THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
DeAndrea Gist Benjamin, Circuit Court Judge

Op. No. 6090
(S.C. Ct. App. Withdrawn, Substituted, and Refiled January 2, 2025)
Case No. 2015-CP-40-1805

Wendy Brawley, ... Petitioner-Respondent,

v.

Richland County, South Carolina ..... Respondent-Petitioner.

PETITION FOR WRIT OF CERTIORARI OF RESPONDENT-PETITIONER RICHLAND COUNTY

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CERTIFICATE OF COUNSEL

Counsel for the Respondent-Petitioner Richland County certifies that the Petitions for Rehearing were made and finally ruled on by the South Carolina Court of Appeals on January 2, 2025 and on January 28, 2025.

QUESTIONS PRESENTED

I. Did the Court of Appeals misapply the rule commonly emanating from *Futch v. McAlister Towing of Georgetown, Inc.*, 335 S.C. 598, 518 S.E.2d 591 (1999), to avoid deciding two of the four legal errors raised by Richland County on appeal?

II. Did the trial court, as affirmed by the Court of Appeals, err in its award of declaratory relief to Wendy Brawley finding that Richland County committed a FOIA violation?

   A. Did the trial court err in its application of the burden of proof in a FOIA case?

   B. Did the trial court err in refusing to consider and evaluate the scope of the FOIA request itself and whether the request was reasonably described such that the responding public body could understand what was requested?

   C. Did the trial court err in adjudicating a "failure to conduct a reasonable investigation" claim that was never pled?

III. Did the Court of Appeals err in re-characterizing the legal issues raised by Richland County as a factual question and then in affirming on the basis of no evidence, when in reality the Court shifted the burden of proof and disregarded evidence that the County's FOIA response was complete and lawful?

STATEMENT OF THE CASE

The Petitioner-Respondent Wendy Brawley brought this action pursuant to the South Carolina Freedom of Information Act (FOIA), S.C. Code Ann. § 30-4-10, *et seq*.[1] Brawley presented four separate FOIA requests to the Respondent-Petitioner Richland County at the meeting of Richland County Council held on the evening of September 9, 2014. (R. 114-117). Brawley was sent correspondence regarding her FOIA requests on September 12, 2014 and October 1, 2014. (R. 129, 573). Thereafter, by letter dated October 3, 2014, the County provided a response to three of the four FOIA requests, and by letter dated October 8, 2014, the County provided a response to the fourth FOIA request. (R. 574).

Wendy Brawley and her co-Plaintiff -- Hopkins and Lower Richland Citizens United, Inc. ("HLRCU") -- brought this FOIA action in an attempt to enjoin the Lower Richland Sewer Project. In their Complaint, the Plaintiffs sought the following temporary and permanent injunctive relief:

> a. Enjoining Defendant from sending surveys to residents that make any representation that Richland County will provide all residents that reside within 200 feet of the proposed Phase I sewer line a full waiver of tap or connection fees;
>
> b. Enjoining Defendant from entering into negotiations with residents of Hopkins and Lower Richland for the acquisition of easements; and
>
> c. Enjoining Defendant from providing third reading to the Lower Richland Sewer Project.

See, Complaint, ¶ 40. (R. 111). The County filed a motion to dismiss, which Circuit Court Judge Clifton Newman granted by Order entered August 14, 2015. (R. 1-2). Judge Newman

[1] This is governed by the Freedom of Information Act as it was codified in 2014, which was prior to the amendments to FOIA as adopted as part of 2017 Act No. 67, which became effective on May 19, 2017.

ruled that the injunctive relief as sought by the Plaintiffs is not relief contemplated or allowed under FOIA.

Later, after the parties had the opportunity to conduct discovery, Richland County filed a motion for summary judgment. By Order filed October 24, 2016, that motion was granted in part and denied in part by Judge Clifton Newman. (R. 9-16). Judge Newman resolved three of the four FOIA requests in the County's favor. Additionally, the Plaintiff HLRCU was dismissed for lack of standing by that Order.

The fourth FOIA request sought the production of "a copy of the application and supporting documentation Richland County submitted to the USDA Rural Development for grant and loan funding for the Lower Richland Sewer Project." (R. 572). In his Order filed October 24, 2016, Judge Newman determined that "there appears to be a genuine issue of material fact in dispute that precludes the resolution of this claim at the summary judgment stage." (R. 10).

