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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
DeAndrea Gist Benjamin, Circuit Court Judge

Appellate Case No. 2020-001135
Case No. 2015-CP-40-1805

Wendy Brawley,..... Respondent-Appellant,

v.

Richland County, South Carolina ..... Appellant-Respondent.

RESPONDENT'S BRIEF OF APPELLANT-RESPONDENT RICHLAND COUNTY

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STATEMENT OF THE CASE

The Respondent-Appellant Wendy Brawley has brought this action pursuant to the South Carolina Freedom of Information Act (FOIA), S.C. Code Ann. § 30-4-10, *et seq*.[1] Brawley presented four separate FOIA requests to the Appellant-Respondent Richland County at the meeting of Richland County Council held on the evening of September 9, 2014. (R. 114-117). Brawley was sent correspondence regarding her FOIA requests on September 12, 2014 and October 1, 2014. (R. 129, 573). Thereafter, by letter dated October 3, 2014, the County provided a response to three of the four FOIA requests, and by letter dated October 8, 2014, the County provided a response to the fourth FOIA request. (R. 574).

Wendy Brawley and her co-Plaintiff -- Hopkins and Lower Richland Citizens United, Inc. ("HLRCU") -- brought this FOIA action in an attempt to enjoin the Lower Richland Sewer Project. In their Complaint, the Plaintiffs sought the following temporary and permanent injunctive relief:

> a. Enjoining Defendant from sending surveys to residents that make any representation that Richland County will provide all residents that reside within 200 feet of the proposed Phase I sewer line a full waiver of tap or connection fees;

[1] This is governed by the Freedom of Information Act as it was codified in 2014, which was prior to the amendments to FOIA as adopted as part of 2017 Act No. 67, which became effective on May 19, 2017.

b. Enjoining Defendant from entering into negotiations with residents of Hopkins and Lower Richland for the acquisition of easements; and

c. Enjoining Defendant from providing third reading to the Lower Richland Sewer Project.

See, Complaint, ¶ 40. (R. 111). The County filed a motion to dismiss, which Circuit Court Judge Clifton Newman granted by Form Order entered August 14, 2015 (R. 1-2) and by a Formal Order filed October 4, 2016. (R. 4-8). Judge Newman dismissed Brawley's claims for injunctive relief. (R. 8).

Later, after the parties had the opportunity to conduct discovery, Richland County filed a motion for summary judgment. By Order filed October 24, 2016, that motion was granted in part and denied in part by Judge Clifton Newman. (R. 9-11). Judge Newman resolved three of the four FOIA requests in the County's favor. Additionally, the Plaintiff HLRCU was dismissed for lack of standing by that Order.

The fourth FOIA request sought "a copy of the application and supporting documentation Richland County submitted to the USDA Rural Development for grant and loan funding for the Lower Richland Sewer Project." (R. 572). In his Order filed October 24, 2016, Judge Newman determined that "there appears to be a genuine issue of material fact in dispute that precludes the resolution of this claim at the summary judgment stage." (R. 10).

The case was tried before Circuit Court Judge DeAndrea Benjamin without a jury on September 5, 2019. By Order filed February 13, 2020, Judge Benjamin

ruled in favor of Wendy Brawley and found a FOIA violation by the County. (R. 12-24). The County subsequently filed a motion to alter or amend order pursuant to Rule 52(b) and Rule 59(e), SCRCP. (R. 208-216). By Order filed July 16, 2020, Judge Benjamin granted in part and denied in part that motion. (R. 29-38). The court agreed that the claim for injunctive relief had previously been dismissed by Judge Newman, but the judge allowed the award of declaratory relief to stand.

The County filed a Notice of Appeal on August 17, 2020, and Brawley filed a Notice of Appeal on the same date.

In the interim, on July 17, 2020, Brawley's counsel had filed an affidavit claiming an award of attorney's fees and costs. (R. 220-223). No motion was filed. Judge Benjamin held a hearing on the request for attorney's fees and issued an Order Awarding Plaintiff Attorney's Fees and Costs, filed November 30, 2020, awarding a combined $81,264.96 in attorney's fees and costs to Brawley. (R. 39-42). The County filed a motion to alter or amend order seeking reconsideration of the Order Awarding Plaintiff Attorney's Fees and Costs. (R. 241-248). After an additional hearing, Judge Benjamin issued an Amended Order Awarding Plaintiff Attorney's Fees and Costs, filed January 19, 2021, awarding $77,980.75 in attorney's fees and $2,864.96 in costs to Brawley. (R. 94-101).

The County then filed an Amended Notice of Appeal, and this appeal proceeded in this Court.

STANDARD OF REVIEW

The standard of review for questions of law is *de novo*. The appellate court "may reverse where the decision is affected by any error of law." *Murphy v. Owens Corning*, 393 S.C. 77, 710 S.E.2d 454, 457 (Ct. App. 2011). The appellate courts are "free to decide matters of law with no particular deference to the fact finder." *Id.*

ARGUMENTS

In her cross-appeal, the Respondent-Appellant Wendy Brawley argues that the trial court erred in altering its Final Order to remove any award of injunctive relief. The trial court recognized that Circuit Court Judge Clifton Newman had previously granted a motion to dismiss with respect to Brawley's second cause of action for injunctive relief. That left only Brawley's first cause of action to be tried. The first cause of action was styled solely as a claim for a declaratory judgment. (R. 110).

