THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTONCOUNTY
Court of Common Pleas

George M. McFaddin, Jr., Circuit Judge

Appellate Case No. 2023-001116

Mare Baracco, ...……..……..……...Appellant,

v.

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

APPELLANT'S FINAL BRIEF

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II. Did the lower court err in denying Appellant's motion to compel discovery regarding how Appellee is organized on the basis that the lower court's granting of summary judgment found Appellee as a destination marketing organization was not subject to FOIA?

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STATEMENT OF THE CASE

Appellant Mare Baracco ("Appellant") filed this lawsuit on June 30, 2021, against Respondent Charleston Area Convention and Visitors Bureau ("Respondent"). Appellant's complaint was filed contemporaneously with two exhibits. (R. pp. 16; summons and complaint with exhibits.) On July 7, 2021, before service of responsive pleading by Respondent, Appellant served and filed an Amended Complaint seeking a declaratory judgment that Respondent violated the South Carolina Freedom of Information Act, specifically S.C. Code Ann § 30-4-30, when it failed supply either a written determination regarding the availability of information or all the responsive information pursuant to Appellant's FOIA request, as well as injunction to supply the information (R. pp. 25; amended summons and complaint.)

On August 20, 2021, Respondent served its answer to Appellant's amended complaint. (R. pp. 30; answer.) On the same day Respondent served a motion for summary judgment with several exhibits. (R. pp. 56; first motion for summary judgment.) Respondent's motion contended it had supplied a written determination to Appellant and attached it to its motion. (R. pp. 81; first motion for summary judgment.) On January 14, 2022, Appellant filed her affidavit in response to Respondent's motion for summary judgment where several exhibits were attached purporting to show Appellant did not receive such determination from Respondent. (R. pp. 106; Baracco affidavit with exhibits.) On February 1, 2022, the parties submitted a consent motion for leave to amend Appellant's complaint to substitute her one cause of action for failure to supply a written determination for one regarding a failure to supply all responsive information, pursuant to FOIA. (R. pp. 59; consent motion leave to amend.)

The lower court signed and filed the order allowing leave to amend on March 14, 2022. (R. pp. 14; order leave to amend.) Appellant filed and served her second amended complaint on the same day effectively resolving Appellee's summary judgment motion. (R. pp. 47; second amended complaint.) On March 29, 2022, Appellee served its answer to the second amended complaint that denied it had failed to supply all responsive information to Appellant's request. (R. pp. 52; answer to second amended complaint.)

On August 26, 2022, Appellant served her first set of discovery requests to Appellee. (R. pp. 145; appellant discovery requests.) One month later, on September 26, 2022, Appellee served its responses to Appellant's requests wherein it objected to several interrogatories and requests for production as overly broad or otherwise improper. (R. pp. 151; appellee discovery responses.) On the same day, Appellee filed its motion for summary judgment. (R. pp. 61; motion for summary judgment.) On October 27, 2022, Appellant filed her motion to compel discovery. (R. pp. 63; motion to compel discovery.) On April 3, 2023, Appellee filed memoranda in support of its motion for summary judgment and in favor of denial of Appellant's motion to compel. (R. pp. 72; memorandum in support of summary judgment; R. pp. 82; memorandum in support of denial of motion to compel.)

On April 4, 2023, the lower court held a hearing on Appellant's motion to compel discovery and Appellee's motion for summary judgment. (R. pp. 86; hearing transcript.) On May 8, 2023, the lower court entered its order denying Appellant's motion to compel discovery. (R. pp. 9; order denying motion to compel.) On the same day the lower court also entered its order granting summary judgment in favor of

Appellee, ruling it was not a public body for FOIA purposes. (R. pp. 4; order on summary judgment.) On May 18, 2023, Appellant filed her motion to reconsider both the order granting summary judgment and the order denying her motion to compel. (R. pp. 66; motion to reconsider.) The lower court denied Appellant's motion to reconsider on June 9, 2023. (R. pp. 1; order denying motion to reconsider.) On July 7, 2023, Appellant filed her notice of appeal concerning the lower court's orders of May 8 and June 9, 2023.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, this court applies the same standard that governs the trial court under Rule 56(c), SCRCP. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). That standard is that "summary judgment may be rendered only when 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 judgment as a matter of law. Additionally, it must be shown that further inquiry into the facts of the case is not desirable to clarify the application of the law." Folkens v. Hunt, 290 S.C. 194, 196, 348 S.E.2d 839, 841 (Ct. App. 1986).

"All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. Even when there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." Nelson v. Charleston County Parks & Recreation Comm., 362 S.C. 1, 605 S.E.2d 744 (Ct. App. 2004). If "the parties

vehemently dispute the inferences and conclusions to be drawn from the undisputed facts, . . . that simply establishes that summary judgment is not appropriate[.]" Montgomery v. CSX Transp., Inc., 656 S.E.2d 20, 29 (S.C. 2008).

"When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. Moreover, since it is a drastic remedy, summary judgment should be cautiously invoked so that a litigant will not be improperly deprived of a trial on disputed factual issues." Englert, Inc. v. LeafGuard USA, Inc., 377 S.C. 129, 133-34, 659 S.E.2d 496, 498 (2008).

