

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM ANDERSON COUNTY
Roger L. Couch, Circuit Court Judge

Case No. 2009-CP-04-4528

Richard Freemantle, individually and on behalf of
himself and all others similarly situated,

Appellant,

v.

Joey Preston, in His Official Capacities 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 Capacities and Individually, Bill McAbee, in
His Official Capacities and Individually, Larry Greer, in
His Official Capacities and Individually, Michael Thompson,
in His Official Capacities and Individually and
Gracie Floyd, in Her Official Capacities and Individually, Respondents.

**INITIAL BRIEF OF RESPONDENTS
PRESTON, WILSON, McABEE, GREER,
THOMPSON AND FLOYD**

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Statutes and Rules

S.C. Code Ann. § 30-4-80.

S.C. Code Ann. § 30-4-100(a).

Rule 207(b)(2), SCACR.

Rule 208(b)(6), SCACR.

Rule 220(c), SCACR.

STATEMENT OF THE CASE

In accordance with Rule 208(b)(6), SCACR, the Respondents Joey Preston, Ron Wilson, Bill McAbee, Larry Greer, Michael Thompson and Gracie Floyd (hereinafter referred to as Individual Respondents") adopt by reference and incorporate herein the "Statement of Case" included in the brief filed by the Respondents Anderson County and Anderson County Council.

ARGUMENTS

I. The Individual Respondents are not proper parties for an enforcement action under the Freedom of Information Act, and it appears that the Appellant has conceded in his opening brief that the Individual Respondents are no longer parties with respect to his remaining claims.

In his Amended Complaint, the Appellant Richard Freemantle alleged violations of the notice and agenda requirements under the South Carolina Freedom of Information Act (FOIA). In granting summary judgment for all Respondents,¹ Circuit Court Judge Roger Couch ruled that the Appellant's remaining FOIA claims were barred by the South Carolina Supreme Court's decision in *Lambries v. Saluda County Council*, 409 S.C. 1, 760 S.E.2d 785 (2014). As a result, Judge Couch did not find it necessary to reach any alternative grounds for summary judgment as asserted by the Respondents.

Nonetheless, the Individual Respondents submit as an additional sustaining ground that only a "public body," in this case Anderson County Council, is a proper defendant for an enforcement action under FOIA.² S.C. Code Ann. § 30-4-

¹ By footnote in his opening brief, the Appellant asserts that Respondent Ron Wilson did not join in the motion for summary judgment filed by the other Individual Respondents. That is incorrect. Wilson was clearly a moving party as stated in the motion itself. (R. ____).

² In the case of *I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000), the Supreme Court explained that a respondent "may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court." 526 S.E.2d at 723. "The appellate court may

80 expressly places the responsibilities of compliance with FOIA on the "public body." *See, Bellamy v. Brown*, 305 S.C. 291, 408 S.E.2d 219, 221 (1991) ("[t]he FOIA creates an affirmative duty on the part of public bodies to disclose information"). In other words, the "public body" is the only entity against which injunctive and declaratory relief may be entered. There is no statutory authority for asserting a FOIA claim against any individual employees of a government entity or any elected officials. Likewise, a FOIA claim cannot be asserted against a governmental employee or official in his/her individual capacity.³

On appeal, the Appellant appears to agree with the position taken by the Individual Respondents and further appears to have abandoned his claims against them. In particular, the Appellant includes in his opening brief a caption which reads: "The individual Defendants are no longer real parties in interest as to Appellant's FOIA claims" and "thus they have no standing to object to the relief sought." *See*, Appellant's Brief, p. 9. That appears to be an affirmative representation that the Appellant agrees that the FOIA claims may not be asserted

review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment." *Id.* *See also*, Rule 220(c), SCACR ("[t]he appellate court may affirm any ruling, order, or judgment upon any ground(s) appearing in the record"); Rule 207(b)(2), SCACR ("[r]espondent's brief may also contain argument asking the court to affirm for any ground appearing on the record as provided by Rule 220(c)").

³ Even if individual County Council members were held to be proper defendants for claims brought under FOIA, those claims for prospective relief against former Council members are now moot. No prospective relief may be awarded against a former Council member. The

against the Individual Respondents and that no relief may be awarded against them under FOIA. The Appellant further proceeds to state that the Individual Respondents "do not have standing to seek dismissal of the Amended Complaint nor assert any statute of limitations defense." *See*, Appellant's Brief, p. 10. That statement, therefore, constitutes an acknowledgement that the Appellant no longer considers the Individual Respondents to be parties.

In sum, based on the Appellant's brief, it appears that he has abandoned his FOIA claims against the Individual Respondents and acknowledges that he cannot obtain any prospective relief under FOIA against them. Nonetheless, even if the Appellant has not specifically abandoned his claims against the Individual Respondents, the law clearly reflects that a FOIA enforcement action may only be pursued against a "public body" and not against any governmental employee or official in his/her individual capacity. On this basis, this Court is urged to affirm the dismissal of the remaining FOIA claims against the Individual Respondents.

Respondents Wilson, McAbee, Greer and Thompson are no longer members of Anderson County Council, and therefore, the FOIA claims against them are moot.

II. The Appellant has not challenged the actual summary judgment ruling made by the Circuit Court but rather has attempted to interject a new issue which was never pled nor argued nor decided in the court below and thus is not properly raised for the first time on appeal.

