

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Horry County
Court of Common Pleas
The Honorable Clifton Newman, Presiding Judge

RECEIVED
FEB 11 2016
SC Court of Appeals

APPELLATE CASE NO.: 2015-001398
CIVIL ACTION NO.: 2010-CP-26-10848

PAUL CURRY,

APPELLANT,

V.

TOWN OF ATLANTIC BEACH,

RESPONDENT.

INITIAL BRIEF OF RESPONDENT

Leah B. Moody
LAW OFFICE OF LEAH B. MOODY, LLC
235 E. Main Street, Suite 115 (29730)
Post Office Box 1015
Rock Hill, South Carolina 29731
(803) 327-4192
lbmatty@comporium.net
ATTORNEY FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES..... 2

COUNTERSTATEMENT OF ISSUES ON APPEAL 4

COUNTERSTATEMENT OF THE CASE..... 5

COUNTERSTATEMENT OF FACTS 6

ARGUMENT..... 12

 I. THE TRIAL COURT DID NOT ERR IN DENYING CURRY A
 DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF WHERE
 GRANTING DECLARATORY JUDGMENT IS DISCRETIONARY AND
 SHOULD BE EXERCISED WITH GREAT CARE AND DUE REGARD TO ALL
 CIRCUMSTANCES OF THE CASE.....12

 II. THE TRIAL COURT DID NOT ERR IN DENYING CURRY’S REQUEST FOR
 INJUNCTIVE RELIEF UNDER THE DOCTRINE OF RES JUDICATA WHERE
 THE ISSUE WAS NOT PRESERVED. 19

 III. THE TRIAL COURT DID NOT ERR IN DENYING CURRY’S REQUEST FOR
 DECLARATORY JUDGMENT WHERE THERE WAS NO VIOLATION OF
 THE SOUTH CAROLINA FREEDOM OF INFORMATION ACT.
 22

 IV. THE TRIAL COURT DID NOT ERR IN DENYING CURRY’S MOTION TO
 EXCLUDE THE TOWN’S WITNESSES PROPOSED WHERE CURRY WAS
 PLACED ON NOTICE AND AWARE OF THE NAMES OF EACH WITNESS.
 30

 V. THE TRIAL COURT DID NOT ERR IN DENYING CURRY ATTORNEY FEES
 AND COST PURSUANT TO SCFIOA WHERE COLLATERAL ESTOPPEL
 BARS CURRY’S ACTION.33

CONCLUSION..... 35

TABLE OF AUTHORITIES

CASES

<i>Atl. Cost Builders & Contractors, LLC v. Lewis</i> , 398 S.C. 323, 730 S.E. 2d 282, (2012)	19
<i>Beall v. Doe</i> , 281 S.C. 363, 315 S.E.2d 186 (Ct. App. 1984).....	20
<i>Brock v. Town of Mount Pleasant</i> , 767 S.C. 2d 203, 411 S.C. 106 (Ct. App. 2015)	34, 35
<i>Burton v. York Cnty. Sheriff's Dep't</i> , 358 S.C. 339, 594 S.E.2d 888 (Ct. App. 2004).....	34
<i>Campbell v. Marion Cnty. Hosp. Dist.</i> , 354 S.C. 274, 580 S.E. 2d 163 (Ct. App. 2003).....	12
<i>Catawba Indian Nation v. South Carolina</i> , 407 S.C. 526, 756 S.E. 2d 900 (2014).....	21
<i>Carolina Renewal Inc. v. S.C. Dep't of Transp.</i> , 385 S.C. 550, 684 S.E.2d 779, (Ct. App. 2009).....	15
<i>Crestwood Golf Club, Inc. v. Potter</i> , 328 S.C. 201, 493 S.E.2d 826, (1997).....	15, 20
<i>Clark v. Aiken Cnty. Gov't</i> , 366 S.C. 102, 620 S.E.2d 99, (Ct. App. 2005).....	21
<i>Denman v. City of Columbia</i> , 387 S.C. 131, 691 S.E.2d 465, (2010).....	12
<i>Garris v. Governing Bd. of S.C. Reinsurance Facility</i> , 333 S.C. 432, 511 S.E.2d 48 (1998).....	20
<i>Graham v. State Farm Mutual Automobile Insurance Co.</i> , 319 S.C. 69, 459 S.E.2d 844 (1995).	
<i>Grosshuesch v. Cramer</i> , 367 S.C. 1, 623 S.E.2d 833 (2005).....	12
<i>Home Med. Sys., Inc. v. S.C. Dep't of Revenue</i> , 382 S.C. 556, 677 S.E.2d 582 (2009)	19
<i>Hodges v. Rainey</i> , 341 S.C. 79, 533 S.E.2d 578 (2000).....	14
<i>Johnson v. Greenwood Mills, Inc.</i> , 317 S.C. 248, 452 S.E.2d 832, (1994).....	20
<i>Judy v. Judy</i> , 393 S.C. 160, 712 S.E.2d 408 (2011).....	20
<i>Jackson v. Speed</i> , 326 S.C. 289, 486 S.E.2d 750 (1997).....	34
<i>Jumper v. Hawkins</i> , 558 S.E.2d 911, 348 S.C. 142 (Ct. App. 2001).....	30
<i>Kennedy v. the Sc. Retirement Sys.</i> , 549 S.E.2d 243, 345 S.C. 339 (2001).....	14
<i>Kneale v. Bonds</i> , 317 S.C. 262, 452 S.E. 2d 840 (Ct. App. 1994).....	34
<i>New York Times Co. v. Spartanburg Cnty. Sch. Dist. No. 7</i> , 374 S.C. 307, 649 S.E.2d 28 (2007)	34
<i>Ott v. Tindal</i> 297 S.C. 395, 377 S.E.2d 303 (1989).....	13, 17
<i>Power v. McNair</i> , 255 S.C. 150, 153, 177 S.E.2d 551, 552 (1970)	18
<i>Paschal v. State Election Comm'n</i> , 317 S.C. 434, 545 S.E.2d 890 (1994).....	14

