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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

Alison Renee Lee, Circuit Court Judge

Appellate Case No. 2023-000104

Paul Roy Osmundson,.....Appellant,

vs.

School District 5 of Lexington and Richland Counties, ...Respondent.

FINAL BRIEF OF RESPONDENT

James Edward Bradley, SC Bar # 66130
MOORE BRADLEY MYERS LAW FIRM
1700 Sunset Boulevard (29169)
P.O. Box 5709
West Columbia, SC 29171
(803) 796-9160
ward@mbmlawsc.com
Attorney for Respondent

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STATEMENT OF CASE

I. SUMMARY OF ALLEGATIONS

Osmundson's Lawsuit and Request for Relief.

Appellant Osmundson sued School District Five of Lexington and Richland Counties alleging it violated the South Carolina Freedom of Information Act (FOIA), S.C. Code Ann. Section 30-4-10 et. seq. He requests only the following relief:

> 34. On information and belief, Plaintiff is entitled to a declaratory judgment entered by this Honorable Court which includes the equitable relief of an injunction requiring all Board of Trustees and Meetings of Board Officer to be conducted openly and in strict compliance with the Laws of South Carolina, including the Freedom of Information Act.
>
> 35. On information and belief, this Honorable Court's Order should require Defendant to pay a civil fine as authorized by §30-4-110(F) of the South Carolina Code of Laws.
>
> 36. On information and belief, this Honorable Court's Order should declare that the Defendant's handling of the termination, or so called "resignation," of the District Superintendent on June 14, 2021 was a willful violation of the Freedom of Information Act.
>
> 37. On information and belief, this Honorable Court's Order should include the requirement that Plaintiff be awarded attorneys' fees and costs in bringing and prosecuting this action pursuant to §30-4-100(B) of the South Carolina Code of Laws.

(R. pp. 36-37, ¶¶34, 35, 36 and 37).

Two weeks after the service of the Complaint, the School Board voted to hold all its officers' meetings subject to FOIA. At the same meeting, the School Board voted to accept the resignation negotiated between its attorney and the attorney for Dr. Melton, its superintendent.

Mr. Osmundson never moved for injunctive relief or declaratory relief as set forth in South Carolina Code §30-4-100(A).

II. TIMELINE OF PROCEEDINGS

The important dates and actions follow:

June 14, 2021 – School District Superintendent Dr. Christine Melton resigns pursuant to an agreement negotiated between her lawyer and School District lawyer Andrea White. The resignation agreement was given to the press at the meeting. (R. pp. 136, 137, ¶¶9 and 11).

July 23, 2021 – Mr. Osmundson files his initial Complaint alleging the School District did not hold a public vote on Dr. Melton's resignation and that its officer meetings did not follow FOIA requirements. This Complaint requests injunctive relief, but Osmundson does not file a motion seeking declaratory or injunctive relief or request a hearing. (R. pp. 1-25).

July 28, 2021 – Andrea White accepts service of the Summons and Complaint on behalf of the School District. (R. p. 26).

August 9, 2021 – The School Board votes to accept Dr. Melton's previously signed resignation as demanded in the Complaint. The School Board also votes to hold all officer meetings pursuant to FOIA requirements whether a quorum is present or not as demanded in the Complaint. (R. p. 137, ¶12).

August 16, 2021 – Osmundson files an Amended Complaint which is substantially similar to the August 9, 2021, Complaint and requests the same relief. He does not file a motion for injunctive relief or declaratory relief or request a hearing. His lawsuit still alleges the School Board failed to publicly vote to accept Dr. Melton's resignation and alleges the School Board holds officer meetings in violation of FOIA despite the public vote seven days earlier. (R. pp. 27-52).

August 17, 2021 – School District lawyer Andrea White writes Mr. Osmundson's lawyers telling them that the School Board publicly voted "to accept Dr. Melton's resignation effective June 30, 2021, and also to ratify the Settlement Agreement between the parties." Her letter also tells them that the School Board voted to hold all officer and committee meetings pursuant to FOIA whether or not a quorum was present. These votes took place August 9, 2021, a full week before Osmundson filed his Amended Complaint with these allegations. (R. pp. 53-54).

