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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY, COURT OF COMMON PLEAS

JOCELYN NEWMAN, CIRCUIT COURT JUDGE

Docket No. 2022-000803

Greg German..... Appellant

v.

Daniel Ellzey, in his individual capacity
as Executive Director of the South Carolina
Dept. of Employment and Workforce..... Respondent

INITIAL BRIEF OF APPELLANT

Greg J. German
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Appellant *pro se*

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STATEMENT OF THE ISSUES ON APPEAL

Whether the Circuit Court erred in relying upon *Sloan v. Dept. of Rev.*, 409 S.C. 551, 762 S.E.2d 687 (2014) to find that there was no genuine issue of material fact, as the Respondent supposedly complied with the FOIA.

Whether the Circuit Court erred in granting summary judgment before the Department had provided good faith discovery responses.

Whether the Circuit Court erred in granting summary judgment against Appellant's remaining claims based on either Exhaustion of Administrative Remedies or Sovereign Immunity grounds.

Whether the Circuit Courts in Horry and Richland Counties erred, respectively, in first granting Respondent's Motion to Change Venue, and then denying Appellant's Motion to Change Venue.

STATEMENT OF THE CASE

Appellant Greg German is an Army veteran who had never filed for unemployment during his forty-four-year history of employment. In a nutshell, what happened is that Appellant was laid off from work at Red Roof Inn in Myrtle Beach for seven (7) weeks because of the Covid pandemic and the concomitant mandatory lockdown ordered by the Governor of South Carolina.

Appellant filed for unemployment benefits for the first time in his life.

When unemployment payments were not forthcoming, including federal CARES Act funds, Appellant became concerned and began calling Respondent Department of Employment and Workplace (hereinafter "Department" or "DEW"). When Appellant finally got a human on the telephone and was told that his file was fine—but still no unemployment funds came through—he became increasingly concerned.

That's when Appellant filed Freedom of Information Act (hereinafter "FOIA") requests and began taping conversations he had with DEW representatives. The

same day that DEW learned about the FOIA requests and taped conversations, the Department denied six weeks of Appellant's benefits.

Appellant questioned the denial of benefits all the way through the administrative process. That matter is now in front of the South Carolina Court of Appeals.

The current case involves a civil proceeding brought by Appellant against DEW for violating the FOIA process.

STARTING AT THE BEGINNING

As this was the first time in his life Appellant had filed for unemployment, the system was completely unfamiliar to him. With no assistance provided by the Department of Employment and Workforce, he apparently successfully submitted his claim. Unfortunately, all but one of the weeks that Appellant claimed were denied by DEW because of the technical violation of not certifying the claim.

The Appellant sent FOIA requests by email to DEW on June 17, 2020. On July 2, 2020, DEW provided a response that included this statement: "Please be advised that documents related to your UI claim will be provided at no charge." As it turns

out, this would be an implied misrepresentation by the Department. There would be documents related to Appellants UI claim that would be hidden.

DEW basically provided the information that Appellant could access for free with his online portal. There was more in that personal file that they did not provide.

On July 24, Appellant again contacted DEW to indicate that there had been no production of documents in his personal file that showed telephone contacts with the Department. DEW indicated that it had provided Appellant's entire personal file. This, as it turns out, was not true.

These documents, which showed Appellant's contacts with DEW, were critical to his appeal of the denial of his unemployment claim. Complaint, at p. 4.

On September 15, Appellant again emailed DEW with a request for his entire personal file. Appellant indicated that he would have to file a lawsuit in 21 days to produce documents if the Department did not respond with the requested items.

On the morning of September 21, Appellant telephoned DEW about his administrative appeal. During this conversation, the Appellant asked the DEW

agent if it was common practice for folks like her to make a note of conversations with claimants and place those in the claimants' personal files. The DEW agent indicated that that was standard practice.

Later that morning, at 10:03 am, Appellant again emailed DEW about his personal file, providing as follows:

> "I will file suit at the end of 21 days as stated in my prior communications with your office unless you provide all of the records that I have requested. I just got off the telephone with Talesha, a DEW Customer Service Representative (@ 803-737-2520), who confirmed to me that representatives like her take notes and put them in the "file" of unemployment claimants. I recorded that call. When you originally sent me what was supposed to be my unemployment compensation file (but which was actually only what I could get myself on line), there were no such notes. Since I had many conversations with DEW Customer Service Representatives, there should be many such notes in my file. I believe that this office is illegally withholding records from me. I also believe that this office created a fiction about what is in my personal unemployment file. I believe that there is much more in my personal file than what you led me to believe.

At about 11:37 am that same day—about an hour and a half after this email was sent— DEW responded with another document production of what purports

to be these telephone contacts with the Department (although even that is missing many telephone contacts, and there were no "notes" as the DEW agent had described).