<i>Plum Creek Dev. Co. v. City of Conway</i> , 334 S.C. 30, 512 S.E.2d 106 (1999)	20
<i>Tourism Expenditure</i> , 403 S.C. 76, 742 S.E.2d 371 (2013)	13
<i>Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc.</i> , 361 S.C. 117, 603 S.E.2d 905 (2004)	12
<i>Sloan v. S.C. Dep't of Revenue</i> , 409 S.C. 551, 762 S.E.2d 687 (2014)	30, 34
<i>Wiedemann v. Town of Hilton Head Island</i> , 344 S.C. 233, 542 S.E.2d 752 (Ct. App. 2001).....	12

STATUTES

S.C. Code Ann. § 5-7-290 (Rev. 2004).....	6, 9, 19, 22, 24, 25, 26, 30
S.C. Code Ann. § 15-53-30 (Rev. 2007).....	13
S.C. Code Ann. § 30-4-10 (Rev. 2007).....	15
S.C. Code Ann. § 30-4-20 (Rev. 2007).....	17
S.C. Code Ann. § 30-4-100(b) (Rev. 2007).....	34

OTHER AUTHORITIES

<i>Black's Law Dictionary 252</i> (Bryan A. Garner ed., 7th ed. West 1999).....	22
Rule 59 (e), SCRCF.....	20
1978 WL 35175 (S.C.A.G.).....	22,23
1969 WL 15452 (S.C.A.G.).....	23

COUNTERSTATEMENT OF ISSUES ON APPEAL

- I. THE TRIAL COURT DID NOT ERR IN DENYING CURRY A DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF WHERE GRANTING DECLARATORY JUDGMENT IS DISCRETIONARY AND SHOULD BE EXERCISED WITH GREAT CARE AND DUE REGARD TO ALL CIRCUMSTANCES OF THE CASE.
- II. THE TRIAL COURT DID NOT ERR IN DENYING CURRY'S REQUEST FOR INJUNCTIVE RELIEF UNDER THE DOCTRINE OF RES JUDICATA WHERE THE ISSUE WAS NOT PRESERVED.
- III. THE TRIAL COURT DID NOT ERR IN DENYING CURRY'S REQUEST FOR DECLARATORY JUDGMENT WHERE THERE WAS NO VIOLATION OF THE SOUTH CAROLINA FREEDOM OF INFORMATION ACT.
- IV. THE TRIAL COURT DID NOT ERR IN DENYING CURRY'S MOTION TO EXCLUDE THE TOWN'S WITNESSES PROPOSED WHERE CURRY WAS PLACED ON NOTICE AND AWARE OF THE NAMES OF EACH WITNESS.
- V. THE TRIAL COURT DID NOT ERR IN DENYING CURRY ATTORNEY FEES AND COST PURSUANT TO SCFIOA WHERE COLLATERAL ESTOPPEL BARS CURRY'S ACTION.

COUNTERSTATEMENT OF THE CASE

On January 13, 2014, the court called this matter for a non-jury trial. (R. .p. 1, line 5.) Present at the call of the case were Randall K. Mullins, Esquire and Jarrod E. Ownbey, Esquire representing the Plaintiff Paul Curry, and Leah B. Moody, Esquire representing the Defendant Town of Atlantic Beach. (R. p. 1, lines 13-17.) At the conclusion of the trial, the court took the matter under advisement and would allow the parties to submit proposed orders. (R. p. 197.) Initially, the parties had 15 days submit their proposed brief (R. p.197, lines 23-25); however, Defendant Town of Atlantic purchased the transcript and requested additional days to turn in the proposed brief. On June 2, 2014, the court issued its final order denying Plaintiff request for relief. The Final Order was clocked and filed with the Horry County Clerk of Court on September 8, 2014. On September 24, 2014, the Plaintiff Paul Curry filed a motion to reconsider. The court heard the motion to reconsider on February 13, 2015 in Horry County. On May 18, 2015, the court issued an order denying the motion to reconsider. Plaintiff filed notice of intent to appeal on June 22, 2015. This appeal follows.

