Respondents.

Appellate Case No. 2016-001727

ORDER

Appellant and Respondent Alan Wilson have filed petitions for rehearing. After careful consideration of the petitions, the Court has discovered no material fact or principle of law that has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petitions are denied.



J.


J.


J.

Columbia, South Carolina

cc:

Adam Tremaine Silvernail, Esquire

J. Emory Smith, Jr., Esquire

Keith M. Babcock, Esquire

Ariail Elizabeth King, Esquire

David Lee Paavola, Esquire

Robert D. Cook, Esquire

FILED

August 22, 2019