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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

Daniel M. Coble, Circuit Court Judge

Appellate Case No. 2024-000833

Christine Jernigan and
Justin Jernigan……..……...…….……Appellants,

v.

Kershaw County
Sheriff's Office…….…….……..……..…...Respondent.

PETITION FOR REHEARING

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This 20th day of June 2024

Attorney for Appellants

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Appellants, pursuant to Rules 221(a), SCACR, and S.C. Code Ann. 14-3-330, respectfully request rehearing of the June 4, 2024, Order dismissing this appeal for lack of jurisdiction. *See* (Appx. 394).

I. INTRODUCTION

Appellants respectfully submit that this Court's June 4, 2024, Order overlooked or misapprehended the substance and effect of Appellants' underlying motion and memorandum for sanctions/contempt (Appx. 27-33, 79-111), and the corresponding October 20, 2023, Order (the "Order") of the Honorable Daniel M. Coble denying the motion (Appx. 355-57). Specifically, that this Court's June 4, 2024, Order erred in determining that the motion/Order merely concerned "discovery" matters that are not subject to direct appeal. *See* (Appx. 394).

Judge Coble's Order found that the written determination of Respondent Kershaw County Sheriff's Office ("KCSO"), dated July 25, 2022, "complied with" the statutory written determination requirements of FOIA, Section 30-4-30(c), and the Honorable Jocelyn C. Newman's December 28, 2022, Order. (Appx. 358-59). These findings strike/eliminate Count I of the Complaint's request for relief on grounds that "KCSO's written determination of July 25, 2022," violates the written determination requirements of FOIA, Section 30-4-30(c), and prevents judgment from which appeal may later be taken. (Appx. 11-12). The Order also, *sub silentio*, determined that KCSO did not spoliate the body worn camera ("BWC") records/evidence that form the basis of Count II of the Complaint. *Compare* (Appx. 358-59) *with* Appx. 93-102). These erroneous legal determinations, which are based on undisputed facts of record, involve the merits and affect substantial rights in this civil action and special-proceeding for declaratory/equitable relief.

Moreover, the Order's findings that KCSO's July 25, 2022, written determination complies with the requirements of FOIA, Section 30-4-30(c), overrules, modifies, and/or refuses to enforce the equitable/injunctive relief granted by Judge Newman's December 28, 2022, Form 4 Order – i.e., ordering KCSO to "fully comply with the South Carolina Freedom of Information Act vis-à-vis [Appellants'] requests within 20 days of the hearing." (Appx. 24). Judge Newman could not have issued the December 28, 2022, Form 4 Order if KCSO had, in fact, already fully complied with Section 30-4-30(c)'s written determination requirements via its July 25, 2022, FOIA Response. The equitable relief granted by the December 28, 2022, Form 4 Order following the December 19, 2022, initial FOIA hearing is the law of this case and cannot be overruled, modified, and/or refused by Judge Coble's later October 30, 2023, Order. *See Dorchester County Dept. of Social Services v. Miller*, 477 S.E.2d 476, 483, 324 S.C. 445 (Ct. App. 1996) (citations omitted).

II. BACKGROUND

A. Counts I & II of the Complaint

Appellants initiated this civil action and special-proceeding for declaratory/equitable relief on September 12, 2022, in the Court of Common Pleas for Kershaw County, South Carolina. (Appx. 1-18). KCSO filed its Answer on October 28, 2022. (Appx. 19-23).

Appellants' underlying July 22, 2022, FOIA Request encompasses public records relevant to KCSO police actions/activities of June 29, 2022, described in detail therein, including all relevant audio/video recordings. (*See* Appx. 14-18). Count I of the Complaint seeks relief pursuant to FOIA, S.C. Code §§ 30-4-100(A) & (B), including a finding that KCSO's written determination of July 25, 2022, violates the statutory written determination requirements of FOIA, Section 30-4-30(c). (Appx. 11-12).

