THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM RICHLAND COUNTY

William Jeffrey Young, Circuit Court Judge

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SC Court of Appeals

Appellate Case No. 2015-001760

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.

INITIAL BRIEF OF RESPONDENT

SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION

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Respondents, the South Carolina Department of Transportation and Robert St. Onge, Secretary of Transportation, respectfully submit this brief in response to Appellant's Brief.

STATEMENT OF THE CASE

Appellants appeal an Order of the Honorable William Jeffrey Young, filed July 15, 2015, in Richland County denying their request for attorney fees under the Freedom of Information Act's fee shifting provision, S.C. Code Ann. §30-4-100(b) (Rev. 2007), and noting that fees may still be available under a separate case pursuant to Rule 37(a)(4), SCRCP.

STATEMENT OF FACTS

On July 1, 2013, Plaintiffs filed a Complaint in another suit, 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 (Sloan I). That Complaint seeks an Order under the Uniform Declaratory Judgments Act, S.C. Code Ann. §15-53-10, *et seq.*, declaring that the use of Department personnel and equipment to repair a private driveway violated Article X, Section 11, of the South Carolina Constitution preventing the credit of the State from being pledged or loaned for the benefit of private individuals or companies. That matter is currently pending a decision by the Honorable Allison Renee Lee after a bench trial on the merits held August 27, 2015.

The Department and St. Onge responded to plaintiffs' discovery requests in Sloan I on August 20, 2013. In those responses, an internal investigative report prepared by the

Department's Director of Maintenance office at the request of the Chief Counsel was withheld on the ground that it was attorney-client privileged material. In its responses, Defendants also objected to requests for the names of its personnel involved and its internal reports on the incident on grounds of invasion of privacy and relevance. .

Plaintiffs moved to compel production of the report under Rule 37, SCRCP. In response, Defendants delivered to the court two versions of the report for *in camera* review—the complete report, and a copy with the employee names redacted. On October 24, 2013, Judge Robert E. Hood heard counsel on Plaintiffs Motion to Compel Production of Documents in Sloan I, and subsequently ordered that the full investigative report that Defendant had delivered under seal be disclosed. Defendant complied with that order delivering the full report.

Thereafter, Appellants filed this suit under the caption herein against the Department and the Secretary of Transportation, Sloan II, seeking the same report under the Freedom of Information Act, S.C. Code Ann. §30-4-10, *et seq.* (FOIA). Following Judge Hood's Order to produce in Sloan I, Appellant's applied for their costs and fees in Sloan II under subsection (b) of S.C. Code §30-4-100 arguing that, because they had successfully obtained the investigation report in Sloan I, they were prevailing parties under the FOIA statute and deserved to be paid their costs and fees.

Defendants argued that allowing a litigant to proceed simultaneously under FOIA and under the discovery rules has the effect of depriving a governmental defendant in court of substantial rights available to all litigants. The reason lies in the differing language between the FOIA fee-shifting statute and that contained in the Rules of Civil

Procedure. Subsection (b) of §30-4-100 of FOIA states simply: "If a person or entity seeking such relief prevails, he or it may be awarded reasonable attorney fees and other costs of litigation." By contrast, Rule 37(a)(4), SCRCP, allows the party opposing disclosure the opportunity to assert that its position was substantially justified in order to avoid payment of fees. Allowing a party to file a concurrent suit under FOIA would set a precedent that a government defendant would never be permitted to advance an argument of substantial justification thereby depriving it of a right available to all other litigants.

In his Order, Judge Young noted the fairness to both parties of denying the instant petition for fees explaining that the Plaintiffs still had an opportunity to seek fees under Sloan I the actual case they sought production in and doing so would preserve Defendants' right to argue substantial justification for withholding the documents. This appeal followed. Appellants have not moved for their discovery costs and fees in Sloan I.

STATEMENT OF THE ISSUES ON APPEAL

1. Whether the trial court abused its discretion in its refusal to award fees this action, Sloan II, where fees may be available through the fee-shifting provisions of the Rule Petitioners actually pursued?

