ORIGINAL

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
OCT 1 7 2014
SC Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable Larry B. Hyman, Circuit Court Judge

Case No. 2013-CP-26-08446

Appellate Case No. 2014-000756

William H. Bailey, Jr. .... *Appellant*,

v.

Marilyn Hatley, individually and as Mayor
of the City of North Myrtle Beach,
Michael G. Mahaney, Christopher Noury,
and the City of North Myrtle Beach .... *Respondents*.

FINAL BRIEF OF APPELLANT

WRIGHT, WORLEY, POPE,
EKSTER & MOSS, PLLC
Kenneth R. Moss, SC Bar # 15520
628A Sea Mountain Highway
North Myrtle Beach, SC 29582
Tel: (843) 281-9901
Email: kennethmoss@wwpemlaw.com
Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable Larry B. Hyman, Circuit Court Judge

Case No. 2013-CP-26-08446

Appellate Case No. 2014-000756

William H. Bailey, Jr. . . . . *Appellant*,

v.

Marilyn Hatley, individually and as Mayor
of the City of North Myrtle Beach,
Michael G. Mahaney, Christopher Noury,
and the City of North Myrtle Beach . . . . *Respondents*.

FINAL BRIEF OF APPELLANT

WRIGHT, WORLEY, POPE,
EKSTER & MOSS, PLLC
Kenneth R. Moss, SC Bar # 15520
628A Sea Mountain Highway
North Myrtle Beach, SC 29582
Tel: (843) 281-9901
Email: kennethmoss@wwpemlaw.com
Attorneys for Appellant

TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities ii

I. STATEMENT OF ISSUES ON APPEAL 1

II. STATEMENT OF THE CASE 1

III. ARGUMENT 3

A. The Trial Court Erred in Dismissing All Causes of Action Under the South Carolina Freedom of Information Act Against the Individual Named Defendants 3

B. The Trial Court Erred in Finding That Causes of Action Against the Individual Named Defendants Under the South Carolina Freedom of Information Act Were One and the Same as Causes of Action Against the Public Body That Allegedly Violated the Act 8

C. The Trial Court Erred in Dismissing All Causes of Action Against the Individual Named Defendants When the Court Heard Argument on only the South Carolina Freedom of Information Act and Did Not *sua sponte* Address Causes of Action for Violation of the City's Ordinances 14

IV. CONCLUSION 15

CERTIFICATE OF COUNSEL 20

TABLE OF AUTHORITIES

Page

Statutes and Court Rules:

S.C. Code Ann. §§ 5-13-10 *et seq.* (Supp. 2013) 2

S.C. Code Ann. §§ 30-4-10 *et seq.* (Supp. 2013) 1

S.C. Code Ann. § 30-4-20(a) (Supp. 2013) 2

S.C. Code Ann. § 30-4-80(a) (Supp. 2013) 9, 10

S.C. Code Ann. § 30-4-100 (Supp. 2013) 3, 4, 17, 18

Rule 12(b)(6), SCRCP 2, 4, 15, 16, 17, 18

Cases:

Ashley River Props. I, LLC v. Ashley River Props. II, LLC,
374 S.C. 271, 648 S.E.2d 295 (Ct. App. 2007) 17

Blalock v. Johnston, 180 S.C. 40, 185 S.E. 51 (1936) 12

Burton v. York County Sheriff's Dep't, 358 S.C. 339,
594 S.E.2d 888 (2004) 6, 8, 12

Cricket Cove Ventures v. Gilland, 390 S.C. 312,
701 S.E.2d 39 (Ct. App. 2010) 3, 4, 7

Doe v. Marion, 373 S.C. 390, 645 S.E.2d 245 (2007) 16, 17

Easler v. Maybank, 191 S.C. 511, 5 S.E.2d 288 (1939) 12

Elledge v. Wharton, 89 S.C. 113, 71 S.E.2d 657 (1911) 13

Flateau v. Harrelson, 355 S.C. 197, 584 S.E.2d 413 (Ct. App. 2003) 17

Fowler v. Beasley, 322 S.C. 463, 472 S.E.2d 630 (1996) 7, 8, 12, 13

Freemantle v. Preston, 398 S.C. 186, 728 S.E.2d 40 (2012) 13, 14

Gressette v. S.C. Elec. & Gas Co., 370 S.C. 377, 635 S.E.2d 538 (2006) 16

TABLE OF AUTHORITIES

Page

Grimsley v. S.C. Law Enforcement Div., 396 S.C. 276,
721 S.E.2d 426 (2012) 17

Lambries v. Saluda County Council, 398 S.C. 501,
728 S.E.2d. 488 (Ct. App. 2012) 4, 5, 8
rev'd, Op. No. 27400 (S.C. Sup. Ct. filed June 18, 2014)
(Shearouse Adv. Sh. No. 24 at 19) 5, 6, 7, 8