Upon receipt of the July 22, 2022, FOIA Request, KCSO was required, within ten (10) business days, to provide its written determination addressing all relevant records. S.C. Code § 30-4-30(c). On July 25, 2022, KCSO provided the FOIA Response copied below:

> After reviewing your request, we do not have any reports regarding the incident you mentioned from June 29, 2022. The only records of this incident in our system are the calls made to our central dispatch, and you will have to obtain those records from them. According to the records and your request, you were informed that the issue you were dealing with was a civil issue, so that is why we do not have any records regarding this incident. If you have any further questions or concerns, you are welcome to contact us.

(Appx. 8, 143-44).

Count II of the Complaint seeks declaratory/equitable relief pursuant to the Declaratory Judgments Act, S.C. Code Ann. §§ 15-53-10, *et seq*., and S.C. Code Ann. § 23-1-240(g)(5). (Appx. 2, 11-12). Notably, Subsection (5) of 23-1-240(g) specifies that individuals who are themselves the subjects of body worn camera ("BWC") recordings – i.e., Appellants – are "persons who may request and must receive data recorded by a body-worn camera … pursuant to the South Carolina Rules of Criminal Procedure, the South Carolina Rules of Civil Procedure, or a court order."

B. Procedural and Substantive Legal Requirements of FOIA, Section 30-4-100 (i.e., Statutory "Mode of Trial" Rights)

FOIA has been amended/updated over the years to (*i*) require that all actions seeking to enforce its provisions "must be considered to be an irreparable injury for which no adequate remedy at law exists;" and (*ii*) create an expedited track and summary resolution process for FOIA actions. *See* Pls.' April 24, Memo at 3; S.C. Code Ann. § 30-4-100(A) (2017) ("Upon the filing of the request for declaratory judgment or injunctive relief related to provisions of this chapter, the chief administrative judge of the circuit court must schedule an initial hearing within ten days of the service on all parties. …"). As a result of the legislature's mandate requiring that

all FOIA violations must be considered an irreparable injury for which no adequate remedy at law exists, a FOIA plaintiff need only show a likelihood of success on the merits.

A showing of "likelihood of success" does not require a party to "prove an absolute right" to the relief requested; rather, the requesting party "need only present a fair question to raise as to the existence of such a right." *Peek v. Spartanburg Reg'l Healthcare Sys*., 367 S.C. 450, 456, 626 S.E.2d 34, 37 (Ct. App. 2005) (citation omitted). Thus, if the party makes a "*prima facie* showing" of entitlement to the requested relief, the trial court should grant the relief requested. *Id*. Section 30-4-100(A) states that the "court may order equitable relief as it considers appropriate."

If the hearing court is unable to reach a final resolution at the initial hearing, the hearing court "shall" establish a scheduling order to resolve the FOIA action within six months of initial filing (extendable upon a showing of good cause). S.C. Code Ann. § 30-4-100(A). Our appellate courts have explained that the "use of mandatory language is unambiguous" where the duty is specified using terms such as "must" and "shall." *Richland Cty. v. S.C. Dep't of Revenue*, 422 S.C. 292, 309, 811 S.E.2d 758, 767 (2018) ("Under the rules of statutory interpretation, use of words such as 'shall' or 'must' indicates the legislature's intent to enact a mandatory requirement.") (citation omitted). This is true even where the public official charged with the duty possesses discretionary authority. *Id*., 422 S.C. at 308-09, 811 S.E.2d at 767.

Sections 30-4-100(A) (Count I) and 23-1-240(g)(5) (Count II) both include "must" and "shall" language that is mandatory and unambiguous.

C. The December 19, 2022, Initial FOIA Hearing and Judge Newman's December 28, 2022, Order

The Compliant requests that the circuit court "[s]chedule an initial hearing within 10 days of service" as required pursuant to Section 30-4-100(A). (Appx. 12). The initial hearing in this

case was, however, delayed for approximately three months, until December 19, 2022, due to scheduling issues completely beyond Appellants' control. (Appx. 149-79). The chief administrative judge of the circuit court ("CAJ") must schedule the initial hearing, and the hearing court shall establish a scheduling order to resolve FOIA actions within six months of initial filing if a final determination cannot be reached at the initial hearing.

