

RECEIVED

Sep 25 2023

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 REPLY BRIEF OF APPELLANT

Thomas William McGee, III
SC Bar No. 11317
Nelson Mullins Riley & Scarborough LLP
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
billy.mcgee@nelsonmullins.com
(803) 799-2000

Joel W. Collins, Jr.
SC Bar Number: 1341
Collins & Lacy, P.C.
Post Office Box 12487
Columbia, SC 29211
jcollins@collinsandlacy.com
(803) 256-2660

Attorneys for Appellant Paul Roy
Osmundson

TABLE OF CONTENTS

	<u>Page(s)</u>
TABLE OF AUTHORITIES.....	ii
ARGUMENT	1
I. The Court Should Disregard Respondent’s Substantive Factual Arguments Not at Issue in This Appeal.....	1
A. The Order of Dismissal Was Based Solely on the Trial Court’s Legal Interpretation of a Procedural Requirement of FOIA.....	1
B. The Intent Behind Osmundson’s Lawsuit Is Not Relevant to the Trial Court’s Decision and Is Not a Basis for Dismissal.....	3
C. The School District’s Post Hoc Actions Did Not Moot Osmundson’s FOIA Claim.....	4
D. The School District’s Closed-Door, Executive Committee Actions Violate FOIA.....	6
II. The School District Fails to Demonstrate That the Procedural Requirements of S.C. Code Ann. § 30-4-100(A) Justified Dismissal.....	7
III. The Trial Court Erred in Denying Appellant’s Motion for Reconsideration Under Rule 59(e).....	8
CONCLUSION.....	8

TABLE OF AUTHORITIES

Page(s)

Cases

Chastain v. Hiltabidle, 381 S.C. 508, 673 S.E.2d 826 (Ct. App. 2009)2

Disabato v. S.C. Ass'n of Sch. Adm'rs, 404 S.C. 433, 746 S.E.2d 329 (2013).....3

Foster v. Foster, 393 S.C. 95, 711 S.E.2d 878 (2011).....1

Lambries v. Saluda Cnty. Council, 409 S.C. 1, 760 S.E.2d 785 (2014)3

Lucas v. Rawl Family Ltd. P'ship, 359 S.C. 505, 598 S.E.2d 712 (2004)2

Miramonti v. Richland Cnty. Sch. Dist. One, 438 S.C. 612, 885 S.E.2d 406 (Ct. App. 2023)7

Pope v. Wilson, 427 S.C. 377, 831 S.E.2d 442 (Ct. App. 2019)4

Seago v. Horry Cnty., 378 S.C. 414, 663 S.E.2d 38 (2008)3

Sloan v. Friends of Hunley, Inc., 393 S.C. 152, 711 S.E.2d 895 (2011)5, 6

Sloan v. S.C. Dep't of Revenue, 409 S.C. 551, 762 S.E.2d 687 (2014)6

Wiedemann v. Town of Hilton Head Island, 330 S.C. 532, 500 S.E.2d 783 (1998).....3

Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998)2

Rules

Rule 59(e).....2, 8

Rule 220(c).....4

Statutes

Freedom of Information Act1, 2, 3, 4, 5, 6, 7

S.C. Code Ann. § 30-4-10, *et seq.*.....1

S.C. Code Ann. § 30-4-100(A)2, 4, 7, 8

S.C. Code Ann. § 30-4-100(B)5, 6

ARGUMENT

I. The Court Should Disregard Respondent’s Substantive Factual Arguments Not at Issue in This Appeal.

Appellant Paul Roy Osmundson’s (“Osmundson”) appeal arises from two orders issued by the trial court: (1) the October 20, 2022, order granting Respondent School District 5 of Lexington and Richland Counties’ (the “School District”) motion to dismiss (R. pp. 285-87); and (2) the January 6, 2023, order denying Osmundson’s motion for reconsideration. (R. pp. 299-301). Neither of these orders addressed the merits of Osmundson’s lawsuit. The School District nevertheless argues on appeal that dismissal of Osmundson’s Amended Complaint was warranted because, among other things, Osmundson’s claim was moot because Respondent later complied with the South Carolina Freedom of Information Act, S.C. Code Ann. § 30-4-10, *et seq.* (“FOIA”) by voting in open session on the matter which prompted this lawsuit. These substantive factual issues were not ruled upon by the lower court and have no bearing on this appeal. These issues are not properly before this Court. The School District’s arguments are unavailing and do not constitute grounds upon which the trial court’s Order of Dismissal should be affirmed.

A. The Order of Dismissal Was Based Solely on the Trial Court’s Legal Interpretation of a Procedural Requirement of FOIA.

