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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 REPLY BRIEF OF APPELLANT

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INITIAL REPLY BRIEF OF APPELLANT

The Appellant, William H. Bailey, Jr. (hereinafter “Appellant” or “Bailey”), by and through his counsel, responds to the Initial Brief of Respondents as follows:

INDIVIDUAL CULPABILITY UNDER THE FOIA

The Respondents admit that the FOIA does not designate who may be sued under the statute, but go on to make the broad claim that FOIA’s civil remedies do not apply to persons in their individual capacities. This appears to be a case of first impression on this issue.

The provisions of S.C. Code Ann. § 30-4-100(a) are nowhere limited to equitable relief against “public bodies” as the Respondents assert. Under the FOIA, a violation of the statute is expressly deemed to cause an irreparable injury to the plaintiff for which no adequate at law exists. The only protection available to an individual injured by a FOIA violation is such “*equitable relief as [the Court] considers appropriate.*”

In Business License Opposition Comm’n v. Sumter County, 304 S.C. 232, 403 S.E.2d 638 (1991), the Supreme Court reversed the trial court’s dismissal of a cause of action under the FOIA pursuant to Rule 12(b)(6), SCRPC. The Court held that the plaintiff was entitled to litigate the nature and effect of the violation and the appropriate equitable relief, if any, to be awarded under S.C. Code Ann. § 30-4-100(a). The named defendants in the Business License case included individuals named in their official capacity. The naming of those individuals as

defendants, rather than the entity of which they were members, was not raised as an issue in the case either at trial or appellate level.

In Fowler v. Beasley, 322 S.C. 463, 472 S.E.2d 630 (1996), one issue that the Supreme Court addressed was whether service on an incorporated association of claims that included violations of the FOIA was effective to vest jurisdiction over the individual members of that association. The Supreme Court, in holding that service on the unincorporated association was sufficient, was contemplating that the individuals would be bound by any injunctive relief granted under the FOIA. However, on the facts of the case, the Supreme Court held no violation of the FOIA had occurred. Fowler, 322 S.C. at 469, 472 S.E.2d at 634.

The Respondents' reference to 42 U.S.C. § 1983, which allows criminal and civil contempt sanctions against individuals in both their official capacities and personal capacities, is unhelpful. 42 U.S.C. § 2000h provides that the court has both civil and criminal powers to require compliance with its order, and that those civil powers include “[P]revailing usages of law and equity” The real issue in the present case is whether a statute, such as the FOIA, that provides wide equitable remedies, can have application to individuals in addition to the governmental unit for which they are acting. Fowler indicates that the FOIA does indeed apply to individuals.

PUBLIC DUTY RULE

The Respondents' assert that a "public duty rule" insulates public officials, employees, and governmental entities from liability for the negligent performance of their official duties by negating the existence of a duty towards the plaintiff, and that if the Appellant in this case received attorney's fees under S.C. Code Ann. § 30-4-100, that would be an award of compensation to an individual Plaintiff and an exposure to liability for individual officers and employees.

This argument suggests that S.C. Code Ann. § 30-4-110 (Penalties) conflicts with the "public duty rule" postulated by the Respondents. This argument by the Respondents is irrelevant to the matters before this Court. The Appellant in this case has not raised the potential penalties that might arise under the FOIA.

The Respondents further allege that if the General Assembly had intended to cause a shift in the underlying policies of common law for public servants, as asserted by the Respondents, the General Assembly would have expressly provided for it in the FOIA, and that if the legislature had intended the individual liability result the Appellant seeks, it could have expressly stated that individual persons are civilly liable for violations of the FOIA.

But that is precisely what the General Assembly did in enacting, as separate sections of the FOIA, provisions for Injunctive Relief, Costs and Attorney's Fees in § 30-4-100, and criminal penalties in § 30-4-110.

ISSUE PRESERVATION

The Respondents also allege that the Appellant did not preserve his objection to dismissal of his claims against the individual defendants for violation of the City's ordinances in connection with public meetings. However, the trial court – with the concurrence of Respondents' counsel – characterized the March 5, 2014 hearing in the Court of Common Pleas as being solely concerned with issues under the FOIA. (R. p. 37, lines 3–4; R. p. 38, lines 21–24 (“THE COURT: Okay, it’s a FOIA case. Go ahead.”).)

The Appellant's objection to the trial court's Order now under appeal (R. pp. 2–4) includes argument that the Order includes conclusions of law on matters not argued or brought before the court at the hearing. This is not a case where the trial court did not rule on issues that were properly before the trial court, but one where issues not argued before the trial court appeared in the court's Rule 12(b)(6) Order.¹ (R, pp. 2–4.)

TORT CLAIMS ACT

The Respondents' assert that the South Carolina Tort Claims Act, S.C. Code Ann. §§ 15-78-10 *et seq.*, bars the claims of the Appellant under the FOIA, because,

¹ The Respondents have made reference in its Initial Brief to a case alleged to be parallel in nature to the present case, namely *Mitchell Bellamy v. Marilyn Hatley et al.*, C/A No. 2013-CP-26-07765. The Appellant believes reference to this other case is irrelevant and improper, but asks the Court of Appeals to note that the trial court's Rule 12(b)(6) Order in that case was indeed the subject of a Rule 59 Motion, which was denied by a Form 4 Order. To the extent that reference to the *Bellamy* case may be allowed, the denial of the Rule 59 Motion is also relevant.

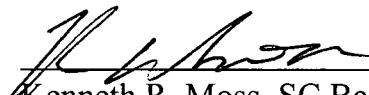
the Respondents assert, the Appellant is seeking a monetary judgment in the form of attorney's fees and costs under S.C. Code Ann. § 30-4-100. The Respondents make this argument despite elsewhere in its Initial Brief admitting that attorney's fees are not damages under the American Rule for damages. The argument made is self-defeating and nonsensical. The award of attorney's fees and costs of litigation under the FOIA is discretionary, and any such award would not constitute damages or a monetary judgment barred by the Tort Claims Act.

STANDING

Lastly, the Respondent City asserts as an additional sustaining ground for the denial of the Appeal, that the Appellant lacks standing to bring any claim for violation of City ordinances. This argument was not made at the trial court level, is not part of the Order being appealed, and its inclusion is improvident and improper.

Respectfully submitted,

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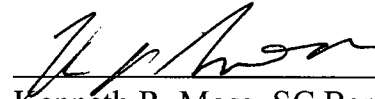
North Myrtle Beach, South Carolina
October 16, 2014

CERTIFICATE OF COUNSEL

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

Respectfully submitted,

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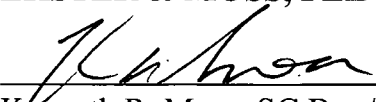
I certify that I have served a copy of the Final Reply Brief of Appellant, along with Proof of Service of same in the above-captioned appeal, on counsel for the Respondents by United States Mail, with sufficient postage affixed, addressed as follows:

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