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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Circuit Court

George M. McFaddin, Jr., Circuit Court Judge

Case No.: 2021-CP-10-02999
Appellate Case No. 2023-001116

Mare Baracco. .... Appellant,

v.

Charleston Area Convention and Visitors Bureau .... Respondent.

BRIEF OF RESPONDENT

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STATEMENT OF THE ISSUES ON APPEAL

I. Did the lower court correctly grant Respondent Charleston Area Convention and Visitors Bureau's motion for summary judgment?

II. Did the lower court correctly deny Appellant's motion to compel?

STATEMENT OF THE CASE

In 1990, the General Assembly enacted the Accommodation Tax (A-Tax) statute, which involves the administration of a state sales tax imposed on sleeping accommodations provided to overnight guests. The A-Tax statute requires local governments to select at least one organization, known as a designated marketing organization (DMO), to manage the expenditure of A-Tax funds. Local governments are responsible for ensuring the funds are only used for advertising and promoting tourism.

Respondent Charleston Area Convention and Visitors Bureau (Charleston Area CVB) is a nonprofit corporation located in Charleston, South Carolina. The parties agree it was selected to serve as the DMO for City of Charleston and Charleston County pursuant to subsection 6-4-10(3) of the South Carolina Code.

On August 10, 2020, Appellant submitted a Freedom of Information Act (FOIA) request to Respondent for "copies of all receipts and invoices for all transactions of Charleston County Accommodations Tax (ATAX) expenditures by the Agency as they relate to the promotion of tourism related activities for the County of Charleston." Pl.'s FOIA Request at R. pp__. In its timely response to Appellant's FOIA request, Respondent stated, in part, that "the Charleston Area Convention and Visitors Bureau does not have any records which fall within the parameters of your request. Although we are not required to, we can provide you with the documentation of the receipt of funds from Charleston County, but the CACVB's accounting records do not itemize or allocate expenditures according to individual revenue categories."

Appellant did not follow up on Respondent's response, and she did not state whether she would like to receive a copy of the documentation of receipt of funds referenced in Respondent's correspondence.

Sometime later, Appellant filed a complaint—and then an amended complaint—alleging Respondent failed to provide a timely written response to her FOIA request. After Respondent produced copies of its timely August 24, 2020 response to Appellant's inquiry, Appellant filed a second amended complaint. In her third iteration of the complaint, Appellant now alleges that Respondent "did not provide [her] with all information responsive to her FOIA request" and also alleges that Respondent's "failure to provide all available responsive information to Plaintiff's request, pursuant to S.C. Code Ann. § 30-4-30(C), is a violation of FOIA." Appellant sought a declaration from the lower court that Respondent violated FOIA and an injunction to provide the records and information responsive to Appellant's request.

Shortly after Appellant filed her second amended complaint, she served her initial discovery requests, to which Respondent responded. Thereafter, Respondent moved for summary judgment, and Appellant moved to compel additional discovery responses from Respondent.

On April 4, 2023, the lower court heard the parties' respective arguments on Respondent's motion for summary judgment and Appellant's motion to compel discovery. On May 8, 2023, the lower court granted Respondent's motion for summary judgment and denied Appellant's motion to compel. In pertinent part, the lower court found that Respondent was a DMO and not subject to FOIA in this specific instance. Appellant filed a motion to reconsider, which was denied in a Form 4 Order. This appeal followed.

STANDARD OF REVIEW

"Summary judgment is appropriate where 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Perry v. Bullock*, 409 S.C. 137, 140, 761 S.E.2d 251, 252 (2014) (quoting Rule 56(c), SCRCP). "[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot

differ, summary judgment should be granted." *BPS, Inc. v. Worthy*, 362 S.C. 319, 326, 608 S.E.2d 155, 159 (Ct. App. 2005). "Determining the proper interpretation of a statute is a question of law, and this Court reviews questions of law de novo." *Perry*, 409 S.C. at 140, 761 S.E.2d at 252–53 (quoting *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008)); *see also Davis v. S.C. Educ. Credit for Exceptional Needs Children Fund*, 441 S.C. 187, 188, 893 S.E.2d 330, 331 (Ct. App. 2023) ("When the circuit court grants summary judgment on a question of law, [the appellate court] review[s] the ruling de novo." (quoting *Stoneledge Lake Keowee Owners' Ass'n, Inc., v. Builders FirstSource-Se. Grp.*, 413 S.C. 630, 634–35, 776 S.E.2d 434, 437 (2015))). "Th[e appellate c]ourt may interpret statutes, and therefore resolve the case, 'without any deference to the court below.'" *Davis*, 441 S.C. at 188, 893 S.E.2d at 331 (quoting *DomainsNewMedia.com, LLC v. Hilton Head Island-Bluffton Chamber of Commerce*, 423 S.C. 295, 300, 814 S.E.2d 513, 516 (2018)).

