

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

The Honorable Doyet A. Early, III, Circuit Judge

Appellate Case No. 2019-001581

RECEIVED

OCT 18 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 Bauknight, its Trustee.....Respondents,

**PETITIONER'S REPLY TO RETURN OF RESPONDENT JAMES BROWN LEGACY TRUST TO PETITION FOR WRIT OF CERTIORARI**

Petitioner respectfully submits this reply to the return of the James Brown Legacy Trust (Legacy Trust) dated October 9, 2019 to Petitioner's petition for writ of certiorari.<sup>1</sup>

As more fully set out herein, the return of the Legacy Trust overlooks novel issues raised in the petition for certiorari, including but not limited to the determination of whether an entity created by the South Carolina Attorney General ("AG") and entirely under the AG's control is a "public body" under the FOIA. The case additionally includes constitutional issues, including issues related to the use of FOIA disruption and noncompliance by two public bodies to promote the announced intention of Legacy Trust

<sup>1</sup> Petitioner incorporates by reference her petition for writ of certiorari and denies all assertions in the return not specifically addressed herein.

beneficiaries to disregard the Supreme Court's May 8, 2013 decision in *Wilson v. Dallas*, 403 S.C. 411, 743 S.E.2d 746 (2013). The petition for certiorari and appendix outline for this Court the eleven-year effort of Respondent Legacy Trust, controlled by the Attorney General of South Carolina (AG), to enforce a 2008 settlement brokered by the AG which dismembered the estate plan of entertainer James Brown; attempted to designate James Brown's heirs under both state and federal law; and put all of James Brown's assets into the Legacy Trust for management and distribution as directed by the AG. *Id.* at 421, 743 S.E.2d at 752. For nine of those eleven years Richland County Case 2010-CP-40-4900 (Richland 4900), a tort suit brought by the AG and Legacy Trust for the benefit of the AG and other Legacy Trust beneficiaries, has been used to try to enforce, and later reinstate, the AG's 2008 settlement. [R. 17, R. 19] Since 2011, the AG and the Legacy Trust have used both FOIA<sup>2</sup> noncompliance and Richland 4900 to advance their effort.

If the decision of the Court of Appeals with respect to the Legacy Trust is not reviewed by the Supreme Court, and reversed, FOIA will be seriously weakened at the hand of the public official charged with its enforcement.

### **History of the Legacy Trust<sup>3</sup>**

In 2008, the AG, along with Tommie Rae and others, created the James Brown Legacy Trust. Tommie Rae and certain children of James Brown transferred all of their copyright termination rights interests to about 900 of James Brown's copyrights to the Legacy Trust, and the AG was given the absolute right to select the Legacy Trust's trustee and replace the trustee at will. *Wilson* at 421, 743 S.E.2d at 752.

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<sup>2</sup> S.C. Code Ann. §30-4-10, et seq.

<sup>3</sup> The history of the Legacy Trust is more fully set out in the Petition for Rehearing herein.

The AG and Tommie Rae together hold 75% of the voting rights on management of the Legacy Trust. *Id.* at 422, 743 S.E.2d at 752. Combined with the AG's sole authority to appoint and replace the Legacy Trust's trustee, the AG and Tommie Rae together have full control of the Legacy Trust.

The AG and Legacy Trust have worked since 2011 to conceal the public documents Petitioner properly requested under FOIA, and others. These public bodies have done so for a private benefit. This flies in the face of decisions of this Court and FOIA. The Court of Appeals' ruling does not, as the Legacy Trust argues on pages 1 and 2 of the return, adequately deal with these issues.

**A Ruling is Needed as to the Status of the Legacy Trust as a Public Body, and this Case Presents Novel Issues as to its Obligations under FOIA**

On pages 5 and 6 of the return, the Legacy Trust argues that the Court of Appeals did not need to rule on the status of the Legacy Trust as a public body, either before or after *Wilson, supra*. The Legacy Trust asserts that *Wilson* made it unnecessary for the question to be answered. This is not the case. In this FOIA case a primary, and novel, question for the Court has existed since 2011, namely:

Where the AG creates and effectively controls a trust; devotes state resources to defending its funding; and allows it to manage and expend private funds over which the AG has taken control solely as a result of the exercise of his public office, is the trust [Legacy Trust] a "public body" under FOIA?

Because this question and those which flow from it involve the public official charged with the enforcement of FOIA, they are both novel and essential to the proper operation of FOIA.

In a case raising a novel question of law; the appellate court is free to decide the

question with no particular deference to the lower court. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 411, 526 S.E.2d 716, 719 (2000) (citing S.C. Const. art. V, §§ 5 and 9, S.C. Code Ann. §§ 14-3-320 and -330 (1976 & Supp. 2005), and S.C. Code Ann. § 14-8-200 (Supp.2005) ); *Osprey, Inc. v. Cabana Ltd. Partnership*, 340 S.C. 367, 372, 532 S.E.2d 269, 272 (2000); *Clark v. Cantrell*, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000).