At the December 19, 2022, initial hearing, Judge Newman stated: "I think that [KCSO] should do a written response, almost like you're responding to interrogatories or requests for production, as to each item set forth in the FOIA request." (Appx. 164 at 17-20). Judge Newman's December 28, 2022, Form 4 Order states that "[KCSO] shall fully comply with the South Carolina Freedom of Information Act vis-a-vis [Appellants'] requests within 20 days of the hearing." (Appx. 24). Judge Newman's instructions at the December 19, 2022, initial FOIA hearing regarding the written response required by Section 30-4-30(c) are on point with controlling precedent. *See*, *e.g.*, *Sloan v. South Carolina Dep't of Revenue*, 409 S.C. 551, 762 S.E.2d 687, 688-89 (2014) (holding that the DOR's "equivocal and evasive" FOIA response was "manifestly at odds with the clarity mandated by" Section 30-4-30(c)).

D. Appellants' February 23, 2023, Motion for Sanctions/Contempt

Appellants' underlying motion for sanctions/contempt raises three primary issues: (*i*) spoliation of the body worn camera ("BWC") records/evidence encompassed by Count II; (*ii*) KCSO's failure to comply with the statutory response and written determination obligations of FOIA, Section 30-4-30(c), and Judge Newman's December 2022 oral/written Orders; and (*iii*) KCSO's failure to comply with the discovery requirements of the SCRCP as to Plaintiffs' October 29, 2022, First Set of Discovery Requests. (Appx. 82).

> THE COURT: …I'm going to try to address those three main issues about destroying evidence. The FOIA response and then the discovery response.

MR. JERNIGAN: Thank you, Your Honor.

(Appx. 349 at 15-18).

The discovery portion of the underlying motion for sanctions/contempt includes a request that the circuit court compel KCSO to provide verified answers to Appellants' October 29, 2022, First Set of Interrogatories (Ex. B). *See* Rule 33(a), SCRCP ("Each interrogatory shall be answered separately and fully in writing under oath"). At the April 27, 2023, hearing for the sanctions/contempt motion, Judge Coble indicated that he would need to review the matter to determine if KCSO was, in fact, required to provide verified answers as requested by Appellants and required by the SCRCP. (Appx. 350 at 12-14) (THE COURT: "I'm going to review the discovery questions and their responses because I'm not aware that a verification is required under oath but I need to review"). Even so, Judge Coble entered a June 2, 2023, Form 4 Order indicating that *all* the requested relief of Appellants' underlying motion was being denied. (Appx. 207). The June 2, 2023, Form 4 Order stated that a more detailed "formal" written order denying all the requested relief would follow. *Id.*

E. Appellants' July 14, 2023, Canon 3E(1) Motion to Recuse or, Alternatively, Reconsider the June 2, 2023, Form 4 Denial

The June 2, 2023, Form 4 general denial of all the relief requested by Appellants' motion for sanctions/contempt, and subsequent October 20, 2023, written order, cannot be supported by the record in this case. Our appellate courts have held that a judge's impartiality might reasonably be questioned "when his [or her] factual findings are not supported by the record." *Ellis v. Procter and Gamble Distributing Co*., 433 S.E.2d 856, 857, 315 S.C. 283, 285 (1993). Appellants believed the circuit court would reconsider and provide findings supported by the record to address and resolve the Canon 3E(1) concerns raised by the July 14, 2023, motion to

recuse. (Appx. 210); *Cf. Davis v. Parkview Apartments*, 409 S.C. 266, 762 S.E.2d 535, 547 (2014) (determining that disqualification was not required under Canon 3E(1) given that "the Record supports all of the court's orders in this case, including the Discovery Order and Privilege Order"). Appellants were, unfortunately, mistaken.