CERTIFICATION OF THE UNEMPLOYMENT CLAIM

In the present suit in the civil court system, Appellant is alleging a count that involves the retaliatory denial of benefits. To understand the claim better, it must be noted that multiple DEW representatives said that Appellant's request for unemployment would be paid in full. For example, these statements were by agents of DEW:

PHONE CALL WITH DEW REPRESENTATIVE 6/19/20

> DEW REPRESENTATIVE: "I submitted all of your certifications for those six weeks ... the whole month of April and two weeks in May, so when you look on your account it's going to say 'pending resolution of late claim.' So, what they're going to do is just verify the information we put in, and once it's cleared, you'll get a payment for all six weeks."

PHONE CALL WITH DEW REPRESENTATIVE 7/10/20

> DEW REPRESENTATIVE: "You need to reactivate your claim. You need to do it on your portal.... Reactivate your claim because you were late in certifying benefits ... so you need to reactivate the claim....

GREG: [After reactivating claim] "Okay, it says that I successfully submitted my application."

DEW REPRESENTATIVE: "Okay, that's all you need to do now.

GREG: "All right. Then that's it? Then, they'll send me payment for the weeks that I screwed up?"

DEW REPRESENTATIVE: "Yes, Sir, they will."

Multiple DEW agents stated that the Appellant's unemployment claim would be paid. That makes the timeline of DEW's denial of benefits significant. Here is the timeline of significant events for the retaliatory denial of benefits claim:

- Plaintiff files for unemployment on or about March 30, 2020
- Plaintiff receives payment for one week on or about April 14, 2020
- Plaintiff "on hold" for other payments although DEW, through its representatives indicate that it is only a matter of time to fix the certification issue
- Plaintiff submits FOIA requests on June 17, 2020.
- Plaintiff reminds DEW it owes all of the records from his personal file on July 2, 2020.

■ Plaintiff notes to DEW the taped conversations on or about July 23, 2020.

■ DEW denies remaining six (6) weeks of unemployment claims on or about July 23, 2020.

The issue raised in Appellant's Complaint was that DEW retaliated for the FOIA requests by denying unemployment benefits on the same day it learned about the FOIA requests.

PERMANENT INJUNCTION

In his Complaint, the Appellant sought a permanent injunction from the court, ordering DEW to provide a complete file when unemployment claimants request one. Complaint, at p. 5.

The dates of filing suit and other relevant information is contained below in the following timeline:

TIMELINE AND OTHER FACTS:

March 30, 2020. Original Unemployment claim filed by Appellant with DEW.

June 17, 2020. Appellant sends FOIA requests to Respondent DEW.

July 2, 2020. Respondent DEW provides documents but not all of Appellant's requested personal file.

July 23, 2020. Date Respondent decided against six (6) weeks of Unemployment benefits.

July 24, 2020. Date Respondent filed appeal with DEW.

July 24, 2020. Appellant requested complete personal file, including notes of telephone conversations.

September 15, 2020. Appellant again requests complete personal file, including notes of telephone conversations.

September 21, 2010. Agent for DEW admits that it was standard practice to make notes of telephone conversations with DEW applicants and put in their personal file. After communicating this information to DEW, the Respondent provides additional telephone contacts, but no "notes" of conversations.

October 8, 2020. Appellant files suit in Horry County.

November 10, 2020. Respondent files Answer and Motion to Change Venue.

December 14, 2020. Appellant files Response to Motion to Change Venue.

May 18, 2021. Appellant files Motion to Compel Discovery.

July 6, 2021. Respondent files Memo in Opposition to Motion to Compel.

October 1, 2021. Honorable Judge orders case transferred to Richland County.

October 6, 2021. Case transferred to Richland County.

January 13, 2022. Respondent files Motion for Summary Judgment.

January 18, 2022. Appellant files Motion to Change Venue.

April 6, 2022. Email correspondence between all counsel and Court regarding venue hardship.

May 1, 2022. Email correspondence between all counsel and Court regarding venue hardship.

May 18, 2022. Judge denies Motion to Change Venue, Grants Motion for Summary Judgment.