"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." In re: Care and Treatment of Miller, 393 S.C. 248, 256, 713 S.E.2d 253, 257 (2011).

ARGUMENT

I. The lower court erred in ruling pursuant to Rule 56, SCRCP, that this record possesses sufficient evidence to indicate no issue of material fact when such record actually establishes no facts regarding Appellee's actual organization.

A careful review of the record in this matter, where Appellant was denied an opportunity to any – much less fruitful – discovery of how Appellee is organized, reveals very little facts about Appellee relevant to the implementation of the drastic remedy deployed to resolve this matter. The Order granting summary judgment for Appellee includes findings of facts that the "Charleston Area CVB is a 501-C-6 not-for-profit designation marketing organization. Charleston Area CVB's primary purpose is to market the greater Charleston areas as an overnight destination." (R. pp.

4; order on summary judgment at 1). The order continues that "local governments must ensure that the funds are only used for advertising and promotion of tourism" but what "funds" are we talking about? The undersigned must assume these funds are those received by Appellee pursuant to the Accommodations Tax Act as a destination marketing organization. The record of this matter is not clear about what public funds Appellee either receives or is charged with expending to compare it to the Hilton Heald Island-Bluffton Chamber of Commerce in DomainsNewMEdia.com, 423 S.C. 295, 814 S.E.2d 513 (S.C. 2018). It is not possible, for example, to adopt the same philosophical approach used by the South Carolina Supreme Court to see if subjecting Appellee to FOIA as a public body would do specific harm to privately funded parts of the organization like in DomainsNewMedia. The legislature's intentions, as stated in that case, may be satisfied by subjecting Appellee to only compliance with that separate statutory procedure but there is simply an issue of fact as to whether Appellee's other funding would warrant that requirement like it did in the cited authority. There simply nothing in this record regarding Appellee's organization to determine the applicability or DomainsNewMedia to this case, such that ruling in this manner on this record was an abuse of discretion.

The only affidavit in the record of this matter that presents facts relevant to determining whether Appellee is a public body is the one actually submitted by Appellant. (R. pp. 106; Baracco affidavit with exhibits.) Exhibit 2 shows the 2020 record request Appellant submitted to Appellee wherein she recites language in the 2017 agreement between Charleston County and Appellee for it to serve as destination marketing organization: "Paragraph 9 states: Agency agrees that by acceptance of

public funds provided herein, the Agency acts as a 'public body' as defined in the S.C. Freedom of Information Act (§30-4-10, et seq.) S.C. Code of Laws for 1976 as amended, with respect to the expenditure of those funds must be in compliance with this Act." Id. Appellant explains in her affidavit that she only submitted this request to Appellee because Charleston County "directed I send my FOIA request to the CACVB." (R. pp. 106; Baracco affidavit with exhibits.) Id. at 1; see also Baracco Affidavit Exhibits # 2. Appellee did not deny this language in its agreement with Charleston County in response to Appellant's request or in its Answer. (R. pp. 30; answer to second amended complaint.) It is entirely possible that Appellant is saying it is subject to FOIA to the County but not so the lower court. Similarly, it is possible Appellee is organized in a manner principally different than the Hilton Head Island-Bluffton Chamber of Commerce and had that language about being a public body stripped from its latest agreement with Charleston County. The record is not clear. There was at least an issue of material fact necessary for the Court's determination as a matter of law that Appellee is not a public body for FOIA purposes.

The absence of facts in an appeal similar to this one illustrates the need for a record to determine the appropriateness of subjecting an entity to FOIA as a public body. "[A] judicial declaration that SCASA is a public body must be based upon evidence, not on mere allegations. Therefore, the issue of whether SCASA is a public body can only be resolved after the parties have engaged in discovery,..." Disabato v. S.C. Ass'n of Sch. Adm'rs, 404 S.C. 433, 746 S.E.2d 329 (S.C. 2013). The South Carolina Supreme Court was forced to assume the South Carolina Association of School Administrators was a public body for FOIA purposes to resolve the First

Amendment challenge to the statute. Id. at 334. There is no need to assume in this appeal as the sufficiency of the order on summary judgment is being challenged, not a motion to dismiss like in Disabato.

II. The lower court erred in denying Appellant's motion to compel discovery regarding how Appellee is organized on the basis that the lower court's granting of summary judgment found Appellee as a destination marketing organization was not subject to FOIA

The Court's denial of Appellant's motion to compel discovery pending at the same time as Appellee's motion for summary judgment represents an error law depriving Appellant and the Court an opportunity to "clarify the application of law" towards the disposition of this case. See Lanham v. Blue Cross & Blue Shield of S.C., Inc., 349 S.C. 356, 362 (S.C. 2002). "Because summary judgment is a drastic remedy, it must not be granted until the opposing party has had a "full and fair opportunity to complete discovery." Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003). As Appellant's counsel stated at the hearing on these motions, Appellant received no responses to discovery this case that did not yield an objection. (R. pp. 151; appellee discovery responses; R. pp. 98; hearing transcript.) Essentially, no opportunity for discovery was had in this matter, much less a full and fair one.