August 17, 2021 to February 10, 2022 – For the following seven months, Mr. Osmundson takes no action. He does not contact the Clerk of Court or the Chief Judge for Administrative purposes to request a hearing. He does not file an affidavit or verified complaint upon which declaratory or injunctive relief could be awarded. And, he does not file a motion seeking declaratory or injunctive relief.

February 11, 2022 – Mr. Osmundson files a two sentence motion for summary judgment. The motion alleges only that "there is no genuine issue of material fact and Plaintiff is entitled to judgment as a matter of law." He does not seek an expedited hearing or move for an injunction. He does not contact the Chief Judge for Administrative Purposes or the clerk's office to request a hearing. (R. pp. 60-112).

February 24, 2022 – The School District moves to dismiss for failure to prosecute because Osmundson did not move for declaratory relief, move for injunctive relief, contact the Clerk of Court, contact the Chief Judge for Administrative Purposes, or request a hearing in conformity with Code Section 30-4-100(A). (R. pp. 113-115).

March 17, 2022 – The School District moves for summary judgment on the basis that it did not violate FOIA and if it did, it has remedied any violations, and includes supporting affidavits. (R. pp. 168-216).

July 18, 2022 - Judge Alison Lee conducts a hearing on the pending motions which includes the School District's Motion to Dismiss and both parties' Motions for Summary Judgment. The School District argues: 1) Osmundson did not file a motion requesting injunctive or declaratory relief, notify the Chief Administrative Judge of his request, or ask the Court for a hearing within ten days of service as required by S.C. Code Section 30-4-100(A); and 2) there was no dispute for the Court to resolve because the School District took the actions requested in the Complaint; thus, the matter was moot. (R. pp. 227-283). Former School District Attorney Andrea White states that the School Board followed her advice "at all times related to the separation from Dr. Melton." (R. p. 274).

October 5, 2022 – Attorney Joel Collins writes Judge Lee requesting a ruling because "the School Board election is a month away." (R. p. 284).

October 10, 2022 – Judge Lee grants the School District's Motion to Dismiss because Osmundson did not timely move for relief or request a hearing. (R. pp. 285-287).

October 31, 2022 – Osmundson files a motion to reconsider but does not serve it on Judge Lee as required by Rule 59(g). (R. pp. 288-298).

January 6, 2023 – Judge Lee denies Osmundson's motion to reconsider because she did not receive it until December 21, 2022, approximately six weeks after it should have been served on her. (R. pp. 299-301).

January 24, 2023 – Osmundson files his Notice of Appeal to the Court of Appeals. (R. pp. 302-311).

STANDARD OF REVIEW

The appellate court may affirm any ruling, order, decision or judgment upon any grounds appearing in the Record on Appeal. SCACR 220(c). Further, the appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000). It is within the appellate court's discretion whether to address any additional sustaining grounds. *Id*. An affirmance promotes judicial economy and finality in private and public affairs, which are important public policies. *E.g., Kreutner v. David,* 320 S.C. 283, 465 S.E.2d 88 (1995) (appellate court may affirm for any reason appearing in the record); *State v. Johnson,* 278 S.C. 668, 301 S.E.2d 138 (1983).

When reviewing a motion to dismiss for failure to prosecute pursuant to Rule 41(b), SCRCP, an appellate court may reverse the trial court's decision upon an abuse of discretion. *In re Miller*, 393 S.C. 248, 256, 713 S.E.2d 253, 257 (2011) (citing *McComas v. Ross,* 368 S.C. 59, 62, 626 S.E.2d 902, 904 (Ct.App.2006)). "An abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions." *Kiriakides v. Sch. Dist. of Greenville County,* 382 S.C. 8, 20, 675 S.E.2d 439, 445 (2009).

"The decision to grant or deny a motion for relief from judgment lies within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion." *Stearns Bank Nat'l Ass'n v. Glenwood Falls, LP*, 373 S.C. 331, 336, 644 S.E.2d 793, 795 (Ct. App. 2007). "An abuse of discretion arises where the judge issuing the order was controlled by an error of law or where the order is based on factual conclusions that are without evidentiary support." *Id.*

DISCUSSION

I. JUDGE LEE CORRECTLY GRANTED THE SCHOOL DISTRICT'S MOTION TO DISMISS BECAUSE THE SCHOOL DISTRICT COMPLIED WITH THE FREEDOM OF INFORMATION ACT AND THIS LAWSUIT IS MOOT.