June 1, 2022. Appellant files Notice of Appeal

Appellant sues for the right to pursue his FOIA claims in the Circuit Court, for court costs and attorney's fees and for such other and further relief at law or in equity to which this Court may find him justly entitled.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard which governs the trial court under Rule 56(c), SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Laurens Emergency Med. Specialists v. M.S. Bailey & Sons Bankers*, 355 S.C. 104, 584 S.E.2d 375 (2003); *Fleming v. Rose*, 350 S.C. 488, 567 S.E.2d 857 (2002); *Regions Bank v. Schmauch*, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003); *Redwend Ltd. Pship v. Edwards*, 354 S.C. 459, 581 S.E.2d 496 (Ct. App. 2003). In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. *Sauner v. Public Serv. Auth.*, 354 S.C. 397, 581 S.E.2d 161 (2003); *Hendricks v. Clemson Univ.*, 353 S.C. 449, 578 S.E.2d 711 (2003); *McNair v.*

Rainsford, 330 S.C. 332, 499 S.E.2d 488 (Ct. App. 1998); *see also Laurens Emergency Med. Specialists*, 355 S.C. at 108, 584 S.E.2d at 377 (stating that in reviewing summary judgment motion, facts and circumstances must be viewed in light most favorable to non-moving party). If triable issues exist, those issues must go to the jury. *Baril v. Aiken Regl Med. Ctrs.*, 352 S.C. 271, 573 S.E.2d 830 (Ct. App. 2002); *Young v. South Carolina Dept of Corrections*, 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999).

Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 578 S.E.2d 329 (2003); *Regions Bank*, 354 S.C. at 659, 582 S.E.2d at 438; Rule 56(c), SCRCP. All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. *Bayle v. South Carolina Dept of Transp.*, 344 S.C. 115, 542 S.E.2d 736 (Ct. App. 2001); *see also Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 563, 564 S.E.2d 94, 96 (2002) (On appeal from an order granting summary judgment, the appellate

court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below.).

Under Rule 56©, SCRCP, the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. *Regions Bank*, 354 S.C. at 659, 582 S.E.2d at 438; *Trivelas v. South Carolina Dept of Transp.*, 348 S.C. 125, 558 S.E.2d 271 (Ct. App. 2001). Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. *Regions Bank*, 354 S.C. at 660, 582 S.E.2d at 438. Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial. *SSI Med. Servs., Inc. v. Cox*, 301 S.C. 493, 392 S.E.2d 789 (1990); *Peterson v. West American Ins. Co.,* 336 S.C. 89, 518 S.E.2d 608 (Ct. App. 1999); Rule 56©, SCRCP. The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003); *George v. Fabri*, 345 S.C. 440, 548 S.E.2d 868 (2001).

ARGUMENT

WHETHER THE CIRCUIT COURT ERRED IN RELYING UPON *SLOAN V. DEPT. OF REV.*, 409 S.C. 551, 762 S.E.2D 687 (2014) TO FIND THAT THERE WAS NO GENUINE ISSUE OF MATERIAL FACT, AS THE RESPONDENT SUPPOSEDLY COMPLIED WITH THE FOIA.

This argument is better when read in tandem with the second argument below about the Respondent failing to provide discovery, and the Circuit Court failing to require Respondent to provide discovery, before the grant of summary judgment. But, the *Sloan* decision is so inappropriate as the linchpin of the Circuit Court's grant of summary judgment, that it must be raised as the first issue on appeal.

THE LINCHPIN OF THE COURT'S ORDER

There is no doubt that *Sloan* is the linchpin of the Circuit Court's grant of summary judgment. Although hidden in a footnote, the Honorable Judge used it to eliminate all of Appellant's FOIA claims. Based upon the holding in *Sloan*, the court stated that "[i]n producing records relating to Plaintiff's UI claim in its

responses on July 2, 2020 and September 21, 2020, the Department fully complied with FOIA."

And with this summary removal of Appellant's FOIA claims, the Circuit Court would go on and claim that it did not have subject matter jurisdiction to hear the other issues, including a request for permanent injunction, the retaliatory denial of benefits, and the request for equitable relief under the FOIA.

HERE'S THE PROBLEM WITH APPLICATION OF SLOAN

In *Sloan v. Dept. of Rev.*, 409 S.C. 551, 762 S.E.2d 687 (2014), the South Carolina Supreme Court held that a failure to provide documents requested under the FOIA could be cured even after a lawsuit had been filed.

The facts of the case show that Sloan filed a FOIA request on November 19, 2012. The Department of Revenue responded on December 10, 2012 by stating that it had received the request, and the request would be "researched and reviewed." Thirty-two days after having filed his FOIA request, Sloan filed a lawsuit.

Three weeks after the lawsuit was filed, the Department of Revenue provided all of the documents related to Sloan's FOIA request. That was a total of approximately fifty-three days from FOIA request to lawsuit.

Appellant in the instant case filed suit one-hundred and thirteen days after the initial FOIA request.

But what really distinguishes *Sloan* from this case is what happened in that time frame.

In Sloan, there was one request, which was responded to with the relevant documents which "Sloan conceded ... mooted" his request for injunctive relief. *Id.* There was no issue that the Department of Revenue provided all documents requested under the FOIA. There was no alleged misrepresentation by the Department of Revenue.

