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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In the Supreme Court

Upon Certiorari to the South Carolina Court of Appeals

APPEAL FROM SALUDA COUNTY
Court of Common Pleas
William P. Keesley, Circuit Court Judge

Case No. 2008-CP-41-0004
Appellate Case No. 2012-212790

Dennis N. Lambries,

Respondent,

v.

Saluda County Council;
T. Hardee Horne, Chairman;
William "Billie" Pugh, Councilman;
Steve Teer, Councilman;
Jacob Schumpert, Councilman; and
James Frank Daniel, Sr., Councilman,

Petitioners

REPLY BRIEF OF PETITIONERS

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QUESTION PRESENTED

Did the Court of Appeals err in reversing the lower court and interpreting the South Carolina Freedom of Information Act as prohibiting public bodies governed by the Act from amending the agenda of a regularly scheduled meeting?

ARGUMENT IN REPLY

The petitioners[1] – the Saluda County Council; its chairman, T. Hardee Horne; and its other members, William "Billie" Pugh, Steve Teer, Jacob Schumpert, and James Frank Daniel, Jr. – respectfully submit this reply brief in response to the brief filed by the respondent, Dennis N. Lambries (hereafter, "Lambries").

The Court of Appeals majority forced a construction of the section of the Freedom of Information Act (FOIA) at issue, S.C. Code Ann. § 30-4-80(a). The majority read into the statute an agenda requirement and an amendment prohibition not contained in its language, in an effort to accomplish a purpose not within the stated purpose of the FOIA, as expressed in S.C. Code Ann. § 30-4-15. The clear meaning of the notice provision and the "if any" language of Section 30-4-80(a) is that agenda are optional and discretionary for regularly scheduled meetings. Both the trial court and the dissenting judge in the Court of Appeals agreed with this construction.

Lambries contends petitioners' construction of the "if any" language is "absurd." To the contrary, petitioners' construction gives meaning to the actual words expressed by the General Assembly. That construction recognizes the difference, created by the statute's own language, between the notice requirements for "regularly scheduled

[1] Lambries' brief erroneously refers to the petitioners as "appellants." In fact, Lambries was the appellant in the Court of Appeals and petitioners were the respondents.

meetings" and for "called, special, or rescheduled meetings." For "regularly scheduled meetings," the notice "must include the dates, times, and places of such meetings." For "called, special, or rescheduled meetings," the notice "must include the *agenda*, date, time, and place of the meeting." *See* S.C. Code Ann. § 30-4-80(a) (emphasis added). The dichotomy of the statute is clear. Petitioners' interpretation gives the "if any" language its plain and ordinary meaning – agenda are not required for regularly scheduled meetings.

Lambries asserts counsel for petitioners conceded in oral argument at the Court of Appeals that the "if any" phrase supports the construction reached by the majority. Counsel did agree, in response to a question from one of the judges, that there are times when meetings are scheduled, the public has been given notice, but there is no business to be conducted. However, in response to the next question attempting to correlate that situation to the "if any" language, counsel specifically responded *in the negative* and explained that the "if any" language "is there because the regular meetings don't require there to be an agenda because it's – a regular meeting is for the general governance of that body."[2] Contrary to Lambries' contention, counsel did *not* concede that the majority's interpretation of the statute is correct.

Lambries asserts petitioners cite no authority for the proposition that regularly scheduled meetings are not called meetings, and that no such authority exists. To the contrary, petitioners devote a significant portion of their principal brief to the controlling authority for this proposition – the language of the statute itself. The statute draws a clear

[2] This quotation of counsel's statement is based on a recording of the oral argument in the Court of Appeals, provided by the clerk of the Court of Appeals to counsel upon request and payment of the required fee.

distinction between three classes of meetings: "regularly scheduled meetings," "called, special, or rescheduled meetings," and "emergency meetings," and the statute treats each of these classes of meetings differently. *See* S.C. Code Ann. § 30-4-80(a).

