THE STATE OF SOUTH CAROLINA

In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

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Case No. 12-CP-40-08469

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South Carolina Public Interest Foundation and Edward D. Sloan, Jr., individually, and on behalf of all others similarly situated, ..... Appellant,

v.

South Carolina Department of Revenue, and James F. Etter, its Director,..... Respondents.

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# APPELLANTS' INITIAL REPLY BRIEF

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### Rules

Appellants South Carolina Public Interest Foundation and Edward D. Sloan, Jr. ("Sloan") submit this Reply Brief.

## I. BECAUSE THE DEPARTMENT MADE NO DISPOSITIVE MOTION, THE COURT SHOULD NOT HAVE ENTERED AN ORDER ENDING THE CASE.

Sloan filed this action on or about December 18, 2012. Respondents South Carolina Department of Revenue and James F. Etter, its Director ("the Department") accepted service of the Summons and Complaint on January 7, 2013. The Department filed an Answer on February 5, 2013. On February 6, 2013, the date of the hearing, the Department filed Defendants' Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction ("Memo in Opposition").

### A. The Department Made No Dispositive Motion.

An application to the court for relief must be made by motion.

> 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 in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of hearing of the motion.

SCRCP 7(b)(1). However, the Department filed no Motion to Dismiss and no Motion for Summary Judgment. Yet the court entered a Form 4 Order that ended the case.

Due process requires notice and an opportunity for a meaningful hearing.

> The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review. S.C. Const. art. 1, § 22; *Stono River Envtl. Protection Ass'n v. S.C. Dep't of Health and Envtl. Control,* 305 S.C. 90, 94, 406 S.E.2d 340, 342 (1991).

*Kurschner v. City of Camden Planning Commission*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008). Without the Department's written motion, Sloan had no notice that the Court was considering a dismissal of his case, nor an opportunity to be heard on that point.

### B. The Department Did Not Consent to the Ruling on the Merits.

Because the Department did not consent to a ruling on the merits, the court's order should have been only to deny the motion for preliminary injunction and defer a ruling on Sloan's request for declaratory judgment.

The Department contends, "The Department believed that the only issue before the court at the time was Sloan's request for injunctive relief, and did not consent to any decision on the merits as to whether the Department violated FOIA" (Brief of Respondent, p. 2, n. 1). At the beginning of the hearing, the Department said, "Part of our argument is going to be, Your Honor, that we don't need to have this motions hearing today" (Transcript, p. 3).

During the Department's argument, it opposed the court's making any ruling on the request for declaratory judgment, because that would be a ruling on the merits. In referring to Sloan's argument, the Department urged:

> What he also said, however, is that what he really wants is a decision on the merits, a declaratory judgment, that the Department's response was not adequate. Your Honor, we would submit to the Court that that would be a decision on the merits of this case. We are not here today for a decision on the merits.

(Transcript p. 7, ll. 19-24). The Department continued along this same line of reasoning:

> I understand the issue that Mr. Sloan would like heard, but, Your Honor, we would ask this Court to deny what's before it today, the issuance of a preliminary injunction. If we need to go to court on the merits of this case, that's fine with the Department. We'll be prepared to do that, but we would submit to the Court that it's not appropriate on a motion for a preliminary injunction to hear the merits of the case.
>
> * * *
>
> Now, we did file an Answer last night, but, Your Honor, we—it would be—we would submit that it's inappropriate to decide the merits of this issue and to—according to Mr. Carpenter, I have no knowledge of this that other state agencies routinely do this. I don't have any knowledge of this.

> But to the extent this is a matter of public interest, we would ask the Court that it's not appropriate to decide this based on the motion before you today.

(Transcript p. 8, ll. 2-9, 16-23).

Similarly, in its conclusion, the Department argued in relation to the attorneys' fees question, "This is just not appropriate at this stage of a preliminary injunction. That's what we're here for today. Mr. Sloan filed a preliminary motion for preliminary injunction. He brought us here, and based on what he filed, Your Honor, we would urge the court not to grant the preliminary injunction" (Transcript, p. 12, ll. 14-19).

On February 11, 2013, the court entered a Form 4 Order stating the following, "Plaintiff's complaint for FOIA enforcement is DENIED. Issue is moot." The box under "ORDER INFORMATION" is checked indicating, "This order ends the case."

There was no further written order clarifying the decision of the court. Sloan respectfully contends that the Form 4 Order's omission of a ruling on Sloan's request for declaratory judgment was error.

Because the Department did **not** consent to a decision on the merits of the case, then the court's Order should have been only to deny the motion for preliminary injunction, and defer a ruling on Sloan's request for declaratory judgment.