The case was tried before former Circuit Court Judge DeAndrea Benjamin without a jury on September 5, 2019. By Order filed February 13, 2020, Judge Benjamin ruled in favor of Wendy Brawley and found a FOIA violation by the County. (R. 12-24). The County subsequently filed a motion to alter or amend order pursuant to Rule 52(b) and Rule 59(e), SCRCP. (R. 208-216). By Order filed July 16, 2020, Judge Benjamin granted in part and denied in part that motion. (R. 29-38). The trial court agreed that the claim for injunctive relief had previously been dismissed by Judge Newman, but the judge allowed the award of declaratory relief to stand.

The County appealed to the Court of Appeals which affirmed by a published opinion substituted and refiled January 2, 2025.

The County then filed a petition for rehearing. On January 2, 2025, the Court of Appeals issued an order which granted the petition, withdrew the previous opinion, and substituted a new opinion, which added the second footnote stating:

> After the initial release of this opinion, the County petitioned for rehearing on the basis that the court did not address several issues raised in its brief, including the County's argument that Brawley did not plead a claim that the County failed to conduct an adequate search for responsive documents. We respectfully disagree that the claim was not pled. Brawley's pleading alleged that the County's FOIA response was incomplete, inadequate, and that the County failed to properly and fully respond. As to the other issues we do not address, we believe the analysis in this opinion renders it unnecessary to address them. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling it is unnecessary for an appellate court to address remaining issues when its resolution of a prior issue is dispositive).

(Slip Op. at 7). Because the Court of Appeals granted the petition for rehearing only in part, Richland County filed an additional petition for rehearing directed at the January 2, 2025 refiled opinion. That petition was summarily denied by an order issued on January 28, 2025.

STATEMENT OF FACTS

Wendy Brawley presented four separate FOIA requests to Richland County at the meeting of Richland County Council held on the evening of September 9, 2014. The FOIA requests were delivered to the Ombudsman's Office the following day. In the four FOIA requests, Brawley sought documents as follows:

> (1) a copy of the minutes from the Richland County Council meeting when funds were approved by Council for waivers of tap on fees for the Lower Richland Sewer Project;
>
> (2) a copy of the minutes from Richland County Council's meeting when the Council gave Third Reading Approval for the Lower Richland Sewer Project;

(3) a copy of Richland County's USDA Rural Development Application and supporting documentation submitted to the USDA for loan and grant funding for the Lower Richland Sewer Project; and

(4) a copy of Richland County's MOU with City of Columbia regarding the sewer services agreement.

See, Complaint, Ex. 1. (R. 114-117).

Brawley was sent correspondence by the Ombudsman's Office regarding her FOIA requests on September 12, 2014 and October 1, 2014. (R. 573, 710). Thereafter, by letter dated October 3, 2014, the County provided a response to three of the four FOIA requests, and by letter dated October 8, 2014, the County provided a response to the fourth FOIA request. (R. 574). The County provided timely correspondence to Brawley and did not assert any statutory exemptions to the requested information.

The FOIA request that remained at issue for the bench trial sought the production of "a copy of the application and supporting documentation Richland County submitted to the USDA Rural Development for grant and loan funding for the Lower Richland Sewer Project." (R. 572). By letter dated October 8, 2014, the Ombudsman's Office provided a response to this FOIA request. The response included the Application for Federal Assistance dated March 16, 2010, as signed by then County Administrator J. Milton Pope, and consisted of six pages with attachments. (R. 574-582).

During the trial, Wendy Brawley acknowledged receiving the October 8, 2014 letter with the Application for Federal Assistance dated March 16, 2010. (R. 349-350). After the lawsuit was filed, Brawley and her counsel were given the opportunity as part of the discovery process to inspect what was represented to be the project files for the Lower Richland Sewer Project. That

inspection occurred on February 10, 2016. She was allowed to mark the documents she wanted, and those documents were copied and Bates numbered and provided to her. (R. 353-355).

Many of those documents inspected by Brawley on February 10, 2016, were submitted into evidence, with Brawley contending that they were responsive to the original FOIA request for "a copy of the application and supporting documentation Richland County submitted to the USDA Rural Development for grant and loan funding for the Lower Richland Sewer Project." Those exhibits are in the trial record as Plaintiff's Exhibits 6 through 15 and Plaintiff's Exhibits 17 through 23. Brawley was only able to testify that those exhibits were in the project file on February 10, 2016. She was unable to testify that those documents were actually in the County's possession in September 2014, when she made her FOIA request. (R. 357).

At trial, Brawley also presented the testimony of Andy H. Metts in her case-in-chief. Metts is the former Director of Richland County Utilities and was involved in locating the documents responsive to the FOIA request at issue. (R. 370, 377-379). The record reflects that other persons, including employees of the Ombudsman's Office and Sara J. Salley, were also involved in the process. Brawley presented only the testimony of Metts and Salley. Salley is a former employee of the County and served a number of roles, including as a grants administrator. She testified that she compiled some of the information made available to Brawley in response to her FOIA requests. (R. 364). No other witnesses involved in the search for responsive documents were presented by Brawley in her case-in-chief.

