

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY

Court of Common Pleas

William Jeffrey Young, Circuit Court Judge

Appellate Case No. 2015-001760

**RECEIVED**  
SEP 08 2015  
SC Court of Appeals

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

v.

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

**MEMORANDUM OF LAW ON APPEALABILITY OF ORDER**

September 2, 2015

Other Counsel of Record:  
Beacham O. Brooker, Jr. S.C. Bar No. 909  
Assistant Chief Counsel, SCDOT  
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Attorney for Respondents

James G. Carpenter, S.C. Bar No. 1136  
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(864) 235-1269  
Attorneys for Appellants

Appellants, the South Carolina Public Interest Foundation and Edward D. Sloan, Jr., submit this Memorandum addressing the appealability of the Order denying them attorneys' fees under the Freedom of Information Act (FOIA).

### **Statement of the Case**

On July 15 and 16, 2015, the Honorable William Jeffrey Young entered an Order and Judgment denying the Appellants' Motion for Attorneys' Fees under FOIA. On July 24, 2015, Appellants received written notice of the entry of the Order and Judgment. On August 16, 2015, Appellants gave Notice of Appeal. On August 25, 2015 the Clerk of Court wrote counsel for the Appellants, requesting a memorandum addressing the issue of the appealability of the Order.

### **Statement of Facts**

Appellants served a FOIA request on the DOT Respondents, requesting public records related to the rebuilding of a private driveway (owned by DOT employee) using public funds, equipment, supplies, materials, and personnel, a violation of the Constitution, Art. X, § 5 and 11. Respondents failed to produce many of the requested public records. In those they did produce, Respondents redacted information. Respondents asserted that the requested public records were exempt from production.

Appellants had sought the same public records in request for production of documents in a parallel case, *South Carolina Public Interest Foundation, et al. the South Carolina Department of Transportation and Jane Doe*, Civil Action No. 2013-CP-40-3677 ("the Driveway Case"). Respondents, citing the attorney client relationship, refused to produce the requested public records either in response to the Freedom of Information Act, or in response to discovery requests in the Driveway Case. Appellants simultaneously filed a motion to enforce FOIA in this case and moved to compel production of the documents in response to the discovery requests in the

Driveway Case. The Circuit Court granted the Motion to Compel Production of Documents in the Driveway Case. *See* Order entered July 2, 2014.

The Court ruled that Respondents were not legally entitled to withhold such documents from production, even though they were generated or discovered in the course of an investigation. A public body may not insulate a matter from production simply by involving an attorney. The DOT Respondents had investigated the rebuilding of a private driveway (of a DOT employee) in the normal course of events, and the involvement of an in-house attorney was not necessary. The Circuit Court ordered the production of the unredacted documents, and the Respondents produced them. Respondents' production of the documents (in the Driveway Case) made moot Appellants' claim for production under FOIA. However, because the Respondents produced the public records **after** Appellants had filed suit to enforce FOIA, Appellants are the prevailing parties under FOIA, and Appellants are entitled to an award of attorneys' fees.

Appellants petitioned the Circuit Court for costs and attorneys' fees pursuant to S.C. Code Ann. § 30-4-100(b), the FOIA attorneys' fees provision.

**(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(b) (emphasis added).

In a very similar case, the Supreme Court ruled that a defendant's production of the documents under FOIA, after suit was filed, did not moot the claim for an award of attorneys' fees, and the defendant's production of the records did not prevent the plaintiff from being a prevailing party under FOIA. *Sloan v. South Carolina Department of Revenue*, 409 S.C. 551, 555-56, 762 S.E.2d 687, 689 (2014). Accordingly, in this case Appellants are prevailing parties and are entitled to recover attorneys' fees and costs under S.C. Code Ann. § 30-4-100(b).

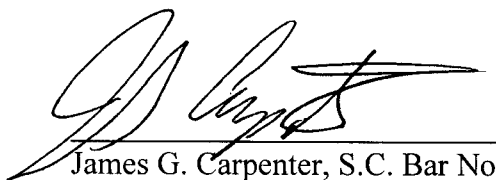
Respondents argued that the Circuit Court should not make an award of attorneys' fees and costs in this case because Respondents made a good faith argument about the withholding of documents under Rule 37(a)(4) in the Driveway Case. The Circuit Court's ruling that the Appellants were not entitled to attorneys' fees under FOIA was the Circuit Court's final action. Counsel for the Respondents has verbally informed the undersigned attorney that he knows of no other action that needs to be taken by the Circuit Court in this case.

Respondents also argue that because Appellants might win the Driveway Case and might be awarded attorneys' fees in the Driveway Case, this case is not ripe for review. Nothing remains to be done in the Circuit Court in this case. The Order denying the attorneys' fees was final. Therefore, Appellants properly gave notice of appeal of the final Order of the Circuit Court.

### CONCLUSION

This action has been fully concluded at the Circuit Court, and it is ripe for review at this Court on whether Appellants are prevailing parties under FOIA, and whether they are entitled to attorneys' fees.

Respectfully submitted,



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**PROOF OF SERVICE**

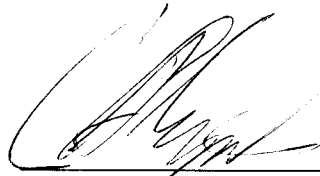
The undersigned attorney hereby certifies that he served a copy of the Memorandum of Law on Appealability of Order upon counsel for the Respondents by US Mail, postage prepaid this Wednesday, September 02, 2015, addressed as follows:

Beacham O. Brooker, Jr.  
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