COUNTERSTATEMENT OF FACTS

On November 17, 2010, Plaintiff filed this action for Declaratory Judgment and Injunction [Relief] action in the Horry County Clerk of Court. The Plaintiff alleged that the Town of Atlantic Beach (Respondent) violated the Freedom of Information Act and Section 5-7-290 of the SC Code of Laws, as amended that required the Town to have “codified” Town Ordinances. The violations occurred sometime in 2003 and continued through August 2010.

On January 21, 2011, Respondent filed an Answer and the attorney of record was John C. Zilinsky, Esquire. At some point, the Plaintiff served the Town with Interrogatories and Request for Production. On April 7, 2011, Plaintiff filed a Motion to Compel, due to the Respondent’s failure to answer discovery.¹ On July 27, 2011, The Honorable Benjamin H. Culbertson held a motion hearing, and issued an Order, on September 16, 2011, in favor of Plaintiff granting the Motion to Compel and awarding attorney fees. The Court ordered the Respondent to answer Plaintiff’s Interrogatories and Request to Produce. The court previously scheduled a non-jury Trial for January 14, 2013 and the attorney of record was Kenneth A. Davis. On January 15, 2013, Kenneth A. Davis, Esquire filed a Notice of Appearance on behalf of Respondent and the court continued the prior Non-Jury Trial. Subsequently, on April 19, 2013, Kenneth A. Davis, Esquire filed a Motion to be Relieved as Counsel for Respondent, and on July 31, 2013, Judge Hyman heard the motion and relieved Mr. Davis as counsel. The court scheduled a non-jury trial for the October 14, 2013 court term. Leah B. Moody, Esquire appeared on behalf of the Respondent. Ms. Moody filed her Notice of Appearance on October 10,

¹ Request to Admit were filed along with the Request for Production and Interrogatories.

2013 and clocked October 16, 2013.² The Circuit Court continued this matter on that date due to an emergency with the presiding judge. The Plaintiff informed the court that Plaintiff was ready to proceed in the court room prior to court continuance. Plaintiff made the request for court order payment regarding the Motion to Compel.³

On January 13, 2014, the court called this matter for a non-jury trial. At the call of the case all parties appeared for trial. Prior to the trial of this matter, the Court entertained Plaintiff's oral *Motion in Limine* to exclude three witnesses sought to be offered by the Respondent Town. The Town's witnesses were [1] William Booker, Town Manager⁴; [2] Linda Cheatham, Assistant Town Manager⁵; and [3] Cheryl Pereira, Town Administrative Assistant. The single ground for Plaintiff's motion to exclude the witnesses was that the Respondent Town failed to file any written discovery responses to disclose the witnesses or documents and thus that allowing the Respondent's witnesses to testify would subject the Plaintiff to an unfair surprise. However, Plaintiff's counsel presented no documents showing that the discovery was still outstanding and served on Town's attorney, Kenneth Davis and/or Leah B. Moody. Plaintiff's counsel stated in response that she was not aware that the discovery responses were still outstanding and just received the request from the Plaintiff.

Specifically, Respondent's counsel informed the court that she did not received any request for production of documents or interrogatories. But, Respondent's counsel

² Notice was filed with a letter to the Horry County Clerk of Court, which copied Randall Mullins, Esquire via facsimile and U.S. Mail on October 10, 2013. The Clerk of Court stamped and returned the notice to Ms. Moody in Rock Hill, SC.

³ Plaintiff did not inform Defense counsel of outstanding discovery responses.

⁴ Judge Hyman ordered that while no counsel represented the Town, service was to be made on Mr. William Booker. Therefore, Plaintiff knew Mr. Booker could be called as a witness. The documents sought were employee/ Town council members' personal records.

⁵ Previous Attorney, Kenneth Davis, provide notice to the Appellant on January 14, 2013 that Linda Cheatham was a potential witness in the Respondent's Pre-trial Brief. Appellant did not deny receipt of this brief at point in 2013 and knew Mrs. Cheatham could be called as a witness.

was willing to comply with the requests. Plaintiff indicated that while Plaintiff served discovery requests on the Respondent Town, through John Zilinsky, on February 18, 2011, no responses had been furnished pursuant to Judge Culbertson's order.⁶ After questioning and hearing from both parties' counsel, the Court declined to exclude the witnesses and instead granted an hour and a half court recess to the Plaintiff to informally interview the witnesses to allow the Plaintiff an opportunity to determine whether the witnesses' testimonies would surprise the Plaintiff. (R. p. 13, lines 10-16.) Then, the court would hear from the Plaintiff as to being unfairly surprised by the witnesses' testimonies and would allow a continuance for formal discovery depositions to be taken if that were the case. (R. p. 13, lines 17-25.)

Plaintiff informally interviewed the witnesses and upon court reconvening from recess, Plaintiff renewed his earlier motion to exclude the witnesses and the basis being he did not think it was fair for there to be a last minute defense and witnesses disclosed. (R. p. 14, lines 10-13; R. p. 20, lines 6-12.) However, Plaintiff did not make a motion for continuance in this matter. (R. p. 14, lines 14-16; R. p. 20, lines 7.) Further, Plaintiff did not make a motion to keep the record open for additional testimony and continue the matter. (R. p. 197, lines 13.)

