

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM RICHLAND COUNTY

William Jeffrey Young, Circuit Court Judge

Appellate Case No. 2015-001760

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SEP 01 2015

SC Court of Appeals

South Carolina Public Interest Foundation and Edward D. Sloan, individually, and on behalf of all others similarly situated, Appellants,

v.

South Carolina Department of Transportation, and Robert J. St. Onge, Jr., Secretary of Transportation, Respondents.

Respondent's Memorandum on Appealability

Respondents respectfully submit this memorandum in accordance with the Court's request that the parties address the appealability of the Order of the Circuit Court.

Background.

Appellants appeal the Order of the Honorable William Jeffrey Young filed July 15, 2015, denying their petition for attorney fees under the Freedom of Information Act's fee shifting provisions, S.C. Code Ann. §34-4-100(b).

The underlying facts involve an inspector with the Department's Chester Maintenance section who directed a maintenance crew in the vicinity to push rocks and dirt that had washed from the driveway of her home onto the adjoining highway back onto her driveway. When the

Department learned of the incident through the report of a neighbor, it assigned three of its management personnel to investigate the matter and report to the Chief Counsel. The written report recommended the penalty of five-day suspension without pay of the inspector and lesser penalties of written and oral reprimands of the other personnel involved under the Department's progressive disciplinary policy. Those sanctions were imposed.

Subsequently, Appellants sued the Department and the inspector under the Uniform Declaratory Judgments Act, S.C. Code Ann. §15-53-10, *et seq.* (Rev. 2005), seeking an order that the actions of the employees violated the State Constitution's prohibition against using public resources for a private benefit. S.C. Code Const., art X §11 (Rev. 2009). South Carolina Public Interest Foundation and Edward D. Sloan, individually, and on behalf of all others similarly situated, v. South Carolina Department of Transportation, and Jane Doe, a DOT employee, No. 2013-CP-40-3677.¹ In discovery in that suit, Appellants sought a copy of the aforementioned investigation report. The Department resisted on the grounds that the employees had already been disciplined and disclosing their names would amount to the additional penalty of a public reprimand. The employees were entitled to their constitutional right of privacy which has been defined as being the right to be left alone; the right of a person to be free of unwarranted publicity. Sloan v. S.C. Department of Public Safety, 355 S.C. 321, 327, 586 S.E.2d 108, 110 (2003) (quoting Holloman v. Life Ins. Co. of Virginia, 192 S.C. 454, 458, 7 S.E.2d 169, 171 (1940)). Appellant's moved to compel production under Rule 37, SCRPC, and the Department submitted two versions of the report to the Court for *in camera* review: the full report and a version with the employee names redacted. After a hearing, the Honorable Robert E. Hood ordered production of the full un-redacted report and the Department complied.

¹ A bench trial was held August 27, 2015, before the Honorable Allison Renee Lee. The Court took the matter under advisement and asked for proposed orders by September 11, 2015.

Thereafter, Appellants moved for attorney fees under the instant case--a complaint they had filed to enforce the Freedom of Information Act as to the same investigative report. Because the FOIA attorney fee provision differs from the fee provisions contained in Rule 37(a)(4) in that there is no provision in the former expressly directing the court to consider whether the defendant's position was substantially justified or whether other circumstances make an award unjust, the Department argued that it would be deprived of the substantial right available to all litigants to argue justification and special circumstances. Judge Young denied Appellants' request for fees noting that they were not foreclosed from seeking those fees under the remedy they elected, *i.e.* Rule 37(a)(4), SCRCF.

Finality and Appealability.

The right to appeal a law case is provided by S.C. Code Ann. §14-3-330 and provides that the Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases and shall review upon appeal "...final judgments in such actions." Our Supreme Court has expounded on the meaning of "final judgment" declaring that a final judgment must

dispose of the cause, or a distinct branch thereof, as to all the parties, reserving no further questions or directions for future determination. It must finally dispose of the whole subject matter or be a termination of the particular proceedings or action, leaving nothing to be done but to enforce by execution what has been determined. In other words, a final judgment is one which operates to divest some right in such a manner as to put it beyond the power of the Court making the order to place the parties in their original position after the expiration of the term; that is, it must put the case out of Court, and must be final in all matters within the pleadings.

Good v. Hartford Accident & Indem. Co., 201 S.C. 32, 41-42, 21 S.E.2d 209, 212 (1942) (emphasis added). Judge Young's Order did not "finally dispose of the whole subject matter" or divest a right in such a manner to put it beyond the power of the Court to restore. Appellant's may yet seek and receive the relief they have requested by moving for costs and fees in case 3677 under the civil rules.

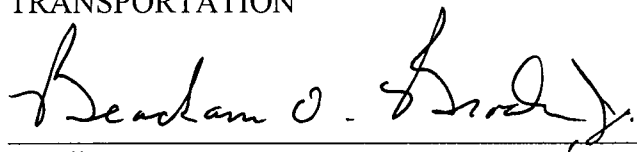
We have found no appellate case directly addressing the question of whether identical relief is available to an appellant in a separate, parallel case between the parties pending before the Circuit Court under a different file number. However, logically, the existence of two cases should not make a difference. Should Appellants apply for fees for prevailing on their motion to compel production of the investigative report in Case No. 2013-CP-40-3677 under Rule 37(a)(4), SCRCF, such relief, if granted, would moot this appeal. Given the availability of that relief, the appealed Order does not “finally dispose of the whole subject matter.”

Conclusion.

We believe the Order appealed from is not final and, thus not appealable. We ask that this appeal be dismissed.

Respectfully submitted,

SOUTH CAROLINA DEPARTMENT OF
TRANSPORTATION



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August 31, 2015

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CERTIFICATE OF SERVICE

I certify that I have caused a copy of the below-mentioned document to be served upon the following parties by depositing same in the United States mail, with postage prepaid and affixed thereto, addressed as follows, this 31st day of August, 2015.

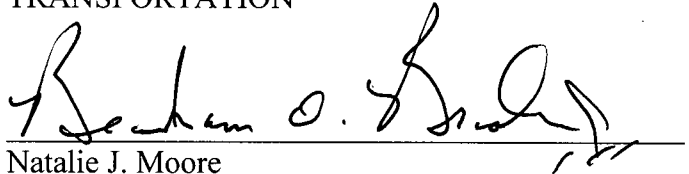
Pleadings Served:

1. RESPONDENT'S MEMORANDUM ON APPEALABILITY

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