ARGUMENT

This case addresses an issue that our supreme court explicitly decided in *DomainsNewMedia.com* and this Court recently reaffirmed in *Davis*. Because the lower court's ruling is in line with these precedents, the Court should affirm.

I. The lower court properly granted summary judgment because, as a matter of law, Respondent is not a public body subject to FOIA.

In *DomainsNewMedia.com*, the supreme court established that the Hilton Head Island-Bluffton Chamber of Commerce was not subject to FOIA simply for receiving public funds according to the A-Tax statute. 423 S.C. at 307, 814 S.E.2d at 519 (holding that "the A-Tax statute and Proviso 39.2 set forth the General Assembly's determination of the required level of oversight, transparency, and accountability [for designated marketing organizations]"). This case has very

similar circumstances as *DomainsNewMedia.com*, and as such, the holding in *DomainsNewMedia.com* was appropriately applied.

FOIA was enacted by the General Assembly to promote transparency in government and make it possible for citizens to learn about the activities of their public officials at a minimum cost or delay. *Id.* at 298, 814 S.E.2d at 514 (citing S.C. Code Ann. § 30-4-15). "Subsequent to the passage of FOIA, the General Assembly enacted the A-Tax statute, which involves the administration of a state sales tax imposed on sleeping accommodations provided to overnight guests." *Id.* at 298, 814 S.E.2d at 514–15 (citing S.C. Code Ann. § 12-36-920(A) (2014 & Supp. 2017); S.C. Code Ann. §§ 6-4-5 through -35 (2004 & Supp. 2017)).

"A portion of this tax is remitted to the local governments where it was collected and, in turn, they must expend the A-Tax funds in accordance with the statutory provisions governing allocation." *Id*. at 298, 814 S.E.2d at 515 (citing S.C. Code Ann. § 12-36-2630(3); S.C. Code Ann. §§ 6-4-10 through -35). The A-Tax statute requires the local governments to select at least one organization—referred to as designated marketing organizations—to manage the expenditure of the funds; however, the local governments must ensure the funds are "only used for advertising and promotion of tourism." *Id*. (quoting S.C. Code Ann. § 6-4-10(3).

The A-Tax statute "directs the local governments to select a DMO to manage the expenditure of certain tourism funds and requires the governments to maintain oversight and responsibility of the funds by approving the proposed budget and receiving an accounting from the DMO." *Id.* at 306, 814 S.E.2d at 519. "Through the A-Tax statute (and Proviso 39.2) there are accountability measures in place and the public has access to information regarding how the funds are spent." *Id*. "[T]he A-Tax statute provides three layers of review for these expenditures—a local advisory committee, a statewide oversight committee, and an expenditure review

committee." *Id.* at 303, 814 S.E.2d at 517. And "local governments remain accountable for the expenditure of these funds as they must review and, if appropriate, approve the budget proposed by the DMO, receive an accounting of expenditures from the DMO, and submit evidence of their compliance to proper committees." *Id.* at 303–04, 814 S.E.2d at 517–18.

"Where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect." *Capco of Summerville, Inc. v. J.H. Gayle Const. Co.*, 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006) (quoting *Wilder v. S.C. Hwy. Dep't*, 228 S.C. 448, 454, 90 S.E.2d 635, 638 (1955)).

Here, as our supreme court has already recognized, FOIA is a general statute, and the A-Tax is a specific statute. *DomainsNewMedia.com*, 423 S.C. at 304, 814 S.E.2d at 518. The A-Tax statute and its oversight provisions thus prevail over the general provisions of the FOIA statute. *See id.* at 298, 814 S.E.2d at 514–15 (finding a literal interpretation of FOIA could lead to the conclusion that the transfer of tax proceeds to a DMO was enough to open its records and finding that through the A-Tax legislation, there are accountability measures in place, and the public has access to information regarding how the funds are spent).

