

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM ANDERSON COUNTY
COURT OF COMMON PLEAS
HONORABLE ROGER COUCH

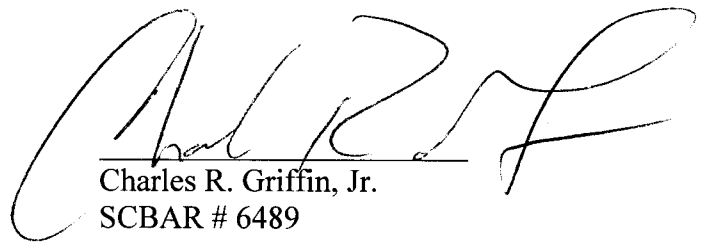
APPELLATE CASE NO.: 2014-002614

RICHARD FREEMANTLE, individually and on behalf of himself
and all others similarly situated ... APPELLANT

VS

JOEY PRESTON, in his official capacity and individually, while administrator of
ANDERSON COUNTY; ANDERSON COUNTY, a political subdivision of the state of
SOUTH CAROLINA; ANDERSON COUNTY COUNCIL, the Legislative and
Executive body of ANDERSON COUNTY; RON WILSON, in his official capacity and
individually; BILL MCABEE, in his official capacity and individually; LARRY GREER,
in his official capacity and individually; MICHAEL THOMPSON, in his official capacity
and individually; GRACIE FLOYD, in her official capacity and individually...
RESPONDENTS

INITIAL BRIEF OF APPELLANT



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March 9, 2015

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STATEMENT OF ISSUES ON APPEAL

- I. Did the Trial Court err in granting Summary Judgment to the Respondents?

STATEMENT OF THE CASE

Plaintiff's Verified Amended Complaint in this case challenges the legality of, the institution of and implementation of a Severance Package (hereinafter "Severance Agreement" or "Settlement Agreement"), that awarded former Anderson County Administrator Joey Preston approximately \$1,139,833.00 in direct cash transfers plus title to the County's luxury 2006 Yukon Denali SUV arising out of a the November 18, 2008 Anderson County Council Meeting. Amended Comp. ¶ 2

Further, the Plaintiff instituted this action for Injunctive and Declaratory Relief to remedy violations of § 30-4-10 et seq S.C. Code of Laws Ann. (Freedom of Information Act) (hereinafter referred to as FOIA). Amended Comp. ¶ 2

The South Carolina Supreme Court previously affirmed the dismissal of all of Plaintiff's claims except the FOIA causes of action.¹

One of Plaintiff's FOIA claims in this Verified Amended Complaint was that the agenda for the regularly scheduled November 18, 2008 Anderson County Council Meeting was illegally amended since no notice to the Public was given that the Agenda for that Council Meeting was to be amended to include the Severance Agreement which was in excess of approximately One Million (\$1,000,000.00) Dollars. Amended Comp. ¶ 36, 39, 108, 109, 113, 117, 120, 121, 122.

Preston asserted that he and Anderson County were bound by an employment agreement contract signed in 1998 which allegedly annually renewed for three years unless one of the parties gives notice of non-renewal. The terms of the contract provided an extremely generous cost-prohibitive termination provision to Preston should the County decide to terminate his employment. Am. Comp. ¶ 18.

¹ *Freemantle v. Preston*, 398 S.C. 186, (S.C. 2012)

Ron Wilson at the Council meeting on November 18, 2008, presented a five-page Severance Agreement and made a motion to approve the Severance Agreement. Am. Comp. ¶ 31.

Immediately after Ron Wilson presented the Severance Agreement to the Council and at the same Council meeting November 18, 2008, Greer presented the Council with a three-page list of accounts from which he proposed transferring funds to provide for the funds necessary to implement Ron Wilson's proposed Severance Agreement. For an unknown reason, the total transfer on Greer's list of accounts and amounts was \$1,140,122.00 exceeding the amount on the Severance Agreement by \$289.00. Am. Comp. ¶ 32.

Ron Wilson's intention to present the Severance Agreement to the Council was not on the agenda despite a prior intention to address the issue and ample time to get the matter on the agenda and provide the public with the notice. Am. Comp. ¶ 34.

