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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 Clifton B. Newman, Circuit Judge

Appellate Case No. 2021-000518

Adele J. Pope..... Appellant,

v.

Alan Wilson, in his capacity as Attorney General of South Carolina,
.....Respondent.

CORRECTED INITIAL BRIEF OF APPELLANT

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Statement of Issues on Appeal

- I. THE CIRCUIT COURT HAD SUBJECT MATTER JURISDICTION TO HEAR AND DECIDE THIS 10-YEAR-OLD FOIA CASE
- II. THE ATTORNEY GENERAL'S USE OF CHARITABLE RESOURCES HE CONTROLLED TO DELAY FOIA COMPLIANCE VIOLATED THE RIGHTS OF APPELLANT AND OTHERS SEEKING FOIA COMPLIANCE
- III. THIS COURT SHOULD PROCEED WITH DIRECTING THE AG TO PROPERLY RESPOND TO APPELLANT'S JUNE 30, 2011 FOIA REQUEST, INCLUDING BY PRODUCING STATE-OWNED FORMER LEGACY TRUST DOCUMENTS AND DOCUMENTS HELD BY WINGATE
- IV. RICHLAND 4900 DISCOVERY PROCEEDINGS DO NOT EXEMPT ANY REQUESTED DOCUMENT FROM PRODUCTION UNDER FOIA
- V. THE AG SHOULD PRODUCE WINGATE AND LEGACY TRUST DOCUMENTS UNDER FOIA
- VI. IN REVERSING THE ORDERS APPEALED FROM, THIS COURT SHOULD FIND THAT APPELLANT IS THE PREVAILING PARTY AND IS ENTITLED TO ATTORNEY'S FEES AND COSTS

Statement of the Case

On August 3, 2011 the complaint in this action under the South Carolina Freedom of Information Act¹ (“FOIA”) was filed in Newberry County. The original defendants were Alan Wilson, in his capacity as Attorney General of South Carolina (“AG”) and the James Brown Legacy Trust (“Legacy Trust”).

Plaintiff is a citizen and resident of Newberry County. The AG is a public body as defined under FOIA, and the official charged with the enforcement of FOIA.

The complaint seeks a declaration that the AG and Legacy Trust are public bodies under FOIA; that the court compel the AG to perform his official duty and the Legacy Trust to comply by permitting Plaintiff to inspect and copy certain public records; that the Court determine and order the payment to Plaintiff of reasonable attorney’s fees and other litigation expenses pursuant to S.C. Code Ann. §30- 4-100; that the AG should direct the law firm of Sweeney Wingate and Barrow, PA (collectively “Wingate”) and all special counsel to comply with their duties under FOIA; and that the Court set a hearing at the earliest possible date on the matters set forth in the complaint. [Complaint, pp. 2,3]

The complaint asserts that on June 30, 2011 Appellant sent to AG Wilson and the Legacy Trust separate requests under FOIA for public records related to the Legacy Trust, namely “the final and all drafts, signed and unsigned, of the [Legacy Trust].” [*Id.* pp. 2,3] It states that, in addition, the FOIA request sought the following from the AG:

All correspondence, email and/or other communications between any member of the Office of the [AG] and Russell 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. [Complaint, p.5]

¹ S.C. Code Ann. §30-4-10, *et seq.*

The complaint asserts that Wingate had refused to release the requested public documents and thousands of other already-public documents for nearly 10 months, although the AG's Retention Agreement for other Special Counsel requires special counsel to comply with FOIA. [Complaint, ¶¶20-22]

The complaint also asserts that on July 16, 2011 Plaintiff received from J. David Black, Esq., a response to the June 30 FOIA request which threatened Plaintiff as follows:

In the event that you continue to file unnecessary... 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 and sanctions. [Complaint, ¶23]

The complaint states that the response of attorney Black was in direct contrast to AG Wilson's position in the *Public Official's Guide to Compliance with South Carolina's Freedom of Information Act* in which AG Wilson 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 (p.1) [Complaint, ¶25]

Of the Legacy Trust, the complaint asserts:

28. On information and belief, the AG's right of absolute control of the Legacy Trust, along with the support it is provided by the AG's office and the funds the AG's office and Legacy Trust expect to receive and control, including from the State's suit against Plaintiff in Case 4900, make it a public body under §30-4-20. See, for example Opinions of Henry McMaster, AG, dtd. May 19, 2006 (in response to Merrill/Rutherford) and December 28, 2006 (in response to McConnell) [Compl., pp. 6,7]

The complaint also asserts:

30. On information and belief, it was willful and reckless for the AG's appointee to assert the attorney-client privilege or work product privilege protects the AG or the Legacy Trust from allowing Plaintiff to inspect and copy the requested documents

which create the vehicle used by AG McMaster and Bauknight to pursue collection of tens of millions of dollars from [Appellant] and which documents have been used as an authorization for Bauknight to act on behalf of the State. [Compl., p. 8]

The complaint further asserts:

31. Based upon the facts set forth above, this Court should enter an order declaring that the requested records are public records and should be made available to the public and Defendant by both AG Wilson and the Legacy Trust, as well as by all special counsel, for inspection and copying as provided by FOIA.

Attached to the complaint were the following exhibits:

Exhibit A – Ltr. of Pope to Custodian of Records, OAG, June 30, 2011;
Exhibit B – Ltr. of Pope to Custodian of Records, Legacy Trust, June 30, 2011;
Exhibit C – Statement of AG on Campaign Contributions by Special Counsel
Exhibit D – Affidavit Supporting Production of Legacy Trust, Fee Contract with State/AG and Related Documents... [Comp., Exs .A; B; C;D]

The complaint asserts that the public records sought by Plaintiff under FOIA had been requested from Wingate for a number of months. [Complaint, ¶22, Ex. D] Exhibit D to the complaint states that the AG's October 20, 2006 special counsel Litigation Agreement with private counsel in the AstraZeneca lawsuit provides:

F. Public Records

Any materials, data, files, discs, or documents created, produced or gathered by Special Counsel, or in Special Counsel's possession in furtherance of this litigation... shall be considered the exclusive property of... South Carolina. Special Counsel agrees to adhere to South Carolina's Freedom of Information Act, ... §30-40-10 et. seq. ... This agreement shall be considered a public document.
[Compl., Ex. D, pp. 7,8]

Exhibit D also references the AG's July 21, 2011 defense of the State/AG's use of private counsel in a filing in the AstraZeneca case in which the AG stated:

On occasion, the Attorney General, in carrying out his responsibility has found that it is necessary to hire outside counsel on a contingency-fee basis. These attorneys... take on substantial risks, litigating

these matters against multi-billion dollar entities, which employ scores of national law firms.²[Footnote 1 in text] ...Private counsel undertake this representation under the direction and control of the Attorney General ... [Exhibit D, p. 9, citing Reply, p 3.] Emphasis supplied.

On September 2, 2011 the AG served a Motion of Attorney General to Dismiss and Alternative Motion to Strike. [Mot. Dismiss, AG, 9/6/11] The AG asserted that venue was improper because the Honorable Casey Manning had determined that venue should be in Richland County because “it is the principal place of business of administration of the trusts at issue” in *Bauknight, etc., McMaster in his capacity as Attorney General, etc., et al., v. Pope and Buchanan*, 2010-CP-40-4900.... [Mot. Dismiss, AG, p.1] The AG attached a copy of the “Richland 4900” complaint. [Exhibit A, Mot. AG]. The AG also asserted:

2. Another action is pending among the same parties, as to the same or substantially the same claim under Rule 12(b)(8). *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 a lengthy exhibit to the instant complaint....Moreover, the documents requested in the [FOIA] request of the [AG] are the subject of pending motions in case 4900. ... Plaintiff is essentially pursuing through the instant suit the same discovery issues that are pending before the Court in Case 4900. [Mot. Dismiss, AG, p.2]

On September 9, 2011, the Legacy Trust also moved to dismiss the FOIA complaint under Rule 12(b). [Mot. Dismiss, LT, 9/9/11]

Appellant filed returns to both motions to dismiss and/or strike asserting that filings, orders and claims in Richland 4900 should have no effect on the venue in this matter. [Return to Mot. Dismiss, Legacy Trust, 9/12/11; Return to Mot. Dismiss, AG, 2/12/11] Appellant opposed the transfer to Richland County and consolidation with Richland 4900 sought by the AG. [Returns, 9/6/11, 9/9/11, p. 1] Appellant’s return states in part:

² 1 For example, in contrast to the figures cited by Defendants...AstraZeneca reported in mid-2009...that it had already spent \$593 million defending Seroquel matters.

9. The Freedom of Information Act has no provisions which could be construed to curtail a person who has been sued by the State from obtaining public documents held by public bodies. [Return, 9/12/11, p.3]

Appellant also filed an affidavit opposing the motion to dismiss and requesting an expedited FOIA hearing. [Affidavit, Pope, dtd. Sept. 6, 2011, w/ Exhibit A, 2/9/09 Petition for Removal of Bauknight as ST]

On September 16, 2011 Appellant filed a supplemental affidavit related to the \$4.7 million at-death valuation which was a subject of Appellant's FOIA request. [Affidavit, Pope, 9/19/11] The affidavit attached a December 6, 2009 email of Sr. Asst. AG Clyde "Sonny" Jones ("AG Jones") to Robert Buchanan ("Buchanan") and Appellant, and a letter of October 12, 2007 of The James Brown Legacy Trust, Inc. to the then-trustees of James Brown's 2000 Trust. [Exhibits, Aff. Pope, 9/16/11]

On September 30, 2011 Appellant filed a motion for summary judgment and an Affidavit Supporting Summary Judgment Including Determination that [Legacy Trust]... is a Public Body ...under FOIA [Mot. for Summary Judgment; Affidavit, Pope, filed 9/30/11]. Exhibits to the affidavit were two charts related to James Brown's estate plan, the AG's 2008 settlement with Tommie Rae Hynie ("Hynie") and other Richland 4900 plaintiffs, and an attachment related to attorneys' fees. [Aff. Pope, 9/30/11, Exhibits A- C]

On October 6, 2011 Appellant filed an affidavit supporting the relief in the summary judgment motion and seeking an expedited hearing with in camera review of the documents. Affidavit, Pope, 10/6/11]. The affidavit raised the issue of Russell Bauknight ("Bauknight") and Wingate – both purporting to speak for the State/AG – claiming that "fee agreements are the epitome of a privileged communication." [Aff. Pope, 10/6/11, p.2] The following exhibits were attached to the affidavit:

Exhibit A – the AG’s website re: Contingency Fee Litigation Retention Agreements. [Aff. Pope, 10/6/11, Ex. A]

Exhibit B- Richland 4900 Plaintiffs’ Motion for Protective Order Concerning Fee Agreement, filed August 9, 2011 [Aff. Pope, 10/6/11, Ex. B]

Exhibit C – Ltr. of Appellant to Tracy Meyers, Esq. (“AG Meyers”) and Custodian of Records, Office of AG, dtd. Oct. 5, 2011, Re: Request for Documents under [FOIA]. [Aff. Pope, 10/6/11, Ex. C]

The letter to AG Meyers outlined FOIA requests made to the AG, through AG Meyers and the Custodian, on September 9, 2011, and the October 3, 2011 response of AG Meyers. [Exhibit C, p. 1]. The letter said it was being sent by fax and mail, and that a \$300 check was being enclosed in the mailed copy. [Aff. Pope, 10/6/11, Ex. C, pp., 1, 5]

On October 13, 2011 the AG moved to strike or exclude Appellant’s October 6, 2011 affidavit stating that it “contains statements that are not based upon personal knowledge, that are speculative, that are hearsay and that are irrelevant.” [Mot. Strike, AG, 10/13/11]