## II. THE CIRCUIT COURT ERRED IN DISMISSING THE CASE WITHOUT RULING ON SLOAN'S REQUEST FOR DECLARATORY JUDGMENT.

In essence, the court below failed to distinguish between a motion for preliminary injunction and a plea for declaratory judgment. The case for declaratory judgment is **not** moot.

> (a) Any citizen of the State may apply to the circuit court for ***either or both a declaratory judgment and injunctive relief*** to enforce the provisions of this chapter in appropriate cases as long as such application

> is made no later than one year following the date on which the alleged violation occurs or one year after a public vote in public session, whichever comes later. The 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.

S.C. Code Ann. § 30-4-100(a) (emphasis added).

To the extent that the Form 4 Order ended the case without a ruling on Sloan's claim for declaratory judgment, the Form 4 Order was entered in error. Sloan clearly moved for preliminary injunction and requested declaratory judgment as a formal remedy in the Complaint. In the Complaint, the first two lines in the Prayer for Relief request an order, "1. Declaring that Defendants have violated FOIA;" and "2. Declaring that the request is deemed approved." These are clear requests for Declaratory judgment, which the court should have granted, or at least ruled upon.

The Department admits that FOIA provides both remedies: "The Department acknowledges that S.C. Code Ann. § 30-4-100 (Supp. 2012) allows a complainant alleging a FOIA violation to 'apply to the Circuit Court for either or both a declaratory judgment and injunctive relief'" (Brief of Respondents, p. 10).

S.C. Code Ann. § 30-4-30(c) sets out the duties of a public body when responding to a request under FOIA

> (c) Each public body, upon written request for records made under this chapter, ***shall within fifteen days*** (excepting Saturdays, Sundays, and legal public holidays) of the receipt of any such request ***notify the person*** making such request ***of its determination and the reasons therefor***. Such a determination shall constitute the ***final opinion*** of the public body as to the ***public availability*** of the requested public record and, if the request is granted, the record must be furnished or made available for inspection or copying. ***If written notification of the determination of the public body as to the availability of the requested public record is neither mailed nor personally delivered to the person requesting the document within the fifteen days allowed herein, the request must be considered approved.***

*Id.* (emphasis added).

The Department predicted that after it had more time, (than the 15 business days) at some unspecified, future time it would declare the "public availability of the requested public records, and the reasons for any refusal or failure to provide access to the requested public records. The issue in this case one for declaratory judgment: whether the Department's response satisfies the Department's statutory duty. It plainly does not.

The Department argues that no justiciable controversy existed about the sufficiency of its response after the documents were produced (Respondent's Brief, p. 10). The Department cites *Friends of the Hunley* on this point. *Id.* at 369 S.C. 20, 26, 630 S.E.2d 474, 478 (2006). However, in this case, unlike *Friends of the Hunley*, there is a clear and separate issue: whether The Department's initial written response to the FOIA request complies with S.C. Code Ann. § 30-4-30(b). In *Friends*, immediately before oral argument, and before the Supreme Court's decision, the organization conceded that it was a public body, an issue initially in contention in that case, but that became moot. *Id.* Here, the issue of the sufficiency of the Department's initial response remains very much in contention.

The General Assembly prescribed a process that public bodies must follow whether or not they eventually provide the documents following service of a FOIA enforcement complaint. S.C. Code Ann. § 30-4-30(c). Reactive production of the public records after an action is filed does not moot the justiciability of a violation of these prerequisite statutory requirements, which were enacted to prevent delay and stone-walling. If this Court declines to address these violations, or more appropriately, to remand for that purpose, it will effectively emasculate S.C. Code Ann. § 30-4-30(c).

## III. THE DEPARTMENT'S RESPONSE WAS FINAL AND VIOLATED FOIA.

When the Department sent its letter dated December 10, 2012, that letter constituted its "final opinion" as to the availability of the documents. S.C. Code Ann. § 30-4-30(c). Accordingly, Sloan sought declaratory judgment that the response violated FOIA by not stating whether the public records would be "publicly available," and that his request "must be considered approved." S.C. Code Ann. § 30-4-30(c). The Department's final opinion was an ***indefinite*** response that said it might produce the documents, but it might not; that at some indefinite time in the future, Sloan would "be notified of the decision and the reasons for it." Thus, fifteen days came and went, and Sloan was left wondering whether the Department would produce the requested public records, and if not, the nature of the Department's reason for not producing the documents. The Department's response does not comply with the requirements of § 30-4-30(c).

As stated in the Complaint, Sloan's purpose in bringing the lawsuit was not only to acquire the documents, but also to obtain declaratory judgment that the Department's response, which is fairly typical of State agencies, does not comply with FOIA (Complaint, par. 10; Prayer for Relief).

