

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Appellate Case No. 2019-001581

RECEIVED

OCT 09 2019

S.C. SUPREME COURT

Adele J. Pope,

Petitioner,

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 WRIT OF CERTIORARI

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INTRODUCTION

Petitioner is seeking a writ of certiorari for a case that was unanimously decided in favor of Respondent and for which rehearing by the Court of Appeals has been denied. Furthermore, Petitioner has failed to set forth any considerations that render this matter appropriate for review by this Court.

As set forth in Rule 242, SCACR, “a writ of certiorari is not a matter of right, but of sound judicial discretion and will only be granted where there are special and important reasons.” The Rule sets forth the general character of reasons that would support a grant of certiorari: (1) where there are novel questions of law; (2) where there is a dissent in the decision of the Court of Appeals; (3) where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court; (4) where substantial constitutional issues are directly involved; (5) where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court. Rule 242(b), SCACR. In her Question Presented, Petitioner merely asserts that the Court of Appeals “erred” in failing to find that the James Brown Legacy Trust was a public body. *Petition for Writ of Cert.*, p. 2. Petitioner is simply attempting to reargue an issue that has been unanimously rejected by the Court of Appeals by claiming it is “novel.”¹

Moreover, contrary to Petitioner’s claim, the Court of Appeals did provide a clear explanation for its dismissal of the James Brown Legacy Trust (“the Legacy Trust”) as a defendant:

¹ None of the other consideration in Rule 242 are present here and Petitioner does not assert any of those as a basis for certiorari.

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.

App. p. 128. The court agreed with the Legacy Trust that “*Wilson* effectively terminated the Attorney General’s involvement in the Legacy Trust,” which was Petitioner’s basis for her assertion that FOIA applied to the Legacy Trust. App. p. 128. Similarly, the Court of Appeals also clearly explained its basis for reversing the circuit court’s order. While the end result—dismissal of the Legacy Trust—is the same, the Court of Appeals explained that “rather than 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 is moot.” *Id.* Since elsewhere in the order the Court of Appeals rejected the argument that the case was moot as to the Attorney General, the court reversed the lower court’s order with instructions to dismiss only the Legacy Trust as a defendant.²

STANDARD OF REVIEW

On certiorari, this Court will review only errors of law and will not review factual findings unless wholly unsupported by the evidence. S.C. Bd. of Exam'rs in Optometry v. Cohen, 256 S.C. 13, 180 S.E.2d 650 (1971); Hollman v. Woolfson, 384 S.C. 571, 577, 683 S.E.2d 495, 498 (2009).

² The Attorney General argued that the matter was moot because the Attorney General had provided responsive documents and also asserted that Pope was improperly using FOIA to bypass the discovery in other litigation involving the Attorney General and herself. The circuit court disagreed with the mootness argument and addressed the FOIA bypass argument in a related opinion, *Pope v. Wilson*, Op. No. 5657 (S.C. Ct. App., filed June 19, 2019), which was referenced by the Court of Appeals. Because there were outstanding issues involving the FOIA to the Attorney General that the circuit court would need to consider upon remand, the case was reversed with instructions to dismiss the Legacy Trust as a defendant and for further proceedings regarding the Attorney General. Petitioner’s feigned confusion as to the Court of Appeals’ basis for its ruling and reversal is simply a tactic to attempt to persuade this Court that certiorari is needed when it is obvious that there is no such need.

I. The opinion in Wilson v. Dallas effectively voided the Legacy Trust and rendered the FOIA moot.

Petitioner initially claims that the opinion in Wilson v. Dallas, 403 S.C. 411, 743 S.E.2d 746 (2013), “did not...void the James Brown Legacy Trust” and that this Court simply reversed the lower court’s approval of a settlement agreement. Pet. Brief, p. 6. This argument is mere semantics. This Court reversed the circuit court’s approval of the compromise, which, though not expressly stated, had the effect of voiding or nullifying the Legacy Trust³—or certainly the Attorney General’s involvement in it. The opinion expressly “invalidat[ed] the circuit court’s approval of the compromise agreement....”⁴ Wilson, 403 S.C. at 450, 743 S.E.2d at 765. The opinion in Wilson also stated:

However, the AG has no authority to become completely entrenched in an action that began here as one to set aside a will and for statutory shares, direct the settlement negotiations, and then fashion a settlement that discards Brown's will and his 2000 Irrevocable Trust and replaces them with new trusts, only to give himself sole authority to select the managing trustee

Wilson v. Dallas, 403 S.C. at 445–46, 743 S.E.2d at 765. This intervening event moots Appellant’s argument that the Legacy Trust is subject to the FOIA because of the Attorney General’s anticipated oversight (which never came to fruition because the settlement was reversed). *See*

³ To support her argument that the Wilson opinion did not void the Legacy Trust, Petitioner’s Brief actually cites to an argument her own attorney made to Judge Manning in a related case. Obviously, lawyer arguments are not evidence and Petitioner’s attempt to bootstrap a previous argument as legal support in this matter should be rejected. *See, e.g.*, Ralph King Anderson, Jr., South Carolina Requests to Charge-Civil, 2002, § 1-8 (“You may not consider as any evidence of counsel made during trial.”) Throughout this case, Petitioner has used similar tactics, such as submitting an affidavit that cites to news articles (including one written by Petitioner herself) and contain hearsay and speculation, rather than relevant facts actually known to Petitioner. *See*, R.p. 464.