On October 24, 2011 the AG filed an affidavit of AG Meyers, dated October 20, 2011, which stated AG Meyers had reviewed Appellant’s June 30, 2011 FOIA request which was addressed to the Custodian of Records of the AG and was attached to the Complaint in this case.[Aff. AG Meyers, 10/20/11, p.1]. AG Meyers stated that the AG’s mail logs did not show that the June 30 letter attached to the complaint had been mailed or delivered to the AG’s office, and opined that it “does not constitute a request under FOIA to which the Office of the [AG] must respond.” [Aff. AG Meyers, p.1] The affidavit of AG Meyers further stated, in part:

4. Upon the conclusion of the suit and the delivery or mailing of the same FOIA request to the Office of the [AG] by Ms. Pope or her attorney, a response to the FOIA request will be made then if permitted by any Order of the Court in [this FOIA case] or any other judicial proceeding related to the matters that are the subject of that request. [Aff. AG Meyers, p.2]

On October 28, 2011 a motion of the Legacy Trust, Hynie and others to intervene in a FOIA

case filed by Appellant in Newberry County on August 10, 2011 seeking the “Wingate Contract” to bring Richland 4900 was filed in this case. [Mot. R4900 parties to Intervene, 10/26/11]

By Order dated November 22, 2011, the circuit court granted the motion to transfer venue in this FOIA case from Newberry County to Richland County. [Order, Jg. Addy, 11/22/11] Appellant timely moved the circuit court to partially alter, amend or reconsider the order. [Order, Jg. Addy, 11/22/11; Mot. Partially Alter; Amended Mot. Partially Alter, 12/5/11; Ltr. Silvernail to Clerk, 12/5/11]

On December 9, 2011 Wm. Jeffrey Smith, an attorney, filed an affidavit in support of the release under FOIA of the documents sought in the FOIA cases. [Affidavit., Wm. J. Smith, 12/9/11]

On December 12, 2011 an Affidavit Supporting Immediate Release of McMaster/Wingate Contract to Sue Buchanan and Pope was filed in this case by Appellant’s spouse, an attorney. [Aff. T. Pope, 12/8/11]

On December 12, 2011 the Legacy Trust and others filed a motion for sanctions against Appellant and her counsel in the Wingate Contract FOIA case.. [Mot. Sanctions,12/12/11]

On January 3, 2012 Appellant filed a return to the AG’s motion to strike the affidavit of attorney Smith. [Pls. Return to Mot. Strike, filed 1/3/12] Appellant also filed affidavits opposing the motion to strike. [Affidavits, Pope, w/ Ex. A; Affs. Spence, Young, Summer, Smith and *Private Foundations*]

On January 6, 2012, Appellant’s counsel in Richland 4900 filed an affidavit with a letter counsel wrote to AG Meyers that day. [Aff. Daryl Williams, 1/6/11]. Counsel stated he was in possession of AG Meyer’s January 5 letter to Ms. Sue Summer. [Aff. Williams., 1/6/12, p. 1] In the letter to AG Meyers, counsel stated in part:

Your description of the events at the December 12, 2011 status conference held in No. 4900 at which neither you nor any attorney

on the AG's staff were present, reflects a misunderstanding of what occurred. No counsel for Mrs. Pope stopped or attempted to stop the production of any document to the Court or to anyone else.
[Ltr. Daryl Williams to AG Meyers, 1/6/12]

On January 6, 2012 Appellant served an affidavit supporting in camera review, expedited ruling and immediate release of the documents sought under FOIA. [Aff. Pope, 1/6/12, w/ Exhibits]. The January 6 affidavit contained the following exhibits:

Exhibit A – A letter of AG Meyers to Ms. Sue Summer dated January 5, 2012 stating that all of the AG's contingency-fee litigation retention agreements “with the exception of the ‘contract’ at issue in [Richland 4900]” were currently posted on the AG's website. The letter of AG Meyers also stated that the AG had attempted to turn over documents which would be subject to Summer's FOIA request, but “were stopped by Ms. Pope's counsel from doing so...”
[Ltr. AG Meyers, 1/5/12]

Exhibit B- A letter of AG Meyers to Appellant dated October 3, 2011 responding to Appellant's September 9, 2011 FOIA request and stating in part:

Responding to your request...for appraisals and other documents supporting the position of the Office of the [AG] and/or valuation of the Estate, this Office does not possess any such documents, and, therefore, is unable to provide this information to you. [Ltr., AG Meyers, 10/3/11, p. 1] along with Pope's October 5 response [Ltr. Pope, 10/5/11]; and an October 17, 2011 letter of Pope requesting under FOIA a CD related to the indictment of David Cannon (“Cannon”) and related documents. [Ltr., Pope dtd. 10/17/11]

Exhibit C – A motion of the AG and others to strike a brief of Buchanan and Appellant in *Ex Parte* David Cannon, Docket No. 2007-CP-02-0122. [Exhibit C, Aff. Pope, 1/6/12]

On January 9, 2012 the AG moved to strike the January 6 affidavit and others, stating “[a]ll of the affidavits and attachments are irrelevant to the legal issues before this Court in the instant case.” [Mot. Strike, AG 1/9/12] That day the Legacy Trust also moved to strike eight affidavits. [Mot. Strike, Legacy Trust, 1/9/12]

On January 9, 2012 an affidavit opposing the motion to strike was filed which outlined

Summer's coverage of Appellant's two FOIA cases and her own FOIA requests for the \$4.7 million claimed valuation of James Brown's music empire and other documents. [Aff. Summer, 1/5/12, w/ Exhibits]. The Summer affidavit contained correspondence with the AG's office, including:

Exhibit A – Email Correspondence with Mark Plowden, the AG's Communications Director, September 20 – Oct.5 re: release of the "Wingate Contract" [Exhibit A, Aff. Summer, 1/6/12]; and

Exhibit B- Summers December 6, 2011 FOIA request.[Exhibit B, Affid., 1/6/12]

On January 10, 2012 Appellant responded to a brief filed by the AG. [Response, 1/10/12], and on January 11, 2012 the AG filed a memorandum supporting his motions to dismiss and motions to strike, and opposing summary judgment. [Memo. AG Supp. Dismiss, 1/11/12]

On January 10, 2012 Bauknight submitted an affidavit which states in part:

4. For nearly three years I have also served as Trustee for the James Brown Legacy trust. The Legacy Trust was created pursuant to a settlement agreement that ended years of litigation surrounding the validity of James Brown's Will and Trust.

5. As its trustee, I manage, control and oversee the Legacy Trust. . . [Aff. Bauknight, 1/10/12, p. 1]

On January 11, 2012, the circuit court issued a Form 4 order denying Appellant's motion for partial reconsideration of the transfer order, and this case was transferred from Newberry County to Richland County and assigned Case No. 2012-CP-40-350. [Order. 1/11/12]

On January 17, 2012 Appellant filed an affidavit in both FOIA cases supporting attorney's fees and costs. [Aff. Fees, Pope, 1/17/2012] The affidavit discussed the service and/or fees of the Legacy Trust's FOIA counsel [*Id.* p.4]; four Legacy Trust attorneys working at \$200 - \$500 an hour. [*Id.* p4, Ex. A] and more than five members of the AG's staff involved in FOIA issues. [*Id.* p. 3-5, Ex. A] . Appellant stated that she was notified in October through AG Meyers that the AG had no separate records of the time spent and costs by the AG's office on the James Brown matters.

[*Id.* p.4, n. 4] Appellant stated that both she and counsel had worked vigorously to keep attorneys' fees down in the FOIA matters. [*Id.* p. 5] The affidavit stated Appellant's belief that a counsel fee of \$9,000 would be reasonable based on applicable factors. [*Id.* p. 2]

On February 2, 2012 the AG, Legacy Trust and other Richland 4900 plaintiffs moved to consolidate this FOIA case with Richland 4900. [Mot. Consolidate, 2/2/2012] The following exhibits were attached to the motion:

Exhibit A-1 – 1/11/12 order of Judge Addy transferring venue in this case;
[Exhibit A-1, Mot. 2/2/12]

Exhibit A-2 – order filed 11/30/11 of Judge Addy transferring venue of this FOIA case from Newberry County to Richland County based on representation that Richland 4900 was “fiduciary litigation” arising out of the Plaintiff's fiduciary responsibilities to the...Legacy Trust.” [Exhibit A-2, Mot. 2/2/12]

Exhibit B- Appellant's June 7, 2011 motion to compel the AG, Bauknight as trustee of the Legacy Trust, and others to comply with Richland 4900 discovery served October 11, 2010. [Exhibit B, Mot. 2/2/12]

Exhibit C – A July 1, 2011 motion of the AG, Legacy Trust and other Richland 4900 plaintiffs for protective order to prevent production of 10 categories of documents in Richland 4900 discovery. [Exhibit C, Mot. 2/2/12]

Exhibit D – Letter of Silvernail to Wingate attorney Mark Gende dated June 15, 2011 requesting items for review, including Hynie domestic file, all documents related to appraisals obtained by Bauknight, and other documents. [Exhibit D, Mot. 2/2/12]

Appellant opposed the consolidation of this FOIA case and Richland 4900. [Ret. Opp., 2/22/2012]

On March 27, 2012 Appellant filed a supplemental affidavit opposing consolidation and the motions to strike. [Aff., Pope, Oppose Consolidation, 3/27/12]. Appellant stated in part:

2. I am informed and believe that consolidation of this FOIA case will delay my FOIA request for years, effectively denying it, while the following troublesome Case 4900 questions are resolved:

a. Can the Wingate Firm legally be the only lawyer for

the State/AG and private citizens, including Tommie Rae and Terry who are not S.C. citizens? [Aff. 3/27/12, p. 1]

...e. Can Bauknight/Wingate prevent discovery of 90 boxes of documents made public by Order of the Honorable Doyet A. Early, III dated August 10, 2007? [Aff. 3/27/12, p.2]

The affidavit also stated:

6. I am informed and believe that public documents I have requested under FOIA should be released immediately – not delayed by consolidations – and will likely confirm:

... c. Bauknight’s assertion to the S.C. Supreme Court that James Brown’s Estate and 2000 Trust have no corpus “to speak of” was incorrect. ... [Aff. 3/27/12, pp. 6,7]

On April 12, 2012 a hearing was scheduled in Richland 4900, the consolidated Wingate Contract FOIA case, and this FOIA case. [Ord., Jg. Manning, dtd. July 5, 2012] The AG, Legacy Trust and other Richland 4900 plaintiffs moved to continue all outstanding motions. [Order, 7/5/12, p. 2]. The AG’s FOIA counsel consented to the motion but Appellant opposed a stay. [Order, 7/5/12, p.2] As stated by the circuit court:

Counsel for Defendant Pope. . . opposed Plaintiffs’ Motion on the grounds that their client had waited a long time on the matters set for the April 12, 2012 hearing and their client desired the Court to hear and rule on each pending motion. [Order, 7/5/12, p. 2]

On July 5, 2012 the circuit court granted the continuance, stating in part:

Based on the interests of justice and judicial efficiency, the Court hereby grants [Richland 4900] Plaintiffs’ motion for a continuance of all of the above-referenced matters. [Order, Jg. Manning, 7/5/12, p. 2]

On December 17, 2012 a hearing was held and the AG’s FOIA counsel in this case stated:

MR. SMITH: The other case was brought also in Newberry. Venue was transferred. It was a motion but it was not consolidated. We’ve got a motion to consolidate that case, so that really needs to be heard first. [Tscpt. Hrg. 12/17/12, p. 37, ll. 1–6]

On February 27, 2013 the Supreme Court in footnote 29 of its first, later replaced, *Wilson*

v. *Dallas* decision³ stated:

Although Brown's music rights have been widely reported as being worth up to \$100 million or more at his death, Bauknight filed documents with the Internal Revenue Service indicating the value of Brown's music empire was only a net of \$4.7 million. The \$4.7 million valuation has been questioned . . .