A. This lawsuit is a political statement and not an attempt to enforce the Freedom of Information Act.

This lawsuit is essentially a political statement cloaked as a FOIA claim. The Amended Complaint requests only the following relief:

> 34. On information and belief, Plaintiff is entitled to a declaratory judgment entered by this Honorable Court which includes the equitable relief of an injunction requiring all Board of Trustees and Meetings of Board Officers to be conducted openly and in strict compliance with the laws of South Carolina, including the Freedom of Information Act.
>
> 35. On information and belief, this Honorable Court's Order should require Defendant to pay a civil fine as authorized by § 30-4-110(F) of the South Carolina Code of Laws.
>
> 36. On information and belief, this Honorable Court's Order should declare that Defendant's handling of the termination, or so called "resignation" of the District Superintendent on June 14, 2021 was a willful violation of the Freedom of Information Act.
>
> 37. On information and belief, this Honorable Court's Order should include the requirement that Plaintiff be awarded attorneys' fees and costs in bringing and prosecuting this action pursuant to § 30-4-100(B) of the South Carolina Code of Laws.

(R. pp. 36, 37, ¶¶34, 35, 36 and 37).

Osmundson filed his initial Complaint on June 23, 2021, and Attorney Andrea White accepted service for the School Board on July 28, 2021. (R. pp. 1-26). Twelve days later, on August 9, 2021, the School Board voted to have meetings "of its Board Officers to set the agenda for Board Meetings open to the public and subject to FOIA." (R. p. 136, ¶12). Thus, less than two weeks after service of the initial Complaint, the School Board voted to do as Osmundson asked,

and it has continued this policy since that time. *Id*. On the same day, the School Board voted to accept the resignation of Dr. Melton pursuant to the agreement negotiated between Dr. Melton's lawyer and the School District's lawyer. *Id*.

One week later, on August 16, 2021, Osmundson filed his Amended Complaint. The Amended Complaint adds paragraph 36 regarding the resignation of Dr. Melton upon which the School Board publicly voted one week earlier. On August 17, 2021, Andrea White wrote Osmundson's lawyers to make sure they were aware the School Board had taken the actions requested in the lawsuit as follows:

> I hope this letter finds you both well. I am writing to advise you that, at its meeting on August 9, 2021, the LR5 Board voted to officially accept Dr. Melton's resignation effective June 30, 2021, and also to ratify the Settlement Agreement between the parties. As the lack of an official vote serves as the basis of your declaratory judgment action, that claim is now moot and there is nothing for a court to decide, particularly as the South Carolina Freedom of Information Act (FOIA) does not require that a public body vote to accept an employee's resignation and clearly permits discussions regarding an employee's release to occur in executive session.
>
> Further, while no court has found that meetings of school board officers to set an agenda constitute the meeting of a "committee" for purposes of FOIA requirements, the LR5 Board voted on August 9, 2021, to consider those meetings as meetings of a public body. Consequently, that part of your declaratory judgment also is now moot.

(R. pp. 53-54).

Thus, The School District complied with ¶¶34 and 36 of the Amended Complaint and has done so since August 9, 2021. As a result, an injunction is not necessary as Osmundson received the relief he requested almost two years.

Paragraph 35 of the Amended Complaint seeks a civil fine under FOIA pursuant to Code Section 30-4-110(F). This code section allows a court to fine a public body if it has "arbitrarily and capriciously violated the provisions of this chapter by refusal or delay in disclosing or

providing copies of a public record." *Id.* By its plain terms, this section does not apply to Osmundson's case because he does not allege the School District has failed to provide a public record, and he never requested a public record. In addition, the School District has found no recorded cases imposing a fine on a public entity in FOIA's forty-five year history. Finally, the School District provided Osmundson the relief he sought in the Complaint less than two weeks after service of his Complaint. Whether or not the School District violated FOIA, a civil fine is not appropriate when the School District quickly voted and changed its policy. As Osmundson received the relief he requested within two weeks of service of his Complaint, a fine is not appropriate.

Finally, Paragraph 37 of the Amended Complaint seeks attorneys' fees. Mr. Osmundson has not filed a motion seeking attorneys' fees or submitted an affidavit supporting attorneys' fees.