Plyler v. Burns, 373 S.C. 637, 647 S.E.2d 192 (2007) 16

Weston v. Carolina Research & Dev. Found.,
303 S.C. 398, 401 S.E.2d 161 (1991) 7, 8, 14

Other Sources:

CITY OF NORTH MYRTLE BEACH, S.C., CODE OF ORDINANCES . . . . *passim*
ch. 1, § 1-9. Enforcement of ordinances, etc.,
by officers and employees – Required 13
ch. 2, § 2-31.5. Executive sessions 9
ch. 2, § 2-32. Quorum and rules of procedure 9. 11
ch. 2, § 2-35. Agenda 6, 9, 11
ch. 2, § 2-71. Duties. (City Attorney) 9

THE CODE OF THE CITY OF SPARTANBURG, S.C.
ch. 2, art. III, § 2-49. – Agenda 10
ch. 2, art. III, § 2-63. – Rescission, suspension or alteration of rules 11

2009 Op. S.C. Att'y Gen. No. 396 (June 9, 2009) 10

I. STATEMENT OF ISSUES ON APPEAL

A. DID THE TRIAL COURT ERR IN DISMISSING ALL CAUSES OF ACTION UNDER THE SOUTH CAROLINA FREEDOM OF INFORMATION ACT AGAINST THE INDIVIDUAL NAMED DEFENDANTS?

B. DID THE TRIAL COURT ERR IN FINDING THAT CAUSES OF ACTION AGAINST THE INDIVIDUAL NAMED DEFENDANTS UNDER THE SOUTH CAROLINA FREEDOM OF INFORMATION ACT WERE ONE AND THE SAME AS CAUSES OF ACTION AGAINST THE PUBLIC BODY THAT ALLEGEDLY VIOLATED THE ACT?

C. DID THE TRIAL COURT ERR IN DISMISSING ALL CAUSES OF ACTION AGAINST THE INDIVIDUAL NAMED DEFENDANTS WHEN THE COURT HEARD ARGUMENT ON ONLY THE SOUTH CAROLINA FREEDOM OF INFORMATION ACT AND DID NOT *SUA SPONTE* ADDRESS CAUSES OF ACTION FOR VIOLATION OF THE CITY'S ORDINANCES?

II. STATEMENT OF THE CASE

The Plaintiff commenced an action in the Court of Common Pleas for Horry County on December 23, 2013 against the City of North Myrtle Beach, the Mayor of the City, the City Manager, and the City Attorney, alleging that the actions of the Defendants in the convening and conduct of scheduled Meetings of the City Council violated the South Carolina Freedom of Information Act ("FOIA"), S.C. Code Ann. §§ 30-4-10 *et seq.* (Supp. 2013, as amended), and the City's Code of Ordinances ("City Ord.").

The City of North Myrtle Beach (the "City"), a municipal corporation in Horry County, South Carolina, is a public body as defined by S.C. Code Ann.

§ 30-4-20(a) (Supp. 2013), and is managed under the council-manager form of government as described in S.C. Code Ann. §§ 5-13-10 *et seq*. (Supp. 2013). Defendant Marilyn Hatley ("Hatley") is the Mayor of the City and presided over each of the Meetings of City Council of which the Complaint was made. (R. pp. 5–22.) Defendant Michael G. Mahaney ("Mahaney") is the City Manager, and prepares agendas for the regularly scheduled and special Meetings of the City Council. Defendant Christopher Noury ("Noury") is the City Attorney and parliamentarian to the City Council. The Plaintiff sought declaratory and injunctive relief, and Orders of the trial court restraining the Defendant City and the named individual Defendants from future violations of FOIA, and compelling compliance with the City's Code of Ordinances.