Further, the AG, with Bauknight's knowledge and cooperation, allegedly entered into contingency-fee agreements with outside counsel Kenneth Wingate, for Wingate to sue Appellant Pope on behalf of the State, Bauknight and others while also representing private plaintiffs in the suit. The suit sought damages to Brown's estate allegedly arising during Pope's appointment. Despite FOIA requests, the AG has refused to publicly release all of the documents pertaining to this purported arrangement. These matters should be considered by the circuit court in the first instance and any fees found to be inappropriately incurred should be disgorged and returned to the trust in light of our finding that the compromise is void and the AG has exceeded his authority by, among other things, controlling the charitable trust through the appointment of Bauknight, who serves at the AG's pleasure. [*Wilson*]

On March 7, 2013 the AG served an answer in this FOIA case, with attachments, including an unsigned copy of the Legacy Trust. [Answer, AG, with attachments]

On March 14, 2013 the AG advised the Supreme Court:

[W]e have released everything we can legally release. One document is the subject of a Motion for Protective Order, pending before Judge Manning. We certainly have no objection to the release of that document... We hope to have resolution of this issue in the near future. [AG Petition for Rehearing, *Wilson v. Dallas* p. 25]

As to Richland 4900, the AG stated:

We advise this Court, therefore, that we will shortly move to have the Attorney General removed as a party to this action and any further action in this case to protect the charitable beneficiaries may be pursued by the new trustee. [*Id.* p.27]

On March 15, 2013 the Legacy Trust moved to stay this FOIA case. [Legacy Trust's Mot. Stay, 3/15/13]

³ 403 S.C. 411, 746 S.E.2d 743 (2013).

On March 18 the Legacy Trust filed a supplemental memorandum in support of its motion to dismiss, with 61 pages of attachments.⁴ [Supp. Memo., LT, 3/18/13]

On April 1, 2013, by direction of the circuit court, Appellant filed a Status Report and Memorandum of Law in this FOIA case. [Status Report, Filed 4/1/13]

On May 8, 2013 the Supreme Court issued its final decision in *Wilson v. Dallas*. Footnote 29 was removed. Footnote 30, however, stated:

We note that the AG and/or Bauknight have allegedly entered into a contingency-fee contract with outside counsel Kenneth Wingate, for Wingate to sue Appellants on behalf of the State, Bauknight; and others while also representing private plaintiffs in the suit. We are aware that a suit has been filed in Richland County seeking damages to Brown's estate allegedly arising during Appellants' service as fiduciaries. Despite FOIA requests, the AG has refused to publicly release all of the documents pertaining to the purported arrangement. However the AG has recently informed the Court, in petitions filed after this Court's initial opinion, that he is now withdrawing as a party to that lawsuit and his office will maintain a monitoring role. *Wilson v. Dallas*, n. 30.

On May 10, 2013 Wingate wrote the circuit court seeking a stay of the FOIA cases and Richland 4900, asserting that the Supreme Court placed no "primacy" on hearing Richland 4900 or the FOIA matters. [Ltr., Gende to Jg. Manning, 5/10/13]

Between 2013 and early 2016 Appellant's counsel made more than a dozen requests for a FOIA hearing. [Ltr., Silvernail to Jg. Manning, dtd. 4/21/15] Wingate, speaking for the AG and Legacy Trust, opposed any hearing. [Email, Gende to Eve Goodstein, dtd. 10/13/14] No hearing was held.

⁴ The attachments included Bauknight's 2012 affidavit, a portion of the Final Reply Brief of Appellant and Buchanan in *Wilson v. Dallas*. [Exhibit A, Aff., 3/18/13]; a portion of FOIA [Exhibit B]; a Richland 4900 Order Denying Change of Venue filed Nov. 9, 2010 [Ex. C, Aff.] and a Motion to Compel Production of Contingency-Fee Contract... July 28, 2011, with Exhibits], w/ affidavit of Appellant seeking production of Legacy Trust, fee contract and other documents before an injunction hearing, dtd. 8/1.11 [Memo. Legacy Trust, filed 3/18/13, w/ attachments]

By Order of the Honorable Donald W. Beatty dated March 24, 2016 Appellant's two FOIA cases and Richland 4900 were assigned to the Honorable Doyet A. Early, III ("Jg. Early"). [Ord. dtd. 3/24/16]

At a May 17, 2016 hearing the Legacy Trust supported its motion to dismiss with a May 2, 2016 affidavit of Bauknight which stated in part:

10. Since the ...Supreme Court's order in *Wilson v. Dallas*, the Attorney General has had no involvement in the Legacy Trust.

...

20. The only funds that the Legacy Trust was ever designed to hold were the private funds of James Brown, and this functioning of the court approved Legacy Trust was overturned and struck down by *Wilson v. Dallas*. Therefore, the court approved Legacy Trust under the settlement agreement does not exist. [Hearing, Trans. 5/17/16, p. 1, Aff. Bauknight, 5/2/16]

In an order dated June 14, 2016, the circuit court granted the AG's motion to dismiss. [Ord. dtd. 6/14/16] The circuit court referenced Richland 4900 and concluded that FOIA "is not a tool that may be used to bypass civil discovery in a pending case." [*Id.*] 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 allows a public body to exempt from disclosure "[m]atters specifically exempted from disclosure by statute or law." [Ord., Jg. Early, 5/17/16].

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) Appellant'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*; and (3) Appellant's action was moot because Appellant was in possession of the records requested from the Legacy Trust and the AG. [*Pope v. Wilson*, Ct. App. Op. No. 2019-UP-219, pp. 3-4]

Appellant timely sought reconsideration of the orders, which was denied. [Ords. dtd.

7/27/16] Appellant appealed, and this FOIA case became S.C. Court of Appeals Case 2016-001727.

After oral argument on February 12, 2019, on June 19, 2019 this Court issued its unpublished Opinion No. 2019-UP-219 in this matter. In the Opinion the Court found that “the *Wilson* opinion mooted the premise for naming the Legacy Trust in this action,” The Court reversed the decision that the entire matter was moot; remanded the case to issue an order dismissing merely the Legacy Trust as a defendant; but did not reach the issue of whether the Legacy Trust is a public body under *Futch v. McAllister Towing of Georgetown, Inc.* 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999).

For reasons discussed by the Court of Appeals in Section I of its published opinion No. 5657 (S.C. Ct. App. filed Jun 19, 2019), the Court of Appeals reversed the circuit court’s order granting the AG’s motion to dismiss and remanded this case for further proceedings. [Ct. App. Op. No. 2019-UP-219]

The AG filed a Petition for Rehearing, asserting among other grounds for rehearing that the Court of Appeals should have considered its argument that it never received Appellant’s June 30, 2011 FOIA request. The Court of Appeals did not request a return to the AG’s Petition. Appellant also filed a Petition for Rehearing. [Pet. Rehearing, Appellant] Rehearing was denied by Order dated August 22, 2019.

On September 19, 2019 Appellant filed a Petition for Writ of Certiorari to the Supreme Court asserting that the Court of Appeals erred in failing to find that the Legacy Trust was a public body and directing that it be dismissed on remand. [Petition, Cert. 9/19/19] Neither Appellant nor the AG sought the Supreme Court’s review of this Court’s findings as to the AG.

On October 9, 2019 the Legacy Trust filed a Return to the Petition for Certiorari. [Ret., LT, filed 10/9/19] The AG did not file a return.

The Supreme Court declined to grant a Writ of Certiorari by Order dated April 1, 2020.

By circuit court order dated May 15, 2020, the Legacy Trust was dismissed as a party to this FOIA suit. [Ord. 5/15/20]

On October 27, 2020 Appellant submitted a brief regarding issues for the hearing to be held on November 2, 2020, and a supporting affidavit [Brief; Aff. Supp. Release of Docs, 11/27/20]. The affidavit attached public documents released under FOIA by the AG in the fall of 2020 which show that on January 20, 2012 Wingate, referring to Richland 4900, wrote the AG “as [the AG’s] attorney in this matter” to “advise against releasing any portion of” the Wingate Contract until the Court rules on this matter. Wingate stated:

Releasing these documents at this time will have the following detrimental effect on the litigation.

First, you will certainly incur the sanctions of costs and attorney fees in the pending FOIA actions. That defeat will be more costly and publicly embarrassing than a decision to continue litigating the fee agreement issue.

Secondly, your decision will jeopardize the rights of your co-litigants...

Third, FOIA specifically exempts from production privileged documents. Whether this complicated fee agreement is privileged is currently before the Court. You are complying with both the letter and spirit of FOIA if you decline to produce the requested documents until the Court has determined whether any of the fee agreement is privileged. [Aff. Appel. dtd. 10/27/20, Ex. B]

The documents released by the AG under FOIA also contained a fee schedule presented by Bauknight in 2008, the year the Legacy Trust was formed. [Bauknight Compensation Schedule]. The schedule showed that Bauknight would be paid \$350 an hour and other amounts. Nexsen Pruet (NP) attorneys serving the Legacy Trust were to be paid between \$375 and \$500 an hour. [Id.]

A hearing was held before the Honorable Clifton B. Newman on November 19, 2020. [Tscrpt. 11/19/20 Hrg., pp. 1, 3-9, 16-20, 26-31, 40-42] At the hearing the AG argued that the FOIA

case should be dismissed and affidavits of Appellant stricken. [Trscpt. 11/19/20, pp. 5-6, 13-14] [Id. pp. 13-14] Appellant opposed the dismissal and striking of her filings and asserted that Appellant was entitled to summary judgment, FOIA compliance and relief sought in the complaint.

On December 18, 2020 Appellant filed an affidavit opposing the participation of the Wingate Firm in this matter. [Aff. 12/18/20]

On April 1, 2021 the circuit court issued its order dismissing this FOIA case on the ground that Appellant never properly requested the documents under FOIA. [Ord. 4/1/21]

Appellant filed a timely motion to alter, amend or vacate the order, which was denied on April 23, 2021. [Ord. 4/23/21] This appeal followed.

Statement of Facts⁵

Since his death on Christmas Day 2006 entertainer James Brown has been a source of attention by media from the New York Times to the Newberry Observer.. [R4900 Plf. Mot. for Dir.Pub. dtd. 8/23/12, Exs. A ,1,10,11,12,13, 92, 94, 95, 96, 99 & 96, 99, 100] Brown left the bulk of his fortune to his “I Feel Good” education charity to provide scholarship to needy students in South Carolina and Georgia.

In 2007 Brown was named by *Forbes* as one of its top-earning “Dead Celebrities” with an income of \$5 million for that first year. [Paine, Jake, “Top-Earning Dead Celebrities,” *Forbes*, 10/29/07] In 2007 an offer of \$100 million was made for the music empire. [Complaint, R 4900] In the 18 months Buchanan and Appellant served as Brown’s fiduciaries Brown’s estate brought in \$7.83 million, topping the amount reported for 2007. [R4900, 2012 Aff. B.Bauknight, Records Custodian, w/ Accountings]

In 2009 the AG attracted media attention when he declared Hynie the spouse of James

⁵ Appellant Incorporates the Statement of the Case in the Statement of Facts.

Brown; declared Brown's other heirs under the U.S. Copyright Act⁶; and took control of Brown's music empire with Hynie through the Legacy Trust. [Mot. Pretrial Publicity, 2008, Ex. A, 17,19]

In 2011 the AG attracted media attention when he declared that Brown's worldwide music empire was worth only about \$4.7 million at Brown's death, and that Brown's total assets, including his mansion and home estate at Beech Island, S.C., were worth only about \$6.5 million. [Mot. Publicity, Ex. A] The AG's \$4.7 million claim also attracted at least three FOIA suits over the AG's decision to keep the valuation to support the claimed \$4.7 million value claim under lock and key. [Motion, Lift Stay, R4900, 4/27/20, pp.4, 5, 9,12; Order, Jg. Griffith, 2014; Complaint] This August 2011 FOIA suit seeking the claimed \$4.7 million valuation and other documents is the longest-running of the three, and appears to be the longest-running and most complex FOIA suit in the history of the State, and perhaps the nation.