The reasons for the Severance Agreement were not presented, and the taxpayers have no way of determining why they were and are paying a government employee a Severance Agreement of more than \$1 Million on a void and/or voidable contract. Am. Comp. ¶ 35.

Another of Plaintiff's FOIA claims is that the actions, conduct and/or omissions of the Personnel Committed described in the Verified Amended Complaint violated FOIA. Am. Comp. ¶¶ 111 – 114.

Michael Thompson as Council Chairman appointed Council Members Bill McAbee, Larry Greer, and Ron Wilson to the ad hoc Personnel Committee in the

regularly scheduled Council meeting on January 15, 2008, and designated Ron Wilson as Chairman of the Personnel Committee. Am. Comp. ¶ 15.

The Verified Amended Complaint describes the meetings held by the Personnel Committee, the last of which was November 4, 2008. Am. Comp. ¶¶ 25 – 30.

Wilson was chair of the Personnel Committee, to which the Council referred Preston's claims against Anderson County. Under Wilson's dubious leadership, the Personnel Committee oversaw the negotiations of Preston's Severance Agreement. Am. Comp. ¶ 55.

Ron Wilson has since plead guilty to Federal Charges of devising a scheme to obtain monies by fraud (operating a multi-million dollar Ponzi Scheme) and is incarcerated in Federal Prison. *See 8:12-cr-00320-JMC-1*. Since Ron Wilson's guilty plea, he has since been indicted by the Federal Government to lying to Federal Agents and Conspiracy to Defraud the United States Government.² *See 6:14-cr-00571-CRI-1*. Appellant's Memo P. 4.

Further, Appellant never saw any written notice posted at the Anderson County Council Chambers or any other place of the dates, times, and places of these Anderson County Personnel Committee meetings nor did he see any written agenda regarding these meetings posted. Also, based on Appellant's investigation, there were never any written notices or written agendas posted regarding any of these Anderson County Personnel Committee meetings until the new Council took over in 2009. Appellant's Affidavit P. 3.

Wilson made the Motion to Amend the Agenda at that the Council approve Preston's Severance Agreement; Wilson voted in favor of the Severance Agreement; and

² Former Anderson County Councilman Ron Wilson has since plead guilty to conspiracy to defraud the United States Government. *See 6:14-cr-00571-JMC*.

Wilson voted in favor of other motions related to the Severance Agreement. Am. Comp. ¶ 55.

The Plaintiff is contesting the aforementioned actions pursuant to the South Carolina Freedom of Information Act (FOIA).

FOIA provides in relevant part: (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 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. *S.C. Code Ann. § 30-4-100.*

ARGUEMENTS

DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT TO THE RESPONDENTS?

“Rule 56 provides the trial court shall grant summary judgment if “there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c), SCRPC. “In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party.” *Quail Hill, LLC v. Cnty. of Richland*, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010) (citation omitted).” *Johnson v. Alexander*, 408 S.C. 58, 61 (S.C. Ct. App. 2014).

THE INDIVIDUAL DEFENDANTS ARE NO LONGER REAL PARTIES IN INTEREST AS TO APPELLANT’S FOIA CLAIMS THUS THEY HAVE NO STANDING TO OBJECT TO THE RELIEF SOUGHT

The individual Defendants, Joey Preston, Larry Greer, Michael Thompson and Gracie Floyd³, (hereinafter “individual Defendants) seek dismissal of the Amended Complaint, claim the Anderson County Council is the only “Public Body” to which FOIA applies, and further claim that some of Plaintiff’s claims under FOIA are barred pursuant to FOIA’s one year Statute of Limitations.

As mentioned above, the only claims the South Carolina Supreme Court remanded were the Plaintiff’s FOIA causes of action. The individual Defendants assert in their Motions for Summary Judgment that they are no longer proper parties to this litigation since these individual Defendants are not a “Public Body” within the meaning of FOIA or any claims against them are now moot. Motion for Summary Judgment P. 2

³ Interestingly Ron Wilson was not included in the Motions for Summary Judgment.

¶ 2. S.C. R. Civ. P. 17(a) provides in part that every action shall be prosecuted in the name of the real party in interest. *Thomas v. Grayson*, 318 S.C. 82 (S.C. 1995).

