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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Erin D. Dean, Special Referee

CASE NO.: 2019-CP-07-00818
APPELLATE TRACKING NO.: 2021-00321

Mare Baracco,…………………………………………………………………….,,,,,,,,,,,,Petitioner,

v.

County of Beaufort,……………………………………………………………………Respondent.

RETURN TO RESPONDENT'S MOTION TO SEAL

In accordance with Rule 240(e) of the *South Carolina Appellate Court Rules*, Appellant replies to the Respondent's August 23, 2022, Motion to Seal the Record as follows:

The parties consulted prior to the Respondent, Beaufort County, filing its motion to transmit the disputed *Freedom of Information* responses to the Court under seal for the Court's *in camera* inspection. Several times, Appellant consented to the request. However, despite the Appellant repeatedly acquiescing, the Respondent filed a motion that contains unnecessary, misleading characterizations of the disputed evidence, forcing Appellant either to remain silent in the face of these misleading characterizations and risk an allegation of waiver or estoppel, or to respond by pointing out that under the procedure governing *Freedom of Information* cases combined with Appellant's consent, the County's application requires only a brief request without unnecessary

argument. Thus, while the Appellant consents to the filing of the disputed documents under seal, the Appellant cannot allow the misleading statements to stand uncorrected.

1) The Petitioner brought this action alleging Beaufort County failed to adhere to its responsibilities of providing access to public documents under the *South Carolina Freedom of Information Act*. Such claims raise important questions of government transparency. Throughout this unnecessarily protracted litigation, the County deployed its superior financial ability to drive up the costs and unjustly complicate what the General Assembly designed to be a simplified, economical process. See § 34-4-100, S. C. Code, ann.: "Upon the filing of the request for declaratory judgment or injunctive relief related to provisions of this chapter, the chief administrative judge of the circuit court must schedule an initial hearing within ten days of the service on all parties." The plaintiff filed the amended complaint on June 27, 2019. (R.O.A. page 30) The Respondent Answered on August 14, 2019. (R.O.A. page 38) Judge Buckner issued his order referring the case on June 3, 2020. (R.O.A. page 4) On July 6, 2020, the Respondent furnished the privilege log required by Judge Buckner's June 3, 2020 Order. (R.O.A. page 87) After the Special Referee admonished the County to stop redacting the identities of the correspondents in the e-mails, on September 3, 2020, the Respondent furnished the modified documents, allowing the Appellant to see for the first time who was included in the email chains (R.O.A. page 125). On September 23, 2020, the Special Referee conducted the hearing via Zoom, and issued her Order on November 13, 2020.

The General Assembly requires the Court to examine the disputed documents *in camera*, and the only way the reviewing Court can do this if they are transmitted to the Court under seal. This procedure distinguishes *Freedom of Information* cases from other civil cases governed by Rule 41.1 *South Carolina Rules of Civil Procedure*. This Court outlined the procedure in *Burton v. York County Sheriff's Department*, 358, S. C. 339, 594 S.E.2d 888 (S.C. App. 2004)

B. In Camera Review

Under the FOIA, an in camera review of documentary material is mandated where there exists any controversy in regard to the production of contested documents.

In *Newberry Publ'g Co. v. Newberry County Comm'n on Alcohol & Drug Abuse*, 308 S.C. 352, 417 S.E.2d 870 (1992), the Supreme Court inculcated:

Section 30-4-40(b) provides that:

If any public record contains material which is not exempt under subsection (a) of this section, the public body shall separate the exempt and nonexempt material and make the nonexempt material available in accordance with the requirements of this chapter.

The Observer contends that the trial judge erred in failing to segregate the nonexempt and exempt portions of the report and to provide the Observer with the nonexempt material, as is mandated by section 30-4-40(b). We agree.

. . . We find that SLED's policy of denying all FOIA requests for criminal investigative reports, without determining whether portions of the report are subject to disclosure, is in direct contravention of the clear language of the FOIA. [358 S.C. 351] [T]he report may not be entirely exempt from disclosure; the statute goes on to state that a public record containing both nonexempt and exempt material must be segregated so that the nonexempt material is made available to the public. As a result, we reject SLED's contention that this, or any, criminal investigative report is per se exempt from disclosure.

In sum, we emphasize that law enforcement agencies do not have carte blanche to deny all FOIA requests for criminal investigative reports. The information contained in these reports can be withheld from disclosure only to the extent that it falls within one or more of the exemptions enumerated in section 30-4-40(a). The determination as to which portions of a report are exempt and which portions must be disclosed should be done on a case-by-case basis. *Id*. at 354-56, 417 S.E.2d at 873. Thereafter, the Court, in *City of Columbia v. ACLU*, 323 S.C. 384, 475 S.E.2d 747 (1996), explicated: "Before Appellant becomes entitled to the report, the trial court must first examine the report in detail in order to determine whether the report's contents or portions thereof qualify for an exemption under § 30-4-40." *Id.* at 388-89, 475 S.E.2d at 750.

In the case *sub judice*, the trial court conducted an *in camera* review resulting in a fact-specific analysis of producible documents as juxtaposed to protected documents. The actual materials and documents reviewed in an *in camera* hearing constitute evidence in the case. The sealed documents reviewed by the trial court have been examined by this Court and support the order issued by the trial court.