The following is a brief summary of the first decade of this FOIA case.

a. 2010 – The AG, Legacy Trust, Richland 4900 and the \$4.7 Million Claimed Value

In May 2010 the AG, Legacy Trust he created in 2008, Hynie and others sued Buchanan and Appellant for tens of millions of dollars in Richland 4900. [Complaint, R4900].

The AG described the Legacy Trust to the circuit court as the “Charitable Trust Settlement Entity” over which the AG “shall have sole authority to remove & replace trustee.” [Motion, Lift Stay, R4900, p. 4]. The AG said the Legacy Trust received “all assets, royalties, tangible & intangible property, ” \$2 million of which would go to the Brown Family Educational Trust. [*Id.*]. The AG said that the remaining assets would be distributed 47.5% to a “Charitable Trust,” 23.75% to “Tommie Rae (spouse),” and 4.79% to “each child.” [*Id.*]

As relevant to this FOIA suit, the AG's never-amended complaint asserts that Buchanan

⁶ 17 U.S.C. §101 *et seq.*

and Appellant should have accepted a \$100 million offer for music empire made in 2007, but also that they overstated the value of Brown's assets to secure a large commission. [Complaint, p. 9]

In September 2010 Bauknight, trustee of the Legacy Trust, received the claimed \$4.7 million at-death valuation of James Brown's music empire from Peter Afterman.⁷ [Aff. Pope, 12/18/20, pp. 21-28]. The AG and Legacy Trust attorneys decided not to disclose the Afterman \$4.7 million valuation to the Supreme Court in *Wilson v. Dallas* until the following May. [Email Chain, Sr. Asst. AG Sonny Jones, D. Black, others, 12/17/10] In December 2010 they discussed the plan not to reveal the Afterman \$4.7 million valuation in their *Wilson v. Dallas* brief. [Email chain, NP Black, AG Jones, others, 2/17/11] A Legacy Trust attorney wrote:

After much discussion with many of you, I propose the following language...:

“In contrast, one of . . . Bauknight's first official acts . . . was to engage an investment banking firm to conduct an appraisal of the estate's value.”

. . . I understand the importance of the appraisal and the significance of the value it places on Mr. Brown's estate. Further, I believe it is critical to our appeal. Thus, I propose . . . we file an amended appraisal with the probate court attaching to it the appraisal as an exhibit. After that time, we will petition the Supreme Court . . .

A second Legacy Trust attorney, in an email copied to AG Jones, added:

I believe this is the proper course of action for two reasons. . . 2) it will highlight this important issue for the court at a time of our choosing after Pope and Buchanan have filed their reply brief. [Emp. Supp.] [Email to Black, Sr. Asst. AG Jones, others p. 1, Ex.B, Brief, Re: Issues for Hg., 12/17/10.]

⁷ From 2009 until 2013 Peter Afterman advised the Legacy Trust, and from 2013 until 2020 Afterman “assisted [Hynie] and her counsel with advice as to music rights matters, including copyright matters and termination rights matters.” [Declaration of Peter Afterman, Civil Action No. 1:08-cv-02191-JMC] The term “termination rights” refers to the right of heirs to clawback certain U.S. royalties of a deceased copyright holders after 56 or 35 years under Sections 304 and 203 of the U.S. Copyright Act, 17 U.S.C. § 101 *et seq.*

In December 2010 the AG, Terry Brown (“Terry”) and others amended the Legacy Trust to allow Terry to bring due diligence on a purchase/sale of the music empire, and Terry assigned his interest to his son Forlando Brown (“Forlando”). [Email, AG Jones, 1/18/11, w/ Legacy Trust amendment and Assignment to Forlando]

Motions to dismiss Richland 4900 were unsuccessful. [Aff. Bauknight, 8/26/10; Acknowledgmt. of AG and others, 8/27/10 Order, Jg. Manning, 1/7/11]

b. 2011 – The Attorney General Discloses the \$4.7 Million and FOIA Suits Filed

In January 2011 the Honorable Alan Wilson (“AG Wilson”) replaced the Honorable Henry McMaster, now Governor of South Carolina (“Governor McMaster”), as AG.

In March 2011 the South Carolina Court of Appeals (“Court of Appeals”), at the request of the AG, dismissed as premature efforts by Appellant and Buchanan to dismiss Richland 4900 as unconstitutional because the private Wingate firm was sole counsel to the AG, Hynie and other Richland 4900 plaintiffs. [Order. Ct. App. 3/17/11]

On April 26, 2011 the AG moved to designate Richland 4900 complex, citing its “very complex procedural history,” having 91 witnesses, and involving the “extremely large estate of the legendary music icon James Brown.” [Mot. Design Complex, 4/26/11]

That month a draft of *Private Foundations, Copyright Heirs and Musical Millionaires: why the James Brown “I Feel Good” Trust doesn’t...* by Wm. Jeffrey Smith and Appellant addressed how the claim that Hynie was Brown’s spouse, a substantial devaluation of the assets, and a sale to Terry would leave Brown’s education charity with almost nothing [*Private Foundations...*, pp. 1 – 11].

On May 4, 2011 and May 6, 2011 Bauknight and the AG filed documents in the probate court and with the Supreme Court in *Wilson v. Dallas* claiming that Brown’s music empire was

worth only \$4,697,736 – less than 1/12 the value of record since 2007.⁸ [Supp. I&A, p. 1; R4900 Mot., Compel Disc. 6/7/11, p.3; Mot., Disqualify and/or Enjoin, May 18, 2011]

On June 30, 2011 Appellant made a FOIA request for the \$4.7 million valuation, the Legacy Trust 2010 amendment and documents related to both. [Complaint, Exs.] Appellant made additional and overlapping FOIA requests on July 19 and 20, including for the Wingate Contract to bring Richland 4900. [Ltr. Pope to AG Meyers, 7/19/11, Aff. Pope, Ex. 1, filed 8/10/11]

On July 1, 2011, the AG and Legacy Trust moved in Richland 4900 to prevent release of the \$4.7 million valuation and other documents.[Mot. Prot. Ord., 7/1/11]

The Wingate Contract states on its face that it is a public document subject to release under FOIA, and that all Richland 4900 documents are property of the State of S.C. and subject to release under FOIA. [Wingate Contract, pp. 7-8⁹]

On July 15, 2011 Bauknight, calling the Legacy Trust the “James Brown Trust,” rejected the FOIA request and threatened sanctions. [Ltr. David Black, Esq. to Pope, 7/15/11]

On August 3, 2011, having received no FOIA response from the AG or Wingate, Appellant filed this FOIA suit. [FOIA Request, dtd. 6/30/11; Complaint]

On August 5, 2011 the AG, by Sr. Assistant AG Tracy Meyers (“AG Meyers”) proposed to delay Appellant’s FOIA request for the Wingate Contract and other documents until the conclusion of Richland 4900. [Ltr. AG Meyers, 8/5/11] AG Meyers said in part:

I propose to put your requests on hold pending the outcome of your current litigation. Once the litigation is complete, I would then provide you with all of the information you have requested that is available (i.e., not exempt) pursuant to the Act. In the meantime, I will forward

⁸ A sale to Terry at this value, as provided in the AG’s 2008 settlement, would have reduced the value of Brown’s charity from about \$80 million before the AG’s 2008 settlement to \$827,292 under the AG’s 2008 settlement . [R4900 Mot., 5/19/11, p. 2]

⁹ Citations to the Wingate Contract herein correspond to the pages as numbered. Some of the pages of the Wingate Contract as identified by Wingate are not numbered.

copies of all six letters to the Civil Division and ask that they be treated as discovery requests in the ongoing litigation referred to above, if appropriate. [Ltr. AG Meyers to Pope, Aug. 5, 2011, pp. 1, 2]

On August 7, 2011, Appellant wrote AG Meyers objecting to the AG's refusal to comply with FOIA, and stating in part:

a. The difficulty you state you have in complying with my FOIA requests pales in comparison with the difficulty, as here, of a private citizen seeking the truth as found in public documents when she has been falsely accused by the State of South Carolina, through its Attorney General, of civil and criminal impropriety in a tort suit brought by a private, contingency-fee law firm seeking tens of millions of dollars in actual and punitive damages.

b. You assert that my not obtaining these public documents through FOIA is "the wisest thing to do." I respectfully submit that one does not have to be wise to exercise his rights under FOIA.

c. I know of no FOIA provision authorizing you to "put [my] requests on hold pending the outcome of your litigation"
[Ltr. Pope to AG Meyers, 8/7/11]

On August 10, 2011 after AG Meyers failed to agree to release the Wingate Contract and other documents, Appellant filed the second Newberry County FOIA suit. [Complaint, Wingate Contract FOIA Suit]

In September 2011, the AG moved to dismiss this FOIA suit, but made no mention of the claimed non-receipt of the June 30 FOIA request. [Mot. Dism., 9/2/11, pp. 1, 2]. Documents attached by the AG to the motion showed that the AG and Wingate had refused release of the public Wingate Contract and other state-owned documents since 2010. [Mot. Dismiss Exhibits A - D Ltr. Silvernail to Gende, 6/15/11; Ltr. Gende to Silvernail, 6/17/11, pp.1,2, filed 9/6/11; Mot. Prot. Order, 8/1/11]

Appellant made additional and overlapping FOIA requests for the Bauknight/ Afterman \$4.7 million claimed value and other documents, and even sent a \$300 deposit.[Ltrs. to/from

Meyers and Pope, 9/9/11; 10/3/11; 10/5/11; and 10/7/11] AG Meyers claimed the AG had no documents responsive to the FOIA requests, and Appellant disagreed. [Lt. Pope to AG Meyers, 10/5/11] ¹⁰

On September 30, 2011 Appellant moved for summary judgment in this FOIA case, and submitted supporting affidavits. [Mot. SJ., 3/30/11, w/ Aff. of Pope; Affidavit, T. Young; *Private Foundations, Copyright Heirs...*; Aff. Smith; Aff. Summer; Aff. Farrar]

By the end of 2011 AG Meyers, AG FOIA counsel Emory Smith (“AG Smith”), the AG’s Communications Director, AG Jones, Wingate attorneys and at least three Legacy Trust attorneys had either directly refused or proposed to delay release under FOIA of the Wingate Contract, the \$4.7 million value and other state-owned documents used in Richland 4900 both in Appellant’s two FOIA cases and by others. [Summer affidavit, w/ Exhibits; Motion for Guidance, Pretrial Pub., Ex. A, Email chain, AG Comm. Dir. Mark Powell, Summer; Ltr. Sr. Asst. AG Jones to Judge Manning, 9/22/11]. The Legacy Trust, Hynie and others were also trying to intervene and obtain sanctions against Appellant in the Wingate Contract FOIA suit. [Mot. Sanctions, 12/12/11] And no documents were produced under FOIA by the AG or Legacy Trust.