Based on their assertions, these individual Defendants claim they are no longer proper parties to this litigation, thus they do not have standing to seek dismissal of the Amended Complaint nor assert any statute of limitations defense. The statute of limitations is an affirmative defense that must be pled and proven. *Rule 8(c)*, *SCRCP. Arant v. Kressler*, 327 S.C. 225, 228 (S.C. 1997).

These individual Defendants claim they are no longer proper parties, thus they are estopped from asserted asserting such a claims.

S.C. Code Ann. § 30-4-80 (a) provides:

All public bodies, except as provided in subsections (b) and (c) of this section, must give written public notice of their regular meetings at the beginning of each calendar year. The notice must include the dates, times, and places of such meetings. Agenda, if any, for regularly scheduled meetings must be posted on a bulletin board at the office or meeting place of the public body at least twenty-four hours prior to such meetings. **All public bodies** must post on such bulletin board public notice for any called, special, or rescheduled meetings. Such notice must be posted as early as is practicable but not later than twenty-four hours before the meeting. The notice must include the agenda, date, time, and place of the meeting. This requirement does not apply to emergency meetings of **public bodies**. (Bold Added)

S.C. Code Ann. § 30-4-20(a)

"Public body" means any department of the State, a majority of directors or their representatives of departments within the executive branch of state government as outlined in Section 1-30-10, any state board, commission, agency, and authority, **any public or governmental body or political subdivision of the State, including counties**, municipalities, townships, school districts, and special purpose districts, or any organization, corporation, or agency supported in whole or in part by public funds or expending public funds, including committees, subcommittees, advisory committees, and the like of any such body by whatever name known, and includes any quasi-governmental body of the State and its political subdivisions, including, without limitation, bodies such as the South Carolina Public Service Authority and the South Carolina State Ports Authority. Committees of health care facilities, which are subject to this chapter, for medical

staff disciplinary proceedings, quality assurance, peer review, including the medical staff credentialing process, specific medical case review, and self-evaluation, are not public bodies for the purpose of this chapter.(Bold Added)

S.C. Code Ann. § 30-4-20 (b) provides:

"Person" includes any individual, corporation, partnership, firm, organization or association.

In its responses to Plaintiff's requests for Admission, which are attached hereto, the Defendant Anderson County admitted that it was a public body within the meaning of FOIA.

2. Defendant Anderson County is a "Public Body" within the meaning of the "Freedom of Information Act" S.C. Code Ann. § 30-4-10.

RESPONSE: Admit.

The individual Defendants assert in their motion that the Anderson County Council is the only public body within the meaning of FOIA. Motion for Summary Judgment P. 2 ¶ 2.

The Defendant Anderson County has not filed an answer and has not pled the affirmative defense of the Statute of Limitations,⁴ although counsel for Respondent Anderson County did forward an email to the Court joining in the other Respondents' Motion for Summary Judgment. Logan Email.

Further, in its responses to Plaintiff's requests for admission states that there genuine issues of material fact. See the Responses to Request to Admit #'s 5, 6, 7, & 8.

FOIA VIOLATIONS REGARDING PERSONNEL COMMITTEE

⁴ Appellant's counsel did agree to an extension of time for the Respondent Anderson County to file and serve an Answer but the Court ruled prior to the Respondent Anderson County Answering the Amended Complaint.

Plaintiff has alleged in his Verified Amended Complaint that the actions of the Personnel Committee were in violation of and prohibited by FOIA. Am. Comp. ¶¶ 111 – 115.

S.C. Code Ann. § 30-4-80 provides:

“All public bodies must post on such bulletin board public notice for any called, special, or rescheduled meetings. Such notice must be posted as early as is practicable but not later than twenty-four hours before the meeting. The notice must include the agenda, date, time, and place of the meeting.” Bold Added

The actions, conduct and/or omissions of the Anderson County Personnel Committee would fall under this provision as a Special or Called meeting. A "special" meeting is a meeting called for a special purpose and at which nothing can be done beyond the objects specified for the call. *Lambries v. Saluda County Council, 2014 S.C. LEXIS 193, 18-19 (S.C. June 18, 2014).*

Further, at the November 18, 2008 Anderson County Council Meeting Ron Wilson stated:

“I've talked a little bit with Larry Greer in the last couple of days about it, and I think this is a possible solution.” Exhibit A to Requests for Admission Pg. 000025.

