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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Appellate Case No. 2023-000104

Paul Roy Osmundson,...Appellant,

vs.

School District 5 of Lexington and Richland Counties, ...Respondent.

PETITION FOR REHEARING AND REHEARING *EN BANC*

Pursuant to Rules 219 and 221(a) of the South Carolina Appellate Court Rules, Respondent files this petition for rehearing and rehearing *en banc*. Respondent respectfully submits that rehearing or issuance of a new opinion reversing the panel's decision is warranted. The grounds for this petition are that the Panel's opinion in this matter overlooked or misapprehended several matters of fact and law. This matter is of importance as it involves the requirements of the South Carolina Freedom of Information Act. S.C Code Ann §§ 30-4-10 to 30-4-165.

In Opinion No. 6066 filed June 26, 2024, a Panel of this Court reversed the trial court's order dismissing Osmundson's Freedom of Information Act claims. The Panel found the Trial Judge Alison Lee erred by dismissing Osmundson's claims when he did not request a hearing

within ten days of service as required by the plain language of Code Section 30-4-100(A). The Panel improperly concluded that despite the statutory language requiring a hearing within ten days of service, Osmundson had no duty to request a hearing for relief or supply the factual basis to support a hearing for relief. The Panel also misapprehended matters of law when it declined to examine the School District's additional sustaining grounds which include that the School District did not violate the Freedom of Information Act and that the School District provided all the relief requested in the complaint almost three years ago.

DISCUSSION

I. THE PANEL ERRED BY FAILING TO CONSIDER THE SCHOOL DISTRICT'S COMPLIANCE WITH THE FREEDOM OF INFORMATION ACT.

The Amended Complaint requests only the following relief:

> 34. On information and belief, Plaintiff is entitled to a declaratory judgment entered by this Honorable Court which includes the equitable relief of an injunction requiring all Board of Trustees and Meetings of Board Officers to be conducted openly and in strict compliance with the laws of South Carolina, including the Freedom of Information Act.
>
> 35. On information and belief, this Honorable Court's Order should require Defendant to pay a civil fine as authorized by § 30-4-110(F) of the South Carolina Code of Laws.
>
> 36. On information and belief, this Honorable Court's Order should declare that Defendant's handling of the termination, or so called "resignation" of the District Superintendent on June 14, 2021 was a willful violation of the Freedom of Information Act.
>
> 37. On information and belief, this Honorable Court's Order should include the requirement that Plaintiff be awarded attorneys' fees and costs in bringing and prosecuting this action pursuant to § 30-4-100(B) of the South Carolina Code of Laws.

(R. pp. 36, 37, ¶¶34, 35, 36 and 37).

Osmundson filed his initial Complaint on June 23, 2021, and Attorney Andrea White accepted service for the School Board on July 28, 2021. (R. pp. 1-26). Twelve days later, on August 9, 2021, the School Board voted to have meetings "of its Board Officers to set the agenda for Board Meetings open to the public and subject to FOIA." (R. p. 136, ¶12). Thus, less than two weeks after service of the initial Complaint, the School Board voted to do as Osmundson asked, and it has continued this policy since that time. *Id*. On the same day, the School Board voted to accept the resignation of Dr. Melton pursuant to the agreement negotiated between Dr. Melton's lawyer and the School District's lawyer. *Id*.

One week later, on August 16, 2021, Osmundson filed his Amended Complaint. The Amended Complaint adds paragraph 36 regarding the resignation of Dr. Melton upon which the School Board publicly voted one week earlier. On August 17, 2021, Andrea White wrote Osmundson's lawyers to make sure they were aware the School Board had taken the actions requested in the lawsuit as follows:

> I hope this letter finds you both well. I am writing to advise you that, at its meeting on August 9, 2021, the LR5 Board voted to officially accept Dr. Melton's resignation effective June 30, 2021, and also to ratify the Settlement Agreement between the parties. As the lack of an official vote serves as the basis of your declaratory judgment action, that claim is now moot and there is nothing for a court to decide, particularly as the South Carolina Freedom of Information Act (FOIA) does not require that a public body vote to accept an employee's resignation and clearly permits discussions regarding an employee's release to occur in executive session.
>
> Further, while no court has found that meetings of school board officers to set an agenda constitute the meeting of a "committee" for purposes of FOIA requirements, the LR5 Board voted on August 9, 2021, to consider those meetings as meetings of a public body. Consequently, that part of your declaratory judgment also is now moot.

(R. pp. 53-54).

Thus, The School District complied with ¶¶34 and 36 of the Amended Complaint and has done so since August 9, 2021. As a result, an injunction is not necessary as Osmundson received the relief he requested almost three years ago.