The AG claimed the FOIA delays were Appellant’s fault, stating:

Plaintiff is prolonging consideration of this case and consuming judicial time by continuing her effort to bypass or avoid proceeding in Richland County. This Court should summarily deny her motion so that consolidation may proceed in Richland. [Memo., AG, 12/7/11, p. 1]

¹⁰ Appellant and others continued to make FOIA requests throughout the litigation, but the AG declined to release the Wingate Contract, \$4.7 million claimed valuation, the handwritten “Hynie Admissions” of bigamy in the AG’s possession since 2008, and other public documents. [Ltrs. Pope to AG Wilson, Greene, 12/8/14, w/ attachments, 3/3/16; Ltr. Green to Pope, 2/29/16; Ltr. Meyers to Summer, dtd. 1/20/12]

c. 2012 – The AG Use of the \$4.7 Million Value and the Journalist’s FOIA Lawsuit

In January 2012 AG Meyers misstated facts about a hearing and asserted Appellant’s counsel was delaying release of the Wingate Contract under FOIA, and counsel was required to correct the misstatement. [Ltr. Williams to AG Meyers, Exhibit A, Affidavit, D Williams, 1/12]

On January 5, 2012, AG Meyers wrote a journalist who was seeking the Wingate Contract, the \$4.7 million valuation, and other documents. [Ltr. AG Meyers to Summer, 1/5/12, pp. 1,2] AG Meyers stated that a portion of the Wingate Contract was public, but planned to notify others before releasing what the AG deemed to be the public portion. [*Id.*]

On January 20, 2012 Wingate wrote the AG in a letter described as **URGENT – PRIVILEGED ATTORNEY/CLIENT COMMUNICATION.** [Ltr. Gende to AG, 1/20/12] Wingate, as counsel for the AG, advised the AG not to produce any part of the public Wingate Contract. [Ltr. Gende to AG, 1/20/12] Wingate asserted that if the AG complied with his FOIA obligation to release the Wingate Contract he would “certainly incur the sanction of costs and attorneys fees in the pending FOIA actions” and that this would be “more costly and embarrassing than a decision to continue litigating...” [Ltr. Gende, to AG, 1/20/12] Wingate asserted that releasing the Wingate Contract that states on its face that it is a public document subject to FOIA, would “jeopardize the rights of your co-litigants.” [Ltr. Gende, to AG, 1/20/12]

On January 20, 2012 the AG, though AG Meyers, released part of the public Wingate Contract to the journalist, but the AG withheld the entire contract from Appellant under FOIA until 2021, claiming Appellant could not get it because she was being sued by the AG. [Ltr. AG Meyers to Summer, 1/20/12]

By early 2012 the AG was seeking to consolidate this FOIA case with Richland 4900, and the AG’s consolidation efforts lasted until the case was dismissed in 2016. [Mot. Consolidate,

2/2/12; Ord. Jg. Early, 7/5/12] The AG also continued motions to strike affidavits urging FOIA compliance, which effort continued until 2021.[Mots. Strike, AG & Legacy Trust 1/9/12; Aff. Summer, 1/9/12];

In 2012 the AG and Legacy Trust, through Wingate, opposed a motion to disqualify Wingate and Bauknight from acting for the State/AG, and on July 5, 2011 the circuit court in Richland 4900 ruled:

At a hearing before the Honorable L Casey Manning on April 12, 2012, the Court heard Defendant Pope's Motion to Disqualify Sweeny, Wingate and Barrow, PA from representing the [AG], enjoining . . . Bauknight from purporting to speak on behalf of the [AG], and for other miscellaneous relief.

Having considered the Memoranda of Law from Defendant and Plaintiffs, hearing oral argument from both parties, and carefully considering the merits of the argument of each party, this Court denies the relief sought by Defendant Pope in her motion. [Ord., Jg. Manning, 7/5/12, R4900, p.2]

From 2012 until 2021, including after the April 24, 2013 letter discussed below, the AG took no action to prevent the constant disruption and interference with FOIA compliance and suppression of public documents, including the Wingate Contract, and violations of Due Process and First Amendment rights by Wingate and Bauknight while acting on behalf of the State/AG. [Mot. Pretrial Publicity, Ex. A, Exs. 96, 97, 78, 84, 80, 69,74,19; Mot. Dismiss, Stay, Ct. Appeals, 9/18/12, *Pope v. Wilson, et al*, p.13].

In a 2012 the AG and Bauknight joined Hynie in using the \$4.7 million claimed value the AG had been refusing to release under multiple FOIA requests and in this suit for more than a year in a motion filed in the Court of Appeals which began:

And while Pope can use her word processor to change the caption, there is nothing she can do to change the facts establishing Tommie Rae's marriage to James Brown. [Mot. 9/18/12, p. 2]

The motion, to support Hynie's false spousal claim, contained a 3-page defense of the

claimed \$4.7 million valuation, incorrectly calling it an “independent professional valuation.” [Mot. 9/18/12, p. 7] The AG incorrectly asserted that an IRS division dealing exclusively with business and royalty valuations had “scrutinized” the Afterman \$4.7 million claimed value and determined it to be correct. [Mot. 9/18/12, pp. 7,8] While suing Appellant and Buchanan in Richland 4900 for not accepting a \$100 million offer, the AG and Bauknight told the Court of Appeals that the approximately \$100 million value assigned to Brown’s assets was “haphazardly claimed.”[*Id.*]

The AG stated it was an “outrageous assumption” to say that IRS would not have investigated the validity of the marital deduction claim “even though the IRS would have been due millions more in taxes if the marriage was invalid.” [Mot. 9/18/12, p. 9].

Overlooking Appellant’s stated concerns that the Bauknight/Afterman \$4.7 million valuation had shifted \$1 million of income a year and nearly 1/3 (31%) of the assets of Brown’s “I Feel Good” charity over to a trust for Forlando and 5 Levenson clients, the AG and Hynie claimed “[t]hat self-interest continues to direct Pope’s conduct today. The AG asserted:

The much more plausible reason for insistence on pressing her valuation conspiracy theory is that her claim for approximately \$2.5 million in fees and commissions [footnote] might appear less outrageous if the estate were valued at the higher amount she claims – a clear indication of her conflicted self-interest. [Mot. Ct. App., 9/18/12, p. 10]

The FOIA noncompliance, First Amendment and Due Process violations, both by the AG and Wingate and Bauknight acting for the State/AG was the backbone of Richland 4900 in 2012 and remained so until 2021. [Mot. Pretrial Publicity, Exs. A.97, 17, 19, 90; Aff. Summer, Opposing Striking Affs., w/ Exhibits; Affidavit, Summer; Order, Jg. Griffith, 2014, Summer FOIA case]

In the Fall of 2012 the AG rejected, filed and moved to strike offers of Appellant to let both the AG and Brown’s Estate/2000 Trust out of Richland 4900 at no cost, and to quickly end the

FOIA cases. [Offers, Pope to AG/ Estate/2000 Trust, R4900, 2012 Motions to Strike Offers to AG, Estate/2000 Trust, R4900, 2012]

In 2012 the AG and Legacy Trust filed 100 media articles and public posts which detailed the increasingly hostile personal attacks of the AG and those acting for the AG against Appellant and others seeking public information under FOIA. [Mot. Direction re: Pretrial Publicity, Ex. A]

In December 2012 the journalist filed a FOIA suit seeking the Wingate Contract, the \$4.7 million valuation, the Hynie Admissions of bigamy and other public documents. [Ord. Jg. Griffith]

d. 2013 – FOIA and Hynie’s May 29 Plan to Reinstate the AG’s 2008 Settlement

The events of 2013 set the stage for eight additional years of FOIA refusal by the AG.

In February 2013 the Supreme Court in the first, later substituted *Wilson v. Dallas* opinion, urged that Richland 4900 and the FOIA cases be considered by the circuit court in the first instance. [Aff. Pope, 12/18/20, p. 16]

In March 2013 AG Wilson, the Solicitor General and the Chief Deputy AG met personally with Appellant to discuss the damage to James Brown’s “I Feel Good” charity caused by the AG’s support for Hynie’s spousal claim and the \$4.7 million valuation. [*Id.* at 17] Appellant and counsel Silvernail met a few days later with the Solicitor General and Chief Deputy AG for the same purpose. [*Id.*] AG Wilson, in his 2017 deposition did not refute Appellant’s recollection of the meeting, and Solicitor General Cook testified to his belief that Appellant was competent and concerned about Brown’s charity. [Depos. Wilson, p. 47, l. 1 – 49, l. 9; Cook, p. 31, l. 1 – 33, l. 25]

In March 2013 the AG told the Supreme Court he was getting out of Richland 4900 and hoped to conclude the FOIA cases promptly, but Bauknight was moving to intervene in the Summer FOIA case at the same time. [Order Jg. Griffith] That month the Legacy Trust moved for a stay of this FOIA case which was supported by the AG and resulted in no FOIA hearing until

2016. [Mot. Stay, Legacy Trust; Ltr. Gende to Jg. Early, 5/10/13; Ltr., Silvernail to Jg. Manning, dtd. 4/21/15]

On April 24, 2013, after a month of meetings and correspondence, the AG told Wingate it had never been hired by the Office of the AG and that Wingate would be subject to disgorgement of the funds Bauknight had advanced from Brown's charity if the *Wilson* decision remained unchanged.[Ltr. AG McIntosh, 4/24/13] The AG's withdrawal left Hynie and Forlando in majority control of the Legacy Trust and Richland 4900, through Bauknight, with Hynie holding about 46% and Forlando about 9%. [Aff. Pope, 12/18/20, p. 19]

On May 8, 2013, the Supreme Court issued its final decision in *Wilson. v. Dallas*.

On May 29, 2013, with AG Jones, two Legacy Trust attorneys and many others present, Hynie's attorney and Levenson, representing most Richland 4900 plaintiffs, advised the circuit court of their plan to ignore *Wilson v. Dallas* and reinstate the AG's 2008 settlement which dismembered James Brown's estate plan. [Aff. Pope, 12/18/20, p. 20] One of Bauknight's NP attorneys then joined Hynie and the Levenson clients in asking the circuit court to exclude Buchanan and Appellant from any participation in James Brown Aiken County cases, and the circuit court, except for their claim cases, did so on June 13, 2013. [Orders, Jg. Early, 6/13/13]

At the conclusion of the May 29 status hearing a second NP attorney served Appellant with a "Disallowance" repeating the false valuation overstatement claim; asserting Appellant was entitled to no pay for her service and costs advanced to Brown's Estate/2000 Trust from 2007 until 2013; and might have to disgorge her partial 2007 SA fee paid in 2008. [Aff. Pope, 12/18/20, p. 12 n. 2]. This required Appellant to file suit within 30 days or receive no pay. [*Id.*]

By August 2013 Hynie, aided by Afterman, was filing public termination rights claims in

the U.S. Copyright Office as Brown’s spouse. [Aff. Pope 12/18/20, Exs. B, C]¹¹ That month, under oath, Bauknight called Appellant dishonest; supported the AG’s 2008 settlement; and even claimed that Appellant (and presumably Buchanan whose actions with Appellant were joint) had “raped” James Brown’s estate. [Aff. Pope, 12/18/20, p. 19]

In September 2013 Bauknight told a federal court that the Wingate Contract and the Afterman \$4.7 million valuation he had shared with Hynie and the Levenson will/2000 Trust contestants for years were confidential. [Aff. Pope, 12/18/20, pp. 26-7] The federal court declared the Wingate Contract public and directed Bauknight to deliver the \$4.7 million valuation to Forlando, Buchanan and Appellant. [Ord., R4900 FOIA Case, 4/1/21]

Forlando testified that the \$4.7 million valuation was “bogus,” and Bauknight made no effort to re-gather the state-owned \$4.7 million valuation from Forlando at the conclusion of the

¹¹ Afterman served as advisor to Hynie’s attorneys from 2013 until 2020, and both Hynie and Afterman made repeated incorrect claims about Hynie’s marriage, termination rights and the value of Brown’s assets, including Afterman’s statement to the Supreme Court in 2019:

6. I agree with the projection in the Settlement Agreement that the termination rights for James Brown are worth tens of millions of dollars. The proceeds from these terminated copyrights will arise when the heirs sell (re-assign) these rights to a publisher, with the primary valuable sales opportunities arising over the next six years. If Mrs. Brown is not the surviving spouse the Charitable Trust will lose out on receiving 32.5 percent of the expected tens of millions of Dollars. [Aff. Pope, 12/18/20, Ex. C]

Afterman’s claims are refuted by the Copyright Act, the Attorney General’s expert Roger Miller, who valued the termination rights of all heirs in 2017 at only \$8.8 million. Further, Afterman failed to note that termination rights will never be exercisable to diminish the non-U.S. royalties which make up about half of the \$4 million annual royalty stream poised to go into the “I Feel Good” charity in 2011, as confirmed by multiple experts. [*Private Foundations, Copyright Heirs, and Musical Millionaires: why the James Brown “I Feel Good” Trust doesn’t*...pp. 1 – 11]

suit. [Aff. Pope, 12/18/20, p. 23]

On October 8, 2013 Judge Early “double approved” all of Buchanan’s service, all of which was joint with Appellant; declared that there was no basis for him to disgorge any of the approximately \$650,000; and praised Buchanan’s work. [Status Report; Pope 1/26/16,p 4, from Hearing, 10/8/13, pp. 2-5]

At the end of 2013 the AG and Legacy Trust were still bitterly resisting release under FOIA of the Wingate Contract, Afterman \$4.7 million valuation, the Hynie Admissions of bigamy and other state-owned public documents in three FOIA lawsuits. [Order, Jg. Griffith, 2014; Affidavit, Pope, 12/18/20, pp. 16-17]

e. 2014 – Circuit Court in Journalist’s FOIA Suit Directs FOIA Compliance

In 2014 the Attorney General and Legacy Trust filed a motion supporting the stay which had been in place since 2013. [Mot. Stay R4900, 2014] No FOIA hearing was held in 2014. [Ltr. Silvernail to Jg. Manning, 4/21/15]

On July 8, 2014 the Honorable Eugene Griffith issued a FOIA order in the journalist’s suit which directed FOIA compliance and stated in part:

. . . [T]he Court was asked to take judicial notice that the FOIA matters transferred to Richland County, one of which was consolidated with Case 4900, had not been concluded. Discovery motions filed in 2010 related to some of the FOIA requests had also not been heard, and Bauknight is currently seeking a delay of both Case 4900 and the related FOIA suits until all James Brown matters are concluded in Aiken County.