The School District raises a host of substantive arguments for why the trial court’s Order of Dismissal should be sustained. Some of these arguments were raised in the School District’s motion for summary judgment, which the trial court did not rule upon, and some are raised for the first time on appeal. None of these arguments are properly before the Court. This appeal is limited to the issue of whether the trial court erred in granting the School District’s motion to dismiss. “In order to preserve an issue for appellate review, a party must both raise that issue to the trial court and obtain a ruling.” *Foster v. Foster*, 393 S.C. 95, 99, 711 S.E.2d 878, 880 (2011). “It is well

settled that, but for a very few exceptional circumstances, an appellate court cannot address an issue unless it was raised to and ruled upon by the trial court.” *Chastain v. Hiltabidle*, 381 S.C. 508, 514–15, 673 S.E.2d 826, 829 (Ct. App. 2009) (citing *Lucas v. Rawl Family Ltd. P’ship*, 359 S.C. 505, 510–511, 598 S.E.2d 712, 715 (2004)). “When an issue is raised but not ruled upon by the trial court, the issue is preserved for appeal only if the party raises the same issue in a Rule 59(e) motion.” *Chastain*, 381 S.C. at 515, 673 S.E.2d at 829 (citing *Wilder Corp. v. Wilke*, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998)).

The School District argues on appeal that the trial court’s Order of Dismissal should be affirmed because (1) Osmundson’s FOIA lawsuit was politically motivated, (2) the School Board later complied with Osmundson’s demands; and (3) the School District’s subsequent action cured the FOIA violation. However, the trial court made no findings on these issues. Instead, the trial court dismissed Osmundson’s Amended Complaint solely on a perceived procedural defect—namely, the Chief Administrative Judge’s failure to hold a hearing within 10 days of service of the Amended Complaint, as required by S.C. Code Ann. § 30-4-100(A). (*See* R. p. 285). Indeed, the Order of Dismissal expressly states that “the Motion to Dismiss is dispositive and the court need not determine the merits of the Summary Judgment claims.” (*Id.*) (emphasis added).¹

Because the trial court did not rule on the merits of the School District’s factual allegations set forth in its motion for summary judgment, these issues are not ripe for review at the appellate level. The Court should disregard the School District’s improper and extraneous arguments and instead focus its ruling on the only issue properly before the Court in this appeal: whether the trial court erred in dismissing the claim because of the absence of a 10-day hearing.

¹ This ruling was made despite the trial judge stating on the record that she would not dismiss this lawsuit for failure to have a 10-day hearing.” (R. p. 272, lines 7-9).

B. The Intent Behind Osmundson’s Lawsuit Is Not Relevant to the Trial Court’s Decision and Is Not a Basis for Dismissal.

The School District attempts to delegitimize Osmundson’s FOIA request and the underlying lawsuit as an illegitimate “political statement cloaked as a FOIA request.” (Respondent’s Initial Brief at 6). Here, the Amended Complaint alleges that Osmundson is a citizen and resident of Richland County, South Carolina. (R. p. 28, ¶ 1). He is also an editor for The State newspaper. (*Id.*) As such, Osmundson’s request for information the School District’s board meetings and claim that the School District violated FOIA’s public meeting requirements were made in furtherance of important news gathering and reporting functions.

Even if Osmundson sought this information for purely political motivations, it would not be a valid reason to dismiss Osmundson’s lawsuit. One could argue that, any request for or use of government records may be politically motivated, or have political ramifications, and government bodies naturally may desire to withhold politically sensitive information from disclosure. Indeed, this is precisely why FOIA was enacted—to prevent government agencies from operating in secret. “The essential purpose of FOIA is to protect the public from secret government activity.” *Lambries v. Saluda Cnty. Council*, 409 S.C. 1, 8–9, 760 S.E.2d 785, 789 (2014) (citing *Wiedemann v. Town of Hilton Head Island*, 330 S.C. 532, 500 S.E.2d 783 (1998)). “The FOIA serves the important governmental interests of providing transparency in governmental decision-making, preventing fraud and corruption, and fostering trust in government.” *Disabato v. S.C. Ass’n of Sch. Adm’rs*, 404 S.C. 433, 450, 746 S.E.2d 329, 338 (2013).