The FOIA request at issue sought "an application submitted to the USDA Rural Development" and "supporting documentation," the latter being the term that on its face is unclear and is subject to varying interpretations. (R. 572). There is no temporal aspect to the request. With her request, Brawley did not make it clear whether she was requesting solely

documents that accompanied the application or whether she was seeking all documentation that was ever submitted to the USDA, regardless of whether the materials accompanied the application or were submitted at different times, separate and apart from the application itself. Andy Metts is the only witness who was questioned about his interpretation and understanding of the request.[2] Metts explained that he understood the request as seeking the Application for Federal Assistance as submitted to the USDA and the documents that accompanied that submission. (R. 521). He did not conclude that the request required the production of the following exhibits placed into evidence by Brawley from her February 2016 review of the project file:

* A timeline that Andy Metts did not prepare and was never submitted to the USDA (Pl. Ex. 6). (R. 502-503, 628-631).

* Unsigned, incomplete and draft copies of applications that were never submitted to the USDA
(Pl. Ex. 7-9). (R. 507-510, 632-649).

* Letter of Transmittal not directed or sent to the USDA
(Pl. Ex. 11). (R. 510, 653).

* Emails from USDA personnel and between USDA personnel which were not submitted by the County to the USDA
(Pl. Ex. 12-15, 19-20). (R. 510-513, 654-659, 669-677).

* USDA internal checklist
(Pl. Ex. 18). (R. 389-392, 666-668).

* Letter of Conditions dated January 30, 2013 from USDA to Richland County
(Pl. Ex. 21). (R. 514, 678-698).

* Loan Resolution
(Pl. Ex. 22). (R. 514, 699-706).

* February 4, 2014 letter
(Pl. Ex. 23). (R. 514-515, 707-709).

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[2] Sara Salley was not questioned as to her understanding of the meaning and scope

A reasonable person attempting to respond to Brawley's FOIA request as it was articulated would not conclude that the foregoing documents were responsive to the request for "supporting documentation."

Wendy Brawley testified that she was provided through discovery with a copy of a different Application for Federal Assistance dated July 18, 2012. (R. 650-652). However, there was no evidence presented that a copy of that application was retained and existed in the County's files in September 2014, when the FOIA request was made. Andy Metts testified that, based upon the search conducted of the files, a copy of this application had not been retained and was not in the County's possession at that time. (R. 517, 522). Brawley presented no evidence to contradict this.

During the discovery process in this litigation, the County made a request to the USDA Rural Development Office to learn what was in their file. The County provided the documents received from the USDA to Wendy Brawley and her counsel as part of discovery. (R. 583-627). However, those documents were requested and obtained from the USDA after the lawsuit was filed. (R. 711-713). Moreover, pursuant to its *Touhy* regulations, the USDA refused to make a witness available for this state court litigation. (R. 217-219).

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of Brawley's FOIA request.

ARGUMENTS

I. The Court of Appeals misapplied the rule commonly emanating from *Futch v. McAlister Towing of Georgetown, Inc.*, 335 S.C. 598, 518 S.E.2d 591 (1999), to avoid deciding two of the four legal errors raised by Richland County on appeal.

In its Statement of Issues on Appeal in the Court of Appeals, the Respondent-Petitioner Richland County raised four specific issues, all of which presented legal questions and not factual questions. Of those four legal issues, the Court of Appeals, however, disregarded or failed to address three of those in its original opinion, and on the fourth, the Court of Appeals ruled in the County's favor although the ultimate ruling of a FOIA violation was nonetheless affirmed. With the new opinion re-filed on January 2, 2025, the Court of Appeals addressed an additional ground but limited that discussion to footnote number two which provided only conclusory rejection of the County's position.

In its Court of Appeals opening brief, Richland County raised the following issues on appeal:

> (1) Did the trial court err in its application of the burden of proof in a FOIA case?
>
> (2) Did the trial court err in refusing to consider and evaluate the scope of the FOIA request itself and whether the request was reasonably described such that the responding public body could understand what was requested?
>
> (3) Did the trial court err in adjudicating a "failure to conduct a reasonable investigation" claim that was never pled?
>
> (4) Did the trial court err in failing to recognize that a public body has no duty under FOIA to retain documents, re-create documents that were not retained, produce documents not in its possession, or obtain documents from a third-party source?

See, County's Court of Appeals Opening Brief.