...

The fact that Bauknight’s discovery motion has not been resolved since 2010 makes it clear that FOIA would be crippled if a public body could refuse to release documents based on discovery disputes or orders in other cases...

Intervention by plaintiffs in Case 4900, or any other suit where the same documents are at issue, is not authorized by the FOIA. To allow such intervention would defeat the purpose of FOIA ...

[Ord., *Sumner v. Wilson*, pp. 3-5].

The Attorney General produced the Wingate Contract to the journalist, but did not produce the Hynie Admissions of bigamy, public since 2007, or the Afterman \$4.7 million valuation. [Ltr. E. Smith to Clerk, Supreme Court, 3/6/15, Appellate Case No. 2014-002222]

f. 2015 – The AG and Wingate Decline to Produce \$4.7 Million Valuation

In January 2015 the circuit court declared Hynie to be the spouse of James Brown and the circuit courts *sua sponte* ordered a joint mediation of Richland 4900 and Aiken 1337. [Email chain, Jgs. Early, Manning, AG Jones, 1/13/15; Mediation Order, 1/20/15]

The AG and Legacy Trust took the position that Appellant's FOIA cases could proceed until the mediation was concluded.[Ltr. Pope to Folkens, others, 4/30/15]

In January 2015 Appellant addressed the Legacy Trust's claim in this FOIA case that it did not exist: [Email Pope to Jg. Early, Jg. Manning, AG McIntosh, AG Jones, others, 1/13/15] The email to the circuit judges who ordered the joint mediation stated:

The office of [Legacy Trust FOIA counsel] informed me by letter dated January 6, 2015 of his position that the [Legacy Trust] no longer exists, and has not existed since May 8, 2013. This is at odds with the position taken by Mr. Wingate's firm in recent Case 4900 filings.

The Legacy Trust has played a central role in Case 4900 since 2010. It is one of the three entities and three people who signed the Wingate Litigation Agreement on behalf of the Case 4900 Plaintiffs.

It is important for me to conclude this mediation because the Estate/2000 Trust asserts it cannot pay its liquidated, allowed, court-approved debt to me which the Estate/2000 Trust has owed me since 2009 until Case 4900 is concluded.

I would appreciate very much...a hearing as soon as possible to determine who, in addition to Mr. Bauknight, is required to be present at the mediation to address the claims the Legacy Trust has made against me, and the counterclaims which have

been made against the Legacy Trust. [Email Pope, Courts, 1/13/15]

In March 2015 the Supreme Court declined to enforce the 2008 *ex parte* gag orders purporting to prevent discussion and dissemination of the handwritten Hynie Admissions of her bigamy, but the AG claimed the Supreme Court's ruling did not apply to the AG in FOIA cases. [Ltr. Smith to Clerk, Supreme Court, 6/6/13] The AG's FOIA counsel also stated to the Supreme Court:

The Office of the Attorney General does not possess and has not seen the \$4.7 appraisal and FOIA does not require nor provide authority for the Attorney General to demand that the appraisal be produced by Russell Bauknight or any third party.
[Ltr. E.Smith to Clerk, Supreme Court, 3/6/15]

g. 2016 – The AG's FOIA Counsel Becomes Involved in Aiken 1337 Discovery

In March 2016 Richland 4900 and the two FOIA cases were assigned to Judge Early. [Ord. 3/24/16].

On March 2, 2016 Bauknight moved to stop the deposition of James Richardson, Esq. *pro bono publico* lead counsel for Appellants in *Wilson v. Dallas*. [Ltr. Ailes to Clerk 3/2/16]

In April 2016 Terry filed a document in the Court of Appeals stating: "Ms. Hynie is a bigamist." [In. Brief, Terry Brown, 2015-002417, filed 4/1/16] Then Terry, the AG, the Legacy Trust and Hynie, with others, moved to consolidate discovery in Richland 4900 and Aiken 1337, and to delay the deposition of Hynie. [Mot. 4/11/16; Motion, 4/25/16, Ltr. Thickens]

Aiken 1337 and Richland 4900 were not consolidated, but Wingate was allowed to participate in Aiken 1337 depositions to protect his client, the AG.

On May 2, 2016 Bauknight filed an affidavit in this FOIA case claiming the Legacy Trust never existed, but also moved to strike affidavits in the FOIA case and later that month served Appellant with interrogatories in Richland 4900. [Affidavit, Bk. 5/2/16; Motion, LT, 5/2/16;

Ltr. Gende to Silvernail, others. 5/5/16]

On May 16, 2016 the AG asserted in this FOIA case that “delays have not come as a result of the [AG]’s position” but the AG continued to assert he had no duty to produce under FOIA the public Wingate Contract and the state-owned documents held by Wingate. [Response, AG, 5/16/16]

On May 17, 2016 the Legacy Trust, the AG, Hynie and others moved for summary judgment as to the counterclaims in Richland 4900, based solely on *Wilson v. Dallas*. [Motion, PSJ, AG, Legacy Trust, 5/17/16, ltr. Thickens, 5/17/16]

In June 2016 Appellant’s FOIA cases were dismissed based. [Orders Dismissing FOIA Case; Wingate Contract FOIA case.]

The AG and Legacy Trust, including through FOIA counsel, remained active in Aiken 1337 and Richland 4900 discovery and efforts to suppress public documents while the FOIA cases were on appeal. [Mot. Prot. Or., Wilson Deposition; Ltr. Pope to Jg. Early, 4/23/17, w/ attached Returns related to depositions of AG , Chief Deputy and others.]

In October 2016 now-Governor McMaster was deposed in Aiken 1337 with both Bauknight’s counsel and FOIA Counsel Smith present and making active objections. [Depos.McMaster , 10/19/16, pp. 5,7, 12, 13, 16 – 18, 31- 40, 42, 44, 46,48, 69, 70]. Governor McMaster testified emphatically under oath that he never authorized Wingate to sue Buchanan and Appellant in Richland 4900 in the name of the State/AG; never authorized Bauknight to act on behalf of the AG; and did not even know he was a party to Richland 4900 until after leaving office as AG in January 2011. ¹² [Mot. Lift Stay, R4900, 4/27/20, p. 8; Depos.Gov. McMaster, pp. 33- 35].

¹² The Appellant’s Reply Brief in Appellate Case No. 2018-2229 recounts the testimony of the Governor, the AG and others.

The AG moved for a protective order as to the documents Governor McMaster produced, but they were released. [Order Jg. Early Denying Mot. Protective Order, McMaster]

On November 9, 2016 the AG, when asked to investigate the McMaster claim that he did not authorize Richland 4900, responded:

This Office does not conduct such investigations, and the [FOIA] does not require this office to do so. Therefore, this request cannot be fulfilled by the Office of the Attorney General. [Ltr. Kot, 11/9/16]

The AG, with FOIA counsel involved, claimed that AG Jones shared a “common interest” with Hynie between 2009 and 2013, when the Afterman \$4.7 million valuation was generated, which protected AG Jones from testifying about communication with Hynie, Afterman and Hynie’s advisors. [Pls. Response to Mot.Prot. Order..Sonny Jones, Aiken 1337,12/31/16, w/ attachments]

h. 2017 – FOIA Counsel Seeks to Suppress Documents of Attorney General, Others

In 2017 the AG, Legacy Trust and Hynie named the same experts Bauknight named in Aiken 1337, and moved to consolidate expert discovery in the two cases. [Mot. Consolidate. Expert Discovery]

On March 1, 2017 the Honorable Judge Jean Toal, acting circuit judge, directed that Wingate attorneys Kenneth Wingate, Esq. and Everett Kendall, Esq. submit to a deposition regarding their authority to commence and continue Richland 4900. [Order, Jg. Toal, 3/1/17] Their testimony was in direct conflict with the public record and the sworn testimony of Governor McMaster. [Return, Re: Wingate, pp. 1 – 5, Return, Re: Kendall, pp. 1,2] Wingate testified that he knew of no change in Wingate’s Richland 4900 clients since 2010 other than the change of AG. [Id.] Both Wingate and Kendall failed to disclose the April 24, 2013 letter of the AG saying they were never hired in Richland 4900.[Id.]

In March 2017 the AG, and others secured an extraordinary circuit court order violating Appellant's Due Process and First Amendment rights. [Ord., Jg. Early, 3/15/17] The order, without review, struck from the record an affidavit of Appellant and directed that all further affidavits of Appellant (and no other party) be filed under seal, to be considered at trial. [*Id.*] This continued the roughshod treatment of citizens seeking FOIA compliance or release of public documents which refuted claims being made by Hynie and the Legacy Trust. [Motion, pretrial publ. Ex. A; Ltr. Pope to Jg. Early, 4/23/17, w/ attachments]

On May 31, 2017 the Richland 4900 Court dismissed the AG as a Richland 4900 plaintiff stating that there was no need for the Attorney General to be a party because Bauknight was protecting the charitable beneficiaries. [Order, Jg. Early, 7/12/17, p. 5]

In 2017 the AG continued to rely on the *Tobaccoville* doctrine to claim a common interest with Hynie, Afterman and others, in a successful effort to suppress more than 35 emails during the days prior to filing Richland 4900 and more than 80 emails clustered around the February 27, 2013 first *Wilson v. Dallas* decision. [Return, Memo. Sandra Matthews, 4/23/17, Exhibit 1 to ltr. of Pope to Jg. Early, 4/23/17] The AG FOIA counsel also tried to suppress documents, testimony or both in the depositions of AG Alan Wilson, former Chief Deputy McIntosh and Solicitor General Cook. [April 23, 2017 Ltr. Pope to Jg. Early, Exhibits 2,5,7]

i. 2019 – Remand Produces More FOIA Noncompliance and Delay

In 2019 both FOIA cases were remanded, but the AG still refused to produce the public Wingate Contract, the \$4.7 million valuation or the Legacy Trust documents. Despite having previously raised the issue to this Court as an additional sustaining ground for Jg. Early's 2016 dismissal, the AG focused on the alleged non-receipt of the 2011 FOIA request as a basis to avoid review of Appellant's FOIA claims after nearly a decade of litigating them.

j. 2020 – The Circuit Court Orders Wingate to Produce Wingate Contract

In March 2020 the AG continued to claim that Appellant was not entitled to have the documents requested under FOIA in 2011, despite multiple and continuing requests. [Amended Answer] .