The Defendants retained one law firm to represent all Defendants jointly, and generally denied the allegations of the Complaint. (R. pp. 5–22; R. pp. 23–28.) The Defendants thereafter filed a Motion pursuant to Rule 12(b)(6), SCRCP on January 15, 2014 as to all Defendants. (R. p. 58.) The Defendants' Motion to Dismiss came before the trial court for oral argument on March 5, 2014, the Honorable Larry B. Hyman presiding. The Defendants sought to dismiss the named individual Defendants on the grounds that they were not proper parties to the action, and that declaratory or injunctive relief under FOIA would only be proper against the City as a public entity. By Order dated March 20, 2014 and filed March 28, 2014,

Judge Hyman granted the Defendants' Motion as to the individual named Defendants. (R. pp. 2–4.) This Appeal follows.

III. ARGUMENT

A. The Trial Court Erred in Dismissing All Causes of Action Under the South Carolina Freedom of Information Act Against the Individual Named Defendants.

The Defendants conceded that the Plaintiff has standing to bring an action under FOIA. (R. p. 39, lines 4–7.) However, the Defendants argued that declaratory or injunctive relief might be had solely against the entity that has authority to act, and that there was no civil remedy against the individuals named in the Complaint. (R. p. 39, lines 8–15; R. pp. 5–22.)

The Defendants argued that the case of *Cricket Cove Ventures v. Gilland*, 390 S.C. 312, 701 S.E.2d 39 (Ct. App. 2010)[1], specifically said that individual actions cannot be brought for the relief sought under FOIA. (R. p. 40, lines 1–4.)

The Plaintiff argued that S.C. Code Ann. § 30-4-100 allowed actions for injunctive and declaratory relief to be brought by individuals. (R. p. 40, lines 17–25.) The cited statute provides:

> **SECTION 30-4-100**. Injunctive relief; costs and attorney's fees.
>
> (a) Any citizen of the State may apply to the circuit court for either or both a declaratory judgment and injunctive relief to enforce the provisions of this chapter in

[1] R. p. 38, line 16; R. p. 39, line 8; R. p. 40, line 1 [naming errors in Transcript].

> appropriate cases as long as such application is made no later than one year following the date on which the alleged violation occurs or one year after a public vote in public session, whichever comes later. The court may order equitable relief as it considers appropriate, and a violation of this chapter must be considered to be an irreparable injury for which no adequate remedy at law exists.
>
> (b) If a person or entity seeking such relief prevails, he or it may be awarded reasonable attorney fees and other costs of litigation. If such person or entity prevails in part, the court may in its discretion award him or it reasonable attorney fees or an appropriate portion thereof.

The Plaintiff (whose counsel represented the appellant before the Court of Appeals in *Cricket Cove*) argued that the Court of Appeals in that case had held that Section 30-4-100 of FOIA contains a civil enforcement provision granting standing to a South Carolina citizen to seek injunctive relief against a violation of any FOIA provision. (R. p. 40, lines 17–25.) *Cricket Cove*, 390 S.C. at 327, 701 S.E.2d at 20. The Court of Appeals upheld the respondents' Rule 12(b)(6) motion in *Cricket Cove* because the actions complained of were not found to be public activity and in the formulation of public policy. *Cricket Cove*, 390 S.C. at 328, 701 S.E.2d at 21–22. The Court of Appeals did not find that individual actions cannot be brought for all relief sought under FOIA.

Further, the Plaintiff argued, there existed appellate cases where individual officers of a city or county were named individually as defendants in an action under FOIA. The Plaintiff cited to *Lambries v. Saluda Cnty. Council*, 398 S.C. 501, 728

S.E.2d 488 (Ct. App. 2012) (Pieper, J. dissenting). (R. p. 43, line 23.[2]) The full caption in *Lambries*, as the Plaintiff pointed out in a Memorandum submitted at oral argument, is in fact *Dennis N. Lambries, Appellant, v. Saluda County Council; T. Hardee Horne, Chairman; William "Billie" Pugh, Councilman; Steve Teer, Councilman; Jacob Schumpert, Councilman; and James Frank Daniel, Sr., Councilman, Respondents.*

Since the hearing in this present matter in the Court of Common Pleas, the South Carolina Supreme Court has reversed the decision of the Court of Appeals. *Lambries v. Saluda Cnty. Council*, Op. No. 27400 (S.C. Sup. Ct. filed June 18, 2014) (Shearouse Adv. Sh. No. 24 at 19). However, that reversal did not address the issue of whether the individual members of the county council were proper party defendants in the FOIA action. The Supreme Court held that where a public body was not required to publish an agenda, the Supreme Court declined to judicially impose a restriction on the amendment of an agenda for a regularly scheduled meeting where none was required under the operative statute.