III. LAW

A. Right to Appeal

"The right of appeal arises from and is controlled by statutory law." *Hagood v. Sommerville*, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005). "The determination of whether a party may immediately appeal an order issued before or during trial is governed primarily by" Section 14-3-330 of the South Carolina Code. *Id*. at 195, 607 S.E.2d at 708. "An order generally must fall into one of several categories" listed in Section 14-3-330 to be immediately appealable. *Id*. Section 14-3-330 allows a party to directly appeal:

> (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas …;
>
> (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out … any pleading in any action;
>
> (3) A final order affecting a substantial right made in any special proceeding …; and
>
> (4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction ….

B. Standard of Review

In a case raising novel questions of law, the appellate court is free to decide the questions with no particular deference to the lower court. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 411, 526 S.E.2d 716, 719 (2000) (citations omitted).

The provisions of FOIA "must be construed so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their public officials at a minimum cost or delay to the persons seeking access to public documents or meetings." S.C. Code Ann. § 30-4-15. "The interpretation of a statute is a question of law." *Brock v. Town of Mount Pleasant*, 415 S.C. 625, 628, 785 S.E.2d 198, 200 (2016) (citations omitted). Injunctive relief is an equitable remedy and "this Court may make factual findings based on its own view of the preponderance of the evidence." *Lambries v. Saluda Cnty. Council*, 409 S.C. 1, 760 S.E.2d 785, 788 (2014) (citation omitted).

C. Equitable/Injunctive Relief

"An injunction is an equitable remedy that may be used to require a party to perform an action." *Richland County v. Kaiser*, 351 S.C. 89, 94, 567 S.E.2d 260, 262 (Ct. App. 2002). To obtain an injunction, a party generally must show "(1) it would suffer irreparable harm if the injunction is not granted; (2) it will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law." *Scratch Golf v. Dunes W. Residential Golf Props., Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 907 (2004) (citations omitted).

Our legislature, however, has mandated that all FOIA violations must be considered "an irreparable injury for which no adequate remedy at law exists" by the hearing court. S.C. Code § 30-4-100(A). Our appellate courts have clarified that the "balancing of the equities" aspect of the test is "subsumed by the irreparable harm and inadequate remedy at law components of the three-part test." *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 586-87, 694 S.E.2d 15, 17 (2010).

The "likelihood of success" element does not require a party to "prove an absolute right," rather, the party seeking equitable relief "need only present a fair question to raise as to the

existence of such a right." *Peek*, 367 S.C. at 456, 626 S.E.2d at 37 (citation omitted). If the party makes a "*prima facie* showing" with respect to the relief requested, the lower court should issue the injunction. *Id*. Section 30-4-100(A) states that the "court may order equitable relief as it considers appropriate."

D. Procedural and Substantive Legal Requirements of Section 30-4-100(A)

The original version of Section 30-4-100 provided all citizens the right "to apply to the circuit court for injunctive relief to enforce the provisions of [FOIA]." 1978 Act No. 593, Section 11.[1] Effective May 26, 1987, the General Assembly updated Section 30-4-100 to mandate that all FOIA violations "must be considered an irreparable injury for which no adequate remedy at law exists." 1987 Act No. 118, Section 8.

The 2017 FOIA amendments impose "time constraints within which *determinative hearings* on the requests for relief must be made." 2017 Act No. 67 (H. 3352), Section 4, Effect of Amendment (emphasis added). The CAJ of the circuit court was assigned to fulfill the expedited scheduling/time requirements via the last round of amendments to H. 3352. *See* S. Journal (Wed., May 10, 2017), 122d Gen. Ass., 1st Reg. Sess., at 36-39 (S.C.).

On May 2, 2017, when H. 3352 was considered by the Judiciary Committee, Senator Margie Bright Matthews, Esq., of Colleton County, noted that the CAJ was available to decide FOIA matters locally on an expedited basis. Senator Matthews explained that adding the scheduling/time constraints would "create an avenue of filing FOIA requests like a temporary [injunction] motion so that it would have [to be] fast-tracked within ten days."