The Legacy Trust argues that it “was not under the control of” the AG. (Return, p. 7) It further argues that “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.” (Return, n. 11) These assertions are completely out of line with the record herein and this Court’s previous holdings in *Wilson*, which show the AG has absolute authority as to the appointment and replacement of the Legacy Trust’s fiduciary, along with 50% control of the voting rights as to management.

Further, this Court made clear findings in *Wilson* that the AG held unprecedented control over the management of the Legacy Trust. *Wilson* at 421-2. Chief Justice Toal, in her Honor’s concurrence to the majority opinion, wrote separately “to comment on what [Chief Justice Toal] view[s] as the government’s unprecedented encroachment into estate administration.” *Wilson*, Toal Concurrence at 451.

Chief Justice Toal proceeded to summarize the AG’s involvement as follows:

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. *Wilson*, Toal Concurrence at 453.

This Court’s previous findings, along with the entire record herein, show that the

AG was in complete control of the Legacy Trust at its inception, and remains so.

Respondent's further argument that the Legacy Trust is not subject to FOIA because it did not receive public funds is without merit. As more fully argued in the Petition herein, there is substantial case law holding that "support" can be in kind, and entities which received little or no actual funding from the State are subject to the FOIA where they are otherwise supported by the State. In fact, an opinion letter of the AG in 2006, based on some of the same case law Petitioner cites, advised that after "a plain reading" of the FOIA, the AG "do[es] not believe the Freedom of Information Act attempts to draw a quantitative line between 'insignificant' or 'de minimis' support and substantial or significant support from public funds." Op S.C. Atty. Gen., May 19, 2006. The AG further noted indirect or in-kind support was adequate to subject an entity to the FOIA. [R. 292-298]

The AG's deep involvement with the Legacy Trust, and the use of State resources to create, defend and fund it, show that it must be subject to the FOIA.

**The Legacy Trust Exists, Holds Termination Rights Proceeds, and is Currently Active**

On pages 4 through 5 of its return the Legacy Trust asserts it does not exist. Its position is based almost entirely on an affidavit of Russell Bauknight, trustee of the Legacy Trust, which is in direct conflict with its vigorous FOIA noncompliance.

Richland 4900 is still pending more than nine years after its commencement and more than six years after this Court decided *Wilson*. The Richland 4900 Plaintiffs have never informed any Court that the Legacy Trust does not exist or that it no longer seeks the relief it has asked for in the Richland 4900 complaint for nine years. It continues to assert claims against Petitioner for the benefit of Legacy Trust owners/beneficiaries.

At present the Legacy Trust is actively defending the AG and other Legacy Trust beneficiaries in two Court of Appeals cases related to a 2017 summary judgment they obtained as to Richland 4900 counterclaims and other relief the Legacy Trust and its beneficiaries have been granted by the circuit court. See Appellate Case Nos. 2017-01899 and 2018-02229.

The position taken by the Legacy Trust since May 2013 in FOIA matters presents two additional novel questions for this Court:

Where the Legacy Trust claims it ceased to exist in 2013, but was never properly dissolved and cannot be dissolved without the consent of the Attorney General, does it remain a public body under FOIA, and subject to compliance and the payment of legal fees and costs?

And:

If the Legacy Trust has been secretly dissolved, but from 2009 until 2013 received loans from the Estate/2000 Trust; managed \$4 million a year of private income over which the AG assumed control; and conducted a lawsuit, is its trustee [Bauknight] required to comply with FOIA requests made during its period of activity if it has not filed its records with the proper public authority?

As shown in the appendix, the Legacy Trust was established by the AG, Tommie Rae and certain clients of Louis Levenson, Esq., in 2008. [App. 16-17] By January 2009 Terry Brown (Terry) had been added as a beneficiary/owner [R. 478], and the termination rights proceeds of all individual owner/beneficiaries under sections 304 and 203 of the Copyright Act to certain U.S. royalties had been placed in the Legacy Trust.

In January 2011, the AG and others amended the Legacy Trust. [R. 478-483]

In June 2011, Petitioner made proper FOIA requests of the AG and Legacy Trust for the documents at issue herein. A Legacy Trust attorney threatened Petitioner with sanctions or a lawsuit when she requested a copy of the Legacy Trust, which was suing

her, and amendments. [R. 25-29; 48]

In 2012 the AG and other Legacy Trust beneficiaries paid Buchanan to release his counterclaims against them. The funds were advanced from funds Brown gave his "I Feel Good" Charity.

The Legacy Trust has been active since 2008 and continues to be active.

### **Conclusion**

The Legacy Trust's claim that it does not exist is inconsistent with the record and its current activity. Despite Respondent's protestations, the Petition for Certiorari presented herein demonstrates novel issues of law which this Court should consider. Petitioner respectfully submits that certiorari should be granted for the Supreme Court to review and rule upon the important FOIA issues raised in the petition and overlooked by the Court of Appeals.

Respectfully submitted,



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PROOF OF SERVICE

I certify that I have served the Reply to Legacy Trust's Return to Petition for Certiorari on all Respondents by hand-delivering a copy of same on October 18, 2019, addressed to his attorney of record as follows:

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