Paragraph 35 of the Amended Complaint seeks a civil fine under FOIA pursuant to Code Section 30-4-110(F). This code section allows a court to fine a public body if it has "arbitrarily and capriciously violated the provisions of this chapter by refusal or delay in disclosing or providing copies of a public record." *Id.* By its plain terms, this section does not apply to Osmundson's case because he does not allege the School District has failed to provide a public record, and he never requested a public record. In addition, the School District has found no recorded cases imposing a fine on a public entity in FOIA's forty-five year history. Finally, the School District provided Osmundson the relief he sought in the Complaint less than two weeks after service of his Complaint. Whether or not the School District violated FOIA, a civil fine is not appropriate when the School District quickly voted and changed its policy. As Osmundson received the relief he requested within two weeks of service of his Complaint, a fine is not appropriate.

Finally, Paragraph 37 of the Amended Complaint seeks attorneys' fees. Mr. Osmundson has not filed a motion seeking attorneys' fees or submitted an affidavit supporting attorneys' fees.

Thus, almost three years ago, Osmundson received the relief he requested.

II. THE PANEL MISAPPREHENDED THE LAW WHEN IT DID NOT CONSIDER THE SCHOOL BOARD'S ADDITIONAL SUSTAINING GROUNDS.

Pursuant to Rule 220(c) of the South Carolina Rules of Appellate Procedure, this Court may affirm Judge Lee's ruling based upon any grounds appearing in the Record on Appeal. Rule 220(c) SCACR. The School Board argued that this lawsuit was moot, citing *Sloan v. S.C. Dep't of Revenue*, 409 S.C. 551, 762 S.E.2d 687 (2014). The court does not concern itself with moot or

speculative questions. *Sloan v. South Carolina Dep't of Transp.,* 379 S.C. 160, 167–68, 666 S.E.2d 236, 239–40 (2008). An appellate court will not pass judgment on moot and academic questions; it will not adjudicate a matter when no actual controversy capable of specific relief exists. *Curtis v. State,* 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001). A case becomes moot when judgment, if rendered, will have no practical legal effect upon the existing controversy. *Id.*

The School Board voted to hold its official meetings subject to FOIA and to accept Dr. Melton's resignation less than two weeks after service of the Complaint. Thus, the School Board gave Mr. Osmundson the relief he seeks approximately three years ago.

The South Carolina Supreme Court faced a similar situation in *Sloan v. S.C. Department of Revenue*. Sloan sued the Department of Revenue alleging violations of FOIA and seeking declaratory relief, injunctive relief, and attorney's fees. Mr. Sloan requested specific documents related to the Department's hiring of a cyber security company. The Department notified Sloan that it received his FOIA request; however, Sloan was not provided with a final determination within the statutory fifteen-day time period. Sloan sued the Department seeking a declaratory judgment that the Department's actions violated FOIA, an injunction requiring the Department to cease violating FOIA, and attorney's fees and costs. Three weeks after Sloan filed his lawsuit, the Department provided Sloan with the documents. It then moved to dismiss on the basis that Sloan had received the relief he requested, and his lawsuit was moot. Sloan argued his claim for declaratory relief was not moot and that he was entitled to attorneys' fees. The trial court agreed with the Department and dismissed the case.

The Supreme Court affirmed the decision holding, "the information Sloan sought has been disclosed, [and] there is no continuing violation of FOIA upon which the trial court could have issued a declaratory judgment." *Sloan v. S.C. Dep't of Revenue*, 409 S.C. 551, 555, 762 S.E.2d

687, 689 (2014) (citing *Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 26, 630 S.E.2d 474, 478 (2006)). It remanded the case for the trial court to consider a reasonable attorney fee award. *Id*.

In *Sloan v. Friends of the Hunley, Inc*. (Sloan I), 369 S.C. 20, 630 S.E.2d 474 (2006), the Supreme Court found compliance with a FOIA request rendered the FOIA lawsuit moot. Sloan submitted a FOIA request to Friends seeking documents pertaining to its corporate structure and relationship to the Hunley Commission, a state agency. Friends denied it was subject to FOIA and did not provide the documents. Sloan sued, and one month later, Friends provided the documents.

Friends then sought summary judgment arguing Sloan's declaratory judgment action was moot because it had complied with Sloan's FOIA request. The trial court dismissed Sloan's case as moot. The Supreme Court affirmed noting that "[a] moot case exists where a judgment entered by a court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the reviewing court." *Id*. It further explained that "[b]ecause the information Sloan sought has been disclosed, there is no continuing violation of FOIA upon which the trial court could have issued a declaratory judgment." *Id*.