In 2020 the circuit court, after resistance, directed Wingate to produce the public Wingate Contract it should have produced in discovery in Richland 4900 in 2010 and under FOIA in 2011. [Ord. 5/12/20] The AG did not produce the Wingate Contract, or any other documents under FOIA.

The AG did release a trickle of important documents under FOIA which should have been released years earlier under multiple FOIA requests. [Bauknight Compensation; April 24, 2013 letter of AG to Wingate.]

k. 2021 – Wingate Contract Released Under FOIA After 10 Years

In 2021 Wingate was still interfering with FOIA and the AG resisted release of the public Wingate Contract under FOIA until ordered to produce it in 2021. [Mot. Exclude Wingate 2021; Order, Jg. Newman 4/1/21]

The AG continues to withhold the Legacy Trust documents, claimed \$4.7 million valuation, and related documents sought in 2011 and since from Appellant and other citizens as this FOIA suit begins its second decade and second appeal.

STANDARD OF REVIEW

The lower court's Order sets forth that the Attorney General's motions to dismiss under Rule 12(b)(6) and for judgment on the pleadings pursuant to Rule 12(c) were granted. [Ord. 4/1/21]

a. Rule 12(b)(6) Dismissal was a Grant of Summary Judgment.

In considering a Rule 12(b)(6) motion, the circuit court must base its ruling solely on allegations set forth in the complaint. *Spence v. Spence*, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). A Rule 12(b)(6) motion converts to a Rule 56, SCRCP motion for summary judgment if the court considers matters outside the pleadings. *See* Rule 12(b), SCRCP ("If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state facts sufficient to constitute a cause of action, matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56" (emphasis added)).

In this case, the Court issued its decision on a full record, including numerous affidavits, memoranda, and attached documents. Indeed, the final hearing on this matter was on various pending motions, including Appellant's motion for summary judgment and numerous motions of the AG to strike affidavits. No party sought to confine the circuit court's review of this case to the pleadings, and the circuit court did not strike any material from the record in this case. The AG specifically offered documents outside the pleadings. [Memo. AG, 11/2/20, Exs.] The parties were therefore "fairly apprised that the court would look beyond the pleadings," and the lower court's order should be considered a grant of summary judgment. *See Higgins v. Med. Univ. of S.C.*, 326 S.C. 592, 598, 486 S.E.2d 269, 272 (Ct.App. 1997).

On review from a grant of summary judgment, this court applies the same standard applied by the circuit court pursuant to Rule 56(c), SCRCP. *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 568, 576, 762 S.E.2d 696, 700 (2014). "Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Murray v. Holnam, Inc.*, 344 S.C. 129, 137, 542 S.E.2d

743, 747 (Ct. App. 2001). "In reviewing the evidence, all inferences must be viewed in the light most favorable to the non-moving party." *Stevens & Wilkinson of S.C., Inc.*, 409 S.C. at 576, 762 S.E.2d at 700.

b. Rule 12(c) Judgment on the Pleadings

This Court previously found that the following standard of review applied to the 2016 grant of the AG's motion for judgment on the pleadings:

"Any party may move for a judgment on the pleadings under Rule 12(c), SCRPC. When considering such motion, the court must regard all properly pleaded factual allegations as admitted." *Falk v. Sadler*, 341 S.C. 281, 286, 533 S.E.2d 350, 353 (Ct. App. 2000). "On review of the motion, the court may not consider matters outside the pleadings." *Id.*

In evaluating a Rule 12(c) motion, the court must consider that "a complaint is sufficient if it states any cause of action or it appears that the plaintiff is entitled to any relief whatsoever. Our courts have held that pleadings in a case should be construed liberally so that substantial justice is done between the parties." *Id.* at 287, 533 S.E.2d at 353 (quoting *Russell v. City of Columbia*, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991)). Moreover, "a judgment on the pleadings is considered to be a drastic procedure by our courts." *Id.* (quoting *Russell*, 305 S.C. at 89, 406 S.E.2d at 339).

Pope v. Wilson, 427 S.C. 377 (Ct.App. 2019)

ARGUMENT

I. The Circuit Court had Subject Matter Jurisdiction to Hear and Decide this 10-year old FOIA Case.

The lower court dismissed the case based on its finding that the AG's alleged non-receipt of the June 2011 FOIA request divested the circuit court of jurisdiction. [Ord. dtd. 4/1/21 at 4] Appellant submits that the circuit court's finding is erroneous and should be reversed on appeal.

South Carolina Circuit Courts have general jurisdiction over actions for declaratory and injunctive relief under the FOIA, as sought by Appellant herein. S.C. Code Ann. §30-4-100(a). The AG used a 9-year-old affidavit prepared almost four months after the FOIA request by one of

four attorneys within the AG's office who had become involved in the FOIA request to argue that this Court lacks subject matter jurisdiction over this matter, because it did not receive Appellant's June 30, 2011 FOIA request. The circuit court agreed and dismissed the case. The AG based its argument, and the circuit court in turn based its finding, on *Gasparutti v. U.S.*, 22 F.Supp.2d 1114, 1116 (C.D.Cal.,1998), a case in which a Federal District Court in California found that it did not have subject matter jurisdiction over a Federal FOIA case in which the Appellant had not alleged that he submitted a proper FOIA request to the Internal Revenue Service ("IRS") under the IRS's regulations regarding FOIA requests. The District Court dismissed that case because it found the Appellant had failed to exhaust his administrative remedies prior to filing suit. *Gasparutti* is distinguishable from this case both as to the facts and law, and does not justify the circuit court's dismissal.¹³

In support of its argument for dismissal, the AG has filed an affidavit of Tracy Meyers, an employee of the Office of the AG (the "OAG"), which states that she checked certain records which indicated Appellant's June 30, 2011 FOIA request was not received by mail or fax. However, the record also contains a letter from Ms. Meyers, dated August 5, 2011, in which Ms. Meyers acknowledges that the Civil Division of the OAG was aware of the June 30, 2011 request. [Ltr. Meyers, dtd. 8/5/11] AG Meyers said nothing in the affidavit about when or how the other attorneys within the office had received the request. Further, she failed to report that Appellant continued to make FOIA requests for the valuation documents which AG Meyers denied prior to

¹³ Appellant notes that Federal appellate caselaw does not appear to support the AG's contention that receipt of the FOIA request is a precedent to this Court's subject matter jurisdiction over the matter. "[E]xhaustion is a prudential consideration rather than a jurisdictional prerequisite, [and] the district court was not precluded . . . from deciding the merits of Wilbur's FOIA claim notwithstanding his failure to comply with the CIA's FOIA appeal deadline." *Wilbur v. C.I.A.*, 355 F.3d 675 (D.C. Cir. 2004).

signing the October 20, 2011 affidavit. Further, AG Meyers made other incorrect FOIA statements, including representations about a hearing which neither she, nor anyone in the AG's office, attended.

Appellant submitted a June 30, 2011 letter from her counsel to Wingate (which was counsel of record for the AG in Richland 4900) providing a copy of Appellant's June 30, 2011 FOIA request. The AG acknowledges that the letter was sent to Wingate [FOIA Req., 6/30/11; Answer of AG, ¶17] The Wingate Contract requires Wingate to notify the AG of a FOIA request and respond to it. Further, the AG undisputedly received the FOIA request as an attachment to the complaint herein, which was served upon the AG in August 2011. Importantly, the AG's initial motion to dismiss, filed September 2, 2011, makes no mention of the AG's not having received the FOIA request. [Mot. Dismiss, dtd. 9/2/11] The Meyers affidavit was generated more than a month later, and long after the June 30 FOIA request was sent to the AG.

Appellant properly alleged that she had submitted a FOIA request to the AG on June 30, 2011; that her request was transmitted to counsel for the AG on that date; and that the OAG directly received the FOIA request, at latest, upon its receipt of the complaint herein. As further discussed below, the AG's initial response to the complaint asserts that the AG was not required to produce **any** documents to Appellant under the FOIA that the AG considered "subject to pending [discovery] motions" in Richland 4900. The AG did not, as discussed more fully below, make a timely and proper FOIA response upon receipt of Appellant's June 30, 2011 FOIA request, regardless of whether the AG received it directly, through counsel or as an attachment to the Complaint herein.

Even under the analysis of the Federal FOIA used in *Gasparutti, supra*, the circuit court has subject matter jurisdiction to hear and decide the FOIA issues before it. *Gasparutti* involves a dismissal under the exhaustion of remedies doctrine because the plaintiff in that case failed to

plead that he had submitted a proper FOIA request to the IRS, which complied with the IRS's FOIA regulations. As an initial matter, Appellant notes that the Federal FOIA requires that requestors comply with regulations put in place by Federal entities in making FOIA requests. The South Carolina FOIA, however, simply requires that public bodies respond "upon written request." S.C. Code Ann. §30-4-30(c). No particular form is prescribed for the substance or delivery of the request. The AG has not alleged that the statute allows for the agency to make more restrictive regulations, nor that the AG has any regulations which would require a particular form or method of delivery for FOIA requests. In fact, the AG's stated guidance, as set out in the *Public Official's Guide to the FOIA*, is "[w]hen in doubt, disclose the public record." As set out above, it is undisputed that the AG received the June 30, 2011 FOIA request more than ten (10) years ago, and that Appellant continues to seek the Afterman \$4.7 million valuation and other documents under FOIA. It is undisputed that the AG, through AG Meyers and others, continued to refuse to release the documents sought in Appellant's two FOIA cases based on Appellant's status as a defendant in a civil case brought against her in 2010, and in which the AG was using all of the documents requested under FOIA to damage Appellant. It is undisputed that the AG's position in both cases until the 2021 order in the Wingate Contract FOIA case was that the AG would not deliver any documents to Appellant under FOIA so long as the AG was suing Appellant in Richland 4900.

Because the AG's response to the complaint herein was a blanket refusal to provide documents to Appellant, this Court should find that Appellant's FOIA claims are properly before it and ripe for disposition. To the extent the Federal case cited by the AG is applicable to this State FOIA action, a reading of *Gasparutti* in the context of Federal FOIA caselaw supports a decision in favor of Appellant on the merits of this case.¹⁴

¹⁴ As a general rule, a Federal FOIA requester must exhaust his administrative remedies. *Oglesby*

II. The Attorney General's Use of Charitable Resources he Controlled to Delay FOIA Compliance Violated the Rights of Appellant and Others Seeking FOIA Compliance.

From 2009 until 2013 the Attorney General maintained effective control over James Brown's music empire and charity. *See Wilson v. Dallas*. The Attorney General elected to share that power with Hynie and exercise it through the Legacy Trust, and their common interest during the period, funded by James Brown's charity, was to assure that the AG's 2008 settlement was enforced.

In 2010 the trustee of the Legacy Trust and three attorneys seeking large contingency fees if they could stop the appeal which became *Wilson v. Dallas* contracted with Wingate to bring a lawsuit in the name of the State/Attorney General.[What Rosen Wants; Wingate Contract]. Sr. Asst. AG Jones helped draft the complaint, but Governor McMaster, as Attorney General, did not sign the Wingate Contract; did not authorize Wingate to bring Richland 4900 in the name of the State/AG; did not authorize Wingate or Bauknight to act on behalf of the AG; and did not even know he was a Richland 4900 Plaintiff until after leaving office as AG in January 2011. Both Sr. Asst. AG Jones and Wingate, however, knew of the defects in the Wingate Contract.

In 2011 suppressing release of the Wingate Contract when it was requested under FOIA became central to Richland 4900. It was important in itself because it showed what Buchanan and Appellant were asserting – that Richland 4900 was never properly authorized. The Wingate

v. Dep't of the Army, 920 F.2d 57, 65 (D.C.Cir.1990). The court need not dismiss a claim for failure to exhaust if it determines that the "purposes and policies underlying the exhaustion requirement" would not be undermined by reaching the merits. *Wilbur v. CIA*, 355 F.3d 675, 677 (D.C.Cir.2004); *see also Hidalgo v. FBI*, 344 F.3d 1256, 1258-59 (D.C.Cir.2003) (while exhaustion is not jurisdictional, "as a jurisprudential doctrine, failure to exhaust precludes judicial review" if a merits determination would undermine the purpose of permitting an agency to review its determinations in the first instance). Even in Federal FOIA cases where, as here, the public body has taken the clear position that Appellant would not have received a different response to her FOIA request, the Court is justified in proceeding to address the merits of the important FOIA issues presented.

