THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM THE COURT OF COMMON PLEAS

Honorable Daniel Coble

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Appellate Case No. 2024-001296

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George S. Glassmeyer……. Appellant,

v.

South Carolina Lottery Commission……..…….....Respondent.

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# REPLY BRIEF OF APPELLANT

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### I. Respondent incorrectly states that the settlement agreement does not contemplate an immediate duty to supply the agreed-upon information

Respondent provides that "[i]f the parties had contemplated the Lottery furnishing winners' names to Appellant automatically upon request, the settlement agreement would have said so." Respondent's Brief at 5. The settlement agreement provides that, if the General Assembly does not enact legislation on the issue by May 31, 2023, the Lottery will provide lottery winners' names "in response to FOIA requests after that date." (R. pp. 78; settlement agreement 2.) A plain reading of the settlement agreement indicates this is a contract (a meeting of the minds contracting parties) in part, concerning the disclosure of information. The trial court (and Respondent) was incorrect in indicating that "the only duty that arose upon receipt of [the] FOIA request was the duty to issue a timely final determination." (R. pp. 20; order 15.) The trial court correctly noted the general duties under Title 30, Chapter 4 for South Carolina Freedom of Information Act requests, but crucially, failed to appreciate the separate duty under the parties' settlement agreement: release the winners names upon receipt (not determination) of Appellant's FOIA request. The trial court and Respondent are incorrect, the settlement agreement's clear and unambiguous language indicated Respondent's determination to supply these winners' names and Respondent failed to perform its duty, breaching the contract.

### II. Appellant's arguments concerning the trial court's use of discovery practice law to decide the unduly burdensome issue were preserved for review, as was the argument concerning the drawer's signatures and fair report privilege

To be preserved for appellate review, an argument must have been both raised to and ruled upon by the trial court. *E.g., Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (1998). In this matter the Appellant's arguments regarding the inapplicability of discovery practice jurisprudence were before the Court. In addition to being referenced at the at previous hearing in this matter, Appellant preserved this issue in argument at a hearing after both parties submitted proposed orders on the cross motions for summary judgment. (See R. pp. 453; March 8, 2024 Hr'g Tr. 26.)

"As to the [a]llusion about discovery practices, it occurred to me that this is when two parties have sued each other and submit to the jurisdiction of the Court clearly when there are those disputes about how they share information between each other in the discovery process. […] You though in this case are not being asked to look at a dispute between two parties who have consented to this jurisdiction with which you need to decide how you share information within this case. This is about the only way that a citizen may ask the government, and the government have to respond to [an] information request of it." (R. pp. 461-462; March 8, 2024 Hr'g Tr. 34-35)(accord R. pp. 453; March 8, 2024 Hr'g Tr. 26).

Later in this same hearing, the fair report /neutral report privilege argument was also raised. "This is what Mr. Glassmeyer is trying to get here also. It is not just that [FOIA's] mandate is to learn the activities of public officials. It's that if you learn the activities of public officials, there's an additional thing that you get which is that potential privilege against you going into oblivion." (R. pp. 463; March 8, 2024 Hr'g Tr. 36)

Then, after Respondent's proposed order was signed in toto, Appellant reraised those arguments directly above in his motion to reconsider filed only two months later. "The Plaintiff incorporates herein by reference all previous arguments in this action. Plaintiff appreciates the Court seeking motions and memorandums (sic.) on issues in this matter. There is much provided in this matter where there is no fact in issue and the Plaintiff would appreciate the Court's view of it again, if possible." (See R. pp. 310; Motion to Reconsider 2.)

## III. Respondent is incorrect that no evidence in this record supports the assertion of Appellant's concern for potential embezzlement of public funds

Respondent contends in its brief that "[a] state agency cannot be required to endure overly broad requests … simply because a frequent requester 'in part' concocts an unfounded concern 'about possible continuing embezzlement of public funds within [the] agency." (Respondent's Brief at 16.) Pushing arguments already raised in Appellant's brief or that the government cannot tell the public why to make FOIA requests or that Title 30, Chapter 4 does not require a requester to indicate why they are making a FOIA request, Appellant did actually present evidence of his concern for potential embezzlement. (See R. pp. 504-505; Glassmeyer Affidavit 1-2.) Further the extensive colloquy between Appellant and Respondent about a separate FOIA request revealed misconduct by an employee of Respondent. (See R. pp. 505; Glassmeyer Affidavit 2, Ex. A.)

## IV. The fair report privilege has never been held to apply exclusively to a person or entity working as 'the press'

Respondent contends in its brief that "no South Carolina authority supports his argument he needs the unredacted records – rather than the information – to assert the fair report privilege some point down the road." Respondent's Brief at 22. The information responsive to Appellant's request (concerning signatures) was what exactly what was not provided in this matter. See Appellant's brief. But Respondent is incorrect to say that the fair report privilege could not be extended to him if he did accurately report the information supplied to him. There is no authority, anywhere in the country, to suggest that such a privilege is limited to the press. Nor, in many respects, is the press entitled to treatment different in kind from the treatment to which any other member of the public may be subjected. See Branzburg v. Hayes, 408 U.S. 665 (1972) (grand jury testimony by newspaper reporter); Zurcher v. Stanford, 436 U.S. 547 (1978) (search of newspaper offices); Herbert v. Lando, 441 U.S. 153 (1979) (defamation by press); Cohen v. Cowles Media Co., 501 U.S. 663 (1991) (newspaper's breach of promise of confidentiality). Such privilege might be enjoyed by Respondent if he received the drawer's signatures rather than the assertion from the government that it was those who signed those checks. But, as was pointed out to the trial court repeatedly, whether such privilege does apply is only a possibility, not reality, because the signatures weren't.

## V. Respondent is incorrect that state law requires redaction of information, such as check signatures, in response to a FOIA request

Respondent indicates that it was entirely proper for the Family Privacy Protection Act to be used to require redaction of the signatures on checks provided to Appellant. (Respondent's Brief at 23.) "That makes sense too: FOIA and the Family

Privacy Protection Act are both in the same title relating to 'Public Records.'" (Id.) Correct, both that Act and FOIA are in Title 30 of the South Carolina Code of Laws. Appellant also agrees with Respondent's citation to Duvall v. S.C. Budget & Control Bd. for the proposition that "[t]he Court must presume the [General Assembly] intended its statutes to accomplish something and did not intend a futile act." Duvall at 377 S.C. 36, 42, 659 S.E.2d 125, 128 (2008). This Court can read Chapter 2 Title 30, and Chapter 4, Title 30, for yourselves, but the purposes of each are different: Chapter 2 concerns collection and sharing of data amongst government agencies, while Chapter 4 concerns the minimum duties of transparency when a member of the public requests to see the government's information. ("It is well settled that statutes dealing with the same subject matter are in pari materia and must be construed together, if possible, to produce a single, harmonious result."). Absolutely, the subject matter of Title 30, Chapter 2 is the collection and Title 30, Chapter 4 is the disclosure. Respondent's assertions that both FOIA and the Family Privacy Protection Act preclude it from disclosing the images of the drawers' signatures defies logic. If indeed either of those acts prohibit the release of those images, Lottery has violated those very provisions as they have disclosed those images to every payee of each of the thousands of checks that it issues annually.

## CONCLUSION

This court should reverse the lower court's orders granting summary judgment for Respondent.

Respectfully submitted,

s/ Taylor Smith_____

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