Likewise, the School Board took the actions Osmundson requested almost three years ago. Osmundson alleges the School Board did not vote in public to accept the resignation of Dr. Melton, the former superintendent, and that the School Board did not open the board officer agenda meetings to the public. The School District accepted service on July 28, 2021. On August 9, 2021, the School Board voted in public to accept Dr. Melton's resignation. It also voted to adopt a rule to open all meetings of its officers to the public and to publish all meetings of officers, including the meetings of executive officers to set agendas, pursuant to FOIA regardless of whether a quorum was present. (R. p. 137, ¶12). As of August 9, 2021, the School Board remedied the concerns the Complaint set forth: Dr. Melton's resignation was publically voted on and accepted, and the School

Board adopted a rule to open all officers' meetings. The relief sought in the Complaint was provided two weeks after the Complaint was served; therefore, this Court should affirm Judge Lee's decision because Osmundson's case is moot.

III. THE PANEL MISAPPREHENDED THE LAW WHEN IT REVERSED JUDGE LEE'S DECISION TO DISMISS FOR FAILURE TO PROSECUTE

Section 30-4-100(A) of FOIA requires that when a plaintiff seeks a declaratory judgment or injunctive relief, the chief administrative judge of the circuit in which the action was filed "**must** schedule an initial hearing within ten days of the service on all parties." (Emphasis added.) The statute continues to state that if the matter is not resolved at the initial hearing by the court hearing the matter, the court "**shall** establish a scheduling order to conclude actions brought pursuant to this section within six months of initial filing." (Emphasis added.) Here, there was no hearing held within ten days nor was the matter concluded within six months of the initial filing in August 2021. A plaintiff has the burden of prosecuting the plaintiff's claims and when the plaintiff fails to meet that burden, the case may be dismissed. *Don Shevey & Spires, Inc. v. Am. Motors Realty Corp.*, 279 S.C. 58, 301 S.E.2d 757 (1983); *Small v. Mungo* 254 S.C. 438, 175 S.E.2d 802 (1970); *Joyner v. Glimcher Props.,* 356 S.C. 460, 589 S.E.2d 762 (Ct. App. 2002). A defendant has no burden to move a case along; that burden belongs solely to the plaintiff. *Thomas & Howard Company v. Fowler*, 238 S.C. 46, 119 S.E.2d 97 (1961); *Shevey*, 301 S.E.2d at 759.

Joyner v. Glimcher Props, addresses the question of the appropriateness of a Rule 41(b) dismissal when a court has not done what it is obligated to do under the applicable law, and the plaintiff has not contacted the court or sought a mandamus. In *Joyner*, the plaintiff was injured when a tree limb in a commercial parking lot fell and destroyed his vehicle. Plaintiff sued the owner of the parking lot and the landscaping company in magistrate's court and was awarded $2,500 by a jury. The parking lot owner then appealed to circuit court. The magistrate did not file

a return with the circuit court as required by Rule 75, SCRCP, and the parking lot owner did not contact the magistrate's court to request a return or file a writ of mandamus. The circuit court subsequently dismissed the appeal under Rule 41(b), SCRCP, finding that the parking lot owner had failed to prosecute his appeal. The Court of Appeals affirmed.

Here, Plaintiff did not contact the Chief Administrative Judge or the Clerk of Court after he filed his Complaint. He did not request a hearing. He did not file a motion seeking injunctive or declaratory relief. And he did not file an affidavit or a verified complaint upon which injunctive relief could be awarded until seven months after service. As a result, the Clerk and the Chief Judge did not even know a hearing was needed. (R. p. 267). He also did not file a writ of mandamus. Further, Plaintiff never requested a scheduling order as mandated by FOIA to ensure the case is concluded with the requisite six-month period.

Plaintiff makes two arguments to justify failing to prosecute his case. He first asserts the court, and not him, must schedule the ten-day hearing and that he has "done all he can" to further his case. Plaintiff's argument ignores his obligation, as explained by the *Joyner* court, to contact the office of the Chief Judge for Administrative Purposes or the Clerk of Court to request that the ten-day hearing be scheduled. He never did this, and he did not file a motion for injunctive relief. Plaintiff also points to the Covid-19 pandemic and its impact on the South Carolina judicial system. While Plaintiff is correct the pandemic had an impact on the scheduling of in-person trials, motions and other hearings, our courts began hearing motions and conducting status conferences before this matter was filed in August 2021. In addition, pandemic or not, the Plaintiff did not request a hearing, file a motion, notify the Clerk that a hearing was requested, or notify the Chief Judge for Administrative Purposes that a hearing was necessary. Thus, pandemic or no pandemic, a hearing would not be held because the Plaintiff did not request a hearing. Plaintiff has the burden of

prosecuting his case, which he failed to do. This justifies dismissal of this action pursuant to Rule 41, SCRCP.