Lambries reiterates his argument, made in the Court of Appeals and in the court below, that there is no distinction between "regularly scheduled meetings" and "called" meetings, that the agenda requirement for "called, special, or rescheduled meetings" also applies to "regularly scheduled meetings," and that the only exception to the agenda requirement is for "emergency meetings." This contention is inconsistent with the rationale adopted by the Court of Appeals, which found an agenda requirement for some regularly scheduled meetings but not for others. Lambries cites three statutes that use the phrase "duly called meeting" to argue that "regularly scheduled meetings" are "called" meetings. *See* S.C. Code Ann. §§ 4-11-265(A), 6-25-115(F), and 59-19-80. The phrase "duly called meeting" in these isolated statutes does not have any bearing on the interpretation of the language of Section 30-4-80(a).

As petitioners pointed out in their brief in the Court of Appeals, none of the cited statutes apply to a county council nor dictate how a county council meeting is conducted or scheduled. However, if the cited statutes are to be given any consideration, each must be read in the context of the subject matter being addressed and in conjunction with other language contained in the same statute or chapter. Such a reading of each statute demonstrates that the phrase "duly called meeting" is merely a generic phrase denoting a legal meeting or a meeting held in compliance with South Carolina law. These statutes do not provide any guidance on the distinction drawn between "regularly scheduled meetings" and "called, special, or rescheduled meetings" in Section 30-4-80(a).

Section 6-25-115(F), cited by Lambries, is a provision of the Joint Authority Water and Sewer Systems Act. It appears in the same chapter as S.C. Code Ann. § 6-25-60(C), which provides: "Any action taken by the joint system under the provisions of this chapter may be authorized by resolution at any regular or special meeting held pursuant to notice in accordance with bylaws of the joint system . . ." Thus, the chapter in which the cited statute appears contemplates that there are regular meetings and special meetings. In context, the phrase "duly called" simply refers to a legally convened meeting of either category.

Section 59-19-80, also cited by Lambries, must be read in its entirety. This statute imposes special notification requirements for any meeting in which a teacher is to be employed or a purchase made. The statute states that each member of the board must be "notified in writing by the clerk of the board at least three days in advance [of the meeting], unless a written waiver of such notice of meeting is signed by each member . . ." Therefore, for the meeting to be legal and "duly called," each member must be given the required three days' written notice or waive such notice.

Finally, Section 4-11-265(A), cited by Lambries, deals with meetings of the legislative delegation of a county with respect to special purpose and public service districts. Meetings and action by legislative delegations under this statute are limited and unique. There are no regularly scheduled meetings of legislative delegations. There are no rules as to how a meeting under this statute is called, held, or even recorded. The language "duly called meeting" in this statute simply has no bearing on the FOIA's distinction between "regularly scheduled meetings" and "called, special, or rescheduled meetings" of public bodies.

Other provisions in the South Carolina Code demonstrate that a distinction exists between regular meetings and called, special meetings. *See, e.g.*, S.C. Code Ann. § 1-3-245(A) (a member of a state board, council, commission, or committee is considered removed if he has three consecutive unexcused absences from regularly scheduled meetings); S.C. Code Ann. § 4-9-110 (county councils "shall meet at least once each month . . . . Special meetings may be called by the chairman or a majority of the members . . ."); S.C. Code Ann. § 5-7-250(a) (councils of municipal corporations "shall meet regularly at least once in every month . . . . Special meetings may be held on the call of the mayor or of a majority of the members."); S.C. Code Ann. § 23-4-140 ("A majority of the members [of the Governor's Committee on Criminal Justice] at any regular meeting or called meeting constitutes a quorum."); S.C. Code Ann. § 40-41-30 (certain county license fees "may be fixed at any subsequent, regular or specifically called meeting . . ."); S.C. Code Ann. § 48-59-40(D) (the board of the South Carolina Conservation Bank "shall meet at least twice annually in regularly scheduled meetings and in special meetings as the chairman may call."). Clearly, the General Assembly recognizes a difference between regularly scheduled meetings and called, special meetings. Section 30-4-80(a) purposefully used language treating "regularly scheduled meetings" differently than "called, special, or rescheduled meetings."