As indicated, Judge Couch granted summary judgment to all Respondents on the basis of the Supreme Court's recent decision in *Lambries v. Saluda County Council*, 409 S.C. 1, 760 S.E.2d 785 (2014). In *Lambries*, the Supreme Court ruled that "FOIA's notice statute does not require an agenda to be issued for a regularly scheduled meeting." 760 S.E.2d at 794. The agenda for the November 18, 2008 Council meeting included an agenda item entitled "Discussion of the Authority of the County Council to employ the Administrator." As such, the public was on notice that the issue of the employment of the County Administrator was a subject of discussion at that Council meeting. Nonetheless, because the Supreme Court in *Lambries* has explained that no agenda was even statutorily required, the absence of a more specific agenda item (or even any agenda item) is not a FOIA violation. In short, the County Council was not even required to issue an agenda, and for that reason, Judge Couch correctly granted summary judgment.

On appeal, the Appellant does not challenge that ruling. Instead, he appears to focus on another FOIA claim that was never pled nor argued in the lower court nor decided by Judge Couch. The Appellant appears to argue that two members of the Personnel Committee, Ron Wilson and Larry Greer, acknowledged at the November 18, 2008 Council Meeting that they had "talked" in the "last couple of

days," with the premise being that that conversation violated FOIA notice requirements. In addition to the fact that this claim was not raised or ruled on below, the Appellant's position is legally flawed. A conversation between two Council members – even two committee members – does not constitute a committee meeting and does not violate FOIA. In fact, Anderson County Code of Ordinances specifically provides that "[a] minimum of three persons is needed to establish a quorum for committee meetings." *See*, Anderson County Code of Ordinances, § 2-369. Consequently, a conversation between two Council members is not a committee meeting subject to any notice provisions under FOIA or Section 2-365 of the Anderson County Code of Ordinances.

Nonetheless, this Court should not even reach this new issue not raised or decided below. In its recent decision in *Stevens & Wilkinson of South Carolina, Inc. v. City of Columbia*, 409 S.C. 563, 762 S.E.2d 693 (2014), the Supreme Court reiterated that "[i]ssue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide the Court with a platform for meaningful appellate review." 762 S.E.2d at 695. "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *Id.* In *Stevens & Wilkinson*, the Supreme Court ultimately found that it was "improper" for the appellant "to concede the sole issue before the circuit court and attempt to inject new issues and theories on appeal." *Id.*

Yet, that is precisely what the Appellant is attempting to do in the present case. He has not challenged the basis for the summary judgment entered by Judge Couch, but instead, he raises a new claim or issue which was never pled, argued or decided in the court below. Moreover, even if the claim had been previously pled, there is no question that Judge Couch did not address the issue in his summary judgment order and the Appellant did not file a motion pursuant to Rule 59(e), SCRCF, in order to obtain a ruling. The Appellant's new FOIA claim is, therefore, clearly not preserved for appellate review and should not even be addressed by this Court on its merits.

III. The Appellant's remaining Freedom of Information Act claims arising prior to November 16, 2008 are statutorily time-barred.

Finally, as another additional sustaining ground, the Individual Respondents submit that the Appellant's allegations of any FOIA violations occurring prior to November 16, 2008, which includes claims pertaining to the Personnel Committee meeting held on November 4, 2008, are statutorily barred under S.C. Code Ann. § 30-4-100(a).

S.C. Code Ann. § 30-4-100(a) provides in part as follows:

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.

S.C. Code Ann. § 30-4-100(a). This is a one-year statute of limitations or statute of creation. *See, Knight Publishing Co. v. University of South Carolina*, 295 S.C. 31, 367 S.E.2d 20 (1988), *reversed on other grounds, McLendon v. South Carolina Highways & Transportation*, 313 S.C. 525, 443 S.C. 539 (1994). The Supreme Court in *Knight Publishing* described the necessity of filing within the one year period as "an indispensable condition of the action." 367 S.E.2d at 22. Likewise, in *Simpson v. Sanders*, 314 S.C. 413, 445 S.E.2d 93 (1994), the Supreme Court acknowledged that a failure to timely commence an action within the statute of creation is no longer recognized to be "a subject matter jurisdiction defect" but the Court also did reaffirm that "an action under a statute of creation cannot be maintained unless brought within the time allowed by that statute." 445 S.E.2d at 94, n.1.

The Appellant argues that a "discovery rule" should apply to S.C. Code Ann. § 30-4-100(a); however, the General Assembly did not expressly include a discovery rule in the statute. Moreover, in *Knight Publishing*, the Supreme Court already rejected the notion that a "statute of creation" includes a discovery rule. In fact, South Carolina courts typically reject the application of a discovery rule where not provided by statute. *See, Jones v. City of Folly Beach*, 326 S.C. 360, 483 S.E.2d 770 (Ct. App. 1997) (rejecting discovery rule in defamation cases).

In sum, the Appellant filed this action on November 16, 2009. The Appellant's allegations of a FOIA violation occurring prior to November 16, 2008 occurred more than one year prior to the filing of this action and hence are statutorily time-barred under S.C. Code Ann. § 30-4-100(a).

CONCLUSION

Based on the foregoing discussion and analysis, the Respondents Joey Preston, Ron Wilson, Bill McAbee, Larry Greer, Michael Thompson and Gracie Floyd respectfully request that this Court affirm the order of Circuit Court Judge Roger L. Couch, granting summary judgment to all Respondents.

Respectfully submitted,

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