A defendant may move for dismissal of an action or of any claim for the plaintiff's failure to comply with these rules or any order of court. SCRCP 41(b). Under FOIA, when requesting declaratory judgment or injunctive relief related to provisions of the chapter, the Chief Judge for Administrative Purposes must schedule an initial hearing within ten days of service on all parties. S.C. Code Ann. § 30-4-100(A). To schedule such a hearing, the Chief Judge must be notified a hearing is necessary. Requests for a hearing must be filed in accordance with the rules of procedure. "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 made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought." SCRCP 7(b)(1). No such motion was filed.

The common practice in South Carolina for requesting a hearing involves filing a motion, or contacting the Chief Judge for Administrative Purposes and requesting a hearing. (R. p. 268). Osmundson did not do either. As a result, the judge was not notified of Osmundson's desired relief, and had no way of knowing this relief was sought. *Id.* The party seeking relief must request the relief it seeks. Therefore, Osmundson did not comply with Section 30-4-100(A) which requires a hearing within ten days of service.

Osmundson now blames the clerk's office for failing to schedule a hearing even though he never requested one. As Judge Lee noted during the July 18, 2022, hearing, the Clerk's office does not read the complaint, nor does it identify the relief sought. *See,* Transcript pp. 41-42; (R. pp. 267-268). If there is no motion for an injunction, or other similarly named request, the clerk has no way of knowing what the prayer for relief is, and cannot bring it to the judge's attention. *Id*. It

is therefore impossible to comply with Section 30-4-100(A) if no motion or request is made. Therefore, Judge Lee did not abuse her discretion in dismissing the lawsuit based upon Osmundson's failure to prosecute his case.

IV. THE PANEL MISAPPREHENDED THE LAW WHEN IT FAILED TO CONSIDER THAT THE SCHOOL DISTRICT DID NOT VIOLATE THE FREEDOM OF INFORMATION ACT

This suit followed the School Board's action at its meeting on June 14, 2021, accepting then Superintendent Dr. Melton's resignation pursuant to a settlement agreement negotiated by legal counsel. The School Board properly considered legal advice and personnel matters in executive session.

In January 2021, the School Board advised Dr. Melton, in accordance with the terms of her contract, that it wished to conduct an informal evaluation of her performance. (R. p. 135, ¶3). That evaluation occurred during executive session of the School Board's meeting on January 25, 2021. *Id.*

Between January 2021 and May 2021, the School Board informally discussed Dr. Melton's performance during executive session several times. During those meetings, several Trustees advised Dr. Melton of their concern with certain aspects of her performance, most significantly her interactions with Trustees. (R. p. 135, ¶4). Following the School Board's meeting on May 10, 2021, Dr. Melton retained legal counsel, who then contacted the School District's legal counsel regarding Dr. Melton's employment status. At the School Board's meeting on May 24, 2021, the School District's legal counsel informed the School Board of her receipt of a letter from Dr. Melton's legal counsel. (R. p. 136, ¶6). The School District's legal counsel then shared with the School Board its options under Dr. Melton's contract. (R. p. 136, ¶6). Each of the seven Trustees shared opinions about the matter but no votes, secret ballots or straw votes took place. (R. p. 136, ¶6; p.163, ¶2; p. 166, ¶¶2-3; p. 165, ¶2; p. 167, ¶¶2-3).

The School District's counsel and Dr. Melton's counsel began settlement negotiations as required by Section 11 of Dr. Melton's contract. (R. p. 136, ¶¶7-8). At the next School Board meeting on June 14, 2021, legal counsel Andrea White advised the School Board in executive session that a settlement had been agreed to by Dr. Melton. She then presented each member of the School Board with a settlement agreement and release for their review. (R. p. 136, ¶9). At the request of Dr. Melton's counsel, all Trustees signed the Agreement after reviewing it, with the exception of Ed White. *Id*. The School Board then returned to open session and began its meeting. During the open session, Trustee White made a public statement in which he revealed what had been discussed during executive session. *Id.* Trustee White then handed a typed letter of resignation to the secretary for the School District and left the meeting, taking his copy of the Settlement Agreement with him. *Id.*

The School Board then reconvened in executive session to receive legal advice following Mr. White's actions. (R. p. 137, ¶10). After Dr. Melton's legal counsel advised the School District's counsel that Dr. Melton still desired to resign and accepted the terms of the negotiated settlement agreement, the School Board's Vice Chair made a public statement accepting Dr. Melton's resignation. (R. p. 137, ¶10). The settlement agreement and release signed by Dr. Melton and six members of the School Board was then immediately released to the media and to members of the public who requested it. (R. pp. 137, ¶11; 152-158). Thereafter, at its meeting on August 9, 2021, the School Board officially voted to accept Dr. Melton's resignation.