Appellant asked in her interrogatories numerous questions about what type of funding Appellee possessed, how it came to its agreement with Charleston County to serve as destination marketing organization or even for an explanation of the "numerical figures contained in the document 'Charleston Area Convention and Visitor's Bureau Exhibit A' filed in this matter on January 14, 2022" to which Appellee

objected on the grounds that such a request is overly broad, unduly burdensome and was not reasonably designed to lead to the discovery of admissible evidence. (R. pp. 145; appellant discovery requests; R. pp. 151; appellee discovery responses.) A response to how those numerical figures were comprised, that it supplied to Charleston County, would certainly aid this Court in determining what type of funds Appellee actually receives – a central inquiry in whether Appellee is a public body for FOIA purposes. "Discovery requests must show a reasonable expectation of obtaining information that will aid the dispute's resolution. Oncology & Hematology Assocs, 692 S.E.2d at 924-25. 'Discovery requests must be reasonably tailored to include only relevant matters.' Id." (R. pp. 9; order denying motion to compel 4.)

Nothing in this record could be more relevant to whether Appellee is a public body than whether it manages the expenditure of public funds.

> In this case, the Chamber was selected to be a DMO—to direct the expenditure of tourism funds—for several local governments and it received funds from the Department of Parks, Recreation, and Tourism (a PRT Grant). These public funds are at the center of this appeal and raise the question of whether the legislature intended the Chamber to be subject to FOIA on the singular basis that it expends these funds.
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> DomainsNewMEdia.com LLC at 515 (emphasis added).

III. The lower court erred as a matter of law in deciding both the motion for summary judgment, the motion to compel discovery and the motion to reconsider on the basis that *DomainsNewMedia.com, LLC v. Hilton Head Island – Bluffton Chamber Com.*, 423 S.C. 295, 814 S.E.2d 513 (2018), exempts all destination marketing organizations from FOIA compliance.

The order granting summary judgment provides: "[i]n *DomainsNewMedia.com, LLC v. Hilton Head Island-Bluffton Chamber Com.*, the South Carolina Supreme Court unequivocally held that 'the General Assembly did not

intend [for designated marketing organizations] to be considered a public body for purposes of FOIA as a result of its receipt and expenditure of these specific funds.' 423 S.C. 295, 814 S.E.2d 513 (2018)." The actual quote from DomainsNewMedia provides "the General Assembly did not intend for *the Chamber* to be considered a public body for purposes of FOIA as a result of its receipt and expenditure of these specific funds." Id. (emphasis added) The 2018 opinion presented a matter of first impression for the S.C. Supreme Court in that it asked whether a nonprofit, private, membership-supported entity's receipt of public funds in that case subjected it "to FOIA on the singular basis that it expends these funds." Id. at 515. Of course, Appellee would appreciate a broader interpretation of DomiansNewMedia, but that is simply not what the Court said in that case. The Court examined closely the organization of the Chamber noting it "offers private membership and conducts seminars, as well as other events, for the benefit of its members" and those "[m]embers pay dues and contribute to the Chamber's various projects." Id. "In addition to these purely private activities, since 1983, the Chamber has served the Town of Hilton Head Island as its DMO." Id. Further, the Chamber's receipt of accommodation's tax funds would then subject it to FOIA as a public body would have different ramifications for it than other all-public entities, the DomiansNewMedia Court noted.

> We do agree with Domains that the A-Tax statute does not provide for the expanse of disclosure requirements that are available under FOIA. Indeed, Domains makes no pretense that FOIA would be imposed on the Chamber so that *all* of the Chamber's procedures and activities would be controlled by all of FOIA's provisions. This would subject the Chamber to ***all*** of the various requirements of FOIA, such as advance notice of meetings, in every area of the Chamber's activities.
>
> Id. at 519 (emphasis in original).

The South Carolina Supreme Court correctly noted that, unlike other states, our FOIA does not separate out a particular division or part of a nonprofit organization and makes only that piece subject to FOIA, it says the whole organization is a public body for FOIA purposes. Id.; see also S.C. Code Ann. § 30-4-20(a)("'Public Body' means … any organization, corporation, or agency supported in whole or in part by public funds or expending public funds.") But the Court decided that the degree of oversight or transparency for the use of public funds resides with the legislature and it "specified a detailed process for the expenditure and accountability of these tourism funds and that determination is controlling" of how it treated an entity serving public and private interests in that case. Id. If the DomainsNewMedia Court intended to settle whether all destination marketing organizations are or are not public bodies for FOIA purposes, it would have said so. It did not. It was an abuse of discretion and error of law to expand the South Carolina Supreme Court's holding to all destination marketing organizations.

CONCLUSION

This court should reverse the lower court's orders granting summary judgment and denying Appellant's motion to compel discovery.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the Final Brief of Appellant Mare Baracco in this matter complies with Rule 211(b), SCACR.

Respectfully submitted,

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