The first two of those issues were never addressed in any respect – not even tangentially -- in the Court of Appeals' opinions. As to the third issue, which is addressed in footnote number two of the re-filed opinion, the Court of Appeals ruled against the County and concluded that the "failure to conduct a reasonable investigation" claim was actually pled, but the Court of Appeals did not address whether the claim was even tried. (Slip Op. at 7). As to the fourth issue, the Court of Appeals "agree[d] with the County that FOIA does not require public bodies to seek documents from third parties or recreate documents in order to respond to FOIA requests." (Slip Op. at 6). Thus, the Court of Appeals actually reversed the trial court and ruled in the County's favor on that fourth issue of law.

In the re-filed opinion, the Court of Appeals acknowledged that there are other issues that had not been addressed. Citing *Futch v. McAlister Towing of Georgetown, Inc.*, 335 S.C. 598, 518 S.E.2d 591, 598 (1999), the Court wrote: "As to the other issues we do not address, we believe the analysis in this opinion renders it unnecessary to address them." (Slip Op. at 7). However, this is not a correct application of the *Futch* rule. As our appellate jurisprudence provides, when raised as a ground for appeal, an issue must be addressed unless the appellate court finds the issue to be "manifestly without merit," Rule 220(b)(2), SCACR, or the appellate court determines the it does not need to reach remaining issues on appeal when disposition of prior issues is dispositive. *See*, *Futch,* 518 S.E.2d at 598. In this case, the Court of Appeals did not find any of the County's issues on appeal to be "manifestly without merit" pursuant to Rule 220(b)(2), SCACR. Instead, in the re-filed opinion, the Court of Appeals added the reference to *Futch* in the second footnote, but that reliance on *Futch* is misplaced. The County's first two issues on appeal have not been resolved by the Court's disposition of the other issues. The rule announced in *Futch* simply does not apply in this instance. *Futch* and some predecessor cases

were intended to allow the appellate courts to avoid deciding multiple issues where one issue results in a reversal. *Futch* presents the perfect example of that scenario. In that case, this Court had before it multiple grounds for reversal of the Court of Appeals' decision. This Court subsequently reversed on one of those grounds, which made it unnecessary to adjudicate all of the remaining grounds seeking reversal. That presents a proper use of the *Futch* rule. The *Futch* rule may also be used where there are multiple bases supporting the judgment in the trial court, and once the appellate court determines that one basis supports that judgment, the appellate court can affirm, and it is unnecessary to adjudicate the other bases. In that regard, the *Futch* rule works similar to the "two-issue" rule.[3]

However, none of those situations are present in the case at bar. Here, there was one singular decision rendered by the trial court as to liability – that the County violated FOIA. The County argued on appeal that the trial court committed four separate errors in reaching that decision and in entering a declaratory judgment against the County on the FOIA claim. In this instance, *Futch* did not allow the Court of Appeals to simply decline to answer two critical issues on appeal, which were not found manifestly in error, but did result in the trial court making an erroneous decision. This Court is, therefore, requested to grant a writ of certiorari in part to provide further guidance on the proper use of the *Futch* rule and clarify that the rule cannot be used to avoid addressing issues properly raised for appellate review. The County further requests a ruling on each of the legal errors it raised regarding the trial court's decision.

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[3] In applying the "two-issue" rule, this Court has explained that "where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case." *Jones v. Lott*, 387 S.C. 339, 692 S.E.2d 900, 903 (2010). Similarly, in *Folkens v. Hunt*, 290 S.C. 194, 348 S.E.2d 839 (Ct. App. 1986), the Court of Appeals held that "[a]n alternative ruling of a lower court that is not excepted to constitutes a basis for affirming the lower court and is not reviewable on appeal." 348 S.E.2d at 845.

II. The trial court, as affirmed by the Court of Appeals, erred in its award of declaratory relief to Wendy Brawley finding that Richland County committed a FOIA violation.

The single FOIA request that remained at issue for the bench trial sought the production of "a copy of the application and supporting documentation Richland County submitted to the USDA Rural Development for grant and loan funding for the Lower Richland Sewer Project." (R. 472). By letter dated October 8, 2014, the Ombudsman's Office provided a response to this FOIA request. (R. 574). The response included the Application for Federal Assistance dated March 16, 2010, as signed by then County Administrator J. Milton Pope, and consisted of six pages with the attachments. (R. 575-582).

The trial court broadly ruled that Richland County "failed to provide all of the documentation that was contained in its files at the time of Loan Documentation FOIA Request." (R. 20). The trial court recognized that the County took the position "that it did not violate FOIA, arguing that it is only required to produce those documents it created or retained, and is not required to obtain documents from a third-party or to duplicate or re-create documents." (R. 21). The trial court rejected that position. The court further found that the County "fail[ed] to conduct a reasonable investigation to obtain and/or locate all relevant documents." (R. 23). In issuing this declaratory ruling of a FOIA violation, the trial court committed numerous errors of law.