Because this Court applies the statutory procedure explicated in *Burton*, Appellant **consented** to Respondent transmitting the documents to the Court under seal. As a result, the

County's application should have been both non argumentative and brief without mischaracterizing controverted facts as settled.

2) Instead, the County's motion inserts several gratuitous, misleading assertions aimed at mischaracterizing disputed facts as though they are already settled when Appellant vigorously disputes them. This requires the Appellant either to respond and correct the record, or face an allegation of conceding facts and inferences. For example in ¶ 4, the County alleges they adhered to Judge Buckner's June 3, 2020 Order and provided properly redacted e-mails to the Special Referee. This assertion is not correct as the record demonstrates. The County did provide the redacted e-mails to the Special Referee, but improperly blocked out the correspondents' identities in the e-mail chains to prevent Appellant from knowing who was privy to them. Only after the Special Referee **required** the County to provide copies showing who the correspondents are, the County complied on September 3, 2020. (R.O.A. page 125) (On this point alone, the Appellant is a "prevailing party," but that is an argument better reserved for the merits hearing.) The point is that the County makes a simple process of transmitting the disputed evidence under seal as difficult and time consuming as possible as the County's needlessly complicated August 23rd motion makes obvious.

3) The County then spends the next six paragraphs of a **consent motion** arguing points neither appropriate nor germane to the relief requested by the motion which is: the agreement to transmit the disputed documents to the Court under seal in accordance with the procedure established by the General Assembly for *in camera* inspection. Thus, when the County writes in ¶ 10 "The emails, as redacted, appear on their face as privileged," this is a highly disputed assertion, not a statement of fact. The County's effort to paper over the central dispute it is both irrelevant to the purpose of the motion, which is the **consent agreement** to transmit the disputed documents under seal, and an uneconomical consumption of limited judicial resources. When the County makes argumentative, disputed assertions instead of submitting a one-sentence consent motion, it

forces the Appellant to elect a Hobson's choice and once again demonstrates its superior financial strength deployed to chill Appellant's resolve to seek access to public documents. Appellant cannot remain silent in the mischaracterization of disputed facts as settled unless she is willing to risk facing allegations of waiver or judicial estoppel. Many trial lawyers experience cardiac events from reading caselaw in which various courts decline to address legal issues not properly raised, or sufficiently argued, or insufficiently controverted. Trial lawyers are, by definition, a paranoid group in order to remain vigilant about their clients' rights.

4) Finally, the Appellant is required to respond to the County's comments about its putative privilege log, submitted belatedly and only after Appellant filed suit and only after Judge Buckner ordered it. (The log is found in the Record on Appeal at page 89.) The entire privilege log is nothing more than conclusory, boilerplate "exemptions," without a scintilla of meaningful information. (This lack of particularity drew the Supreme Court's ire in the context of executive sessions in *Quality Towing v. City of Myrtle Beach*, 345 S.C. 156, 547 S.E.2d 862 (2001): "Therefore, we hold the clear language and the express purpose of FOIA was violated by the presiding officer's failure to announce the specific purpose of the executive session." The County's exemptions here mirror the equally vague explanations struck down in *Quality Towing*.) For example, the County describes the first one, an attachment "regarding rules for public hearings" as "outside the scope of revised request; material removed." (R.O.A. page 89) Why the County would object, or for that matter, make a claim of "privilege," to any citizen about its "rules for public hearings" is beyond comprehension. The Court can address this when it takes up the merits; the point here is that the County asks for permission to transmit the documents to the Court under seal, and Appellant repeatedly consented to this request. Thus it is both improper and unnecessary for the County to characterize its privilege logs, an issue the Court will evaluate for itself on the merits.

Conclusion

Rather than refute the County's factual allegations inserted in its motion point-by-point, it is sufficient to reply that the material allegations contained in its motion are both highly contested and fully briefed to the Court. The County improperly uses a consent motion to shore up its legal theories to sandbag Appellant on disputed factual matters. The consent motion asks this Court to do nothing more than apply the undisputed procedure governing challenges brought under the *Freedom of Information Act* as this Court explained in *Burton*. Because this is a *F.O.I.A.* case, the Respondent is neither required to show it meets the factors under Rule 41.1 nor that public policy favors providing the documents under seal because the General Assembly proscribes the procedure. The *Freedom of Information Act* provides a specific, statutory method of addressing disputed documents and Appellant has consented for the County to adhere to the statutory process. While the Respondent has done an admirable job identifying the procedural factors under Rule 41.1, that analysis is unnecessary in a *Freedom of Information* case because the General Assembly proscribes the process.

For these reasons, the Appellant respectfully requests that the Court grant the motion to transmit the disputed documents under seal but asks the Court to disregard the County's characterization of factual allegations because they are matters in dispute.

August 29, 2022

/s/ Thomas R. Goldstein__________
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PROOF OF SERVICE

I certify that I have served the Appellant's Return to Respondent's Motion to File Records Under Seal upon the Respondent, Beaufort County by depositing a copy of it in the United States mail, postage prepaid on August 29, 2022, addressed to its attorney of record, E. Richardson LaBruce, Finger, Melnick & Brooks, P.A., P. O. Box 24005, Hilton Head Island, South Carolina 29925-4005 and also by providing a copy by electronic means.

August 29, 2022

/s/Thomas R. Goldstein_____________
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