In the present case, the Appellant requested all matter in his personal file four separate times. The requests asked for notes of telephone contacts between Appellant and the Department. DEW's response to the first FOIA request included

this statement: "Please be advised that documents related to your UI claim will be provided at no charge." As it turns out, this would be an implied misrepresentation by the Department.

DEW basically provided the information that Appellant could access for free using the Department's online portal.

There was more in that personal file that DEW hid.

After that, Appellant again contacted DEW to indicate that there had been no production of documents from Appellant's personal file that showed telephone contacts with the Department.

In this time period, DEW indicated that it had provided Appellant's entire personal file. This, as it turns out, was a lie.

Still later, Appellant again emailed DEW with a request for his entire personal file. Plaintiff indicated that he would have to file a lawsuit in 21 days to produce documents if the Department did not respond with the requested items.

After that email, Appellant telephoned DEW about a different subject. During this conversation, Appellant asked the DEW agent if it was common practice for folks like her to make a note of conversations with claimants and place those in the claimants' personal files.

The DEW agent indicated that that was standard practice.

Later that morning, Appellant, for the fourth time, emailed DEW about his personal file. But that email specifically stated,

> I will file suit at the end of 21 days as stated in my prior communications with your office unless you provide all of the records that I have requested. I just got off the telephone with Talesha, a DEW Customer Service Representative (@ 803-737-2520), who confirmed to me that representatives like her take notes and put them in the "file" of unemployment claimants. I recorded that call. When you originally sent me what was supposed to be my unemployment compensation file (but which was actually only what I could get myself on line), there were no such notes. Since I had many conversations with DEW Customer Service Representatives, there should be many such notes in my file. I believe that this office is illegally withholding records from me. I also believe that this office created a fiction about what is in my personal unemployment file. I believe that there is much more in my personal file than what you led me to believe.

About an hour and a half after this email was sent— DEW responded with another document production of what purports to be these telephone contacts with the Department (although even that is missing many telephone contacts and any of the "notes" their agent described in our conversation).

DISTINGUISHING SLOAN

The facts and the law make *Sloan* easily distinguishable from the present case. Here are some examples:

> *Sloan*. Document production was a little tardy, but complete. Department of Revenue didn't misrepresent the documents it had. Department of Revenue wasn't asked four times to provide relevant documents and wasn't caught in a lie and had to hurriedly produce relevant documents. Department of Revenue didn't fail to respond to discovery requests (albeit, that lawsuit was at an early stage and most likely didn't have discovery initiated). Sloan didn't request a permanent injunction so that this wouldn't happen to others in the future.
>
> *This Case*. Document production was very tardy. Department of Employment and Workforce continually misled about the relevant documents it had, was asked four times for specific documents, and was caught in a lie and had to hurriedly produce them. DEW has failed to respond to discovery in good faith. Appellant has requested a permanent injunction so that this doesn't happen to others in the future.

Most significantly, the *Sloan* decision at least arguably didn't violate the very essence of the Freedom of Information Act, which provides "that it is vital in a democratic society that public business be performed in an open and public manner." S.C. Code Ann. 30-4-15 (1991).

By failing to respond to three valid FOIA requests for specific documents, and misleading about their very existence until caught in a lie, DEW failed the basic test of the legislation.

Because it is a remedial statute, the FOIA should be liberally construed. *See Campbell v. Marion Cnty. Hosp. Dist.*, 354, S.C. 274, 281, 580 S.E.2d 163, 166 (Ct. App. 2003).

PUBLIC POLICY

Granting summary judgment in favor of an executive department after it has been asked to produce relevant FOIA documents three times would be bad public policy. Granting summary judgment when the department actively misled what FOIA-relevant documents existed would be worse public policy.

Whether because the department actively misled the public or just failed to exercise due diligence, it is just bad public policy.

Granting summary judgment after relevant, FOIA-requested documents have been discovered only because the department got tripped up in a lie, would be the worst public policy conceivable. You may as well gut the entire Freedom of Information Act system.

As you can see, the *Sloan* decision—the linchpin holding the summary judgment together—does not apply to the facts of our case. It gets even worse when you consider that the Respondent failed to provide good faith discovery, Appellant filed a Motion to Compel Discovery, and the Circuit Court granted summary judgment without considering the Motion to Compel.

WHETHER THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT BEFORE THE DEPARTMENT HAD PROVIDED GOOD FAITH DISCOVERY RESPONSES.

