

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Appellate Case No. 2013-001273

RECEIVED

JUN 24 2015

SC Court of Appeals

South Carolina Public Interest Foundation and Waring S. Howe, Jr., individually, and on behalf of all others similarly situated, Petitioners,

v.

James H. "Jay" Lucas, in his official capacity as Speaker of the South Carolina House of Representatives, Hugh K. Leatherman, in his official capacity as President of the South Carolina Senate, Representative Peter M. McCoy, Jr., Senator George E. "Chip" Campsen, and the State of South Carolina, Respondents.

PETITION FOR REHEARING

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Petitioners moved for Attorneys' Fees under S.C. Code Ann. § 15-77-300, contending that the Petitioners were prevailing parties. This Court ruled Petitioners were not prevailing parties. Petitioners respectfully suggest that pursuant to the reasoning of *Sloan v. Friends of the Hunley* 393 S.C. 152, 157-159, 711 S.E.2d 895, 897-898 (2011), Petitioners are the prevailing parties. The Friends of the Hunley made an argument similar to the respondents in this case and similar to the ruling of this Court. The Supreme Court rejected that argument in finding that Sloan was entitled to attorneys' fees as the prevailing party.

Friends argues that Sloan was not a prevailing party under this definition "because Sloan did not receive any of the relief he requested in his complaint" **We reject Friends' position** and agree with the trial court that **Sloan was a prevailing party for purposes of the FOIA attorney's fees provision**. We find persuasive the decision of the Montana Supreme Court in *Havre Daily News, LLC v. City of Havre*, 333 Mont. 331, 142 P.3d 864 (2006). The *Havre* court addressed whether the post-complaint **voluntary production** of disputed documents precludes prevailing party status to a plaintiff:

Although Havre correctly observes that the Newspaper did not technically "prevail" in its action in the District Court, the court granted summary judgment in favor of Havre precisely because Havre mooted the case by providing the Newspaper with unredacted copies of the Reports. Absent Havre's conduct, the case would not have become moot. **In mooting the case, Havre provided the Newspaper with the very relief it sought to procure through litigation; thus, the Newspaper has prevailed in substance, albeit without court intervention.** Given these circumstances, we will consider the Newspaper to be the prevailing party with respect to its request for unredacted copies of the Reports. Otherwise, a similarly situated party could, after extensive litigation, at the eleventh hour, and facing imminent defeat, simply moot a case in order to dodge this fee-shifting statute.

Id. at 878 (emphasis added). Similarly, under the facts of this case, we find that **Sloan is the prevailing party** under section 30-4-100(b). When a public body frustrates a citizen's FOIA request to the extent that the citizen must seek relief in the courts and incur litigation costs, the public body

should not be able to preclude prevailing party status to the citizen by producing the documents after litigation is filed.

Sloan v. Friends of the Hunley, 393 S.C. 152, 156-57, 711 S.E.2d 895, 897 (2011) (emphasis in *Havre* quotation added by the Supreme Court of South Carolina; other emphasis added). Our Supreme Court found that its ruling on attorneys fees was in keeping with the FOIA generally and the attorneys' fees provision, in particular. The Court concluded:

Here, Sloan's complaint prompted Friends to do what a series of FOIA letter-requests could not accomplish—produce the requested documents. Accordingly, **Sloan prevailed and is entitled to an award of attorney's fees.**

* * *

We affirm the trial court's finding that Sloan is a prevailing party under FOIA and is thus entitled to an award of his attorney's fees.

Id. 393 S.C. 152, 158-159, 711, S.E.2d 895, 898 (2011) (emphasis added). The Supreme Court held that a plaintiff can be a prevailing party, and entitled to attorneys' fees **even in the absence of an actual court ruling.**

In a similar case, the Supreme Court again ruled that Mr. Sloan was a prevailing party, **even when his case was dismissed on mootness.** The Department of Revenue had provided the requested records three weeks after Sloan had filed suit, and then moved to dismiss the action. The trial court dismissed the action for mootness, but Sloan moved for attorneys' fees. The trial court refused to award them, and Sloan appealed. The Supreme Court took the case away from the Court of Appeals using SCACR 204. The Supreme Court affirmed the dismissal on grounds of mootness, but also ruled as follows:

[T]here is no continuing violation of FOIA upon which the trial court could have issued a declaratory judgment." *Friends I*, 369 S.C. at 26, 630 S.E.2d at 478. **This, however, does not end the case, for Sloan further sought to recover his attorney's fees** and costs⁴ as provided in section 30-4-

100(b).

Sloan is the prevailing party. See *Sloan v. Friends of the Hunley, Inc. (Friends II)*, 393 S.C. 152, 157, 711 S.E.2d 895, 897 (2011) (“When a public body frustrates a citizen’s FOIA request to the extent that the citizen must seek relief in the courts and incur litigation costs, the public body should not be able to preclude prevailing party status to the citizen by producing the documents after litigation is filed.” (citations omitted)). As the prevailing party under these circumstances, **the trial court erred in not awarding Sloan his reasonable attorney’s fees and costs. Sloan is entitled to recover his reasonable attorney’s fees and costs in this action.** See *Litchfield Plantation Co. v. Georgetown Cnty. Water & Sewer Dist.*, 314 S.C. 30, 34, 443 S.E.2d 574, 576 (1994) (Toal, J., concurring in part, dissenting in part) (“A governmental agency should not be allowed to stonewall an FOIA request without some penalty for its actions.”) **We reverse the trial court and remand to the trial court for an award of reasonable attorney’s fees and costs to Sloan.**

Sloan v. South Carolina Department of Revenue, 409 S.C. 551, 555-56, 762 S.E.2d 687, 698 (2014) (footnote omitted) (emphasis added).