As a DMO, Respondent is subject to the A-Tax statute, not FOIA. It is undisputed that Respondent Charleston Area CVB is a nonprofit entity appointed to serve as a DMO for several governmental entities including the City of Charleston and Charleston County. *See* Second Am. Compl. 2-3; Am. Answer 2. Respondent operates as a DMO for the City of Charleston and Charleston County under the same statute and structure the supreme court traced in *DomainsNewMedia.com*. Just like the appellant in *DomainsNewMedia.com*, Appellant argues that

Respondent's expenditure of public funds—through its role as a DMO—causes Respondent to fall within the plain language of FOIA.

Although Appellant seeks to relitigate the merits of *DomainsNewMedia.com*, the supreme court already shut the door on this argument. *See DomainsNewMedia.com*, 423 S.C. at 301, 814 S.E.2d at 516 (stating the Court was "firmly persuaded that the General Assembly did not intend the Chamber to be considered a public body for FOIA purposes based upon its receipt and expenditure of accommodation tax funds."). And Appellant failed to distinguish Respondent's role as a DMO for the City of Charleston and Charleston County from Hilton Heald Island-Bluffton Chamber of Commerce's role as a DMO for the Town of Hilton Head Island in *DomainsNewMedia.com*. So, *DomainsNewMedia.com* remains the controlling law in this case. *See* S.C. CONST. art. V, § 9 ("The decisions of the Supreme Court shall bind the Court of Appeals as precedents.").

Accordingly, Respondent was and is entitled to judgment as a matter of law, and the Court should affirm the lower court's decision.

II. Alternatively, Respondent appropriately responded to Appellant's FOIA request.

Even if Respondent were subject to FOIA, which Respondent vehemently denies, Respondent has already fully and completely responded to Appellant's FOIA request. In Respondent's FOIA response to Appellant, we stated in part, "the Charleston Area Convention and Visitors Bureau does not have any records which fall within the parameters of your request. Although we are not required to, we can provide you with the documentation of the receipt of funds from Charleston County, but the CACVB's accounting records do not itemize or allocate expenditures according to individual revenue categories."

Respondent has previously informed Appellant that it does not possess any responsive documents. Pursuant to section 30-4-30(A)(2) of the South Carolina Code, even if Respondent were subject to FOIA, it is not required to create a record in order to respond to Appellant. *See* South Carolina Code Ann. § 30-4-30(A)(2) ("A public body is not required to create an electronic version of a public record when one does not exist to fulfill a records request."). Respondent further argued this point to the lower court during the motion for summary judgment hearing. *See* Hearing Tr. 9-10, 4-4. Even if the lower court did not specifically rule on this issue, the Court can affirm upon any ground that appears in the Record on Appeal. Rule 220(c), SCACR; *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 418, 526 S.E.2d 716, 722 (2000).

Respondent's response to Appellant's FOIA inquiry ends her FOIA inquiry. While Appellant may not have been satisfied with Respondent's response, without some substantial evidence showing Respondent violated FOIA, Appellant has not been injured. Appellant's Third Amended Complaint states that "Respondent failed to produce all records." *See* Third Am. Compl. Appellant does not get to question whether Respondent has or should have certain documents. FOIA specifically provides if the government entity does not have the records requested, it is not obligated to create such records to comply with a FOIA request. Appellant has failed to identify what additional records were not produced that actually exist. Further, Appellant has failed to produce any evidence or make any showing of what records Respondent has failed to produce—because Respondent does not possess any records that are responsive to Appellant's request. The FOIA statute was not created as a mechanism to weaponize against entities subject to FOIA when favorable responses are not produced. Appellant has no basis for this allegation, and she cannot file a lawsuit in search of an injury that does not exist.

Additionally, Appellant is not entitled to relief she has failed to plead. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." (quoting *Creech v. South Carolina Wildlife and Marine Resources Dep't*, 328 S.C. 24, 491 S.E.2d 571 (1997)). In Appellant's FOIA request, she referenced a contract in which Respondent agreed to be subject to FOIA. *See* Pl.'s FOIA Request. Even if Respondent were able to contractually bound itself to be subject to FOIA, Appellant has not sufficiently plead such allegations in her Complaint. For these reasons, the Court should affirm the grant of summary judgment in this case.