A. The trial court erred in its application of the burden of proof in a FOIA case.

The trial court failed to recognize that the burden of proof rests with a plaintiff to prove a FOIA violation. To compound that error, the Court of Appeals never addressed this critical issue.

Indeed, the words "burden of proof" do not appear in the re-filed opinion. To the extent that the *Futch* rule was used, that was in error because the proper application of the burden of proof is not an "unnecessary ruling," even assuming the rule was applied correctly (which it was not).

As the County continues to argue, the trial court failed to recognize that the burden of proof rests with a plaintiff to prove a FOIA violation. In this case, the burden of proof lay with Wendy Brawley, as the requester, to prove the reasonable scope of the request and that any reasonably responsive documents were actually in the County's possession at the time the FOIA request was made but were not then disclosed in response. In response to a Rule 52(b) motion, the trial court ultimately shifted the burden of proof to the County to prove that a document need not be produced. In fact, the trial court confused a prima facie claim under FOIA on which a plaintiff has the burden of proof on the elements of the claim with an exemption on which the governmental entity has the burden of proof. FOIA requires disclosure of records held by a public body unless the documents fall within enumerated exemptions set forth in S.C. Code Ann. § 30-4-40(a). *See*, *Burton v. York County Sheriff's Department*, 358 S.C. 339, 594 S.E.2d 888, 892 (Ct. App. 2004). The exemptions from disclosure under FOIA "simply allow public agencies the discretion to withhold exempted materials from public disclosure," and the justification for the exemption lies with the entity withholding the document. 594 S.E.2d at 893. This case, however, does not involve the assertion by the County of any exemptions from disclosure. The County did not plead that it withheld disclosure of any public records based upon a statutory exemption, nor did the County argue any exemption at trial. Thus, the trial court shifted the burden of proof to the County to prove that a document need not be produced, which is an error of law. This Court is, therefore, urged to grant a writ of certiorari to provide additional guidance to the bench and bar with respect to the burdens of proof in a FOIA action.

B. The trial court erred in refusing to consider and evaluate the scope of the FOIA request itself and whether the request was reasonably described such that the responding public body could understand what was requested.

The Court of Appeals, like the trial court, never addresses whether the FOIA request was ambiguous or how it could be reasonably interpreted by the County in responding to it. As the County argued, Brawley had the burden of showing that the responding public body would understand that the contested documents were within the scope of the search. As before, the County respectfully disputes the Court of Appeals' conclusion using the *Futch* rule that this issue presents an "unnecessary ruling." In fact, just the opposite is true. This issue is a critical consideration of any FOIA analysis. In fact, the County presented supporting authority for its position, none of which the Court of Appeals acknowledged or addressed in its original opinion or in its re-filed opinion. Importantly, the Court of Appeals did not reject or distinguish such authority; the entire issue was disregarded -- except for now being deemed "unnecessary" in the second footnote added in the re-filed opinion -- despite being a legal argument that should have been a threshold determination.

As the federal courts have explained in mandatory language, "[b]efore addressing the adequacy of the search under FOIA, a court must first ascertain the scope of the request itself." *Judicial Watch v. United States Department of State*, 681 Fed. Appx. 2, 3-4 (D.C. Cir, 2017). "A requester bears the burden of reasonably describing the records it seeks such that the agency is able to determine precisely what records are being requested." 681 Fed. Appx. at 4. "A FOIA request must reasonably describe the records requested." *Landmark Legal Foundation v. Environmental Protection Agency*, 272 F.Supp.2d 59, 64 (D.D.C. 2003). "The agency's obligation to search is limited to the four corners of the request." *Id*. "Where a FOIA request is unclear, an agency

processing a FOIA request is not required to divine a requester's intent." *Id*. That should be the law in South Carolina as well. This case thus presents an opportunity for this Court to weigh-in on this threshold issue and to adopt the common sense approach of the federal courts. An important part of the inquiry regarding the legality of a FOIA response is whether the request was reasonably described and whether the responding public body's understanding of the request was reasonable or not.

As the County argued, the trial court was required *as a threshold issue* to assess the reasonable meaning and scope of the FOIA request for "a copy of the application and supporting documentation Richland County submitted to the USDA Rural Development for grant and loan funding for the Lower Richland Sewer Project." (R. 572). The trial court failed to engage in such analysis and made no findings of fact or conclusions of law in that regard. On appeal, the Court of Appeals similarly erred in failing to even consider or address that threshold issue. Such a threshold inquiry is not an issue to be rejected under the *Futch* rule.