Appellant believes that DEW still has not complied with its responsibilities under the FOIA. As noted previously, Appellant had to ask four times for call logs

before they showed up within an hour-and-a-half after DEW realized that Appellant knew that they existed. DEW still has not provided the notes that their agent said they put in a claimant's file as standard procedure.

There is plenty of evidence to believe that DEW still has not complied with its responsibilities under the FOIA given the fact-based allegations contained in the Complaint.

On page three of the Complaint, Appellant alleges that DEW representatives "take notes and put them in the 'file' of unemployment claimants." DEW provided only a call log—and that was missing a number of calls. *See also, supra* (quoting the email sent to DEW about the discovery of the call logs and notes).

Where are the "notes" that the DEW representative mentioned?

THE MOTION TO COMPEL

Appellant attempted to use the discovery process to find out. When Respondent failed to answer interrogatories and requests to admit, or respond to document requests in good faith, Appellant filed a Motion to Compel Discovery.

The Motion to Compel was filed on May 18, 2021. On January 13, 2022, Respondent filed its Motion for Summary Judgment. As you can see, the Motion to Compel was filed about seven months before the Motion for Summary Judgment.

HERE ARE SOME EXAMPLES

These are some of the relevant interrogatories sent to Respondent:

> "5. Please provide a complete list of Plaintiff's files retained by DEW, save that Attorney Work Product and all information accessible to Plaintiff through his DEW internet portal are exempted from this Interrogatory. This list should include a brief description of the subject matter, any heading, the person or persons who created or added to the document or other thing, as well as the place where the document or other thing is currently stored."
>
> "8. Please provide the standard operating procedure for DEW in responding to a FOIA request in which the person has requested a copy of his or her own personal file."

The Respondent DEW provided the following in response to these interrogatories and fourteen others:

> "Object. This request exceeds the scope of Plaintiff's claims under the South Carolina Freedom of Information Act. The inquiry posed by this interrogatory is neither relevant nor

> calculated to lead to the discovery of information relevant to claims within the jurisdiction of this Court.... Further, this interrogatory is unduly burdensome."

Additionally, here are some of the relevant requests to produce:

> "5. Please provide a complete copy of Plaintiff's files retained by DEW, save that Attorney Work Product and all information accessible to Plaintiff through his DEW internet portal are exempted from this Request."

> "7. Please provide a copy of any memo or inter-office communication of any kind that shows the standard operating procedure for DEW in responding to a FOIA request in which the person has requested a copy of his or her own personal file from March 30, 2019 to the present."

The Respondent answered both of these requests to produce (and eleven others) with the same boilerplate language that included claims that the requests "exceed[] the scope of Plaintiff's claims under the South Carolina Freedom of Information Act...."

And finally on this subject, here are some of the requests to admit served on Respondent:

> "3. Admit or deny that the initial DEW response to the FOIA requests described in numbers one and two above did not contain any call log confirming certain dates of communication between DEW and Plaintiff."

"4. Admit or deny that the initial DEW response to the FOIA requests described in numbers one and two above contained no mention of a call log existing that would confirm certain dates of communication between DEW and Plaintiff."

"5. Admit or deny that the initial DEW response to the FOIA requests described in numbers one and two above did not claim an express exemption from providing that information to Plaintiff."

To all of these requests to admit, the Department answered with the same boilerplate: "Denied as stated. DEW's initial response provided the process for obtaining documents via the South Carolina Freedom of Information Act and requested acknowledgement and agreement by Plaintiff with that process."

Depositions, of course, would have been useless as the Respondent named only one person who supposedly had information about Appellant's claims. Moreover, it is standard practice to obtain depositions after the opposing party has fully responded to written discovery.

The final paragraph of Appellant's Motion to Compel states the obvious about the Respondent's attitude towards discovery:

"In effect, [Respondent] has answered good faith discovery requests in bad faith, having provided the name of one person

> who works for DEW, while providing invalid responses to Requests to Admit and a document production that amounts to everything the Plaintiff already had access to on his DEW 'portal' *and nothing else*."

(emphasis in original)

THE COURT OF APPEALS' DECISION IN SCHMIDT

This court took a stern view of the grant of summary judgment before discovery had been completed in *Schmidt v. Courtney*, 592 S.E.2d 326 (Ct. App. 2003). This court stated the standard.

Many South Carolina cases point out summary judgment is a drastic remedy which should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues. *Cunningham v. Helping Hands, Inc.*, 352 S.C. 485, 575 S.E.2d 549 (2003); *Lanham v. Blue Cross & Blue Shield*, 349 S.C. 356, 563 S.E.2d 331 (2002); *Conner v. City of Forest Acres*, 348 S.C. 454, 560 S.E.2d 606 (2002); *Redwend Ltd. Pship v. Edwards*, 354 S.C. 459, 581 S.E.2d 496 (Ct. App. 2003); *Baril v. Aiken Regl Med. Ctrs.*, 352 S.C. 271, 573 S.E.2d 830 (Ct. App.