Thus, almost two years ago, Osmundson received the relief he requested. Yet the lawsuit continues on. This is because the lawsuit is not about relief under FOIA. Instead, it is a political action maintained for purely political purposes. Osmundson's lawyer Joel Collins essentially admitted this when he mailed Judge Lee requesting a ruling because the "School Board election is a month away." (R. p. 284). The relief Mr. Collins proposed at oral argument, but did not include in the Complaint, also makes clear that the purpose of the lawsuit is to embarrass the School Board rather than obtain compliance with FOIA. Mr. Collins proposed that Judge Lee "require the six trustees who signed that agreement to undergo training on The Freedom of Information Act. And that all training sessions that they have be publicly conducted so that the public can see what they've been instructed to do." (R. p. 244). He then suggests that the Court impose fines on individual board members and their pay for service as trustees though they are not parties to this lawsuit. (R. p. 245). This additional relief is not requested in the Complaint and the oral request

for it shows that the lawsuit is not maintained to ensure compliance with FOIA because the School Board has already complied with FOIA. Instead, Osmundson is seeking to have the Court publicly reprimand and fine elected Trustees for their legislative actions. This request is improper. School Board Trustees are elected officials and as such are entitled to legislative immunity for their official acts. *See, South Carolina Public Interest Foundation v. Courson*, 420 S.C. 120, 801 S.E.2d. 185 (Ct. App. 2017).

B. This Court should affirm Judge Lee's dismissal because the School Board complied with Osmundson's demands two years ago.

Judge Lee correctly dismissed this lawsuit based on the School Board's arguments at the July 18, 2022, hearing. Pursuant to Rule 220(c) of the South Carolina Rules of Appellate Procedure, this Court may affirm Judge Lee's ruling based upon any grounds appearing in the Record on Appeal. Rule 220(c) SCACR. The School Board argued that this lawsuit was moot, citing *Sloan v. S.C. Dep't of Revenue*, 409 S.C. 551, 762 S.E.2d 687 (2014). The court does not concern itself with moot or speculative questions. *Sloan v. South Carolina Dep't of Transp.*, 379 S.C. 160, 167–68, 666 S.E.2d 236, 239–40 (2008). An appellate court will not pass judgment on moot and academic questions; it will not adjudicate a matter when no actual controversy capable of specific relief exists. *Curtis v. State*, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001). A case becomes moot when judgment, if rendered, will have no practical legal effect upon the existing controversy. *Id.*

As discussed above, the School Board voted to hold its official meetings subject to FOIA and to accept Dr. Melton's resignation less than two weeks after service of the Complaint. Thus, the School Board gave Mr. Osmundson the relief he seeks approximately two years ago.

The South Carolina Supreme Court faced a similar situation in *Sloan v. S.C. Department of Revenue*. Sloan sued the Department of Revenue alleging violations of FOIA and seeking

declaratory relief, injunctive relief, and attorney's fees. Mr. Sloan requested specific documents related to the Department's hiring of a cyber security company. The Department notified Sloan that it received his FOIA request; however, Sloan was not provided with a final determination within the statutory fifteen-day time period. Sloan sued the Department seeking a declaratory judgment that the Department's actions violated FOIA, an injunction requiring the Department to cease violating FOIA, and attorney's fees and costs. Three weeks after Sloan filed his lawsuit, the Department provided Sloan with the documents. It then moved to dismiss on the basis that Sloan had received the relief he requested, and his lawsuit was moot. Sloan argued his claim for declaratory relief was not moot and that he was entitled to attorneys' fees. The trial court agreed with the Department and dismissed the case.

The Supreme Court affirmed the decision holding, "the information Sloan sought has been disclosed, [and] there is no continuing violation of FOIA upon which the trial court could have issued a declaratory judgment." *Sloan v. S.C. Dep't of Revenue*, 409 S.C. 551, 555, 762 S.E.2d 687, 689 (2014) (citing *Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 26, 630 S.E.2d 474, 478 (2006)). It remanded the case for the trial court to consider a reasonable attorney fee award. *Id*.