In the remaining FOIA request at issue, Brawley sought an application submitted to the USDA Rural Development and "supporting documentation," with the latter being the term that on its face is unclear and is subject to varying interpretations. Had the trial court and the Court of Appeals examined the plain and ordinary meaning of that request, it would be immediately apparent that there is *no temporal aspect* to Brawley's FOIA request. In other words, Brawley did not make it clear whether she was requesting solely documents that accompanied the application or whether she was seeking all documentation that was ultimately submitted to the USDA over time, regardless of whether the materials accompanied the application or were submitted at different times, separate and apart from the application itself. The trial court and the

Court of Appeals should have recognized that the lack of clarity in the request has given rise to the controversy between the parties.

As the record indisputably reflects, Andy Metts is the only witness who was questioned at trial about his interpretation and understanding of the request. Metts explained that he understood the request as seeking the Application for Federal Assistance as submitted to the USDA and the documents that accompanied that submission. (R. 521). He did not conclude that the request required the production of the following exhibits placed into evidence by Brawley from her February 2016 review of the project file:

* A timeline that Andy Metts did not prepare and was never submitted to the USDA (Pl. Ex. 6). (R. 502-503, 628-631).

* Unsigned, incomplete and draft copies of applications that were never submitted to the USDA
(Pl. Ex. 7-9). (R. 507-510, 632-649).

* Letter of Transmittal not directed or sent to the USDA
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* Emails from USDA personnel and between USDA personnel which were not submitted by the County to the USDA
(Pl. Ex. 12-15, 19-20). (R. 510-513, 654-659, 669-677).

* USDA internal checklist
(Pl. Ex. 18). (R. 389-392, 666-668).

* Letter of Conditions dated January 30, 2013 from USDA to Richland County
(Pl. Ex. 21). (R. 514, 678-698).

* Loan Resolution
(Pl. Ex. 22). (R. 514, 699-706).

* February 4, 2014 letter
(Pl. Ex. 23). (R. 514-515, 707-709).

As a result, the trial court and the Court of Appeals erred in failing to find that an objectively reasonable person attempting to respond to the FOIA request as it was articulated

would not conclude that the foregoing documents were responsive to the request for "supporting documentation." Accordingly, Brawley did not sustain her burden of proving that the County personnel should have properly determined that the documents at issue were responsive to her request and were withheld by the County in violation of FOIA. Moreover, based on a review of the documents themselves and the testimony explaining what they are (see above list), no reasonable fact finder could find that the "February 2016 Located Document," as identified by the trial court, would meet a reasonable person's interpretation of "supporting documentation" provided to the USDA with an Application for Federal Assistance.

The Court of Appeals also failed to address the inconsistencies in the trial court's findings which the trial court refused to correct in response to the County's Rule 52(b) motion. As the County demonstrated, the "February 2016 Located Documents" were identified by the trial court in the "Findings of Fact" as Plaintiff's Exhibits 7, 8, 9, 10, 11, 13, 17, 18, 19, 21, and 23. (R. 16). However, the trial court then refers to "Exhibits 5-15, 17, and 19-23" in the "Legal Analysis" section of its order as "all responsive FOIA documents which were not provided to Ms. Brawley in the Original Response Documents." (R. 20). On reconsideration, the trial court refused to address this inconsistency on the following basis: "Since the injunctive relief requiring Richland County to provide the documents to the Plaintiff is no longer requisite, this Court finds no need to make specific findings regarding the documents that were to be provided to the Plaintiff per the injunctive relief order." (R. 33). The trial court, however, failed to recognize that those findings are a critical part of its declaratory relief as well. The Court of Appeals, likewise, did not acknowledge or address those inconsistencies. That was in error.

Finally, the Court of Appeals also disregarded and made no mention of the most obvious legal error committed by the trial court – a mistake that truly encapsulates the erroneous legal

analysis that permeates the trial court's finding of a FOIA violation. The trial court impermissibly shifted the burden to the County by ruling as follows: "No question concerning vagueness was made, nor did the Defendant file a request to the circuit court seeking relief from an overly broad request. Rather, the Defendant responded to the request with 6 pages of responsive information." (R. 32). The trial court thus relied on a newly-enacted provision of FOIA. There were significant amendments to FOIA that were adopted as part of 2017 Act No. 67. Those amendments, however, did not become effective ***until May 19, 2017***. S.C. Code Ann. § 30-4-110(A) now provides:

> A public body may file a request for hearing with the circuit court to seek relief from unduly burdensome, overly broad, vague, repetitive, or otherwise improper requests, or where it has received a request but it is unable to make a good faith determination as to whether the information is exempt from disclosure.