The General Assembly also provided public bodies with a corresponding right to seek declaratory relief via an expedited hearing under Section 30-4-110(A) via the 2017 FOIA

[1] H*2727 (Rat #0739, Act #0593 of 1978) General Bill.

amendments. Accordingly, the public body has a duty to file an action seeking relief with respect to (*i*) alleged "unduly burdensome, overly broad, vague, repetitive, or otherwise improper requests," or (*ii*) where the public body "received a request but it is unable to make a good faith determination as to whether the information is exempt from disclosure." S.C. Code Ann. § 30-4-110(A).

IV. REASONS FOR REHEARING

A. Appellants' Motion for Sanctions/Contempt, and the Order Denying Appellants' Motion, is not Merely a "Discovery" Matter

Our appellate courts, and the appealability statue itself, emphasize that appealability turns on the effect of a particular motion/order rather than the label given. *See* S.C. Code Ann. § 14-3-330(2) (stating that "[a]n order affecting a substantial right" is directly appealable if it "*in effect* determines the action"); *Thornton v. S.C. Elec. & Gas Corp*., 391 S.C. 297, 303, 705 S.E.2d 475, 477 (Ct. App. 2011) (stating, at n.6, that "[o]ur courts have previously looked beyond the labels on motions and orders to discern their actual effect for purposes of appealability"). In this respect, appealability must be determined on a case-by-case basis. *Stone v. Thompson*, 426 S.C. 291, 295, 826 S.E.2d 868, 870 (2019). Any order "involving the merits," "affecting a substantial right," or "granting, continuing, modifying, or refusing an injunction" is immediately appealable under Section 14-3-330.

As set forth above, in addition to discovery matters under the SCRCP, Appellants' underlying motion for sanctions/contempt raises KCSO's failure to comply with the statutory response and written determination obligations of FOIA, Section 30-4-30(c), and Judge Newman's December 2022 oral/written Orders; as well as the spoliation of the BWC records/evidence that form the basis of Count II. (Appx. 82). Appellants respectfully submit that Section 14-3-330 allows, and/or requires, that these matters be appealed directly.

B. The Order's Findings that KCSO's Written Determination Complied with FOIA, Section 30-4-30(c), "Involves the Merits" and "Affects Substantial Rights" of Count I

Section 30-4-30(c) (emphasis added) states that the public body "*shall* … notify the person making the request of its determination and the reasons for it;" and that "[t]his determination *must* constitute the final opinion of the public body as to the public availability" of requested records. *See also Sloan*, 409 S.C. 551, 762 S.E.2d at 688-89 (holding that the DOR's "equivocal and evasive" FOIA response was "manifestly at odds with the clarity mandated by" Section 30-4-30(c)). Section 30-4-30(c) imposes mandatory thirty or thirty-five-day disclosure deadlines for requested public records.

The Order's determination that KCSO complied with the legal written response requirements of FOIA, Section 30-4-30(c), involves the merits and affects substantial rights. *See* (Appx. 358-59). The Order's determination prevents judgment from which an appeal may later be taken, and effectively strikes the Complaint's request for declaratory/injunctive relief on the grounds that "KCSO's written determination of July 25, 2022," fails to comply with and/or violates the written determination requirements of FOIA, Section 30-4-30(c). (Appx. 11-12). An interlocutory order is appealable where the order's determination "has the effect of striking out a pleading." *Link v. Sch. Dist. of Pickens County*, 302 S.C.1, 393 S.E.2d 176 (1990).

The Order's determination is also a final order affecting substantial rights in this special proceeding. Notably, this is a special proceeding because Appellants are seeking declaratory/equitable relief, and Judge Coble's order becomes law of the case if not appealed.

Moreover, orders affecting the mode of trial are immediately appealable and become law of the case if a timely appeal is not filed. *See Creed v. Stokes*, 285 S.C. 542, 331 S.E.2d 351 (1985). The prevailing rule of statutory interpretation is that "use of words such as 'shall' or

'must' indicates the legislature's intent to enact a mandatory requirement." *Richland Cnty. v. S.C. Dep't of Revenue*, 422 S.C. 292, 309, 811 S.E.2d 758, 767 (2018) (citation omitted). Statutory provisions are generally regarded as mandatory when, as in the present case, the power or duty is for the security or protection of important rights. *State v. Blair*, 275 S.C. 529, 273 S.E.2d 536 (1981) (citation omitted); *see also Seago v. Horry Cnty.*, 378 S.C. 414, 423, 663 S.E.2d 38, 42 (2008) ("FOIA grants the public an immutable right to access public records").