In *Sloan v. Friends of the Hunley, Inc*. (Sloan I), 369 S.C. 20, 630 S.E.2d 474 (2006), the Supreme Court found compliance with a FOIA request rendered the FOIA lawsuit moot. Sloan submitted a FOIA to Friends seeking documents pertaining to its corporate structure and relationship to the Hunley Commission, a state agency. Friends denied it was subject to FOIA and did not provide the documents. Sloan sued, and one month later, Friends provided the documents.

Friends then sought summary judgment arguing Sloan's declaratory judgment action was moot because it had complied with Sloan's FOIA request. The trial court dismissed Sloan's case as moot. The Supreme Court affirmed noting that "[a] moot case exists where a judgment entered

by a court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the reviewing court." *Id*. It further explained that "[b]ecause the information Sloan sought has been disclosed, there is no continuing violation of FOIA upon which the trial court could have issued a declaratory judgment." *Id*.

Likewise, the School Board took the actions Osmundson requested almost two years ago. Osmundson alleges the School Board did not vote in public to accept the resignation of Dr. Melton, the former superintendent, and that the School Board did not open the board officer agenda meetings to the public. The School District accepted service on July 28, 2021. On August 9, 2021, the School Board voted in public to accept Dr. Melton's resignation. It also voted to adopt a rule to open all meetings of its officers to the public and to publish all meetings of officers, including the meetings of executive officers to set agendas, pursuant to FOIA regardless of whether a quorum was present. (R. p. 137, ¶12). As of August 9, 2021, the School Board remedied the concerns the Complaint set forth: Dr. Melton's resignation was publically voted on and accepted, and the School Board adopted a rule to open all officers' meetings. The relief sought in the Complaint was provided two weeks after the Complaint was served; therefore, this Court should affirm Judge Lee's decision because Osmundson's case is moot.

II. JUDGE LEE CORRECTLY DISMISSED THIS CASE BECAUSE OSMUNDSON DID NOT MOVE FOR INJUNCTIVE RELIEF AT ANY TIME AND NOT WITHIN TEN DAYS OF SERVICE PURSUANT TO CODE SECTION 30-4-100(A).

Section 30-4-100(A) of FOIA requires that when a plaintiff seeks a declaratory judgment or injunctive relief, the chief administrative judge of the circuit in which the action was filed "**must** schedule an initial hearing within ten days of the service on all parties." (Emphasis added.) The statute continues to state that if the matter is not resolved at the initial hearing by the court hearing the matter, the court "**shall** establish a scheduling order to conclude actions brought pursuant to

this section within six months of initial filing." (Emphasis added.) Here, there was no hearing held within ten days nor was the matter concluded within six months of the initial filing in August 2021.

A plaintiff has the burden of prosecuting the plaintiff's claims and when the plaintiff fails to meet that burden, the case may be dismissed. *Don Shevey & Spires, Inc. v. Am. Motors Realty Corp.*, 279 S.C. 58, 301 S.E.2d 757 (1983); *Small v. Mungo* 254 S.C. 438, 175 S.E.2d 802 (1970); *Joyner v. Glimcher Props.,* 356 S.C. 460, 589 S.E.2d 762 (Ct. App. 2002). A defendant has no burden to move a case along; that burden belongs solely to the plaintiff. *Thomas & Howard Company v. Fowler*, 238 S.C. 46, 119 S.E.2d 97 (1961); *Shevey*, 301 S.E.2d at 759.

Joyner v. Glimcher Props, addresses the question of the appropriateness of a Rule 41(b) dismissal when a court has not done what it is obligated to do under the applicable law, and the plaintiff has not contacted the court or sought a mandamus. In *Joyner*, the plaintiff was injured when a tree limb in a commercial parking lot fell and destroyed his vehicle. Plaintiff sued the owner of the parking lot and the landscaping company in magistrate's court and was awarded $2,500 by a jury. The parking lot owner then appealed to circuit court. The magistrate did not file a return with the circuit court as required by Rule 75, SCRCP, and the parking lot owner did not contact the magistrate's court to request a return or file a writ of mandamus. The circuit court subsequently dismissed the appeal under Rule 41(b), SCRCP, finding that the parking lot owner had failed to prosecute his appeal. The Court of Appeals affirmed.