Contact was also important because the AG's refusal to release it under FOIA provided the keystone to hold together Hynie's meritless spousal claims and the post *Wilson v. Dallas* efforts to reinstate the AG's 2008 settlement as announced on May 29, 2013. If the Wingate Contract were released, it would confirm that the \$4.7 million valuation and Legacy Trust documents being used in Richland 4900 would also have to be released under FOIA.

In 2012 the Attorney General's private counsel understood the problem and advised the Attorney General not to comply with his FOIA obligations. Wingate said it would cause the Attorney General embarrassment and jeopardize the interests of Wingate's private clients, primarily Hynie and Terry and the undisclosed Forlando.

In April 2013 the Attorney General acknowledged that funds devised to Brown's charity and used in Richland 4900 and the FOIA cases faced the possibility of having to be disgorged if the *Wilson v. Dallas* decision stood. The Attorney General, however, did nothing to prevent years of continued FOIA delay and noncompliance in three separate FOIA cases.

From May 29, 2013, when the plan to disregard *Wilson v. Dallas* was announced, Sr. Asst. AG Jones, the Civil Division of the AG's office, controlled the AG's decision to continue the FOIA noncompliance and delay which had begun in 2011, and to continue to allow it, and Richland 4900 to be used as the FOIA graveyard it had become prior to *Wilson v. Dallas*.

The Attorney General's use of funds James Brown devised to his "I Feel Good" education charity for needy students in Richland 4900, in a case conducted solely to benefit Hynie and other private Wingate clients since 2013, has diminished FOIA and deprived Appellant and others of FOIA rights as well as First Amendment and Due Process rights.

The Appellate Court's direction that the Attorney General comply with his obligations under FOIA and produce the documents properly sought under FOIA in 2011 will mitigate the

damage to Appellant and other citizens.

III. This Court should Proceed with Directing the AG to Properly Respond to Appellant's June 30, 2011 FOIA Request, including by Producing State-owned former Legacy Trust Documents and Documents held by Wingate.¹⁵

The AG argued that, even if this case were not dismissed, it has provided all responsive documents to Appellant's June 30, 2011 FOIA request, and Appellant is therefore entitled to no relief in this action. The record shows that the AG is incorrect. S.C. Code Ann. §30-4-30(c) provides that a public body must "notify the person making the request of its determination [of the public records it will release under FOIA] and the reasons therefor." The AG's belated, piecemeal production of certain documents and justifications for not releasing others, which appear to be based solely on the AG's **possession** (as discussed below) of documents, does not satisfy the AG's FOIA responsibility under the statute.

First, the AG alleges that it provided two draft copies of the Legacy Trust to Appellant as attachments to its answer herein. [Answer of AG, dtd. 3/7/13] While partially-responsive documents were attached to the answer, the proposed amended answer and attachments were not filed and served until March 8, 2013, more than 18 months after the commencement of this case, and the AG's answer purports to provide those documents subject to its position that Appellant is not entitled to them under FOIA and without fully complying with Appellant's FOIA request as to either the \$4.7 million valuation and related documents or the Legacy Trust documents. The S.C. Supreme Court has held that a FOIA action for declaratory and injunctive relief is mooted *upon*

¹⁵ The circuit court's April 1, 2021 Order does not pass on the AG's additional arguments, nor does its April 22, 2021 Order denying Appellant's Rule 59(e) motion. Nonetheless, especially in light of this case being over ten (10) years old, Appellant submits that this Court, in addition to reversing the dismissal of the case, should proceed with deciding the merits. The issues have been fully argued below, and the record on these matters is complete. For that reason, Appellant submits her argument on this and each successive point for this Court's consideration.

the public body's production of the requested document, but that further causes of action for attorneys' fees and costs are not mooted by a delayed response. *See Sloan v. SCDOR*, 409 S.C. 551, 762 S.E.2d 687 (2014). The AG's response, however, had never been complete.

Further, the AG asserted in its answer that it "does not have" documents responsive to Appellant's request for:

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.

This statement does not constitute an adequate FOIA response. Under S.C. Code Ann. §30-4-20(c), public records include those "prepared, owned, used, in the possession of, **or** retained by a public body" (emphasis supplied). Possession by a public body is therefore not required in order for a document to be a public record responsive to a FOIA request, and so the AG's filings indicating that it "does not have" further documents responsive to Appellant's FOIA request is inadequate.

The Litigation Retention Agreement between the AG and Wingate provides:

Any material, data, files, discs, or documents created, produced or gathered by Special Counsel or in Special Counsel's possession in furtherance of this litigation, or which fulfils and obligation of this appointment, shall be considered the exclusive property of the State of South Carolina. Special Counsel agrees to adhere to South Carolina's Freedom of Information Act . . . and maintain all public records in accordance with State law"

The AG's answer makes reference to the Litigation Retention Agreement for its terms and does not assert that the Litigation Retention Agreement is inapplicable to the FOIA request at issue herein. [See Answer of AG, ¶¶17, 19]

The AG has nonetheless taken the position that it need not produce any documents held by Wingate or the former Defendant Legacy Trust the AG created and controlled at least from 2011

until 2013 in response to Appellant’s FOIA request. Pursuant to both the terms of the Litigation Retention Agreement and §30-4-20(c), responsive documents held by Wingate are “owned” by the State/AG, and in order to make a full and proper FOIA response to Appellant, the AG must include documents held by Wingate in its response to Appellant’s FOIA request. Likewise, the documents of the former Legacy Trust over which the AG had effective control at least until *Wilson v. Dallas*, and which then claims to have disappeared, should be produced under FOIA.

IV. Richland 4900 Discovery Proceedings do not Exempt any Requested Document from Production under the FOIA.

At the hearing before the circuit court, the AG continued to argue that any response to Appellant’s FOIA request was barred by discovery motions in Richland 4900 which were pending at the time Appellant’s FOIA request was made and unresolved in 2021. In the previous appeal in this case, this Court found¹⁶ that in order to claim a FOIA exemption under S.C. Code Ann. §30-4-40(a)(4) as a result of pending discovery in another case, a public body “must point to the **specific** language of a discovery rule that **expressly** prohibits disclosure of a particular type of record”¹⁷ (emphasis supplied). The AG never identified any rule expressly prohibiting it from disclosing the documents sought in Appellant’s FOIA request, and Appellant submits that this Court should find that pending motions regarding civil discovery in another case do not, under the applicable Rules of Civil Procedure, expressly prohibit a public body from releasing public records under the FOIA.

V. The AG should Produce Wingate and Legacy Trust Documents Under FOIA.

Appellant and other citizens have been denied FOIA rights based solely on the existence

¹⁶ This Court, in its unpublished opinion in this case, made reference to its decision in *Pope v. Wilson*, 427 S.C. 377, 831 S.E.2d 442 (Ct.App. 2019), for analysis of this issue.

¹⁷ *Pope* at 389, 831 S.E.2d 442 at 448 (Ct.App. 2019).

of a lawsuit brought in the name of the AG and an entity which his private counsel represented to the Court to be under the control of the AG.

Between 2011 and 2016 this FOIA case, at the AG's request, was moved from the county where it was filed, and where the FOIA request was made, because the AG alleged that he and others were suing Appellant in Richland County, and that the Legacy Trust which the AG controlled was located there. The AG sought to consolidate this case with Richland 4900 until the first appeal herein was taken, and later with an Aiken County case.

While the appeal was pending, both the AG and the Legacy Trust, through private counsel, continued to be active in that Richland lawsuit despite the testimony of the Governor that, as AG, he did not authorize the private firm to act for the Attorney General in Richland 4900. What is certain is that the Wingate firm and its private clients contracted that every document created, produced or gathered in Richland 4900, or possessed by Wingate in Richland 4900, is the property of the State of South Carolina and subject to FOIA.

If Wingate, who received a copy of the FOIA request, did not comply and the Legacy Trust has now disappeared, the AG's FOIA duties as to the documents held by them continues.

VI. In Reversing the Orders Appealed from, this Court should find that Appellant is the Prevailing Party and is Entitled to Attorneys' Fees and Costs.

Pursuant to S.C. Code Ann. §30-4-100(b), courts may award the reasonable attorneys' fees and costs to a FOIA plaintiff who has prevailed in an action to secure a public body's compliance with the FOIA. In this case, although the AG provided Appellant with certain documents (over 18 months after she filed this case), the AG's belated partial response to Appellant's FOIA request was inadequate and a proper FOIA request has never been made.

Appellant submits that this Court, especially in light of the previous appeal and the decade

of litigation over Appellant's FOIA claims, should reverse the circuit court and direct the AG to make a full and proper FOIA response to Appellant as of the date of the ruling. This Court should further find that Appellant is the prevailing party in this case and that she is entitled to an award of reasonable attorneys' fees and costs incurred herein. *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)). It is undisputed in the record that both before and since Appellant filed her motion for summary judgment in this FOIA case in 2011, Appellant and her counsel, faced by a battery of State attorneys and others purporting to act for the State/AG, have conducted this FOIA case as reasonably and efficiently as possible.

Appellant acknowledges that on remand, this would leave for the circuit court the sole issue of determining the amount of reasonable attorney's fees and costs to be taxed to the AG.

CONCLUSION

For the reasons set forth above, Appellant asks that this Court reverse the dismissal of this FOIA action; find that Appellant is entitled to summary judgment on her FOIA claims; direct the AG to fully and properly respond to the June 30, 2011 FOIA request, providing all responsive documents from the time of request to the date of the order for compliance; and remand the matter solely for the circuit court to determine a reasonable award of attorney's fees and costs owed to Appellant as the prevailing party herein.

Respectfully submitted,

s/Adam T. Silvernail

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August 30, 2021

Attorney for Plaintiff

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Sep 01 2021

SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Richland County
Court of Common Pleas

The Honorable Clifton B. Newman, Circuit Judge

Appellate Case No. 2021-000518

Adele J. Pope..... Appellant,

v.

Alan Wilson, in his capacity as Attorney General of South Carolina,
.....Respondent.

PROOF OF SERVICE

I certify that I have served a copy of the Appellant’s Corrected Initial Brief and Designation of Matter to be Included in the Record on Appeal on Respondent by email on September 1, 2021, addressed to his attorney of record as follows:

J. Emory Smith, Jr., Esquire
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
esmith@scag.gov

Counsel for Respondent Attorney General

s/Adam T. Silvernail
Adam T. Silvernail

Law Office of
ADAM T. SILVERNAIL
LLC September 1, 2021

RECEIVED

Sep 01 2021

SC Court of Appeals

By email:

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211
ctappfilings@sccourts.org

Re: *Pope v. Wilson*
Appellate Case No. 2021-000518

Dear Ms. Kitchings:

I represent Appellant Adele J. Pope in the above-referenced matter. After the filing of our Initial Brief on Monday, we discovered that the Standard of Review section was inadvertently omitted in the final version of the Brief.

I am therefore filing herewith a Corrected Initial Brief. Because we are correcting an editing error and the Brief is not due until September 10, 2021, I ask that the Court accept the Corrected Initial Brief as filed; if a motion is necessary, kindly let me know and we will file one promptly. Other than the insertion of the Standard of Review section and corresponding corrections to the Table of Contents and Table of Authorities, no changes have been made from the document filed on August 30.

Thank you for your time and attention.

Sincerely,



Adam T. Silvernail

cc: J. Emory Smith, Esquire
Adele J. Pope, Esquire