Defendant informed the court that a check for attorney's fees, previously ordered to be paid to the Plaintiff, was logged in the Respondent's ledger, but had not been cashed and that the checks were mailed out to Plaintiff. (R. p. 12, lines 1-6.)⁷ Upon

⁶ No Rule to Show Cause has been filed prior to the court terms of October 10, 2013 or this January 14, 2014.

⁷ After the trial of this action, Respondent Town of Atlantic Beach tendered payment January 21, 2014 of the attorney's fees ordered by Judge Culbertson in this action and filed on September 16, 2011 and by Judge Hyman in a separate case, Civil Action No.: 2008-CP-26-03990, between the parties in an Order filed July 7, 2011 with interest. Appellant did not served the Request for Production on Davis or Moody. In court, Plaintiff served the Respondent's counsel with a copy of the Request for Production and Interrogatories served on John C. Zilinsky on February 18, 2011. Plaintiff did not raise the issue of the non-compliance with Respondent's counsel until sometime after serving pre-trial brief on

further inquiry and after confirming with the bank, the check never cleared the bank. The Defendant's counsel acknowledged that the Town's Ordinances were not "codified" in a bound volume published by a 3rd party vendor that would cost \$10,700 according to the Town's budget.⁸ Plaintiff did not request a continuance from the Court. Both the Plaintiff and Defendant stated to the court that they were ready to proceed. (R. p. 20, lines 20-21).

In trial, Appellant present one witness, Paul Curry. Mr. Curry testified that he made request for copies of Town Ordinance to four different town managers for the Town of Atlantic Beach. (R. p.27, lines21-22; R. p. 32, lines 2-4; R. p. 33, lines 17-18; R. p. 52, lines 8-14). Further, Mr. Curry testified that from June 2003 to August 2010, he requested that to review ordinances and the Town failed or refused to his request. (R. p. 52, lines 20-25; R. p. 56, lines 17-25; R. p. 57, lines 1-13; 16-25; R. p. 58, lines 24-25). However, Mr. Curry met with Mr. Booker and reviewed documents purported to be Town ordinances. (R. p. 59, lines 5-8; R. p. 61, lines 1-25). Notwithstanding, Appellant stated the ordinance were not in compliance with S. C. Code of Laws § 5-7-290 and therefore, the Town violated FIOA. (R. p. 55, lines 1-25).⁹

When questioned regarding the court order in the February 28, 2005 matter, Mr. Curry testified he filed an action regarding the Town's South Carolina Freedom of Information Act violations as it related to **public records**. (R. p. 83, lines 2-6.)

Friday, January 10, 2014 at 3:28 p.m. The parties appeared for trial in October 2013 and the Plaintiff stated to the court the case was ready for trial. Again, Plaintiff did not serve either of Town's subsequent attorneys prior to trial despite sending a letter for payment for the motion of compel attorney's fees.

⁸ The budget estimate comes from Boykin and Davis Law Firm with a 3rd party vendor, Municode, Municipal Code Corporation.

⁹ Mr. Curry's could not recall the exact documents he requested from Ms. Cheatham and never makes clear if the documents requested are town ordinances that were still outstanding. However, goes to the Town Hall 2-3 times a week. (R.p. 77, lines 10-11.) The Town Hall hours are 10:00 a.m. until 3:00 p.m. but in 2000 the hours were 8:30 a.m. until 5:30 p.m. (R. p. 119, lines 2-17.)

Specifically, Judge Howe's Order made public records available to Mr. Curry for inspection and copying. (R. Def. Ex. # 1)

Respondent presented three witnesses over the objection of the Appellant. (R. p.105-106, lines 9-25; 1-3.) The first witness called was Ms. Cheryl Pereire, a town employee for approximately 13 years and the former Town Clerk for the Town Council from 2007 until July 2011. (R. p. 106-107, lines 22-25; 1-13.) She testified that her job responsibilities involved drafting the Town's ordinances, and she maintained the ordinances on her assigned Town computer, and in loose-leaf notebooks and filing cabinets. (R. p. 110, lines 5-15; 22-25; R. p. 111, lines 23-25; R. p. 112, lines 19-23; R. p. 128, lines 6-25.) Also, Ms. Periere provided testimony regarding [1] the enactment process for ordinances; [2] the manner or method; and [3] maintenance the Town's ordinances. (R. p. 108-113.) She testified she provided Mr. Curry documents regarding FIOA on prior occasions. (R. p. 116, lines 1-22; R. p. 117, lines 16-23; R. p. 118, lines 3-20.)

The Respondent's next witness was Linda Cheatham, Assistant Town Manager¹⁰ and she testified as to the manner/method the ordinances have been maintained by the Town. (R.p. 147, lines 6-25; 1-22.) Mr. Curry only requested one document, a letter from the Town attorney¹¹ that Mr. Curry previously requested under the prior administration. (R. p. 143, lines 8-25.) She testified about the frequency of Mr. Curry present at the Town Hall when the Town was short on staff. (R. p. 144-145, lines 14-25; 1-7.) Mrs. Linda Cheatham was aware of Judge Howe's Order. (R. p. 145, lines 10-19.)