At the November 18, 2008 Anderson County Council Meeting, Larry Greer admitted having conversations with Ron Wilson.

LARRY GREER: In my conversations with Mr. Wilson, the sum that's listed in the severance agreement, and it is not one and a half million --- Exhibit A to Requests for Admission Pg. 000029.

Additionally, at the November 18, 2008 Anderson County Council Meeting, Chairman Michael Thompson admitted both Ron Wilson and Larry Greer were members of the Personnel Committee.

MICHAEL THOMPSON: Mr. Waldrep, what I did was talked to Mr. Greer, who is a member of the personnel committee, and I spoke to Mr. Wilson, who is the chairman. And I made my wishes and desires known and that's where I left it. Who else spoke to these gentlemen, I do not know. Exhibit A to Requests for Admission Pg. 000037.

S.C. Code Ann. § 30-4-20 (e) provides:

"Quorum" unless otherwise defined by applicable law means a simple majority of the constituent membership of a public body.

Further, Anderson County Ordinance § 2-370 provides that the chairperson of council may appoint an *ad hoc* committee, such as the Personnel Committee referenced here. Anderson County Code of Ordinances § 2-361 establishes Six (6) standing committees.

Further, Anderson County Code of Ordinances § 2-365 provides, that no meeting of any committee shall be called by the committee chairperson **or by a majority of the members without 24 hours notice to all members and the news media** and required compliance with the South Carolina Freedom of Information Act. (bold added)

Clearly, these two (2) Personnel Committee members' conversations were in violation of and prohibited by FOIA, since applicalble law (Anderson County Ordinance § 2-365) required notice if a majority of a committee members had a meeting.

Further, § 2-366 of the Anderson County Code of Ordinances requiried that all committee recommendations requiring formal action by council shall be furnished to all members of council prior to consideration and adoption by council. It is obvious from a reading of the minutes of the November 18, 2008 Anderson County Council meeting, this was not done, and it is obvious from the minutes that it was deliberate since a majority of the Anderson County Council knew about it.

This suit was filed on November 16, 2009; the Anderson County Council meeting at issue here was held November 18, 2008 and Ron Wilson stated at that November 18, 2008 meeting: "I've talked a little bit with Larry Greer in the last couple of days about it,...". The word "Couple" used in normal language means two (2), thus the inference is that Ron Wilson and Larry Greer, a majority and quorum of the Personnel Committee, were having illegal meetings about this matter on November 16, 2009, the date this suit was filed.

Clearly, the terms of the Severance Agreement were decided upon outside of any formal Anderson County Council Meeting or any formal Anderson County Personnel Committee meeting.

Additionally, Plaintiff could not have known of these FOIA violations until November 18, 2008 when this scam took place.

The essential purpose of the FOIA is to protect the public from secret government activity. ... ("FOIA was enacted to prevent the government from acting in secret.") *Burton v. York County Sheriff's Dep't*, 358 S.C. 339, 347 (S.C. Ct. App. 2004).

South Carolina recognizes the discovery rule and pursuant to the discovery rule, the limitations period commences when the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some claim against another party might exist. *Burgess v. Am. Cancer Soc'y. S.C. Div., Inc.*, 300 S.C. 182, 386 S.E.2d 798 (Ct.App.1989). Under the discovery rule, the statute of limitations begins to run from the date the injured party either knows or should know, by the exercise of reasonable diligence, that a cause of action exists for the wrongful conduct. See *Dean v.*

Ruscon Corp., 321 S.C. 360, 468 S.E.2d 645 (1996); S.C. Code Ann. § 15-3-535. See also *Berry v. McLeod*, 328 S.C. 435, 492 S.E.2d 794 (Ct.App.1997).

Further, South Carolina recognizes the doctrine of equitable tolling. "[i]n order to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits, the doctrine of equitable tolling may be applied to toll the running of the statute of limitations." *54 C.J.S. Limitations of Actions § 115 (2005)*. "Equitable tolling is a nonstatutory tolling theory which suspends a limitations period." *Ocana v. Am. Furniture Co.*, 2004 NMSC 18, 135 N.M. 539, 91 P.3d 58, 66 (N.M. 2004). *Hooper v. Ebenezer Senior Servs. & Rehab. Ctr.*, 386 S.C. 108, 115 (S.C. 2009).