2002); *Trivelas v. South Carolina Dept of Transp.*, 348 S.C. 125, 558 S.E.2d 271 (Ct. App. 2001); *Murray v. Holnam, Inc.*, 344 S.C. 129, 542 S.E.2d 743 (Ct. App. 2001); *McNair v. Rainsford*, 330 S.C. 332, 499 S.E.2d 488 (Ct. App. 1998). Because summary judgment is a drastic remedy, it must not be granted until the opposing party has had a full and fair opportunity to complete discovery. *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003); *Lanham*, 349 S.C. at 363, 563 S.E.2d at 334; *Doe v. Batson*, 345 S.C. 316, 322, 548 S.E.2d 854, 857 (2001); *Baird v. Charleston County*, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999); *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991).

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Lanham*, 349 S.C. at 362, 563 S.E.2d at 333; *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 534 S.E.2d 672 (2000); *Mosteller v. County of Lexington*, 336 S.C. 360, 520 S.E.2d 620 (1999); *Redwend Ltd. Pship*, 354 S.C. at 468, 581 S.E.2d at 501; *Baril,* 352 S.C. at 280, 573 S.E.2d at 835; *Trivelas,* 348 S.C. at 130, 558 S.E.2d at 273; *Hall v. Fedor*, 349 S.C. 169, 561 S.E.2d 654 (Ct. App. 2002); *Hedgepath v. American Tel. & Tel. Co.*, 348 S.C. 340, 559 S.E.2d 327 (Ct. App. 2001); *Bayle v. South Carolina Dept of Transp.*, 344 S.C. 115, 542 S.E.2d 736 (Ct. App. 2001); *Vermeer Carolinas, Inc. v.*

Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999); *Middleborough Horizontal Prop. Regime Council v. Montedison*, 320 S.C. 470, 465 S.E.2d 765 (Ct. App. 1995). Summary judgment is inappropriate when further development of the facts is desirable to clarify the application of the law. *Lee v. Kelley*, 298 S.C. 155, 158, 378 S.E.2d 616, 617 (Ct. App. 1989). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. *Redwend Ltd. Pship*, 354 S.C. at 468, 581 S.E.2d at 501; *Baril*, 352 S.C. at 280, 573 S.E.2d at 835; *Hall*, 349 S.C. at 173-74, 561 S.E.2d at 656; *Glasscock, Inc. v. United States Fid. & Guar. Co.*, 348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001); *Stewart v. State Farm Mut. Auto. Ins. Co.*, 341 S.C. 143, 533 S.E.2d 597 (Ct. App. 2000); *see also Laurens Emergency Med. Specialists v. M.S. Bailey & Sons Bankers*, 355 S.C. 104, 584 S.E.2d 375 (2003) (noting that summary judgment should not be granted even when there is no dispute as to evidentiary facts, if there is dispute as to conclusions to be drawn therefrom).

The grant of summary judgment was, at best, premature in the present case. DEW had not responded to discovery, no depositions had been taken, and a motion to compel discovery was on file and should've been heard first.

WHETHER THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT AGAINST APPELLANT'S REMAINING CLAIMS BASED ON EITHER EXHAUSTION OF ADMINISTRATIVE REMEDIES OR SOVEREIGN IMMUNITY GROUNDS.

We have come full circle to the Circuit Court's reliance on *Sloan v. Dept. of Rev.*, 409 S.C. 551, 762 S.E.2d 687 (2014) as the linchpin for its grant of summary judgment. As long as Appellant's FOIA claim survives, there is ample subject matter jurisdiction for the trial court to rule on a permanent injunction or rule that the agency denied benefits in an illegal, retaliatory way.

The subject matter jurisdiction is derived from the FOIA itself. Section §30-4-100 provides in relevant part that a trial court "may order equitable relief as it considers appropriate, and a violation of this chapter must be considered to be an irreparable injury for which no adequate remedy at law exists."

That is also ample jurisdiction for the trial court to evaluate whether other South Carolina citizens have been injured because DEW has not provided FOIA-

requested documents in the appropriate way, or whether other South Carolina citizens have been injured because DEW has denied benefits in retaliation for exercising the right to file a FOIA request.

The FOIA provides the trial judge with subject matter jurisdiction to enter a permanent injunction if, as stated in the Appellant's Complaint: "Defendant is taking advantage of financially disadvantaged folks who request their personal files and not providing a full disclosure as required under the South Carolina Freedom of Information Act." Complaint, at p. 5.