In the present case, the Complaint (R. pp. 5–22) alleges that the City Ordinances, unlike FOIA, required the City Manager to place matters to be considered by Council at a regular meeting of the City Council on a written agenda, and that a vote of a majority of Council Members present is required to consider

---

[2] [Naming error in Transcript.] The Plaintiff drew the trial court's attention to the appellate status of the *Lambries* case. (R. pp. 43–44.)

matters not on the agenda. (R. p. 7, ¶ 17(g): City Ord., ch. 2, art. II, div. 2, § 2-35.) The Complaint in the present case alleged that those provisions of the City Ordinances were not followed (R. pp. 8, ¶ 29; R. p. 10, ¶ 42; R. p. 11, ¶ 53; R. p. 20, ¶ 184, etc.), in addition to other procedural irregularities under the City Code of Ordinances. Those issues have not been addressed at the trial level by the court. The Supreme Court in its reversal of *Lambries* focused on the absence of a specific requirement in Saluda County concerning publication or amendment of council agendas, and held that the "spirit and purpose" of FOIA was not violated by the events of which the plaintiff in that lawsuit was complaining. Although the Supreme Court declined in *Lambries* to judicially impose a restriction on the amendment of an agenda for a regularly scheduled meeting where none was required under the operative statute, in the present case the City's Ordinances give an unequivocal requirement for publication of an agenda and the means of amendment to an agenda once published.

The Plaintiff's Memorandum provided to the trial court also identified other cases under FOIA where individuals were named in their individual as well as their representative capacities. Those additional cases were:

1. *Burton v. York County Sheriff's Dep't*, 358 S.C. 339, 594 S.E.2d 888 (Ct. App. 2004) (*Injunction issued by trial court upheld on appeal*). Full caption:

   Ray B. BURTON, III and East Coast Newspapers, Inc., Respondents/Appellants

   v.

   YORK COUNTY SHERIFF'S DEPARTMENT and Bruce Bryant, York County Sheriff, Appellants/Respondents.

2. *Fowler v. Beasley*, 322 S.C. 463, 472 S.E.2d 630 (1996) (*Injunction issued*). Full caption:

Sandra FOWLER, Nick Cuomo, Tom McFall, Patricia Quattlebaum, Damon Thomas, Lonnie Hamilton, Sr., Lucille Whipper, Floyd Breeland, Mckinley Washington, Robert Ford, Respondents,

v.

David M. BEASLEY, Governor, the Charleston County Legislative Delegation, the Charleston County School Board, and Richard L. Mock, Defendants.

Of Whom Richard L. Mock; House Members of the Charleston County Legislative Delegation and Senate Members of the Charleston County Legislative Delegation are Appellants, and David M. Beasley, Governor, is a Respondent.

3. *Weston v. Carolina Research and Development Foundation*, 303 S.C. 398, 401 S.E.2d 161 (1991). Full caption:

Chris WESTON and Multimedia, Inc., d/b/a The Greenville News–Piedmont Company, Respondents

v.

CAROLINA RESEARCH AND DEVELOPMENT FOUNDATION, Christopher Vlahoplus, Arthur M. Williams, Jr., John L. M. Tobias, Richard E. Day, Gayle O. Averyt, William R. Bruce, Robert E. Roberson, Guy F. Lipscomb, Jr., and William Weston, Jr., Appellants. And John C. SHURR and The Associated Press, Respondents

v.

CAROLINA RESEARCH AND DEVELOPMENT FOUNDATION, Christopher Vlahoplus, Arthur M. Williams, Jr., John L. M. Tobias, Richard E. Day, Gayle O. Averyt, William R. Bruce, Robert E. Roberson, Guy F. Lipscomb, Jr., and William Weston, Jr., Appellants.

The trial court relied upon *Cricket Cove*, 390 S.C. 312, 701 S.E.2d 39 (Ct. App. 2010), to find that "[o]nly the public body can perform such acts that are

subject to FOIA's equitable provisions. . . . [T]he proper party defendant is the public body and in this case the sole proper party defendant is the City of North Myrtle Beach." (R. p. 3.) This was error by the trial court. Individuals may indeed be proper party defendants in cases seeking injunctive relief, as *Lambries, Burton, Fowler,* and *Weston*, illustrate.