Lambries scoffs at the preservation argument raised by petitioners. Petitioners contend the argument advanced by Lambries for the first time in the Court of Appeals and adopted by the majority is unpreserved. Lambries' response is that the "if any" issue was preserved because the trial court relied on the "if any" language in its ruling. However, this response does not address the issue preservation problem presented here.

Lambries did not raise in the court below the theory that the "if any" language of the statute distinguishes between regularly scheduled meetings at which there is to be formal action or discussion and regularly scheduled meetings at which there is to be no action or discussion. Rather, in the court below, Lambries argued that all regularly scheduled meetings are called meetings, subject to the agenda requirement for "called, special, or rescheduled meetings," and that emergency meetings are *the only exception* to the agenda requirement. As shown by the record on appeal, Lambries never argued the "if any" language contemplated *an additional exception* for a regularly scheduled meeting at which there is to be no action or discussion. A party cannot present one theory of the case in the court below and a different theory on appeal. *See Dunes West Golf Club, LLC v. Town of Mount Pleasant*, 401 S.C. 280, 303 n.11, 737 S.E.2d 601, 613 n.11 (2013); *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003); *Butler v. Town of Edgefield*, 328 S.C. 238, 248, 493 S.E.2d 838, 843 (1997). The argument raised for the first time in the Court of Appeals was not preserved and could not serve as the basis for the majority's decision.

Lambries also challenges petitioners' invocation of the additional sustaining ground of unclean hands because petitioners did not appeal the trial court's failure to accept that argument. Such appeal was not required as a prerequisite to reliance on that argument as an additional sustaining ground. *See* Rule 220(c) (appellate court may affirm lower court's judgment upon "any" ground appearing in the record on appeal), SCACR; *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) (finding ordinary preservation rules do not preclude the party who prevailed in the court below from asserting additional reasons for affirmance by the appellate court).

Lambries invokes principles of statutory interpretation that seek to give effect to the purpose, design, and policy of legislation. However, as is more fully argued in the petitioners' principal brief, the majority's interpretation does not achieve this goal. Rather than construing the language in the manner that effectuates the *stated* purpose of the FOIA, the majority has *expanded* that purpose to accomplish a broader purpose the majority believes the FOIA *should* serve. Such a judgment is uniquely within the province of the legislature, not the judiciary. *See Adkins v. Comcar Indus., Inc.*, 316 S.C. 149, 151-52, 447 S.E.2d 228, 230 (Ct. App. 1994), *aff'd*, 323 S.C. 409, 475 S.E.2d 762 (1996). The majority exceeded its constitutional authority and invaded the province of the General Assembly by engrafting on the FOIA an agenda requirement not contained in the language of the statute and imposing an amendment prohibition about which the statute is silent.

The trial judge and Court of Appeals dissenting judge correctly analyzed the issue before the Court. Under the plain language of Section 30-4-80(a), posting an agenda for a regularly scheduled meeting is discretionary. Moreover, Section 30-4-80(a) contains no prohibition of amendment of a posted agenda. This Court should hold, as those judges held, that agenda for regularly scheduled meetings are discretionary and that the FOIA, which is silent on the subject, does not prohibit the amendment of such agenda.

CONCLUSION

The Court should reverse the decision of the Court of Appeals majority and affirm the judgment of the lower court.

Respectfully submitted,

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PROOF OF SERVICE

I certify that I have served the Reply Brief of Petitioners upon respondent, Dennis N. Lambries, by mail, postage prepaid, to his attorney, Richard R. Gleissner, 1237 Gadsden Street, Suite 200A, Columbia, South Carolina 29201, this 20th day of February, 2014.

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