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THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

William Jeffrey Young, Circuit Court Judge

Appellate Case No. 2015-001760

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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., Respondents.
Secretary of Transportation, ...

APPELLANTS' FINAL REPLY BRIEF

January 13, 2016

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Appellants the South Carolina Public Interest Foundation and Edward D. Sloan, Jr. appeal the Circuit Court's Order denying them attorneys' fees under the South Carolina Freedom of Information Act (FOIA).

The Appellants served a FOIA request on the DOT Respondents on June 10, 2013 (R. p. 24). Respondents served their response to the FOIA request on June 20, 2013 (R. p. 26). Because Respondents refused to produce the requested "public records" under FOIA, Appellants filed suit in a Complaint dated July 1, 2013 and file stamped July 5, 2013 (R. p. 19-37).

Respondents imply on page 2 of their Brief that Appellants did not file the Complaint in this FOIA enforcement action until after Judge Hood had ordered that the investigative report be released. This is not accurate. Appellants simultaneously sought to compel production of the same documents in a Motion to Compel under Rule 37, SCRCF, in the Driveway Case, and in this FOIA enforcement action. On October 24, 2013, the Circuit Court heard both motions simultaneously and later ordered the documents produced under Rule 37 in the Driveway Case, but did not rule in this case, the FOIA enforcement action.

I. THE PUBLIC PURPOSE AND MECHANISM FOR PRODUCTION OF PUBLIC RECORDS UNDER THE S.C. FREEDOM OF INFORMATION ACT DISTINGUISH IT FROM THOSE FOR PRODUCTION OF DOCUMENTS UNDER THE RULES OF CIVIL PROCEDURE.

Respondents argue that public bodies should enjoy the same status and treatment in shielding their activities and public records from exposure under FOIA as private litigants under the Rules of Civil Procedure.

The trial court noted the unfairness of allowing a litigant against the government to seek production of documents under Rule 37, SCRCF, simultaneously seek the same the same documents under FOIA, then, after

prevailing under the former, demanding fees under the latter. . . . 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.

(Respondent's Brief, p. 4)

However, this argument fails to recognize the purpose and functioning of the S.C. FOIA. The South Carolina Freedom of Information Act distinguishes the rights of public bodies from ordinary litigants by demanding openness from public bodies, and a minimum of delay and expense in the production of public records.

SECTION 30-4-15. Findings and purpose.

The General Assembly finds that it is vital in a democratic society that **public business** be performed in an **open and public manner** so that citizens shall be advised of the performance of public officials and of the decisions that are reached in **public activity** and in the formulation of **public policy**. Toward this end, provisions of this chapter must be construed so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their public officials **at a minimum cost or delay** to the persons seeking access to public documents or meetings.

SECTION 30-4-100. Injunctive relief; costs and attorney's fees.

(a) **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. The court may order equitable relief as it considers appropriate, and a violation of this chapter must be considered to be an **irreparable injury** for which no adequate remedy at law exists.

(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. 30-4-15, -100 (emphasis added).

S.C. FOIA opens state and local government to the sunlight and requires the courts to enforce this openness by construing enforcement actions “so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their public officials at a minimum cost or delay” *Id.* (emphasis added). The purposes of SCRCP 37 do not recognize or provide for a similar public purpose. As a public body in the context of freedom of information, Respondent is not “every other litigant in our courts” (Respondent’s Brief, p. 4).

The standard for production of documents under FOIA is broader and more inclusive than the standard for production of documents under Rule 37. Under Rule 37, the requested document must meet standards of Rule 26: “any matter, not privileged, which is relevant to the subject matter involved in the pending action.” Accordingly, production under Rule 37 is limited to the issues in the litigation.

Under the Freedom of Information Act, production of a “‘public record’ is not so limited. The definition of “public record” includes “all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body.” S.C. Code Ann. 30-4-20(c) (emphasis added). Under FOIA, the “public records” need not relate to any particular litigation. Accordingly, the breadth of production provided under FOIA is far more comprehensive than production allowed under the South Carolina Rules of Civil Procedure.

Furthermore, a person need not be a litigant against a “public body” in order to obtain “public records.” “Any person has a right to inspect or copy any public record of a public body.” S.C. Code Ann. 30-4-30(a) (emphasis added).

The Respondents petition this Court to limit the Freedom of Information Act to hold that when a public body litigates, the Freedom of Information Act is no longer applicable to a request for a "public record," but rather that the Rules of Civil Procedure control the production of "public records." Respondents state, "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." (Respondents Brief, p. 2) This focus on the "rights" of a government litigant (or public body) would amount to a judicial amendment of the Freedom of Information Act. Such a ruling would trespass far beyond the proper authority of this Court.

A "public record" should be disclosed under the Freedom of Information Act regardless of whether the "public body" is involved in litigation with the person requesting the "public record."

II. THE STANDARD FOR AWARDING ATTORNEYS' FEES UNDER THE FREEDOM OF INFORMATION ACT IS MORE GENEROUS THAN THE STANDARD FOR AWARDING FEES UNDER THE STATUTES ON WHICH THE RESPONDENTS RELY.

In arguing against the award of attorneys' fees in this case, Respondents posit a rule of "substantial justification" for their refusal to produce "public records" under the Freedom of Information Act. They argue, "The Respondents were substantially justified in seeking to protect the information sought in this matter even though the court ordered the information be disclosed." From that proposition, they argue that they should not be ordered to pay attorneys' fees under the Freedom of Information Act.