¹⁰ Mrs. Linda Cheatham served, at one point, Interim Manager and the Appellant was aware Mrs. Cheatham was a witness per a January 14, 2013 Pretrial Brief submitted by Kenneth Davis, Esquire.

¹¹ The attorney terminated his services with the Town.

Mr. Curry never specifically asked Mrs. Cheatham to provide him any ordinances. However, she did receive complaints regarding FIOA about Mr. Curry and his behavior regarding providing him with ordinances and public records. (R. p. 149, lines 1-11; R. p. 151-152, lines 9-25; 1-15.) Mrs. Cheatham testified as to her understanding of “codified” ordinances versus the Town’s ordinances, which were in binders not book [bound] form. (R. p. 167, lines 2-25.) Mrs. Cheatham was served, at one point, as Interim Manager and the Appellant was aware Mrs. Cheatham was a witness according to the January 14, 2013 Pretrial Brief submitted by Kenneth Davis, Esquire.

The last witness, Mr. William Booker testified Mr. Booker testified that he had been the Town Manager since July 2013. Prior to July 2013, Mr. Booker served as the Town Manager from June 2009 to July 27, 2011.¹² Mr. Booker testified that he signed on behalf of the Town the Settlement with the prior attorney, John Zilinsky. (R. p. 80-81; R. p. 172, lines 14-16; 1-25; and Def. Ex. #1.) Also, Mr. Booker testified that he personally “show[ed] him [Curry] a book that I used in my office which has an index of all the titles with the particular subjects under the title.” Further, the index is in the Town’s reception area as evidenced by photographs of books and cabinets in the Town’s reception area. (R. p. 174, lines 9-14; Pl. Ex. #15, 16 and 18.)

Further, Mr. Booker testified that “[o]ver time, there have been amended variants of these ordinances, and so what we have in the lobby is the amendments to the original set of ordinances, but we still have a set of books that are in the back that we put in some of the amendments. We keep the amendments in the filing cabinets as well.” (R. p. 175, 4-10.)

STANDARD OF REVIEW

¹² Prior to 2009, Mr. Booker was a production manager for a business in Richmond, Virginia.

“Declaratory judgements in and of themselves are neither legal nor equitable.” *Campbell v. Marion Cnty. Hosp. Dist.*, 354 S.C. 274, 279, 580 S.E. 2d 163, 165 (Ct. App. 2003). “The standard of review for a declaratory judgement action is therefore determined by the nature of the underlying issue. *Wiedemann v. Town of Hilton Head Island*, 344 S.C. 233, 236, 542 S.E.2d 752, 753 (Ct. App. 2001). Actions for injunctive relief are equitable in nature.” *Grosshuesch v. Cramer*, 367 S.C. 1, 4 623 S.E.2d 833, 834 (2005). In equitable actions, an appellate court may review the record and make findings of fact in accordance with its own view of the preponderance of evidence. *Denman v. City of Columbia*, 387 S.C. 131, 140, 691 S.E.2d 465, at 470 (2010). “An injunction is a drastic remedy issued by the court in its discretion to prevent irreparable harm suffered by the plaintiff. *Id.* at 140- 41, 691 S.E.2d at 470.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN DENYING CURRY A DECLARATORY JUDGEMENT AND INJUNCTIVE RELIEF WHERE GRANTING DECLARATORY JUDGEMENT IS DISCRETIONARY AND SHOULD BE EXERCISED WITH GREAT CARE AND DUE REGARD TO ALL CIRCUMSTANCES OF THE CASE.

For a court to grant an injunction, a party must demonstrate: (1) irreparable harm; (2) a likelihood of success on the merits; and (3) an inadequate remedy at law. *See Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 908 (2004). In addition, a court may balance the equities between the parties to determine if the injunction is warranted. *See Kneale v. Bonds*, 317 S.C. 262, 268, 452 S.E.2d 840, 843 (Ct. App. 1994).

For a court to review a cause of action under the Declaratory Judgment Act, a party must demonstrate the existence of a justiciable controversy; such a controversy "exists when there is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute that is contingent, hypothetical, or abstract If there is no actual controversy, [a court should] not decide moot or academic questions." *Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 25-26, 630 S.E.2d 474, 477 (S.C. 2006). The Declaratory Judgment Act, however, is not an independent grant of jurisdiction, and thus an actual controversy must exist before a court can render a judgment. *See Tourism Expenditure Review Committee v. City of Myrtle Beach*, 403 S.C. 76, 82, 742 S.E.2d 371, 374 (S.C. 2013). The proper party to file for declaratory judgment is, "[a]ny person . . . whose rights, status, or other legal relations are affected by a statute [or] municipal ordinance" S.C. Code Ann. § 15-53-30 (Supp. 2013 & 2005). Any person "may have determined any question of construction or validity arising under the statute [or] ordinance . . . and obtain a declaration of rights, status or other legal relations thereunder." *Id.* A declaratory judgment may be proper when the meaning of a statute is in question, but questions of statutory interpretation by themselves do not rise to the level of an actual controversy. *See Tourism Expenditure*, 403 S.C. at 81, 742 S.E.2d at 374; *Ott v. Tindal*, 297 S.C. 395, 398, 377 S.E.2d 303, 305 (S.C. 1989).