2. Whether the Respondents were substantially justified in withholding and redacting the records sought?

ARGUMENT

I. The trial court did not abuse its discretion.

Because the statute providing for awards to prevailing parties in suits to enforce FOIA uses the term "may," an award under that statute is discretionary with the trial judge. Litchfield Plantation Co., Inc. v. Georgetown County Water and Sewer District,

314 S.C. 30, 33, 443 S.E.2d 574, 576 (1994). The decision to award or deny attorneys' fees under a state statute will not be disturbed on appeal absent an abuse of discretion. Kiriakides v. Sch. Dist. of Greenville County, 382 S.C. 8, 20, 675 S.E.2d 439, 445 (2009) (citing Layman v. State, 376 S.C. 434, 444, 658 S.E.2d 320, 325 (2008)). An abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions. *Id.*, 675 S.E.2d at 445. Neither is present here. The trial court noted the unfairness of allowing a litigant against the government to seek production of documents under Rule 37, SCRCP, simultaneously seek the same documents under FOIA, then, after prevailing under the former, demanding fees under the latter. As the trial court's Order points out, Rule 37 (a)(4) allows losing parties to argue that their litigating position was substantially justified or that other circumstances exist that would make an award unjust. Although Respondents would argue that these factors may be considered in the discretionary decision of the judge under the FOIA fee shifting provision, courts are not expressly directed to consider those factors under that Code section. The result of sanctioning this dual course approach to discovery may mean that a State defendant may never be able to avail itself of the protections provided by Rule 37(a)(4) that is available to every other litigant in our courts. Finally, as the trial court noted, it is not unfair to the Petitioner to be required to seek their fees under the Civil Rules because that is the course they chose to pursue.

Secondly, Petitioners were not prevailing parties in their FOIA suit, Sloan II. Rather, they successfully obtained an order for disclosure of the report in their declaratory judgment action, Sloan I. The existence of two lawsuits under two separate statutes suffices to distinguish this matter from Sloan v. Friends of the Hunley, 393 S.C.

152, 711 S.E.2d 895 (2011). There, the Supreme Court declared that producing requested information under FOIA only after suit to enforce the request was filed in order to deny the requester prevailing party status would frustrate the Act's intent and allow agencies to stonewall the request without penalty. Respondents do not argue in this case that Petitioners are not entitled to fees because the documents were produced prior to court action in their FOIA suit. Rather, Respondents attempts to assert their rights under the civil discovery rules to argue that withholding employees' names on privacy grounds was substantially justified and that Petitioners' lack of standing to bring the underlying suit for declaratory judgment, Sloan I, is a circumstance making an award unjust.

II. Respondents were substantially justified in withholding and redacting the document sought on grounds of privacy. Petitioners' lack of standing in the underlying suit is a circumstance that would make an award unjust.

The Respondents were substantially justified in seeking to protect the information sought in this matter even though the court ordered the information be disclosed. In Sloan I, Appellants seek an order declaring that a highway inspector's direction to a maintenance crew to clean the highway in front of her house and redeposit the dirt and stone back on her driveway violated the State Constitution's prohibition against the use of public resources for private benefit. Respondents ordered an internal investigation and issued disciplinary action under the Department's employee disciplinary policy. The inspector was suspended for a week without pay. Having served the time, she is entitled to expect no further penalty. Publishing her name amounts to a public reprimand and additional penalty. Public reprimand is a well-known and frequently utilized sanction or penalty in disciplinary regimes. See, e.g., Rule 413, Rules for Lawyer Disciplinary

Enforcement, Rule 7 (b)(3) (Public reprimand as the third most severe sanction for lawyer misconduct.) In the lawyer disciplinary sphere, the complaint and the identity of the lawyer being investigated is confidential until such time as the sanctions of disbarment, suspension, or public reprimand are imposed. *Id.,* Rule 12. Respondents were justified in seeking to conceal her identity even though the court denied its motion due to the discovery rules' bias in favor of disclosure.

The South Carolina Supreme Court has defined the constitutional right of privacy as 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)). Despite repeatedly printing the name of the inspector in their court filings, plaintiffs have yet to explain why her identity is relevant to the relief it requests. Moreover, plaintiffs have not served the inspector, nor made her a party to these proceedings to afford her the opportunity to defend herself, even though they seek an order that she pay money back to Respondents. Respondents were substantially justified in asserting a right to conceal her identity and thus are entitled to protection from an attorney fee award under the civil rules.

Our Supreme Court has based its consideration of the term "substantially justified" in another South Carolina fee-shifting statute, the "State action" statute, S.C. Code Ann. §15-77-300 (Supp. 2012), on the U.S. Supreme Court's interpretation of similar language in the main federal fee-shifting statute involving the government, the

Equal Access to Justice Act, 28 U.S.C.A. § 2412.[1] Heath v. County of Aiken, 302 S.C. 178, 394 S.E.2d 709 (1990); see, also, Video Gaming Consultants, Inc. v. S.C. Dep't. of Revenue, 358 S.C.647, 595 S.E.2d 890 (Ct. App. 2004). That statute, enacted in 1980, provides in part,

> (d)(1) ...a court shall award to a prevailing party other than the United States fees and expenses...unless the court finds the position of the United States was substantially justified or that special circumstances make and award unjust.