In furtherance of these interests, “FOIA grants the public an immutable right to access public records.” *Seago v. Horry Cnty.*, 378 S.C. 414, 423, 663 S.E.2d 38, 42 (2008). While certain categories of information are exempt from disclosure under FOIA, the allegedly political purpose of Osmundson’s FOIA claim, an allegation for which there is no evidence in the record, is not a

basis for affirming the trial court. There is no exemption from the requirements of FOIA for requests deemed as “political” by the agency against which a FOIA request or claim of FOIA violation is made—and for good reason. The purpose of FOIA is “to make it possible for citizens, or their representatives, to learn and report fully the activities of their public officials” *Pope v. Wilson*, 427 S.C. 377, 384, 831 S.E.2d 442, 446 (Ct. App. 2019). This purpose would be rendered meaningless if the School District could avoid disclosure of information or ignore FOIA’s public meeting requirements by simply branding a FOIA request as “politically motivated.” As such, the Court’s decision should not turn on the claimed purpose behind Osmundson’s FOIA claim.

C. The School District’s Post Hoc Actions Did Not Moot Osmundson’s FOIA Claim.

The School District asserts that the Court should affirm the trial court’s Order of Dismissal because the School District changed its policies following the filing of Osmundson’s lawsuit, thus mooting his claims. However, this argument was not raised in the School District’s motion to dismiss, was disputed by Osmundson, and the trial court’s Order of Dismissal was based on a narrow and perceived procedural issue rather than a substantive determination that there was no FOIA violation by the School Board.²

Although Rule 220(c), SCACR, allows the court to “affirm a lower court’s decision on any basis appearing in the record,” here the trial court’s decision was not based on a legal determination of whether Osmundson complied with the procedural requirements of S.C. Code Ann § 30-4-100(A). The trial court’s decision was not based in any way on the facts surrounding the School District’s post-filing efforts to comply with FOIA’s open meetings requirements. (*See R. p. 285*)

² As detailed in Osmundson’s opening brief, in dismissing this case on procedural grounds, the trial court ignored several orders from the Supreme Court governing court operations during the Covid-19 pandemic. (Op. Br. of App. at pp. 10-12).

(finding that “Defendant’s Motion to Dismiss is dispositive” because a hearing was not held within the 10-day timeframe required by § 30-4-100(A) and stating “the court need not determine the merits of the Summary Judgment claims.”). Indeed, the School District’s motion to dismiss was premised solely on this basis. (*See R.* pp. 113-14). Accordingly, the Court should not look beyond the scope of the motion or the resulting Order of Dismissal for substantive justifications to affirm the trial court’s decision on disputed issues not addressed by the trial court.

However, even if the Court determines it has jurisdiction to make such a finding, the evidence in the record would show that Osmundson is entitled to an order from this Court remanding the case for a determination of his right to attorneys’ fees as the prevailing party. S.C. Code Ann. § 30-4-100(B) provides, “[i]f a person or entity seeking relief under this section prevails, he may be awarded reasonable attorney’s fees and other costs of litigation specific to the request.” In *Sloan v. Friends of Hunley, Inc.*, the plaintiff, Sloan, served a FOIA request on Friends of the Hunley, Inc. (“Friends”). *Sloan v. Friends of Hunley, Inc.*, 393 S.C. 152, 154, 711 S.E.2d 895, 896 (2011). When Friends did not comply with the request, Sloan filed a lawsuit alleging Friends violated FOIA’s disclosure requirements. *Id.* at 154, 711 S.E.2d at 896. Friends subsequently complied with Sloan’s request and moved for summary judgment on the basis that Sloan’s claim was moot. *Id.* On appeal, the South Carolina Supreme Court found that although Friends’ disclosures mooted Sloan’s FOIA violation claim, Sloan was a prevailing party for purposes of the FOIA attorney’s fees provision. *Id.* at 157, 711 S.E.2d at 897.

Here, if the Court takes the step of determining that Osmundson’s FOIA claim was in fact mooted by the School District’s actions taken subsequent to the filing of Osmundson’s lawsuit, this necessarily means that Osmundson is a prevailing party and is entitled to attorney’s fees under section 30-4-100(B). *See Sloan*, 393 S.C. at 157, 711 S.E.2d at 897 (“When a public body frustrates

a citizen's FOIA request to the extent that the citizen must seek relief in the courts and incur litigation costs, the public body should not be able to preclude prevailing party status to the citizen by *producing the documents after* litigation is filed.” (emphasis added)); *Sloan v. S.C. Dep't of Revenue*, 409 S.C. 551, 556, 762 S.E.2d 687, 689 (2014) (finding that the plaintiff’s claim seeking declaratory judgment for violation of FOIA “was mooted when DOR produced the requested information” but remanding to the trial court for an award of reasonable attorney's fees and costs to the plaintiff as the prevailing party). As such, at a minimum the Court should remand the case to the trial court for an award of attorney’s fees.