III. The lower court properly denied Appellant's motion to compel.

Like the chamber in *DomainsNewMedia.com*, it has been established, by Appellant herself, that Respondent is a nonprofit organization and serves as the City of Charleston and Charleston County DMO. *See* Appellant's Second Am. Compl. 2-3. So, her attempt to engage in a fishing expedition is insufficient to preclude the Court from considering a properly supported motion for summary judgment. On that note, Appellant did not even support her naked assertion that she was not afforded a "full and fair opportunity to complete discovery." *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003). Simply saying it does not make it so. *See* Rule 56(f), SCRCP ("Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.").

Although the scope of discovery is broad, discovery is not without its limits. *See Oncology & Hematology Assocs. of S.C. LLC v. South Carolina Dep't of Health & Envtl. Control*, 387 S.C.

380, 388, 692 S.E.2d 920, 924 (2010); Rule 26(b)(1), SCRCP. Our supreme court has clarified that the merits of a claim "should not be relegated to a secondary status" during discovery practice. *Id.* Rather, discovery requests must show a reasonable expectation of obtaining information that will aid the dispute's resolution. *Id.*, 387 S.C. at 388, 692 S.E.2d at 924-25. "Discovery requests must be reasonably tailored to include only relevant matters." *Id*.

To the extent Appellant attempts to "muddy the waters" by questioning which funds Respondent Charleston Area CVB received and used for tourism marketing, the Court need look no further than the text of the A-Tax statute, which she acknowledges governs Respondent's role as a DMO for the City of Charleston and Charleston County. *See* S.C. Code Ann. § 6-4-10(3) ("To manage and direct the expenditure of these tourism promotion funds, the municipality or county shall select one or more organizations, such as a chamber of commerce, visitor and convention bureau, or regional tourism commission, which has an existing, ongoing tourist promotion program."). Moreover, Appellant herself identifies that the funds about which she sent a FOIA inquiry were for "all receipts and invoices for all transactions of Charleston County Accommodations Tax (ATAX) expenditures." Respondent's Responses to Interrogatories No. 9.

It is disingenuous for Appellant to assert that she is now unaware of what funds are at issue in the litigation that she commenced. *See Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 463–64, 892 S.E.2d 297, 301 (2023) (repeating the court's holding that "it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine" (quoting *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013)). Further, Appellant was afforded an opportunity to establish a record to prove that Respondent is a public body but failed to do so. *See Disabato v. S.C. Ass'n of Sch. Adm'rs*, 404 S.C. 433, 443, 746 S.E.2d 329, 334 (2013) (finding "a judicial declaration that SCASA is a public body must be based upon evidence, not on

mere allegations."). However, the additional discovery that Appellant sought would not have contributed additional evidence to answer this judicial inquiry. Appellant has acknowledged that the funds received by Respondent were from Charleston County's A-Tax funds. *See* Pl.'s Affidavit and Exhibits to Def.'s First Motion for Summary Judgment. Additionally, Appellant has acknowledged that Respondent is a nonprofit entity appointed to serve as a DMO for several government entities, including the City of Charleston and Charleston County. *See* Second Am. Compl. 2-3; Am. Answer 2. Therefore, there is no additional evidence necessary in order to establish a record from which the lower court could make a judicial determination whether Respondent was a public body. Thus, the lower court had sufficient evidence before it to correctly rule that Respondent was not a public body due to its similarities to the chamber in *DomainsNewMedia.com*.

Nevertheless, no additional inquiry was needed for the lower court to determine Respondent was not a public body as a matter of law. Appellant's argument regarding need for additional information about Respondent's organizational structure or the source of the public funds were not necessary to decide this issue as a matter of law. Indeed, Appellant is simply trying to manufacture an issue where none exists. A review of *DomainsNewMedia.com*, however, shows that the chamber's organizational structure had no impact on the court's legal analysis. The supreme court noted that the chamber was a nonprofit organization and served as the Town of Hilton Head Island's DMO. *DomainsNewMedia.com*, 423 S.C. at 298, 814 S.E.2d at 515. That was the extent of the court's analysis of the chamber's organizational structure.

Because Appellant's last-ditch effort to withstand summary judgment was conclusory, contrived, and did not forecast evidence that would shed additional light on the legal question

decided, the lower court properly denied her motion to compel and granted summary judgment in favor of Respondent.

CONCLUSION

For the foregoing reasons, the Court should summarily affirm.

Respectfully submitted,

s/Robert E. Tyson, Jr.

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