South Carolina Code Section 30-4-70(a)(1) allows a public body to hold a meeting closed to the public for several reasons, including "discussion of employment, appointment, compensation, promotion, demotion, discipline or release of an employee…." Pursuant to this statute, the School Board properly discussed Dr. Melton's employment during executive session.

Multimedia, Inc. v. Greenville Airport Com., 287 S.C. 521, 339 S.E.2d 884 (Ct. App. 1986). As no votes, secret ballots or straw votes were taken at any of the meetings where Dr. Melton's employment was discussed, the School Board did not violate either the spirit or the intent of FOIA. (R. p. 137. ¶11; p. 163, ¶2; p. 166, ¶¶2-3; p. 165, ¶2; p. 167, ¶¶2-3).

In his Amended Complaint and through the Affidavit of Ed White, Osmundson asserts the School Board violated FOIA when it discussed the terms of the settlement negotiated by the School District's counsel and Dr. Melton's counsel during the executive session portion of the meeting on May 24, 2021. His assertion is unfounded based on the plain language of FOIA. In Section 30-4-70(a)(2), FOIA states that the "settlement of legal claims" may properly be discussed in executive session.

Historically, the School Board Chair or the School Board Officers gathered with the Superintendent to plan the agenda for School Board meetings. This group was composed of three members of the School Board. It set proposed agendas for review and approval by the School Board. And, it had no power to bind the School District or adopt policy. As the School Board has seven members, this group of three did not constitute a quorum as it was less than half of the School Board. *See,* S.C. Code Ann §30-4-20(e) (defining quorum as a simple majority). As a result, this group is not a meeting under FOIA. *See,* S.C. Code Ann. §30-4-20(d) (defining meeting as a convening of a quorum). And, it is not subject to FOIA meeting requirements. Nevertheless, on August 9, 2021, the School Board passed a motion to hold these agenda setting meetings subject to the requirements of FOIA. (R. p. 137, ¶12). Since that date, all meetings of School Board Officers and the Superintendent to set the agenda for School Board meetings have been open to the public. *Id.* Thus, the School District did not violate FOIA. But, even if it did, it remedied the

violation making Osmundson's claims moot. *Sloan v. Friends of the Hunley, Inc.* 369 S.C. 20, 630 S.E.2d 474 (2006).

CONCLUSION

This Court should reconsider its decision and affirm Judge Lee's order for the following reasons:

1. The School District has already provided Osmundson the relief he sought in his Complaint, and the lawsuit is moot;

2. Osmundson failed to prosecute his case because he did not request the hearing required by Code Section 30-4-100(A) or otherwise notify the Clerk or the Chief Judge for Administrative Purposes that a hearing was necessary; and

3. The School District did not violate the Freedom of Information Act.

Respectfully submitted,

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APPEAL FROM RICHLAND COUNTY
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v.

School District 5 of Lexington and Richland Counties, ... Respondent.

PROOF OF SERVICE

I, Lynn G. Ivey, an employee of the Moore Bradley Myers Law Firm, P.A., certify that I have served the Respondent's Petition for Rehearing and Rehearing *En Banc* by emailing counsel on July 8, 2024, and by depositing a copy of same in the United States Mail, postage prepaid on July 8, 2024, addressed to Appellant counsel as follows:

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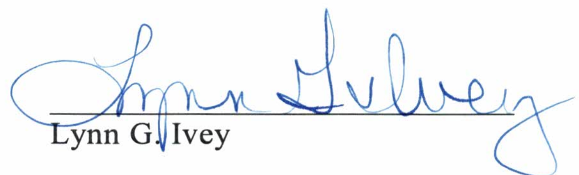
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July 8, 2024

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The Honorable Jenny Abbott Kitchings
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RE: Paul Roy Osmundson vs. School District 5 of Lexington and Richland Counties
App. Case No. 2023-000104

Dear Ms. Kitchings:

Please find included with this cover letter Respondent's Petition for Rehearing and Rehearing *En Banc* and Proof of Service for filing through email.

Our firm check is being sent under cover of this letter for the required filing fee.

Thank you in advance for your assistance in this matter.

Sincerely,

Lynn G. Ivey
Legal Assistant to James Edward Bradley

Enclosures
cc: Thomas W. McGee, III, Esq.
Joel W. Collins, Jr., Esq.