The Department contends that the first paragraph of its letter dated December 10, 2012, was an unequivocal response that it would provide the requested public records (Brief of the Respondents, pp. 20-21). The Department relies on its statement, "As soon as the information has been compiled, you will be contacted again and the requested information will be sent to you" (December 10, 2012 letter).

However, what the left hand gives, the right hand takes away. The Department modified this allegedly unequivocal promise of production with the following

qualification: "If we are unable to locate, obtain or release the requested file(s) you will be notified of the decision and the reasons for it." The Department argues that "the subsequent qualifying language does not undercut this determination" (Respondents' Brief, p. 21). However, this statement does not communicate whether the requested public records will be "publicly available," as § 30-4-30(c) requires. Instead, the Department reserved to itself the right to determine at any time (1) that it might be "unable to locate" a requested public record; (2) that it might be "unable to obtain" a requested public record; or (3) that it might be "unable to release" a requested public record.

In none of these three possible contingencies does the Department declare whether requested public records are "publicly available" or assert **why** in the future it might be unable to locate, obtain or release the public record; but these are exactly the decisions that should have already been rendered within 15 days. FOIA requires that the decision on the "public availability" of the documents be made and communicated within 15 days. S.C. Code Ann. § 30-4-30(c). The Department argues that § 30-4-30(c) required only that it "must act reasonably to provide the documents as soon as possible" without "any unreasonable delay (Respondents' Brief, p. 21). This language is not found in § 30-4-30(c) and flies in the face of the General Assembly's 15-day deadline for stating the records' "public availability."

The Department also contends that the possibility of its inability to release a record for an unspecified reason, or perhaps for no reason, constitutes an assertion of a statutory exemption: "The third alternative—the Department cannot release the record—is consistent with the prevailing law inasmuch as applicable exemptions to FOIA

disclosures are not waived even if not cited in an initial agency determination" (Respondents' Brief, p. 21). However, the Department must claim any statutory exemption "***within fifteen days*** (excepting Saturdays, Sundays, and legal public holidays)." S.C. Code Ann. § 30-4-30(c).

The December 10, 2012, letter does not reference any statutory exemption or any other statutory reason under FOIA why the Department would not release a requested public record. If the Department wishes to assert a statutory exemption, it must assert the exemption specifically and provide the statutory basis for the exemption. The Department's December 10, 2012, letter does not assert any statutory exemption, nor does it give any other satisfactory justification for a potential refusal to release the requested public records.

Instead, the Department sought to create *the illusion of compliance* with FOIA, while reserving to itself the unfettered discretion to refuse to comply with FOIA, and an unlimited extension of time in which it could make a decision about whether it was "unable to locate, obtain or release the requested file(s)." Section 30-4-30(c) requires that a public body declare the "public availability of the requested public records within 15 business days, including whether the public record will be provided, and any reasons why it will not be provided. The Department's letter dated December 10, 2012 failed to meet the statutory standard. Accordingly, Sloan's request for declaratory judgment is **not** moot, and the failure of the court to grant declaratory judgment was error.

## IV. BOTH PARTIES ARGUED THE MOOTNESS EXCEPTIONS, AND THE COURT ERRED IN DECLARING THE CASE MOOT AND IN DISREGARDING THOSE EXCEPTIONS.

In the alternative, if this Court believes that the trial court properly ruled that the request for declaratory judgment was moot, this Court should also rule that the trial court should have recognized one of the three most commonly understood exceptions to the doctrine of mootness: (1) the issue is capable of repetition, yet evading review, (2) the questions are of imperative and manifest urgency, or (3) the decision may affect future events or have collateral consequences. *Sloan v. Dept. of Transportation*, 379 S.C. 160, 168, 666 S.E.2d 236, 240 (2008). Sloan presented the court with these exceptions in the course of the oral argument.

Sloan argued to the court that the Department's response in the December 10, 2012, letter was improper, but was also "very typical or fairly common in how government agencies respond to FOIA requests" (Transcript, p. 4). Sloan also argued that the court's decision would have collateral consequences or would affect future events, and was of imperative and manifest urgency (of great public importance).

> [T]he point Mr. Sloan would like the Court to decide is: Does this letter that says "we will notify you" comply with the statute that says, "Within 15 days the public body shall notify the requesting party of its determination and the reasons therefor?" We contend that this letter does not satisfy the statute, and ***we have requested a declaratory judgment***.
>
> . . . ***What we need is declaratory relief*** that says this response did not fulfill the public body's obligation under FOIA. I think that would be an ***important decision***, not only for this case, but ***for all the other public bodies***, who have . . . pretty much taken it on themselves to give themselves an unlimited extension of time just by writing a letter that says we will tell you when we feel like it. . . . And, Your Honor, I think that's a case of ***great public importance***, because it's very widespread. I don't have statistics or anything else, but that's what they do. When you send a FOIA request, if they're so inclined, they'll send a letter that says will tell you some day when we feel like it. And then they give themselves basically an unlimited extension of time simply by writing you a letter

> back, instead of doing what the statute says is notifying you of the determination and the reasons therefor. So ***what we need is a decision*** and the basis – ***in the nature of declaratory judgment***.