The “rule of statutory construction is to ascertain effectuate the intent of the legislature.” *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578 (2000). The first question of statutory interpretation is whether the statute's meaning is clear on its face. “If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning.” *Paschal v. State Election Comm'n*, 317 S.C. 434, 436, 545 S.E.2d 890, 892 (1995); *See also Kennedy v. the Sc. Retirement Sys.*, 549 S.E.2d 243, 345 S.C. 339 (S.C., 2001).

Collateral estoppel is applicable in this action. Appellant and Respondent were in involved in prior litigation, which commenced on February 28, 2005, where Appellant filed an action seeking declaratory judgment and permanent injunction against Respondent. (Order Denying Injunction and Declaratory Relief, September 8, 2014, p. 1.) The February 28, 2005 action was based on alleged **violations of FOIA** on the part of the Respondent. (Order Denying Injunction and Declaratory Relief, September 8, 2014, p. 1; R. p. 83, lines 2-6; 17-21; R. p. 90, lines 8-11.) The Appellant alleges that the Respondent failed or refused to respond to his requests to review the Town’s Ordinances from June 2003 to August 2010. (R. p. 22, lines 15; 23-25; Def. Ex. #1; Order Denying Injunction and Declaratory Relief, September 8, 2014, p. 3.) Judge Howe’s Order clearly addresses the production of public records pursuant to FOIA. Therefore, the collateral estoppel doctrine is a bar to the Appellant’s present action, and injunctive relief should be denied. (Order Denying Injunction and Declaratory Relief, September 8, 2014, p. 7.)

The trial court held that Appellant was not entitled to injunctive relief in the form of requiring Respondent to have a third party “codify” the Town’s Ordinances. Further,

Appellant has and was allowed an inspection of Respondent's Town ordinances. (Def. Ex. #18; Order Denying Injunction and Declaratory Relief, September 8, 2014, p. 5-7.)

The Trial Court concluded that:

For an action to be barred by collateral estoppel, Respondent must show that the issue in the present lawsuit was: **'(1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment.'** *Carolina Renewal Inc. v. S.C. Dep't of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009). The doctrine only bars particular issues that were actually litigated; therefore, collateral estoppel is inapplicable when a party argues that the other party should have litigated a particular issue in the prior action. See *Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201, 216, 493 S.E.2d 826, 835 (S.C. 1997).

(Order Denying Injunction and Declaratory Relief, September 8, 2014, p. 5).

The trial court further reasoned that the Order issued by Judge Howe, Master in Equity for Horry County in Civil Action 2005-CP-26-1091, which granted Appellant a permanent injunction against the Respondent for violations of the South Carolina Freedom of Information Act (FOIA) established Appellant's right to review the ordinances of Respondent. *Id.* The trial court correctly determined that the previous litigation concerning the FOIA between the Appellant and Respondent regarding the Town's Ordinances was resolved in Judge Howe's Order. *Id.* In the Order filed January 7, 2010 in Civil Action 2005-CP-26-1091, Judge Howe states:

As the Respondent is in default and all the allegations contained in the Complaint are deemed to be true, the Court finds that as alleged in the Complaint herein the Respondent, The Town of Atlantic Beach ("The Town"), has violated the South Carolina Freedom of Information Act (the "SCFOIA"), S.C Code §§ 30-4-10, et seq., in the following respects: a. The Respondent has failed to notify the Plaintiff of the times, dates, places, and Agenda of all meetings, whether scheduled, rescheduled, or called, of the Atlantic Beach Town Council (the "Town Council"). b. The Respondent has failed to note in the Minutes of the meetings of the Town Council, the efforts made to comply with Plaintiff's requests for notification of the times, dates, places, and Agenda of all meetings, whether scheduled, rescheduled, or called, of the town [sic] Council. c. The Respondent has failed to make available to the Plaintiff, for public inspection and copying, the

prepared Minutes, whether “approved” or “unapproved” of meetings of the Town Council, for six months preceding the filing of this action, during the hours of operation of the Atlantic Beach Town Hall (the “Town Hall”), without the Plaintiff being required to make a written request to inspect or copy the records, when the Plaintiff appeared in person to make such request. d. The Respondent failed to make requested public records available to the Plaintiff, for inspection and copying, after declining to provide written notification to Plaintiff within fifteen days (excepting Saturdays, Sundays, and legal public holidays), allowed by law, when Plaintiff returned to the Town Hall after the expiration of the above period.

(Pl. Ex. #17, p. 2-3, 1a-d.)

Appellant argues from the reading of the Complaint and Order that only Minutes of the Town Council were the basis of the action and not the Town’s Ordinances.

Therefore, collateral estoppel does not apply.

a. FREEDOM OF INFORMATION

However, the trial court opined that “[t]he availability of the [Town’s] ordinances for public review was an issue that the parties litigated in the prior action. The order of Judge Howe provided injunctive relief and established the right of Plaintiff to review the ordinances. Plaintiff is not entitled to additional injunctive relief herein as he is collaterally estopped from obtaining the relief sought under the FOIA.” (Order Denying Injunction and Declaratory Relief, September 8, 2014, p. 5).