B. The Trial Court Erred in Finding That Causes of Action Against the Individual Named Defendants under the South Carolina Freedom of Information Act Were One and the Same as Causes of Action Against the Public Body That Allegedly Violated the Act.

The trial court noted that there are cases under FOIA where individuals have been named as parties. The trial court however, interpreted those decisions as meaning that the courts had treated "[S]uch individual defendants as being one in [*sic*] the same as the public body because it is the public body that has allegedly violated FOIA." (R. p. 4.) In making this interpretation, the trial court cited to *Lambries*, 398 S.C. at 502, 728 S.E.2d at 489 (Ct. App. 2012). The case report does not contain the phrasing used by the trial court, and the decision in the Court of Appeals did not address whether named individuals were one and the same as the public body: the word "individuals" does not appear in the case report.

The Supreme Court, in reversing the Court of Appeals decision in *Lambries*, also did not address whether named individual defendants were one and the same as the public body for whom they were acting. *Lambries v. Saluda Cnty. Council*, Op. No. 27400 (S.C. Sup. Ct. filed June 18, 2014) (Shearouse Adv. Sh. No. 24 at 19). The

issue was not litigated in that case at any level. The decision in the Supreme Court turned on the issue of whether the defendant county council was obliged to publish any agenda before its meetings. The Supreme Court (and the Court of Appeals before it) found that the Saluda County council had no obligation under FOIA to publish an agenda, and that the council followed its own ordinances in amending its agenda at a meeting by a motion that was properly made, seconded, and voted upon.

The City of North Myrtle Beach, by contrast, has adopted an Ordinance that **requires** the publication of an agenda before each regularly scheduled City Council meeting. City Ordinances also require Executive Sessions of the City Council to be held in compliance with FOIA, that the City Council adopt and follow rules and procedures for the conduct of its meeting, and that the City Attorney act as its parliamentarian. City Ord., ch. 2, art. II, §§ 2-35, 2-31.5, 2-32; ch. 2. art. IV, § 2-71.

In June 2009, the Attorney General provided an Opinion to counsel for Spartanburg School District 7 on the question of whether that School District, which had a written policy permitting amendment of agendas for regularly scheduled meetings of the School District Board by majority vote of its members, might properly amend its agenda without violating § 30-4-80(a) of FOIA.

The Attorney General answered that in 1989, a similar question had been posed with regard to meetings and agendas of Spartanburg City Council: the Attorney General in that matter had opined that while a public body may have provisions that would allow amendment to an agenda within twenty-four hours prior to a meeting,

the best reading of S.C. Code Ann. § 30-4-80(a) was that the spirit of FOIA was served by requiring an agenda to be posted in its final form twenty-four hours before the meeting. The Attorney General was of the opinion, however, that Spartanburg City Council and the School District might lawfully amend their agendas if their governing rules of procedure allowed it.

Nonetheless, the Attorney General commented that:

> [I]nterpreting section 30-4-80(a) to permit last minute changes to agendas gives public bodies the ability to post agendas with only noncontroversial items and later amend those agendas to include more controversial items without notice to the public. Accordingly, we believe this reading would deny the public some of the protection FOIA seeks to afford.

2009 Op. S.C. Att'y Gen. No. 396 (June 9, 2009).

The Code of the City of Spartanburg's Ordinances contain the following provisions in Chapter 2, Article III:

> **Sec. 2-49. – Agenda.**
>
> All reports, communications, ordinances, resolutions, contract documents or other matters to be submitted to the council shall be delivered or submitted to the city manager at least four (4) days prior to such meeting. The city manager shall arrange a list of such matters, according to the order of business and furnish each member of the council and the city attorney with a copy of same prior to the council meeting and as far in advance of the meeting as time for preparation will permit.
>
> (Code 1958, § 2-2.1)

Sec. 2-63. – Rescission, suspension or alteration of rules.

(a) Any of the rules set out in this article, except those requiring unanimous consent, can be rescinded or altered by a majority of the members present.

(b) By common consent of all members present at a regular meeting, the rules of procedure as set forth herein may be temporarily suspended, with the exception of those rules prescribed in accordance with the laws of the state.