(Transcript, pp. 5-6).

The Department and the court understood that Sloan was making an argument that the case fell into the category of public importance. The Department responded: "I have no knowledge of this that other state agencies routinely do this. I don't have any knowledge of this. But to the extent this is a matter of public interest, we would ask the court that is not appropriate to decide this, based on the motion before you today" (Transcript, page 8, lines 19-23). Thus, both Sloan and the Department in the court below argued the substance of both the issue of the public importance of this case and the effect, importance, and collateral consequences of a ruling in this case beyond the parties themselves. Accordingly, the court erred in declaring the case moot, in failing to address these exceptions, in failing to address the FOIA violations, and in failing to issue a declaratory judgment, regardless of the eventual production of the public records.

## V. ATTORNEYS' FEES TO SLOAN ARE NOT ONLY ALLOWED BY FOIA, BUT ARE PROPER IN THIS CASE.

Sloan prayed the court for an order "Awarding [Sloan] attorneys' fees and costs of litigation pursuant to S.C. Code Ann. § 30-4-100(b)" (Complaint, Prayer for Relief, par. 4). FOIA calls for an award of attorneys' fees:

> (b) If a person or entity seeking such relief prevails, he or it may be awarded reasonable attorney fees and other costs of litigation. If such person or entity prevails in part, the court may in its discretion award him or it reasonable attorney fees or an appropriate portion thereof.

*Id.* Sloan also asserted a claim for attorneys' fees in oral argument, (Transcript, p. 6, l. 20 – p. 7, l. 3. Because the court disposed of the case so rapidly, there was no opportunity to

file a fee affidavit. Additionally, the hearing was scheduled on a Motion for Preliminary Injunction. The Department opposed the court's consideration of the attorneys fees request. "The Department would respectfully submit that no decision on attorney's fees should be made on a motion for preliminary injunction but only after a hearing so the Court may adequately weigh all circumstances" (Memo in Opposition, p. 6).

The court quickly dismissed the case with only a Form 4 Order that, by its terms "ended the case." The court did not address the specifics of the amount of fees. However, if Sloan prevails on the merits of the case (that the Department's response to his FOIA request failed to comply with FOIA), he is entitled to attorneys' fees for his efforts both at the court and on appeal. *See Green v. Green*, 320 S.C. 347, 353, 465 S.E.2d 130, 134 (Ct. App. 1995) (fees may be awarded after remand for all previous services).

> When an award of attorney's fees is requested and authorized by contract or statute, the court should make specific findings of fact on the record for each factor set forth in *Collins [v. Collins,* 239 S.C. 170, 122 S.E.2d 1 (1961)]. On appeal, absent sufficient evidentiary support on the record for each factor, the award should be reversed and ***the issue remanded*** for the trial court to make specific findings of fact.

*Blumberg v. NealCo., Inc.*, 310 S.C. 492427 S.E.2d 659 (1993) (emphasis added). *See also Eason v. Eason*, 384 S.C. 473, 482, 682 S.E.2d 804, 808 (2009) (request for attorneys fees by party prevailing on appeal requires remand after reversal).

## CONCLUSION

The Department's response in the December 10, 2012 letter failed to comply with the Department's statutory duty under FOIA. The request for declaratory judgment on the FOIA violations in the initial response are not moot. The court erred in ending the case without ruling on these violations. Even if this Court considers the request for declaratory judgment to be moot, this Court should rule that the trial court erred in not recognizing and applying one of the standard exceptions to the doctrine of mootness and ruling on the merits.

Accordingly, Sloan respectfully requests that this Court reverse the judgment of the court and rule that the Department's response violated FOIA; and in the alternative, reverse the dismissal of the case and remand it for a ruling on Sloan's claim for declaratory judgment.

Finally, if Sloan prevails on the merits of the declaratory judgment action, he should be awarded attorneys' fees.

July 15, 2013

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**PROOF OF SERVICE**

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The undersigned attorney hereby certifies that he served a copy of the Appellants' Initial Reply Brief upon counsel for the Respondents by US Mail, postage prepaid this Monday, July 15, 2013, addressed as follows:

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July 15, 2013

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Appellate Case No. 2013-000577

Dear Ms. Johnson:

I enclose a copy of the Appellants' Initial Reply Brief

If you need anything else, please telephone me.

Sincerely yours,
THE CARPENTER LAW FIRM, PC

James G. Carpenter

Enclosures
CC w/enclosures: Milton Kimpson