⁴ Even Petitioner recognizes that this Court “**voided** the AG’s settlement....” Pet. Brief, p. 7 (emphasis added).

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.”); *see also*, 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 other words, in light of the ruling that the trusts established by James Brown could not be replaced with new trusts, the Legacy Trust was essentially rendered null and void.

II. The Court of Appeals did not err in not reaching the issue of whether the Legacy Trust is a public body.

After claiming the Legacy Trust is not void, Petitioner turns to the main thrust of her argument: that the Court of Appeals erred in failing to issue a ruling on whether the Legacy Trust is a public body under FOIA.⁵ However, the Court of Appeals did not need to reach that issue because it determined that the 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

⁵ 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; App. p. 48-51.

*1 (S.C. Ct. App. July 18, 2012). The mere fact that Appellant is dissatisfied with the Court of Appeals' ruling is not grounds for certiorari.⁶

III. The law is clear that the Legacy Trust does not qualify as a public entity subject to FOIA and the Attorney General's former involvement in the now-void Legacy Trust did not convert it into a public body.

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 previous 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

⁶ The Court of Appeals' determination that mootness required the dismissal of the Legacy Trust, and its finding that there was no need to reach the issue of the Legacy Trust as a public body are not novel questions of law. The ruling sets no new precedent and, because the facts of this case were particularly unusual, the ruling is effectively limited to this case.

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.⁷ 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.⁸ 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 to a FOIA-like disclosures where it was not acting as state’s agent or expending the funds for the public benefit).

Petitioner has attempted, throughout this case, to convert the Legacy Trust to a public entity by claiming it has been supported by the Attorney General, relying primarily on *Weston v.*

⁷ In fact, due the decision in *Wilson v. Dallas*, the Attorney General’s anticipated involvement in oversight of the Legacy Trust never truly came to fruition and the Attorney General has not had any other involvement in the Legacy Trust. R.p. 495.

⁸ 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).

Carolina Research & Development Foundation, 303 S.C. 398, 401 S.E.2d 161 (1991).⁹ In Weston, the question was whether a private non-profit 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, this Court's opinion in Disabato v. South Carolina Association of School Administrators, *supra*, 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. This 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, this Court clarified the "limited

⁹ Petitioner's additional reliance on a case from Kansas, Associated Press v. Sebelius, 78 P.3d 486 (Kan. Ct. App. 2003), is not persuasive. That case involved the Kansas Open Meeting Act rather than FOIA, and was concerned with state employees serving in a group organized by the governor-elect to evaluating efficiencies and savings in state government. The court concluded that while the group was publicly funded and had a public purpose, with meeting times that could be directly traced to specific state employees, it still was not an agency, subordinate of an agency or other entity subject to the open meeting law of that state.

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.

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 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.¹⁰ R. p. 494-496.

Petitioner argues that because members of the AG’s office defended the Legacy Trust’s creation, funding, and existence in the Wilson case, the Legacy Trust has been directly supported by the AG. Of course, what Petitioner fails to recognize is that the Attorney General was a party in Wilson (unlike the Legacy Trust or its Trustee Mr. Bauknight) and the Attorney General’s “support” of the Legacy Trust was in the context of the compromise approved by the circuit court and the Attorney General’s role in that compromise.¹¹ In other words, any defense of the

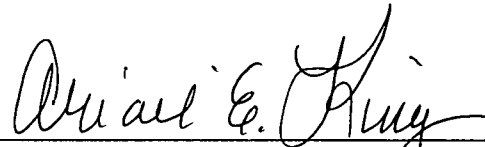
¹⁰ In contrast, see Quality Towing, Inc. v. City of Myrtle Beach, 345 S.C. 156, 161-63, 547 S.E.2d 862, 864-65 (2001) (Committee formed to help determine the award of a City contract that involves the expenditure of city funds is subject to FOIA).

¹¹ Moreover, 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.

existence of the Legacy Trust was ancillary to the Attorney General's defense of his own actions. Such ancillary support does not convert the Legacy Trust into a public body.¹²

CONCLUSION

Petitioner has failed to set forth any ground for certiorari. This case does not present a novel issue of law and Petitioner is simply seeking another bite at the apple. The Court of Appeals correctly determined that the Petitioner's basis for including the Legacy Trust in the FOIA-- the Attorney General's anticipated oversight of the Legacy Trust—never came to fruition and that this Court's ruling in Wilson v. Dallas effectively voided the Legacy Trust and the Attorney General's interest, thereby mooting Petitioner's inclusion of the Legacy Trust as a defendant. After making that dispositive decision, the Court of Appeals was not required to address the remaining issues. However, the overwhelming evidence and case shows that the Legacy Trust was never a public body subject to FOIA. Respondent Legacy Trust respectfully requests that the petition for certiorari be denied.



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¹² In addition, the Legacy Trust has not been represented by Attorney General with regard to Petitioner's initial FOIA or the instant litigation.

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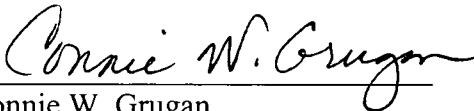
PROOF OF SERVICE

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

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This 9th day of October, 2019.