D. The School District’s Closed-Door, Executive Committee Actions Violate FOIA.

The School District also argues that the trial court’s Order of Dismissal should be affirmed because the conduct at issue in this lawsuit did not constitute a violation of FOIA. This issue was not ruled upon by the trial court. In the Order of Dismissal, the trial court stated that “the Motion to Dismiss is dispositive and the court *need not determine the merits* of the Summary Judgment claims.” (*See* R. p. 285) (emphasis added). Accordingly, this issue is not properly before the Court, and the Court should refrain from making any fact-specific determinations of the merits of the case.

Regardless, it’s clear that the School District’s admitted conduct during a closed-door executive session did constitute a violation of FOIA’s open meetings requirements. The School District alleges that in closed-door sessions over several months it (1) evaluated and discussed the performance of Dr. Melton, the District’s superintendent; (2) discussed its options for Dr. Melton’s contract with legal counsel; and (3) reviewed and signed a settlement agreement between the School District and Dr. Melton. (Op. Br. of Resp. at pp. 15-16). Taken as whole, this conduct clearly violated section 30-4-70(b)’s requirements that the “members of a public body may not

commit the public body to a course of action by a polling of members in executive session” and that “[n]o action may be taken in executive session except to (a) adjourn or (b) return to public session.” See *Miramonti v. Richland Cnty. Sch. Dist. One*, 438 S.C. 612, 616, 885 S.E.2d 406, 408 (Ct. App. 2023) (holding that a public-school board violated FOIA by discussing how to respond to parents’ complaints in executive session). Accordingly, to the extent the Court takes any action on the merits of Osmundson’s claims, it should find that the School District’s conduct constituted an egregious violation of FOIA’s open meeting requirements as provided in section 30-4-70.

II. The School District Fails to Demonstrate That the Procedural Requirements of S.C. Code Ann. § 30-4-100(A) Justified Dismissal.

The School District correctly notes that S.C. Code Ann. § 30-4-100(A) requires the Chief Judge for Administrative Purposes to schedule an initial hearing within ten days of service of a FOIA complaint on all parties. Based on this requirement, the School District jumps to the erroneous conclusion that because an initial hearing was not conducted within ten days of service as required by § 30-4-100(A), the mandatory result is dismissal of Osmundson’s lawsuit. What is missing from this argument is any evidence that the Legislature intended: (1) the hearing requirement to be an obligation imposed upon and borne by FOIA litigants rather than the courts; and/or (2) that FOIA lawsuits are subject to dismissal for the Chief Administrative Judge’s failure to satisfy this procedural requirement. The School District argues that the “common practice in South Carolina” is for litigants to either contact the court or file a motion to schedule a hearing. Even if there was evidence establishing such a common practice exists, which there is not, the Legislature did not see fit to impose such a requirement as part of § 30-4-100(A). Additionally, the School District ignores that, in his Amended Complaint, Osmundson specifically requested “an initial hearing be set within ten days of service on all parties pursuant to section 30-4-100(A).”

Accordingly, the Court should disregard the School District's legally and factually unsupported argument and find that the trial court improperly dismissed Osmundson's lawsuit on this basis.

III. The Trial Court Erred in Denying Appellant's Motion for Reconsideration Under Rule 59(e).

The School District fails to address the arguments raised by Osmundson regarding the trial court's order denying Osmundson's motion for reconsideration. For the reasons set forth in its opening brief, Osmundson again states that the Court of Appeals should reverse the trial court's Order denying Osmundson's Motion for Reconsideration.

CONCLUSION

For the reasons set forth herein, the trial court's Order of Dismissal and Reconsideration Order should be reversed, and the case should be remanded for further proceedings.

Respectfully Submitted,
NELSON MULLINS RILEY & SCARBOROUGH, LLP
/s/ Thomas William McGee, III
Thomas William McGee, III
SC Bar No. 11317
Nelson Mullins Riley & Scarborough LLP
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
billy.mcgee@nelsonmullins.com
(803) 799-2000

Joel W. Collins, Jr.
SC Bar Number: 1341
Collins & Lacy, P.C.
Post Office Box 12487
Columbia, SC 29211
jcollins@collinsandlacy.com
(803) 256-2660
Attorneys for Appellant Paul Roy Osmundson

RECEIVED

Sep 25 2023

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.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Reply Brief of Appellant complies with Rule 211(b).

/s/ Thomas William McGee, III

Thomas William McGee, III

S.C. Bar No. 11317

Attorney for Appellant

September 25, 2023

RECEIVED

Sep 25 2023

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.

PROOF OF SERVICE

I certify that I have served the foregoing Final Reply Brief of Appellant on the date given below by emailing it to counsel for the Respondent at the address(es) noted below.

James Edward Bradley, Esq., at ward@mbmlawsc.com

/s/ Thomas William McGee, III

Thomas William McGee, III

S.C. Bar No. 11317

Attorney for Appellate

September 25, 2023