Brawley claims that the trial court was "misled" into finding that Judge Newman had dismissed her claim for injunctive relief. However, the trial court had access to the form order filed August 14, 2015, which reads: "Defendant's Motion to Dismiss Plaintiff's claim for injunctive relief is granted." (R. 1). That was followed by a formal order filed October 4, 2016, issued by Judge Newman, which similarly reads: "The Court therefore grants the Motion to Dismiss with respect to the Plaintiff's claim for injunctive relief." (R. 8).[2]

Moreover, the record shows that, during the bench trial, counsel for Richland County advised the court as follows: "I will just remind the Court, Judge Newman has already decided the claims for injunctive relief. This claim is solely

[2] Notably, Brawley does not appeal from either of the orders issued by Judge Clifton Newman, which are accordingly the law of the case. *See, Atlantic Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 730 S.E.2d 282, 285 (2012) ("an unappealed ruling, right or wrong, is the law of the case").

for declaratory relief." (R. 534). In reply to that statement, Brawley's counsel stated: "I say Bingo to that." (R. 534).[3] Thus, Brawley agreed with the characterization as to the status of the claims alleged, namely that the injunctive relief claims were disposed of by Judge Newman and the declaratory judgment claim was what remained for trial.

Later, after the trial court gave effect to Judge Newman's unappealed orders by declining to grant any injunctive relief, Brawley did not contest that decision or object, just as Brawley's counsel had not done so during the trial. Brawley did not file any opposition to the County's motion to alter or amend order which asked the trial court to delete the award of injunctive relief. Likewise, and perhaps most importantly, Brawley did not file her own motion for reconsideration under Rule 52(b) or Rule 59(e) challenging the court's decision to decline any injunctive relief.

Instead, after never asserting any challenge at the trial level, Brawley waited until this appeal to raise *for the first time* her current assertion that she was entitled to injunctive relief, despite Judge Newman's dismissal of her claim for injunctive relief. However, [i]t is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review. Moreover, an objection must be sufficiently

[3] According to the Online Slang Dictionary, the use of "Bingo" as an interjection means an "exclamation used when someone has expressed the correct answer to a question or quandary." *See*, http://onlineslangdictionary.com/meaning-definition-of/bingo. Clearly, the use of "Bingo" was intended to convey agreement or affirmation of what was previously stated.

specific to inform the trial court of the point being urged by the objector." *Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 731, 733 (1998).[4] In sum, the issues raised by Brawley in her cross-appeal are not preserved for appellate review.

Nonetheless, even if this Court finds Brawley's cross-appeal to be preserved for appellate review, she has not demonstrated any reversible error by the trial court. In obvious recognition that Judge Newman had actually dismissed her second cause of action for injunctive relief, Brawley now attempts to claim coercive relief (i.e., injunctive relief) as part of the first cause of action which, as styled, seeks only a declaratory judgment. Indeed, Brawley asks this Court to "reinstate" the "*declaration* to Richland County to search for and produce Loan Records to Mrs. Brawley upon remittitur." *See*, Brawley's Opening Brief, p. 7. (Emphasis added). As the highlighted language shows, Brawley has, in essence, merged or melded the distinct concepts of injunctive relief and declaratory relief. They are not the same or interchangeable. As the First Circuit Court of Appeals has explained, "[a]n injunction is a coercive order by a court directing a party to do or refrain from doing something, and applies to future actions. A declaratory

[4] In *Elam v. South Carolina Dept. of Transportation*, 361 S.C. 9, 602 S.E.2d 772 (2004), the Supreme Court explained that "[i]ssues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court." 602 S.E.2d at 779-780. "Error preservation requirements are intended 'to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.'" *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 594 S.E.2d 485, 498 (Ct. App. 2004), *citing I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716, 724 (2000). "It is well settled that an appellate court cannot address an issue unless it was raised to, *and ruled upon by,* the trial court." *Id.* (Emphasis in original).

judgment states the existing legal rights in a controversy, but does not, in itself, coerce any party or enjoin any future action." *Ulstein Maritime, Ltd. v. United States*, 833 F.2d 1052, 1055 (1st Cir. 1987).[5] Thus, as the trial court correctly determined, it was not proper to grant coercive relief as part of a declaratory judgment claim. That portion of the trial court's Final Order should be affirmed.

[5] *See also, Steffel v. Thompson*, 415 U.S. 452, 467 (1974) ("the express purpose of the Federal Declaratory Judgment Act [is] to provide a milder alternative to the injunction remedy ... even though a declaratory judgment has the force and effect of a final judgment ... it is a much milder form of relief than an injunction. Though it may be persuasive, it is not ultimately coercive; noncompliance with it may be inappropriate, but it is not contempt"); *Olagues v. Russoniello*, 770 F.2d 791, 803 (9th Cir. 1985) (recognizing the "considerable difference between *ordering* a government official to conduct his activities in a certain manner, and simply *pronouncing* that his conduct is unlawful and *should* be corrected") (Emphasis in original).

CONCLUSION

Based on the foregoing discussion and analysis, the Appellant-Respondent Richland County respectfully requests that the Court deny the relief sought by the Respondent-Appellant in her cross-appeal. The County also renews its request that the Court reverse the Orders issued by Circuit Court Judge DeAndrea Benjamin finding a FOIA violation and awarding declaratory relief to the Respondent-Appellant. Richland County further requests that the Court reverse and set aside the Order issued by Judge Benjamin awarding $80,845.71 in attorney's fees and costs.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned counsel for the Appellant-Respondent Richland County certifies that the Respondent's Brief of Appellant-Respondent Richland County complies with Rule 211(b), SCACR.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Appellant-Respondent Richland County certifies that the Respondent's Brief of Appellant-Respondent Richland County complies with the Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.

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CERTIFICATE OF SERVICE

Pursuant to Section (d)(1) of the Supreme Court's Order RE: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended May 6, 2022), the undersigned employee of Lindemann & Davis, P.A., counsel for the Appellant-Respondent Richland County, does hereby certify that service of the **Respondent's Brief of Appellant-Respondent Richland County** was made upon all counsel of record by email only this the 21st day of July 2022 as follow:

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