Equitable tolling may be applied where it is justified under all the circumstances. *Hooper v. Ebenezer Senior Servs. & Rehab. Ctr.*, 117 (S.C. 2009). FOIA itself refers to and provides for equitable remedies.

Plaintiff's Verified Amended Complaint is replete with allegations that the actions of the Personnel Committee regarding Preston were quite furtive. Am. Comp. ¶¶ 24 – 36. A verified complaint is an acceptable substitute for an affidavit at the summary judgment phase as long as the pleading satisfies S.C. R. Civ. P. 56(e). *Dawkins v. Fields*, 354 S.C. 58 (S.C. 2003).

Further, the actions involving certain Anderson County Members, i.e., Ron Wilson, Michael Thompson and Bill McAbee, surrounding this whole matter were rather questionable, to say the least. Comp. ¶¶ 33 – 63.

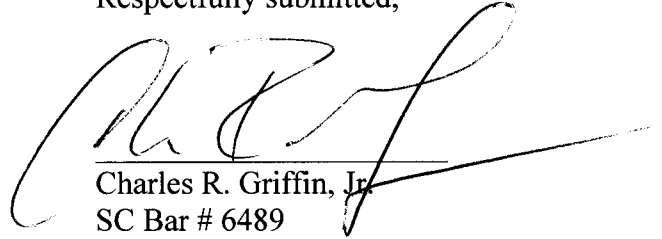
Given the more than dubious manner in which the Severance Agreement was acted upon by the Personnel Committee under the questionable leadership of convicted swindler Ron Wilson, equitable tolling clearly applies to this case.

Assuming the Affirmative Defense of the Statute of Limitations is properly before this Court, clearly, Plaintiff has established as a matter of law that any applicable statute of limitations be tolled and that Plaintiff be granted Summary Judgment in his favor on his FOIA claim as it relates to the actions of the actions of the Anderson County Personnel Committee which formed the basis of the Agenda being Amended at the November 18, 2008 Anderson County Meeting.

CONCLUSION

For the reasons stated above, the Appellant asks that the Order of the Court appealed from be reversed.

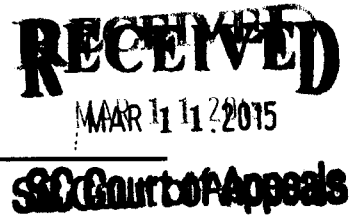
Respectfully submitted,

A handwritten signature in black ink, appearing to read 'C. R. Griffin, Jr.', written over a horizontal line.

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March 9, 2015

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS



APPEAL FROM ANDERSON COUNTY
COURT OF COMMON PLEAS
HON. ROGER L. COUCH

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Capacities and Individually; MICHAEL THOMPSON, in His Official Capacities and
Individually; GRACIE FLOYD, in Her Official Capacities and Individually; ...
RESPONDENTS

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on March 9, 2015 he served the
Appellant's Initial Brief and Designation of Matter to be included in the Record on
Appeal on the Respondents by depositing copies of same in the U.S. Mail with postage
prepaid addressed to the following:

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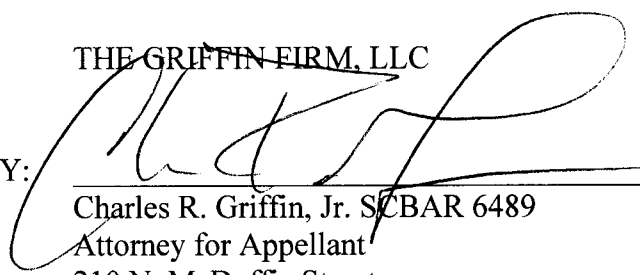
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SC Court of Appeals

March 9, 2015

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RE: Richard Freemantle, individually and on behalf of himself and all others similarly
situated v. Joey Preston, et al.
Appellate Case Number: 2014-002614

Dear Ms. Kitchings:

Enclosed, please find Appellant's Initial Brief, Designation of Matter to be included in
the Record on Appeal and along with Certificate of Service of same.

Sincerely,


Charles R. Griffin, Jr.

cc:

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