Here, Plaintiff did not contact the Chief Administrative Judge, or the Clerk of Court after he filed his Complaint. He did not request a hearing. He did not file a motion seeking injunctive or declaratory relief. And he did not file an affidavit or a verified complaint upon which injunctive relief could be awarded until seven months after service. As a result, the Clerk and the Chief Judge did not even know a hearing was needed (R. p. 267). He also did not file a writ of mandamus.

Further, Plaintiff never requested a scheduling order as mandated by FOIA to ensure the case is concluded with the requisite six-month period.

Plaintiff makes two arguments to justify failing to prosecute his case. He first asserts the court, and not him, must schedule the ten-day hearing and that he has "done all he can" to further his case. Plaintiff's argument ignores his obligation, as explained by the *Joyner* court, to contact the office of the Chief Judge for Administrative Purposes or the Clerk of Court to request that the ten-day hearing be scheduled. He never did this, and he did not file a motion for injunctive relief.

Plaintiff also points to the Covid-19 pandemic and its impact on the South Carolina judicial system. While Plaintiff is correct the pandemic had an impact on the scheduling of in-person trials, motions and other hearings, our courts began hearing motions and conducting status conferences before this matter was filed in August 2021. In addition, pandemic or not, the Plaintiff did not request a hearing, file a motion, notify the Clerk that a hearing was requested, or notify the Chief Judge for Administrative Purposes that a hearing was necessary. Thus, pandemic or no pandemic, a hearing would not be held because the Plaintiff did not request a hearing. Plaintiff has the burden of prosecuting his case, which he failed to do. This justifies dismissal of this action pursuant to Rule 41, SCRCP.

A defendant may move for dismissal of an action or of any claim for the plaintiff's failure to comply with these rules or any order of court. SCRCP 41(b). Under FOIA, when requesting declaratory judgment or injunctive relief related to provisions of the chapter, the Chief Judge for Administrative Purposes must schedule an initial hearing within ten days of service on all parties. S.C. Code Ann. § 30-4-100(A). To schedule such a hearing, the Chief Judge must be notified a hearing is necessary. Requests for a hearing must be filed in accordance with the rules of procedure. "An application to the court for an order shall be by motion which, unless made during

a hearing or trial in open court with a court reporter present, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought." SCRCP 7(b)(1). No such motion was filed.

The common practice in South Carolina for requesting a hearing involves filing a motion, or contacting the Chief Judge for Administrative Purposes and requesting a hearing. (R. p. 268). Osmundson did not do either. As a result, the judge was not notified of Osmundson's desired relief, and had no way of knowing this relief was sought. *Id.* The party seeking relief must request the relief it seeks. Therefore, Osmundson did not comply with Section 30-4-100(A) which requires a hearing within ten days of service.

Osmundson now blames the clerk's office for failing to schedule a hearing even though he never requested one. As Judge Lee noted during the July 18, 2022, hearing, the Clerk's office does not read the complaint, nor does it identify the relief sought. *See,* Transcript pp. 41-42; (R. pp. 267-268). If there is no motion for an injunction, or other similarly named request, the clerk has no way of knowing what the prayer for relief is, and cannot bring it to the judge's attention. *Id*. It is therefore impossible to comply with Section 30-4-100(A) if no motion or request is made. Therefore, Judge Lee did not abuse her discretion in dismissing the lawsuit based upon Osmundson's failure to prosecute his case.

III. JUDGE LEE PROPERLY DISMISSED THIS CASE BECAUSE THE SCHOOL DISTRICT DID NOT VIOLATE THE FREEDOM OF INFORMATION ACT.

This suit followed the School Board's action at its meeting on June 14, 2021, accepting then Superintendent Dr. Melton's resignation pursuant to a settlement agreement negotiated by legal counsel. The School Board properly considered legal advice and personnel matters in executive session.

A. The School Board properly discussed personnel matters in executive session and conducted no improper votes, secret ballots or straw votes in executive session.