(Code 1958, § 2-10)

By contrast, the Code of Ordinances for the City of North Myrtle Beach, in Chapter 2, Article II, Division 2, provides:

Sec. 2-35. Agenda.

Matters to be considered by council at a regular meeting shall be placed on a written agenda prepared by the city manager and publicly posted by the city clerk by noon of the day preceding the meeting. Matters not on the agenda may be considered with the approval of a majority of councilmembers.

(Ord. No. 90-5, 4-3-90; Ord. No. 91-14, § 1, 4-15-91)

Sec. 2-32. Quorum and rules of procedure.

The city council shall, by resolution, adopt its own rules and procedures for the conduct of meetings. The city attorney shall act as parliamentarian. A majority of councilmembers serving shall constitute a quorum for the conduct of business at any meeting. The mayor shall preside or, in his absence, the mayor pro tempore shall preside. In the absence of both, the vice-mayor pro tempore shall preside. Except as otherwise required by state law or ordinance, all proceedings of council shall be governed by rules and procedures adopted by resolution.

(Ord. No. 90-5, 4-3-90)

Where Spartanburg City Council does not mandate a fixed date or time at which an agenda must be published in advance of a meeting, the City of North Myrtle Beach does require a deadline for publication. Further, while Spartanburg City Council has specific provisions for suspending the applicable Rules of Procedure, the City of North Myrtle Beach does not. The Complaint in the present matter alleged that in altering the agenda at certain meetings of the North Myrtle Beach City Council, the Mayor did not follow the City Council's rules of procedure, and the City Attorney, in his role as parliamentarian, did not demur from the action proposed and taken.

In *Burton*, an injunction under FOIA was sought against both the sheriff's department and the sheriff personally. *Burton*, 358 S.C. at 344, 594 S.E.2d at 890. The Court of Appeals found no error in the issuance of the injunction or its scope. *Burton*, 358 S.C. at 356, 594 S.E.2d at 897.

In *Fowler*, the Supreme Court noted that while nothing requires each individual in an agency to be served with a complaint under FOIA, there were numerous cases in which individual members were not named. *Fowler*, 322 S.C. at 467, 472 S.E.2d at 632. The Supreme Court also held that it had jurisdiction to review the ministerial acts of South Carolina Governor Beasley.

> This Court has jurisdiction to review the ministerial acts of the governor. *Easler v. Maybank*, 191 S.C. 511, 5 S.E.2d 288 (1939). In *Blalock v. Johnston*, 180 S.C. 40, 185 S.E. 51 (1936), we held that a statute prescribing the method of appointment of a tax collector and stating

> "which appointment shall be made by . . . the Governor, upon the recommendation of the majority of the Members of the General Assembly," vested the Governor with no discretion since the appointment could not legally be made without the recommendation. Accordingly, the appointment was subject to review by this Court. *See also Elledge v. Wharton*, 89 S.C. 113, 71 S.E. 657 (1911).

Fowler, 322 S.C. at 467, 472 S.E.2d at 633.

The Complaint in this present matter describes various alleged failures of the individually named defendants to perform their ministerial duties under FOIA and the City's Code of Ordinances. *E.g.*, R. pp. 5–22, ¶¶ 34, 41, 45, 51, 56, 60, 63, 67, 70, 75, 78, 83, 89, 94, 97, 103, 106, 115, 120, 124, 126, 128, 132–33, 135, 139, 140–41, 143, 148, 151, 153, 158–59, 163–64, 167–68, 173, and 179. The Complaint separately alleges violations of FOIA and the City Ordinances by the City as a defendant. R. p. 20, ¶¶ 183–85. The City Mayor, City Manager, and City Attorney have no discretion whether to obey those Ordinances or deviate from their ministerial duties prescribed thereunder. They are required to enforce obedience to statutes, provisions of the Code or Ordinances, or any ordinances, resolutions, rules, regulations or orders issued thereunder as may relate to their regular duties. City Ord., ch. 1, § 1-9.

In *Freemantle v. Preston*, 398 S.C. 186, 728 S.E.2d 40 (2012), the Supreme Court noted without comment that "[S]everal former and current Council members [were named] in their official and individual capacities." *Freemantle*, 398 S.C.

at 190, 728 S.E.2d at 42. The Supreme Court in *Weston*, where the public body and each of the Board members of the Foundation were sued individually, made no comment on the fact that the Board members had been made party-defendants, and the issue was not litigated.