Appellant concedes that the Order issued by Judge Howe does require Respondent to afford Appellant access to “public records” that includes town ordinances. (R. p. 83, lines 1-6; 17-21; R. p. 84, lines 21-25.) Further, at trial, Appellant testified that the town ordinances were public record and that was his point to have all documents available. (R. p. 89-90, lines 22-25; 1-11.) However, the Appellant’s brief position is now the town ordinances are not public records and the trial court erred in its reasoning

because neither Order defines “public records.” Therefore, ordinances are not included in the category or definition of “public records.”

However, the trial court, in the case at bar, interpreted the prior Order’s usage of the term “public records” to include town ordinances, even though the term “ordinances” is not contained in the prior Order. (Order Denying Injunction and Declaratory Relief, September 8, 2014, p.5). There is no need for the trial court to define “public records” for FOIA purposes as § 30-4-20, S.C. Code Ann. (Rev. 2007) defines “public records” as follows:

(c) 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 [emphasis added]...**

The trial court found the ordinances to be public records based on the plain and unambiguous meaning of the words “public records.”

b. CODIFICATION OF THE TOWN’S ORDINANCES

Appellant argues that Respondent failed to respond to Appellant’s Request for Admissions. Included in the request for admission is a request stating: “admit that there are no codified ordinances for the Town of Atlantic Beach.” The trial court opined “Plaintiff has failed to make a clear showing of the existence of an actual controversy and he is not entitled to the relief sought. *Ott v. Tindal* 297 S.C. at 398, 377 S.E.2d at 305.

At trial, Appellant proffered the unanswered requests for admission to the trial court upon the commencement of the trial. (R. p. 21-22, lines 23-25; 1-17; Pl. Ex. 1.) The Respondent did respond to the request for admission by stipulating “to the fact that there are no codified ordinances for the Town of Atlantic Beach.” Respondent also admitted

“the \$10,700 allocated in the 2010-2011 proposed budget was not realized and/or executed for the purpose of codifying the town ordinances, it did not go forward, they were not able to.” (R. p. 21, lines 2-9.)

The trial court opined the following:

“In the absence of a justiciable controversy, the court lacks subject matter jurisdiction to provide relief.¹³ A justiciable controversy exists when ‘there is a definite assertion of legal rights and a positive legal duty which is denied by the adverse party.’¹⁴ If the judgment would not settle legal rights of the parties, the judgment would be merely advisory, and therefore beyond the scope of the purpose of a declaratory judgment.¹⁵”

(Order Denying Injunction and Declaratory Relief, September 8, 2014, p. 5). Guided by Ott, trial court opined:

“In Ott, the South Carolina Supreme Court upheld a declaratory judgment in which a trial court construed terms concerning compensation and the time frame to present a claim under the Guaranty Fund Act.¹⁶ There, a justiciable controversy existed because the statutory interpretation concerned terms affecting without a showing of a legal right or duty. Whether Defendant organizes its ordinances in a bound volume versus an unbound volume neither affects the positive legal duty of Defendant to make those ordinances available to the public, nor the legal right of Plaintiff to review those public ordinances. If the ordinances are readable so as Plaintiff can exercise his right to review them, interpretation under the MOCS would not resolve any further legal rights of the parties. In essence, Plaintiff seeks to have the court issue an advisory opinion involving statutory interpretation which is contrary to case precedent in that no justiciable controversy exists. Our law does not permit this Court to issue merely advisory opinions and this Court therefore denies the request of Plaintiff to construe the meaning of codification under the MOCS.

Id.

¹³ See *Tourism Expenditure*, 403 S.C. at 81, 742 S.E.2d at 374 (“holding that parties cannot by consent or agreement confer jurisdiction on the court to render a declaratory judgment in the absence of an actual justiciable controversy.”)(citing *Power v. McNair*, 255 S.C. 150, 153, 177 S.E.2d 551, 552 (1970)).

¹⁴ *Graham v. State Farm Mutual Automobile Insurance Co.*, 319 S.C. 69, 71, 459 S.E.2d 844, 846 (S.C. 1995).

¹⁵ See *Tourism Expenditure*, 403 S.C. at 81, 742 S.E.2d at 374.

¹⁶ *Id.* 297 S.C. at 399, 377 S.E.2d at 306.

Acknowledging that the Respondent failed to reply to the Request to Admit regarding the existence of “codified” ordinances for the Town of Atlantic Beach, the Town did have ordinances and those ordinances complied with § 5-7-290, S.C. Code Ann. (Rev. 2004). Further, the Town’s Ordinances were available for the Appellant to review, which in fact the Appellant reviewed. (R. p. 66-67, lines 13-25; 1-5; 13-18.)

II. THE TRIAL COURT DID NOT ERR IN DENYING CURRY’S REQUEST FOR INJUNCTIVE RELIEF UNDER THE DOCTRINE OF RES JUDICATA WHERE THE ISSUE WAS NOT PRESERVED.