In January 2021, the School Board advised Dr. Melton, in accordance with the terms of her contract, that it wished to conduct an informal evaluation of her performance. (R. p. 135, ¶3). That evaluation occurred during executive session of the School Board's meeting on January 25, 2021. *Id.*

Between January 2021 and May 2021, the School Board informally discussed Dr. Melton's performance during executive session several times. During those meetings, several Trustees advised Dr. Melton of their concern with certain aspects of her performance, most significantly her interactions with Trustees. (R. p. 135, ¶4). Following the School Board's meeting on May 10, 2021, Dr. Melton retained legal counsel, who then contacted the School District's legal counsel regarding Dr. Melton's employment status. At the School Board's meeting on May 24, 2021, the School District's legal counsel informed the School Board of her receipt of a letter from Dr. Melton's legal counsel. (R. p. 136, ¶6). The School District's legal counsel then shared with the School Board its options under Dr. Melton's contract. (R. p. 136, ¶6). Each of the seven Trustees shared opinions about the matter but no votes, secret ballots or straw votes took place. (R. p. 136, ¶6; p.163, ¶2; p. 166, ¶¶2-3; p. 165, ¶2; p. 167, ¶¶2-3).

The School District's counsel and Dr. Melton's counsel began settlement negotiations as required by Section 11 of Dr. Melton's contract. (R. p. 136, ¶¶7-8). At the next School Board meeting on June 14, 2021, legal counsel Andrea White advised the School Board in executive session that a settlement had been agreed to by Dr. Melton. She then presented each member of the School Board with a settlement agreement and release for their review. (R. p. 136, ¶9). At the request of Dr. Melton's counsel, all Trustees signed the Agreement after reviewing it, with the

exception of Ed White. *Id*. The School Board then returned to open session and began its meeting. During the open session, Trustee White made a public statement in which he revealed what had been discussed during executive session. *Id.* Trustee White then handed a typed letter of resignation to the secretary for the School District and left the meeting, taking his copy of the Settlement Agreement with him. *Id.*

The School Board then reconvened in executive session to receive legal advice following Mr. White's actions. (R. p. 137, ¶10). After Dr. Melton's legal counsel advised the School District's counsel that Dr. Melton still desired to resign and accepted the terms of the negotiated settlement agreement, the School Board's Vice Chair made a public statement accepting Dr. Melton's resignation. (R. p. 137, ¶10). The settlement agreement and release signed by Dr. Melton and six members of the School Board was then immediately released to the media and to members of the public who requested it. (R. pp. 137, ¶11; 152-158). Thereafter, at its meeting on August 9, 2021, the School Board officially voted to accept Dr. Melton's resignation.

South Carolina Code Section 30-4-70(a)(1) allows a public body to hold a meeting closed to the public for several reasons, including "discussion of employment, appointment, compensation, promotion, demotion, discipline or release of an employee…." Pursuant to this statute, the School Board properly discussed Dr. Melton's employment during executive session. *Multimedia, Inc. v. Greenville Airport Com.*, 287 S.C. 521, 339 S.E.2d 884 (Ct. App. 1986). As no votes, secret ballots or straw votes were taken at any of the meetings where Dr. Melton's employment was discussed, the School Board did not violate either the spirit or the intent of FOIA. (R. p. 137. ¶11; p. 163, ¶2; p. 166, ¶¶2-3; p. 165, ¶2; p. 167, ¶¶2-3).

In his Amended Complaint and through the Affidavit of Ed White, Osmundson asserts the School Board violated FOIA when it discussed the terms of the settlement negotiated by the School

District's counsel and Dr. Melton's counsel during the executive session portion of the meeting on May 24, 2021. His assertion is unfounded based on the plain language of FOIA. In Section 30-4-70(a)(2), FOIA states that the "settlement of legal claims" may properly be discussed in executive session.

B. The School Board properly created standing committees and treats all meetings of such committees as subject to the requirements of FOIA.

At its meeting in February 2021, the School Board voted to create three standing committees: Finance, Procurement and Policy. Nothing in FOIA prohibits a public body from implementing the use of committees. Since the inception of those committees, their meetings have been noticed and conducted in accordance with the requirements of FOIA. (R. pp. 137, ¶13; 159-162).

C. The School Board treats the meetings of its officers and the District Superintendent to set agendas for School Board meetings as subject to the requirements of FOIA.