Finally, under the South Carolina Tort Claims Act, it is expressly noted that "Nothing herein shall affect the power of a court of equity at the suit of a party complainant to enjoin unlawful acts committed by governmental entities or mandate lawful action by governmental entitites." S.C. Code Ann. §15-78-50(c).

EXHAUSTION OF ADMINISTRATIVE REMEDIES

As for the argument that Appellant must exhaust his administrative remedies, that is in fact occurring. However, the allegations in the civil complaint dealing

with the FOIA and retaliatory denial of benefits and the permanent injunction are not something one would expect an administrative law judge to handle.

The administrative case deals with whether DEW's denial of benefits was appropriate under the administrative law. The instant case deals with whether DEW's actions involving the FOIA were unlawful to this Appellant and perhaps others.

These are two separate cases seeking two separate remedies for two distinct injuries.

WHETHER THE CIRCUIT COURTS IN HORRY AND RICHLAND COUNTIES ERRED, RESPECTIVELY, IN FIRST GRANTING RESPONDENT'S MOTION TO CHANGE VENUE, AND THEN DENYING APPELLANT'S MOTION TO CHANGE VENUE.

The Circuit Court relied on the case of *Stalheim v. Doskocil*, 275 S.C. 252, 269 S.E. 2d 346 (1980) for the proposition that venue in actions against public officials is mandatory in Richland County. In Appellant's Motion to Change Venue, he noted that The South Carolina Supreme Court carved out a hardship exception in that case, which should also apply to this case.

Plaintiff does not own a car. According to Google, the distance between Myrtle Beach and Columbia, South Carolina is approximately 152.8 miles. Without a car, attending hearings and trial would prove difficult and expensive for the Plaintiff. This was especially true in this case.

There were supposed to be monthly docket call hearings, and these presented an untenable situation for Appellant, who wrote emails to the Circuit Court and counsel on April 6, 2022 and May 1, 2022 noting that "[m]onthly in-person Roster Meetings or hearings on matters would amount to a de facto default judgment...."

The cited concerns were work schedules, which are inflexible during the Summer in the Myrtle Beach hotel business, the lack of a vehicle and expense.

This is even more so since the Defendant denied the major portion of his Unemployment Claim, so that he now lives paycheck to paycheck. The current balance in Appellant's one and only bank account was $844.59 on January 10, 2022.

At the time of the Motion to Change Venue pleadings in Horry County, Appellant's account showed $322.45 on 12/8/2020. It hardly seems equitable for

a state agency to deny benefits and then force a plaintiff to travel, without a car, 152.8 miles for redress.

Additionally, in a decision from the South Carolina Supreme Court that occurred after *Stalheim*, the court held "Where an action is properly commenced in any one of two or more venues and is properly brought in one of such venues, it is removable to the other proper venue only if there exists some statutory ground for removal other than the bringing of suit in the wrong venue. *Jeter v. SCDOT*, 369 S.C. 433, 633 S.E.2d 143 (2006).

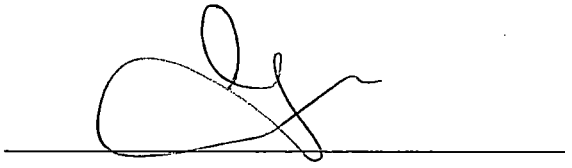
Appellant would ask this Honorable Court to take judicial notice of the distances between Appellant's residence in Myrtle Beach, and the courthouses in Horry and Richland Counties. Additionally, Appellant would ask this Honorable Court to take judicial notice of the docket sheet of this matter in Richland County, as it lists all of the "just show up" hearings where attendance is "MANDATORY." A copy of one such notice is part of the Record on Appeal.

The Circuit Courts in Horry and Richland Counties should have applied a two-pronged test: (1) Does Appellant meet the burdensomeness exception contained in Stalheim? And, if so, (2) Was venue otherwise proper in Horry County?

The answer to both of those questions is yes.

CONCLUSION/PRAYER

Appellant prays that this Court finds in his favor on all counts, remand the case back to the Circuit Court in Horry County, and order DEW to pay costs and attorney's fees, and he prays for such other and further relief the Court may justly determine.



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY, COURT OF COMMON PLEAS

JOCELYN NEWMAN, CIRCUIT COURT JUDGE

Docket No. 2022-000803

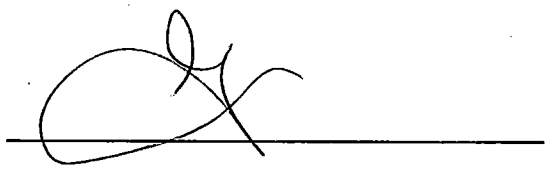
Greg German..... Appellant

v.