The expedited resolution requirements and substantive legal standards of Section 30-4-100(A) are imposed using "must" and "shall" language. First, "[u]pon the filing of the request for declaratory judgment or injunctive relief related to provisions of [FOIA], the chief administrative judge of the circuit court *must* schedule an initial hearing within ten days of the service on all parties." S.C. Code Ann. § 30-4-100(A) (emphasis added). Second, "[i]f the hearing court is unable to make a final ruling at the initial hearing, the lower court *shall* establish a scheduling order to conclude actions brought pursuant to [FOIA] within six months of initial filing," unless "good cause" exists to extend the proceedings. *Id.* Moreover, "a violation of [FOIA] *must* be considered to be an irreparable injury for which no adequate remedy at law exists." *Id.*

FOIA was "enacted to prevent the government from acting in secret" and should be "liberally construed to carry out the purpose mandated by the legislature." *Campbell v. Marion County Hosp. Dist*., 354 S.C. 274, 580 S.E.2d 163 (Ct. App. 2003) (citations omitted). The lower court's failure to comply with and follow the mandatory procedural and substantive legal standards of Section 30-4-100(A) has effectively denied Appellants the statutory "mode of trial" rights explicitly enacted by the legislature for the benefit of FOIA plaintiffs.

C. Destruction/Spoliation of the BWC Records/Evidence Forming the Basis of Count II "Involves the Merits" and "Affects Substantial Rights"

Judge Coble's October 20, 2023, Order, *sub silentio*, determined that KCSO did not spoliate the body worn camera ("BWC") records/evidence that form the basis of Count II of the Complaint. *Compare* (Appx. 358-59) *with* Appx. 93-102). This implicit determination, which is contrary to the undisputed facts of record, also involves the merits and affect substantial rights in this civil action and special proceeding seeking declaratory/equitable relief.

It is undisputed that Appellants requested, in writing, that KCSO and its pre-suit counsel preserve all the BWC records/evidence relating to the relevant June 29, 2022, police activities. (Appx. 93-94). It is undisputed that the "Traffic Stop" label of KCSO's BWC Retention Schedules, and its corresponding 180-day retention period, should have applied to all the relevant body worn camera audio/video recordings of KCSO's traffic stop of Appellant Mrs. Jernigan, and her mother Mrs. Martin, on the morning of June 29, 2022. *See* (Appx. 94-96, 148).

KCSO spoliated evidence by ensuring that all the body worn camera recordings of the June 29, 2022, police-involved incidents were "written over" 120 days before expiration of the 180-day retention period that is required for "Traffic Stops." (Appx. 96). If the correct Traffic Stop category and corresponding 180-day retention period had been properly applied, the body worn camera recordings of the June 29, 2022, traffic stop could not have been destroyed prior to December 26, 2022. In other words, all of these body worn camera audio/video recordings should have been retained pursuant to the requirements of KCSO's own Body Camera Retention Schedules until:

- At least three weeks after the hearing/status-conference held on December 5, 2022;
- Over three months after Appellants filed/served their Complaint on September 12 and 14, 2022; and
- Over five months after KCSO received Plaintiffs' July 22, 2022, FOIA Request. *Id.*