The Freedom of Information Act does not contain a “substantially justified” standard for denying the award of attorney’s fees. The standard is whether the person or entity requesting the public records “prevails” in litigation.

(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 the case at bar, the Appellants prevailed. The court ordered production of the requested public records.

Respondents erroneously rely on other statutes with different standards for the award of attorneys’ fees. Respondents rely on S.C. Code Ann. § 15-77-300, but they fail to quote the statutory standard. That statute contains an explicit “substantial justification” standard:

(A) In any civil action brought by the State, any political subdivision of the State or any party who is contesting state action, unless the prevailing party is the State or any political subdivision of the State, the court may allow the prevailing party to recover reasonable attorney’s fees to be taxed as court costs against the appropriate agency if:

- (1) the court finds that the agency acted without substantial justification in pressing its claim against the party; and
- (2) the court finds that there are no special circumstances that would make the award of attorney’s fees unjust.

The agency is presumed to be substantially justified in pressing its claim against the party if the agency follows a statutory or constitutional mandate that has not been invalidated by a court of competent jurisdiction.

S.C. Code Ann. § 15-77-300 (emphasis added). Accordingly, the statutory standard from section 15-77-300 is different from and not applicable to an award of attorney’s fees under the Freedom of Information Act.

Similarly, Respondents rely on the federal Equal Access to Justice Act, 28 U.S.C.A. § 2412, which like § 15-77-300 contains an explicit rule of substantial justification.

Accordingly, neither the Equal Access to Justice Act nor § 15-77-300, nor any case law interpreting either of those acts is applicable to the standard under the Freedom of Information Act.

The Supreme Court of South Carolina recently addressed this issue under the Freedom of Information Act in two cases brought by Mr. Sloan. *Sloan v. Friends of the Hunley, Inc.*, 393 S.C. 152, 157, 711 S.E.2d 895, 897 (2011); *Sloan v. South Carolina Department of Revenue*, 409 S.C. 551, 555-56, 762 S.E.2d 687, 689 (2014).

“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, Inc.*, 393 S.C. 152, 157, 711 S.E.2d 895, 897 (2011)]. 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, 689 (2014) (footnotes omitted, emphasis added). Accordingly, in this case, Sloan and the South Carolina Public Interest Foundation are prevailing parties, and are entitled to recover attorneys’ fees and costs under S.C. Code Ann. § 30-4-100(b).

This Court should follow the rulings of the South Carolina Supreme Court on the award of attorneys’ fees under the Freedom of Information Act when a person is forced to resort to the courts in order to enforce to a request for a “public record” from a “public body.” The Supreme Court ruled that the payment of attorneys’ fees under these

circumstances is entirely appropriate and supported by the public purpose of the Freedom of Information Act.

III. RESPONDENTS DO NOT CONTEST OTHER IMPORTANT ASPECTS OF THE APPELLANTS' CLAIM FOR ATTORNEYS' FEES.

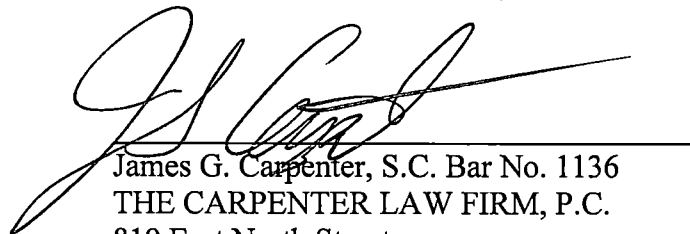
Respondents do not argue that the requested documents were not "public records" under the Freedom of Information Act. Respondents do not argue that the Circuit Court improperly ordered that the documents be produced, even under the more restrictive Rules of Civil Procedure. Finally, Respondents do not object to the amount of attorneys' fees the Appellants claimed.

CONCLUSION

WHEREFORE, Appellants pray the Court for an order:

1. Awarding the Appellants' attorneys' fees and costs of litigation pursuant to S.C. Code Ann. § 30-4-100(b); and
2. Granting Appellants such other and further relief as the Court deems just and proper.

Respectfully submitted,

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

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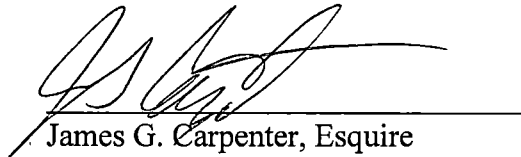
CERTIFICATE OF COUNSEL

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Pursuant to Appellate Rule 211(a), the undersigned hereby certifies that his Final Reply

Brief for Appellants complies with Rule 211(b).

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

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Secretary of Transportation, ... Respondents.

Certificate of Service

The undersigned attorney hereby certifies that he has served a copy of the foregoing
Appellants' Final Reply Brief on counsel for Defendants by US Mail, postage prepaid on
Wednesday, January 13, 2016 to the following persons:

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The Honorable Jenny Abbott Kitchings
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Re: Appellate Case No. 2015-001760

Dear Ms. Kitchings:

I enclose an original and fifteen copies of the Appellants' Final Reply Brief, and proof of service in this matter.

If you need anything else, please telephone me.

Sincerely yours,
THE CARPENTER LAW FIRM, PC

James G. Carpenter

Enclosures

CC w/enclosures: Beacham O. Brooker, Jr.