The critical issue that supports these findings was that the **unilateral** actions of the government party gave those plaintiffs the relief they sought. In the case at bar, Respondents likewise took unilateral actions. **“In mootng the case, [Respondents] provided the [Petitioners] with the very relief [they] sought to procure through litigation; thus, the [Petitioners have] prevailed in substance, albeit without court intervention.”** *Sloan v. Friends of the Hunley*, 393 S.C. 152, 156-57, 711 S.E.2d 895, 897 (2011), quoting *Havre Daily News, LLC v. City of Havre*, 333 Mont. 331, 142 P.3d 864, 878 (2006) (emphasis added by the Supreme Court of South Carolina).

Respondents were sued in their official capacities, as representatives of the body in which they serve, the South Carolina General Assembly. The General Assembly repealed the offending act. Respondents admit, “[T]he General Assembly enacted legislation that moots this appeal.” Respondents’ Return to Motion for Attorneys’ Fees, p. 3. All

Respondents litigated this case in their official capacities, with lawyers paid for by the State. Petitioners achieved their goal of invalidating the Act at issue through the unilateral action of the Respondents.

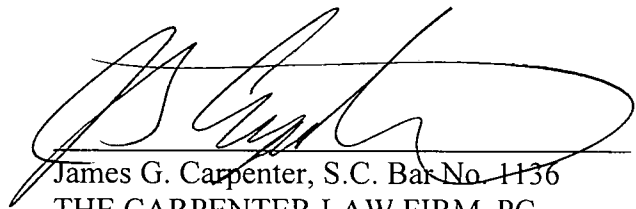
Just as the Supreme Court ruled in the *Friends of the Hunley* case, and in *Sloan v. South Carolina Department of Revenue*, this Court should also rule that the Petitioners are prevailing parties, because the Respondents made a unilateral change in position (repealing Act 130) long after suit was filed, and thereby provided the Petitioners the very relief they sought through litigation “albeit without court intervention.” *Sloan v. Friends of the Hunley*, 393 S.C. 152, 156-57, 711 S.E.2d 895, 897 (2011), quoting *Havre Daily News, LLC v. City of Havre*, 333 Mont. 331, 142 P.3d 864, 878 (2006).

Through May 23, 2015, Petitioners incurred \$148,931.25 in attorneys’ fees and \$4,756.38 in costs pursuing this matter, for a total of \$153,687.63. Respondents did not contest the amount of the attorneys’ fees listed in the affidavit of the Petitioners’ counsel. With all of the different teams of attorneys arrayed on the Respondents’ side of the courtroom, Petitioners suggest that the amount of Petitioners’ fees pale in comparison to what was most likely paid by or for the Respondents. The Court should find that Petitioners’ actual attorneys’ fees and costs were reasonable, and that Petitioners are entitled to a full award of attorney’s fees and costs as the prevailing parties in this action.

CONCLUSION

Petitioners are prevailing parties. The Respondents were not substantially justified in pressing their claims. No other factors make an award of attorneys' fees unjust. Wherefore, Petitioners pray the Court for a rehearing and for a ruling sending them an award of actual and reasonable attorneys' fees and costs from the Respondents.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'J. G. Carpenter', is written over a horizontal line.

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June 22, 2015

Certificate of Service

The undersigned attorney hereby certifies that he has served a copy of the foregoing Petition for Rehearing on counsel for Respondents by email and US Mail, postage prepaid, on Monday, June 22, 2015 addressed as follows:

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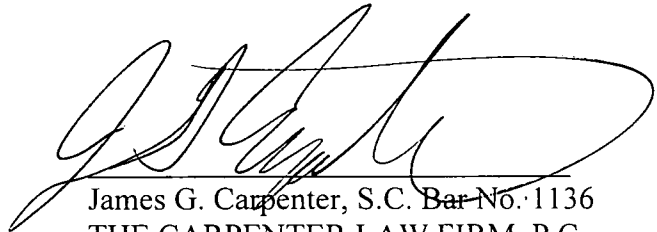
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June 22, 2015

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SC Court of Appeals

Re: *South Carolina Public Interest Foundation et al. vs. Harrell, et al*
Court of Appeals Case No. 2013-001273

Dear Ms. Allen:

I enclose the original and seven copies of Appellants' Petition for Rehearing.

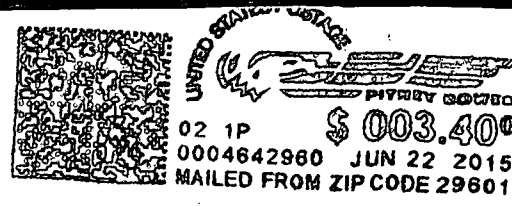
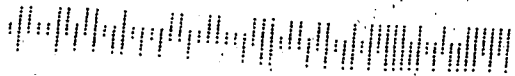
Please file the originals and return a clocked in copy to me in the enclosed, postage paid envelope.

Thank you very much.

Sincerely yours,
THE CARPENTER LAW FIRM, PC

James G. Carpenter

Enclosure
CC w/encl: all opposing counsel



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