No policy or schedule of any kind could, in any case, provide a legally valid excuse for destroying relevant records/evidence knowingly, negligently, and/or intentionally. *See*, *e.g.*, *Micron Tech. v. Rambus Inc*., 645 F.3d 1311, 1329-31 (Fed. Cir. 2011) (holding that a prelitigation policy which included destroying/spoliating relevant evidence to prevent its production during anticipated litigation triggered the crime-fraud exception). KCSO was legally obligated to preserve all relevant records/evidence beginning at the point when a party reasonably should know that the materials may be relevant to anticipated litigation. *See*, *e.g.*, *Silvestri v. General Motors Corp*., 271 F.3d 583, 590 (4th Cir. 2001); *John B. v. Goetz*, 531 F.3d 448, 459 (6th Cir. 2008) (holding that the duty to preserve evidence is triggered when a "party has notice that the evidence is relevant to litigation or ... should have known that the evidence may be relevant to future litigation"); *Gathers v. South Carolina Elec. & Gas*, 311 S.C. 81, 427 S.E.2d 687 (S.C. Ct. App. 1993). (Appx. 96).

D. The Order's Findings that KCSO's Written Determination Complied with FOIA, Section 30-4-30(c), Overrules, Modifies, and/or Refuses to Enforce the Equitable/Injunctive Relief Granted by Judge Newman's December 28, 2022, Form 4 Order

"An injunction is an equitable remedy that may be used to require a party to perform an action." *Richland County v. Kaiser*, 351 S.C. 89, 94, 567 S.E.2d 260, 262 (Ct. App. 2002). Section 30-4-100(A) states that 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."

Judge Newman's December 28, 2022, Form 4 Order granted equitable/injunctive relief – i.e., ordering KCSO to "fully comply with the South Carolina Freedom of Information Act vis-à-vis [Appellants'] requests within 20 days of the hearing." (Appx. 24). Judge Newman could not have issued the December 28, 2022, Form 4 Order if KCSO had complied with Section 30-4-

30(c)'s written determination requirements via its July 25, 2022, FOIA Response. The October 20, 2023, Order's findings that KCSO's July 25, 2022, written determination complies with the requirements of FOIA, Section 30-4-30(c), overrules, modifies, and/or refuses to enforce the December 28, 2022, Form 4 Order. *See* (Appx. 358-59).

The equitable/injunctive relief granted by the December 28, 2022, Form 4 Order following the December 19, 2022, initial FOIA hearing is the law of this case and cannot be overruled, modified, and/or refused by Judge Coble's later Order. *See Dorchester*, 477 S.E.2d at 483, 324 S.C. 445 (citations omitted).

E. This Court Should Consider the Recusal Order Because There are Other Related Appealable Issues Before This Court

As noted above, the primary basis for Appellants' recusal motion is that Judge Coble's denial of all the relief requested by Appellants' motion for sanctions/contempt cannot be supported by the record in this case. *See Ellis*, 433 S.E.2d at 857, 315 S.C. at 285 (holding that a judge's impartiality might reasonably be questioned "when his [or her] factual findings are not supported by the record"). Appellate courts may consider matters not otherwise directly appealable if there is an appealable issue before the court and a ruling on appeal will avoid unnecessary litigation. *Ferguson v. Charleston Lincoln Mercury*, 349 S.C. 558, 564 S.E.2d 94 (2002). Appellants respectfully submit that the recusal order may, and should, also be considered on appeal because it is directly related to, and not meaningfully separable, from appealable issues before this Court.

V. CONCLUSION

Accordingly, for the foregoing reasons, Appellants respectfully request that the Court reconsider its June 4, 2024, Order dismissing this appeal for lack of jurisdiction pursuant to Rules 221(a), SCACR, and S.C. Code Ann. 14-3-330.

Respectfully submitted,

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This 20th day of June 2024

Attorney for Appellants

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

Daniel M. Coble, Circuit Court Judge

Appellate Case No. 2024-000833

Christine Jernigan and
Justin Jernigan……..……...……..……Appellants,

v.

Kershaw County
Sheriff's Office…….……..……..……..……...Respondent.

PROOF OF SERVICE

I hereby certify that the foregoing Petition for Rehearing, and the associated Appendix of Exhibits on Rehearing, are being served by email to counsel for the Respondent David Morrison, Esq., at david@dmorrison-law.com.

Respectfully submitted,

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This 20th day of June 2024

Attorney for Appellants