See, S.C. Code Ann. § 30-4-110(A) (Supp. 2017). Accordingly, the trial court committed an error of law by impermissibly and unfairly finding that the County failed to utilize the new provisions of S.C. Code Ann. § 30-4-110(A), *which were not even in existence in 2014*. In its opinion, the Court of Appeals did not even mention this clear error of law, although the Court did state that "[t]hroughout this opinion, we rely on the 2014 version of the act, which controls this litigation." (Slip Op. at 5). The trial court, however, did not rely on the 2014 version of the Act, which constitutes clear error and requires reversal.

And, in relying on a FOIA provision that did not exist, the trial court compounded its error by failing to decide the threshold question that requires the court to evaluate the reasonable meaning and scope of the FOIA request and how it was understood by the County. The court further erred in finding that numerous documents, as delineated above, were responsive to the

FOIA request and were improperly withheld, which is clearly not supported by the evidence or frankly common sense.

C. The trial court erred in adjudicating a "failure to conduct a reasonable investigation" claim that was never pled or tried.

Finally, with respect to the third issue raised, the Court of Appeals initially did not address that this case was adjudicated as a "failure to conduct a reasonable investigation" claim when that claim was never pled and was not raised as a theory *until the trial court issued its order*. With the re-filed opinion issued on January 2, 2025, this issue was rejected in a footnote with no analysis. In a conclusory manner the Court of Appeals found that the claim was pled because "Brawley's pleading alleged that the County's FOIA response was incomplete, inadequate, and that the County failed to properly and fully respond." (Slip Op. at 7). Notably, the Court of Appeals cited no specific paragraph or language in the Plaintiff's Complaint. Simply put, under basic notice pleading, a "failure to conduct a reasonable investigation" claim does not appear with any precision or clarity in the Complaint.

To reiterate, this theory of liability is not in Brawley's Complaint, and at no time after discovery was completed did Brawley move to amend to bring such a claim. Likewise, the claim is not addressed in the Plaintiff's pre-trial brief. (R. 802-804). Most importantly, the case was not tried as a "failure to conduct a reasonable investigation" claim. In its re-filed opinion, the Court of Appeals never addresses this critical point – not even in the second footnote which was added in the re-filed opinion. As the County pointed out in its brief, the term "reasonable investigation" does not appear in the trial transcript. Instead, the claim first appeared in Brawley's proposed order submitted to the trial court *after the trial*. (R. 815). That is not commensurate with fundamental fairness and due process.

In effect, the Court of Appeals affirmed "the circuit court's finding that the County did not diligently investigate Brawley's FOIA request." (Slip Op. at 7). Yet, the Court of Appeals did not correctly address whether such a claim was even pled and never addressed whether the issue was even tried. This remains a critical issue, and not one the Court of Appeals should have disregarded or later "adjudicated" with a conclusory footnote. Basic notions of fundamental fairness require much more.

III. The Court of Appeals erred in re-characterizing the legal issues raised by Richland County as a factual question and then in affirming on the basis of no evidence, when in reality the Court shifted the burden of proof and disregarded evidence that the County's FOIA response was complete and lawful.

Ultimately, to avoid deciding what are threshold and critical legal issues, the Court of Appeals re-phrased the "County's main argument" to characterize it as a factual question and then to decide the appeal in Brawley's favor under the more deferential standard of review. The Court of Appeals wrote as follows: "The County's main argument against the circuit court's finding of FOIA violation is that the County supposedly requested and received certain documents from the USDA after this case commenced." (Slip Op. at 5). However, that is not the "main argument." The County's main arguments are clearly and concisely articulated in the Statement of Issues on Appeal as required by Rule 208(b)(1)(B), SCACR, and those arguments all present legal issues, not factual ones, to which a *de novo* standard of review applies. As discussed above, the Court of Appeals then refused to acknowledge, let alone address, at least two of the four legal issues actually raised by the County.

Nonetheless, even the "main argument" as articulated by the Court of Appeals is deserving of review on certiorari. With respect to the different Application for Federal

Assistance dated July 18, 2012, there was no evidence presented that a copy of that application was retained and existed in the County's files in September 2014, when the FOIA request was made. Andy Metts testified that, based upon the search conducted of the files, a copy of this application had not been retained and was not in the County's possession at that time. (R. 517, 522). Brawley presented no evidence to contradict this.