In the present matter, the trial court erred because the causes of action alleged against the individual named defendants centered on their disobedience of their ministerial duties under the City's own Ordinances, including compliance with FOIA, and the relief sought against those individual named defendants was separate from the relief sought against the City itself.

C. The Trial Court Erred in Dismissing All Causes of Action Against the Individual Named Defendants When the Court Heard Argument on Only the South Carolina Freedom of Information Act and Did Not *Sua Sponte* Address Causes of Action for Violation of the City's Ordinances.

The Defendants' Motion as argued before the trial court concerned only the issue of individual liability for violations of FOIA.

> Basically, what we have here is a Freedom of Information Act Claim. . . .
>
> What is before you to be decided today is our motion for an order dismissing the individuals whom he has named in the lawsuit and an order dismissing claims for acts that occurred more than one year [ago]. The FOIA claim against the City of North Myrtle Beach would remain intact if you were to grant our motion.

(R. p. 37, lines 3–4, and 16–21.) "This is strictly an act that arises under [the] Freedom of Information Act." (R. p. 38, lines 22–23.)

The Plaintiff, on the other hand, explained to the trial court that the Plaintiff was asking for the individuals to be ordered to comply with their administrative duties under FOIA and the City Ordinances. (R. p. 47, lines 10–19.) The trial court, however, stated the issue before the court as being whether the individual named defendants could have a cause of action stated against them under FOIA for the purposes of a Rule 12(b)(6) Motion. (R. p. 48, lines 4–9.)

Despite the limitations of the issues indicated in the Defendants' Motion and the argument before the court, the detailed March 28, 2014 Order of the trial court dismissed all causes of action and all forms of relief sought against the individuals. (R. p. 3.) In doing so, the trial court dismissed all the allegations set forth in the Complaint concerning violations of the City Code of Ordinances by the individual defendants. *E.g.*, R. p. 19, ¶¶ 166–170 (Hatley), R. p. 19, ¶¶ 172–76 (Mahaney), and R. p. 20, ¶¶ 178–182 (Noury), which gave rise to the prayer for relief against those individuals that are stated as separate and apart from the relief sought against the City under FOIA.

The trial court failed to differentiate between the issues that arise in this case from failure of the individual defendants to follow their duties under the City Code of Ordinances, and those arising solely under FOIA. Even if the trial court had

limited its Order to those issues arising from FOIA violations, as illustrated above, the trial court would have ruled in error.

IV. CONCLUSION

A ruling on a motion to dismiss pursuant to Rule 12(b)(6) must be based solely on the factual allegations set forth in the complaint, and the Court must consider all well-pled allegations as true. *Gressette v. S.C. Elec. & Gas Co.*, 370 S.C. 377, 378–79, 635 S.E.2d 538, 538 (2006).

An appellate court and the trial court apply the same standards when considering dismissal of an action pursuant to Rule 12(b)(6), SCRCP. *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint. *Doe*, 373 S.C. at 395, 645 S.E.2d at 247. The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief. *Plyler v. Burns*, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007). Dismissal under Rule 12(b)(6) is improper [i]f the facts alleged and inferences reasonably deducible from them, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory. *Doe*, 373 S.C. at 395, 645 S.E.2d at 247. Moreover, [t]he complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. *Doe*, 373 S.C.

at 395, 645 S.E.2d at 248. The trial court's grant of a motion to dismiss will be sustained only if the facts alleged in the complaint do not support relief under any theory of law. *Ashley River Props. I, LLC v. Ashley River Props. II, LLC*, 374 S.C. 271, 278, 648 S.E.2d 295, 298 (Ct. App. 2007).

On appeal from a dismissal pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court—whether the defendant demonstrates the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court. *Grimsley v. S.C. Law Enforcement Div.*, 396 S.C. 276, 281, 721 S.E.2d 423, 426 (2012); *Flateau v. Harrelson*, 355 S.C. 197, 201–03, 584 S.E.2d 413, 415–16 (Ct. App. 2003). The court is required to view the allegations in the complaint in the light most favorable to the plaintiff and determine whether the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief under any theory of the case. *Grimsley*, 396 S.C. at 281, 721 S.E.2d at 426. The court may sustain the dismissal when the facts alleged in the complaint do not support relief under any theory of law. *Flateau*, 355 S.C. at 202, 584 S.E.2d at 416.