Historically, the School Board Chair or the School Board Officers gathered with the Superintendent to plan the agenda for School Board meetings. This group was composed of three members of the School Board. It set proposed agendas for review and approval by the School Board. And, it had no power to bind the School District or adopt policy. As the School Board has seven members, this group of three did not constitute a quorum as it was less than half of the School Board. *See,* S.C. Code Ann §30-4-20(e) (defining quorum as a simple majority). As a result, this group is not a meeting under FOIA. *See,* S.C. Code Ann. §30-4-20(d) (defining meeting as a convening of a quorum). And, it is not subject to FOIA meeting requirements. Nevertheless, on August 9, 2021, the School Board passed a motion to hold these agenda setting meetings subject to the requirements of FOIA. (R. p. 137, ¶12). Since that date, all meetings of School Board Officers and the Superintendent to set the agenda for School Board meetings have been open to

the public. *Id.* Thus, the School District did not violate FOIA. But, even if it did, it remedied the violation making Osmundson's claims moot. *Sloan v. Friends of the Hunley, Inc.* 369 S.C. 20, 630 S.E.2d 474 (2006).

IV. JUDGE LEE CORRECTLY DENIED OSMUNDSON'S MOTION FOR RECONSIDERATION BECAUSE HE DID NOT SERVE IT ON HER WITHIN TEN DAYS AS REQUIRED BY RULE 59(G).

Judge Lee properly denied Osmundson's Motion for Reconsideration because he did not provide her with the Motion within ten days of filing. Rule 59(g) states, "a party filing a written motion under this rule shall provide a copy of the motion to the judge within ten days after the filing of the motion." SCRCP 59(g). In *Gallagher v. Evert*, the South Carolina Court of Appeals recognized that a circuit court could deny a Rule 59(e) motion solely for failing to comply with Rule 59(g). *Gallagher v. Evert*, 353 S.C. 59, 63, 577 S.E.2d 217, 219 (Ct. App. 2002). Likewise, in *Smith v. Fedor*, the Court of Appeals held that the trial court properly denied a motion for reconsideration for failure to provide the trial judge with the motion within ten days of filing. (*Smith v. Fedor*, 422 S.C. 118, 126, 809 S.E.2d 612, 616 (Ct. App. 2017)). Judge Lockemy noted that Rule 59(g) would lack any purpose if trial courts committed error by denying the motion based on noncompliance with the rule.

Appellant filed his motion for reconsideration on October 31, 2022; however, a copy was not provided to Judge Lee pursuant to 59(g). Judge Lee did not receive notice until December 21, 2022, when an email was sent to her with the motion attached. Osmundson provided Judge Lee a copy of the Motion roughly two months after the Motion was filed, which is well past the ten-day time period required. Therefore, Judge Lee properly denied Osmundson's Motion for Reconsideration because he failed to provide a copy of his motion to her within the required time period.

CONCLUSION

This Court should affirm Judge Lee's dismissal for the following reasons:

1. The School District has already provided Osmundson the relief he sought in his Complaint, and the lawsuit is moot;

2. Osmundson failed to prosecute his case because he did not request the hearing required by Code Section 30-4-100(A) or otherwise notify the Clerk or the Chief Judge for Administrative Purposes that a hearing was necessary;

3. The School District did not violate the Freedom of Information Act; and

4. Osmundson did not serve his motion for reconsideration on Judge Lee as required by Rule 59(g).

Respectfully submitted,

MOORE BRADLEY MYERS LAW FIRM, P.A.

By: s/James Edward Bradley _____
James Edward Bradley, SC Bar # 66130
P.O. Box 5709 (29169)
1700 Sunset Blvd.
West Columbia, SC 29171
(803) 796-9160
ward@mbmlawsc.com
Attorney for Respondent

West Columbia, South Carolina
September 21, 2023

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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

Alison Renee Lee, Circuit Court Judge

Appellate Case No. 2023-000104

Paul Roy Osmundson,.....Appellant,

v.

School District 5 of Lexington and Richland Counties, ...Respondent.

CERTIFICATION OF COUNSEL

The undersigned certifies that this Respondent's Final Brief complies with Rule 211(b), SCACR.

Respectfully submitted,

MOORE BRADLEY MYERS LAW FIRM, P.A.

By: s/James Edward Bradley _____
James Edward Bradley, SC Bar # 66130
P.O. Box 5709 (29169)
1700 Sunset Blvd.
West Columbia, SC 29171
(803) 796-9160
ward@mbmlawsc.com
Attorney for Respondent

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