Daniel Ellzey, in his individual capacity
as Executive Director of the South Carolina
Dept. of Employment and Workforce..... Respondent

PROOF OF SERVICE

On the 30th day of June, 2022, undersigned hand delivered a true and correct copy of the Initial Brief of Appellant in a properly stamped and addressed envelope to the USPS for delivery as outgoing mail to the Honorable Clerk of Court and counsel of record.



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The Honorable Jenny Abbott Kitchings
Clerk of Court
Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: German v. Ellzey
No. 2022-000803

Honorable Clerk of Court,

Please find enclosed Appellant's Initial Brief, Proof of Service and Certificate of Compliance in the above-referenced matter. I have also sent same to all counsel of record.

If you have any questions or comments for me, please do not hesitate to give me a call or send an email.

Sincerely,

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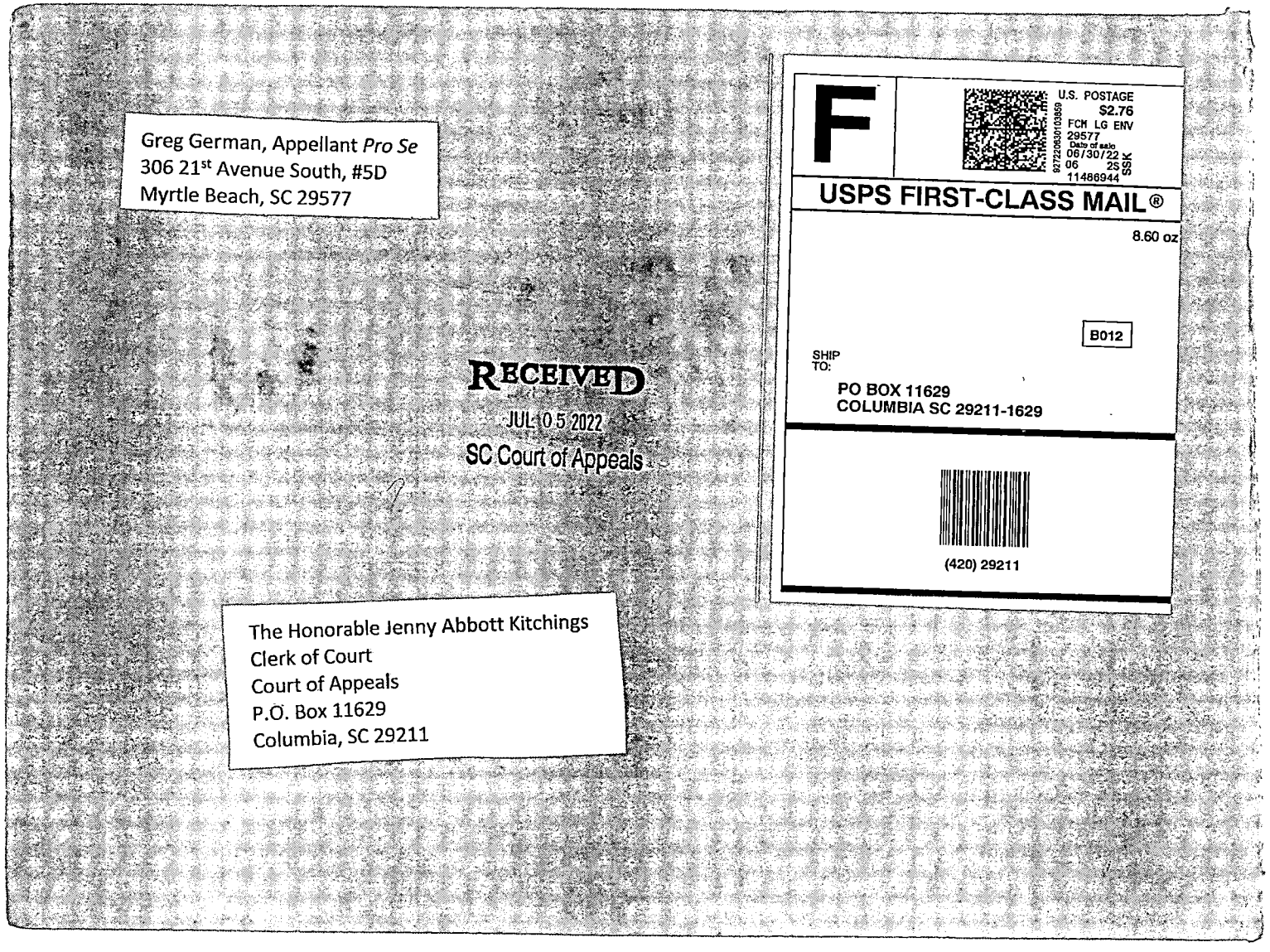

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