The Plaintiff has clearly alleged causes of action under FOIA sufficient to survive a Rule 12(b)(6) Motion. The Supreme Court has never dismissed claims under FOIA against individuals, nor found that individuals may not be properly named defendants for the purposes of S.C. Code Ann. § 30-4-100.

The named individual defendants, Hatley, Mahaney and Noury, were dismissed in error by the trial court, which failed to differentiate between the allegations made and the consequent relief sought against them for failure to perform public duties mandated by City Ordinances, as compared to the separate allegations and relief sought against the City acting as a public body.

The trial court also erred in dismissing all claims made against the named individual defendants when the Motion heard and argued before the trial court was limited to matters arising under FOIA. By phrasing the Order of Dismissal in the manner adopted by the trial court, the claims made against the named individuals for failing to comply with the City Ordinances were also dismissed. (R. pp. 2–4.)

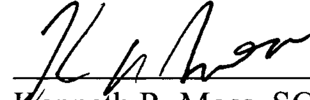
The Appellant respectfully requests oral argument before this Honorable Court, that the Order of the trial court should be reversed, and that the matter be returned to the Circuit Court for Horry County for an Order consistent with the Court of Appeals finding that:

1. Individual named defendants are subject to the injunctive provisions of S.C. Code Ann. § 30-4-100 (Supp. 2013); and
2. The Circuit Court erred in granting the Defendants' Motion made pursuant to Rule 12(b)(6), SCRCP, as the Complaint stated facts sufficient to constitute a cause of action for injunctive relief against the individual named Defendants for violations of the City's Code of Ordinances in addition to FOIA; and

3. The dismissal of all causes of action against the individual named Defendants was error by the Circuit Court.

Respectfully submitted,

WRIGHT, WORLEY, POPE, EKSTER & MOSS, PLLC



Kenneth R. Moss, SC Bar # 15520
628A Sea Mountain Highway
North Myrtle Beach, SC 29582
Tel: (843) 281-9901
Email: kennethmoss@wwpemlaw.com
Attorneys for Appellant

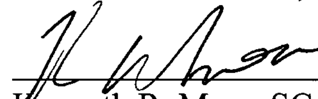
North Myrtle Beach, South Carolina
October 16, 2014

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR. The undersigned further certifies that this Final Brief complies with the Supreme Court's Revised Order concerning personal identifying information and other sensitive information in Appellate Court filings.

Respectfully submitted,

WRIGHT, WORLEY, POPE, EKSTER & MOSS, PLLC



Kenneth R. Moss, SC Bar # 15520
628A Sea Mountain Highway
North Myrtle Beach, SC 29582
Tel: (843) 281-9901, ext. 103
Email: kennethmoss@wwpemlaw.com
Attorneys for Appellant

North Myrtle Beach, South Carolina
October 16, 2014

RECEIVED
OCT 17 2014
SC Court of Appeals

Q

RECEIVED
OCT 17 2014
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable Larry B. Hyman, Circuit Court Judge

Case No. 2013-CP-26-08446

Appellate Case No. 2014-000756

William H. BAILEY, Jr. . . . . *Appellant,*

v.

Marilyn HATLEY, individually and as Mayor
of the CITY OF NORTH MYRTLE BEACH,
a South Carolina Municipal Corporation,
Michael G. MAHANEY, Christopher NOURY,
and the CITY OF NORTH MYRTLE BEACH . . . . *Respondents.*

PROOF OF SERVICE

I certify that I have served a copy of the Final Brief of Appellant, along with Proof of Service of same in the above-captioned appeal, on counsel for the Respondents by United States Mail, with sufficient postage affixed, addressed as follows:

Michael W. Battle, Esq.
Battle Law Firm, LLC
1200 Main Street
Post Office Box 530
Conway, South Carolina 29528

*** *signature page follows* ***

Respectfully submitted,

WRIGHT, WORLEY, POPE, EKSTER & MOSS, PLLC

Kenneth R. Moss, SC Bar # 15520
628A Sea Mountain Highway
North Myrtle Beach, SC 29582
Tel: (843) 281-9901, ext. 103
Email: kennethmoss@wwpemlaw.com
Attorneys for Appellant

North Myrtle Beach, South Carolina
October 16, 2014