During the discovery process in this litigation, the County made a request to the USDA Rural Development Office to learn what was in their file. The County provided the information received from the USDA to Brawley as part of the discovery process after the lawsuit was filed. (R. 712). The origin of those documents is clearly stated in discovery responses (R. 712), but the trial court erroneously ruled that there was no evidence "supporting the origin for June 2015 Discovery Documents." (R. 21). The court improperly shifted the burden of proof and required the County -- not Brawley -- to prove (or rather disprove) whether those documents were in the County's possession in September 2014, when the FOIA request was made. The burden of proof, however, lies with a plaintiff, and Brawley did not show that the July 2012 application was in the County's possession in September 2014, such that a diligent search would have revealed its existence and the need for production.

As the County argued, the trial court did not need to decide whether the County's representations made in discovery responses is evidence or not. That is because the trial court erred in shifting the burden of proof -- particularly to the extent that the court was critical that defense counsel did not testify about the origin of documents produced in discovery. As discussed above, the Court of Appeals never addressed the issues related to burden of proof.

Nevertheless, instead of addressing the burden of proof in any respect, the Court of Appeals wrote: "There was no admissible evidence presented to the circuit court to show the

responsive documents Brawley procured in litigation came solely from the USDA." (Slip Op. at 7). In making that ruling, the Court disregarded and failed to consider that, as a matter of law, the County was precluded by Federal law – specifically the USDA's *Touhy* regulations -- from being able to call an employee of the USDA as a witness. *See*, *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951). That limitation was well documented in the record. (R. 217-219). Moreover, the Court of Appeals did not explain why the County's discovery responses which explained the source of USDA documents is not considered evidence – particularly in light of the fact that the USDA refused to provide a witness under *Touhy*. Discovery responses are routinely included in the trial record as a form of evidence.

Finally, the Court of Appeals erred in concluding that the February 4, 2014 letter from Metts to the USDA (Plaintiff's Exhibit 23) is responsive to the FOIA request. That letter from 2014 was not "supporting documentation" sent to the USDA with an Application for Federal Assistance dated July 18, 2012. That is illogical from a purely temporal standpoint. Likewise, the Court of Appeals erred in concluding that the documents referenced on pages 6 and 7 of the opinion that came from the USDA were in the County's possession when the FOIA request was made. There is no evidence to support that conclusion.

In sum, the Court of Appeals committed multiple errors of law in affirming the trial court's declaratory judgment that a FOIA violation was committed by Richland County. Those errors warrant additional judicial review, particularly in light of the Court of Appeals' refusal to consider the basic, threshold issues that must be considered in adjudging the propriety of a public body's response to a FOIA request.

CONCLUSION

Based on the foregoing discussion, the Respondent-Petitioner Richland County respectfully requests that this Court grant its petition for a writ of certiorari.

Respectfully submitted,

LINDEMANN LAW FIRM, P.A.

BY: *s/ Andrew F. Lindemann*

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February 3, 2025

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
DeAndrea Gist Benjamin, Circuit Court Judge

Op. No. 6090
(S.C. Ct. App. Withdrawn, Substituted, and Refiled January 2, 2025)
Case No. 2015-CP-40-1805

Wendy Brawley, ... Petitioner-Respondent,

v.

Richland County, South Carolina ..... Respondent-Petitioner.

CERTIFICATE OF SERVICE

Pursuant to Section (d)(1) of the Supreme Court's Order Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended April 24, 2024), the undersigned employee of Lindemann Law Firm, P.A., counsel for the Respondent Richland County, does hereby certify that service of the **Petition for Writ of Certiorari of Respondent-Petitioner Richland County** in the above-captioned matter was made upon all counsel of record by email only this the 3rd day of February 2025, as follows:

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February 3, 2025

Via Email Only
The Honorable Jenny Abbott Kitchings
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South Carolina Court of Appeals
Email: ctappfilings@sccourts.org

RE: Wendy Brawley v. Richland County, South Carolina
Supreme Court Appellate Case Number: 2025-000174
SCCA Appellate Case Number: 2020-001135
Civil Action Number: 2015-CP-40-1805
Our File Number: 314.9670

Dear Ms. Kitchings:

Pursuant to Section (b)(2) of the Supreme Court's Order RE: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (as Amended April 24, 2024), please find enclosed for filing the **Petition for Writ of Certiorari of Respondent-Petitioner Richland County** and **Certificate of Service** in the above referenced matter that has also been filed with the South Carolina Supreme Court.

Thank you for your assistance in this matter.

Sincerely,

LINDEMANN LAW FIRM, P.A.

Andrew F. Lindemann

AFL/jmb
Enclosures

cc: Jenkins M. Mann, Esquire *(w/ Enclosures, Via Email Only)*
Shaun C. Blake, Esquire *(w/ Enclosures, Via Email Only)*
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