In Heath, our Supreme Court noted,

> In Pierce [v. Underwood, 487 U.S. 552, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988)], the Supreme Court discussed the definition of "substantial justification" in the context of attorney's fees and determined that this term does not mean "'justified to a high degree', but rather 'justified in substance or in the main'-that is, justified to a degree that could satisfy a reasonable person." 108 S.Ct. at 2250. To say that there was no substantial justification is not the same as a determination that a claim was frivolous. Therefore, a court need not go so far as to brand a claim "frivolous" in order for it to be found to be without substantial justification. Pierce v. Underwood, 108 S.Ct. at 2251.

Heath, 394 S.E.2d at 712.

There is an abundance of legislative history and case law interpretation of the federal statute. Reference is craved to the annotation at 69 A.L.R. Fed. 130 ("What constitutes substantial justification of government's position so as to prohibit awards of attorneys' fees under the Equal Access to Justice Act, (28 U.S.C.A. § 2412(d)(1)(A)).") With regard to the legislative history, the annotation refers to the House Judiciary Committee Report which states that the substantial justification test is essentially one of reasonableness. Thus, no award is intended where the government can show that its case

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[1] Both the federal and the South Carolina statutes negate the "American Rule" that each party to a lawsuit bear its own costs. Statutes in derogation of the common law are to be strictly construed. Crosby v. Glasscock Trucking Co., Inc., 340 S.C. 626, 532 S.E.2d 856 (2000). Further, statutes waiving the state's immunity from suit being in derogation of sovereignty must be strictly construed and the State can be sued only in the manner and upon the terms and conditions prescribed by the statute.

had a reasonable basis in both law and in fact. The Report explains that the substantial justification standard should not be read to raise the presumption that the government was not substantially justified simply because it lost the case, and indicates that the standard does not require the government to establish that its decision to litigate was based on a substantial probability of prevailing. 69 A.L.R. Fed. 130.

Regarding the federal case law, Am. Jur. Fed. has a good summary:

> To be substantially justified means, of course, more than merely undeserving of sanctions for frivolousness. However, a position can be justified even though it is not correct and can be substantially (that is, for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact. It must have enough foundation in law and fact that a reasonable person could think it correct; in other words, such position must be sufficiently colorable to engender "genuine dispute."

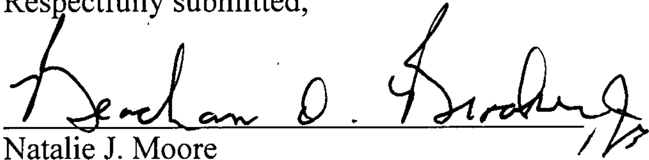
32 Am. Jur. 2d Federal Courts, §260. Respondents' positions on its employees' rights of privacy and on Plaintiffs' standing were substantially justified and constitute circumstances making an award unjust.

Finally, the main case, Sloan I, involving the constitutional issue has not concluded. The defense in that suit involves the lack of standing of Petitioners as strangers to the underlying activities. If the defense prevails on the standing issue, Petitioners would not have had standing to bring their suit or conduct discovery. This would be a circumstance that would make an award of fees unjust under the provisions of Rule 37 (a)(4), SCRCP.

CONCLUSION

The Court should affirm the Order of the Circuit Court dismissing this case.

Respectfully submitted,



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APPEAL FROM RICHLAND COUNTY

William Jeffrey Young, Circuit Court Judge

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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.

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 7th day of December, 2015.

Pleadings Served:

1. INITIAL BRIEF OF RESPONDENT
2. RESPONDENT'S DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

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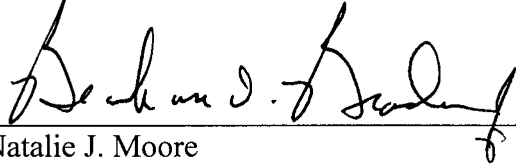
SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION



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RE: *SC Public Interest Foundation v. SCDOT, et al*
Appellate Case No. 2015-001760

Dear Ms. Kitchings:

Enclosed, please find an original and one copy of the Initial Brief of Respondent, Respondent's Designation of Matter to be Included in the Record on Appeal, and a Certificate of Service regarding both pleadings. Please file the originals and return the copies to me using the envelope provided.

By copy of this letter, I am serving the Plaintiff with copies of the pleadings.

Sincerely,

Beacham O. Brooker, Jr.
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BOB,JR:jmt

Enclosures

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