An appellant must raise to the trial court with specificity in a timely manner and receive a ruling from the trial court on an issue for preservation of the issue. If the issue is not raised and the court does not ruled upon it, then an appellant must raise the issue by way of Rule 59(e) motion. Then, an appellant must raise the issue in the appellant’s statement of issues on appeal in initial brief with citation to authority, or the issue is not preserved.

A party must file a Rule 59(e), SCRCP, motion requesting a ruling to preserve the issue for the court’s review. *Home Med. Sys., Inc. v. S.C. Dep’t of Revenue*, 382 S.C. 556, 562, 677 S.E.2d 582. Further, the Appellate court may find an issue unpreserved even though the parties themselves did not argue issue preservation. *Atl. Cost Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E. 2d 282, 285 (2012).

The Appellant did not raise this issue at trial and is not properly preserve for the record. Although the Appellant filed a Rule 59(e), the Appellant did not raise with specificity the issue through his Rule 59(e) motion orally or in writing. The Court did not have a chance to rule on the issue.

However, the doctrine of res judicata is a distinguishable concept. *Beall v. Doe*, 281 S.C. 363, 315 S.E.2d 186 (S.C. App., 1984). Res judicata encompasses both issue preclusion and claim preclusion. *Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201 at 216, 493 S.E.2d at 826 (1997). However, res judicata is more commonly referred to simply as claim preclusion. *Garris v. Governing Bd. of S.C. Reinsurance Facility*, 333 S.C. 432, 449, 511 S.E.2d 48, 57 (S.C. 1998). Claim preclusion bars plaintiffs from pursuing a later suit where the claim (1) was litigated or (2) could have been litigated. *Crestwood Golf Club, Inc.*, 328 S.C. at 216, 493 S.E.2d at 835. The South Carolina Supreme Court recently reaffirmed the following statement of the doctrine:

“Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties. Under the doctrine of res judicata, [a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit.”

Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (S.C. 1999) (alteration in original) (citations omitted), cited with approval in *Judy v. Judy*, 393 S.C. 160, 172, 712 S.E.2d 408, 414 (S.C. 2011).

Res judicata may be applied if (1) the identities of the parties are the same as in the prior litigation, (2) the subject matter is the same as in the prior litigation, and (3) there was a prior adjudication of the issue by a court of competent jurisdiction. *Johnson v. Greenwood Mills, Inc.*, 317 S.C. 248, 250-51, 452 S.E.2d 832, 833 (S.C. 1994). The doctrine of res judicata is not an “ironclad bar,” however, to a later lawsuit. *Judy*, 393 S.C. at 167, 712 S.E.2d at 412; *Garris*, 333 S.C. at 449, 511 S.E.2d at 57 (S.C. 1998); *Clark v. Aiken Cnty. Gov't*, 366 S.C. 102, 109, 620 S.E.2d 99, 102 (Ct. App. 2005).

However, in a recent case, *Catawba Indian Nation v. South Carolina*, the Court

discussed the application of res judicata to declaratory judgments. 407 S.C. 526, 756 S.C.2d 900 (S.C. 2014). Specifically, the Court opined “although res judicata normally applies to issues that were previously raised or that could be raised in the prior action, declaratory judgments are distinguishable. As one legal treatise has observed, res judicata does apply to declaratory judgments, but only as to issues actually decided by the court...” *Id.* at 535.

In this case, the matter did determine the production of public records, that includes ordinances that Plaintiff alleged do not exist, and res judicata would be inapplicable to this declaratory relief action.

The identities of the parties are the same as in the prior litigation. On February 28, 2005, Mr. Curry filed an action for Declaratory Judgment and Permanent Injunction in Horry County Court of Common Pleas against the Town of Atlantic Beach. (2005-CP-26-1091, Horry County, filed February 28, 2005). A hearing was held on November 29, 2009 and the matter was extensively negotiated according to the Settlement Order dated January 25, 2010. The subject matter included the problems Mr. Curry incurred with the Town in complying with FIOA. The issues date back to April 25, 2003 through February 25, 2005. In that case, the allegations in the Complaint include dates June 25, 2003, July 3, 2003, January 3-5, 2005, May 18-19, 2006 and March 24, 2009 that Mr. Curry stated the Town violated FIOA. Mr. Curry filed his lawsuit on February 28, 2005 that dealt with public records. The Consent Order submitted from the Master-In-Equity dated January 25, 2010 requires the Town to comply with FIOA and provides additional duties to the Town in providing Mr. Curry notice of hearings and the like under FIOA. The

Order was filed on January 27, 2010 as the final action in the matter. The Order addressed production of the “public records” pursuant to FIOA.

Because this issue was not raised with specificity and ruled upon by the trial court and does not meet any exception to the rule for issue preservation. The appellant is bar from raising this issue as it is not properly preserved for the record.

III. THE TRIAL COURT DID NOT ERR IN DENYING CURRY’S REQUEST FOR DECLARATORY JUDGMENT WHERE THERE WAS NO VIOLATION OF THE SOUTH CAROLINA FREEDOM OF INFORMATION ACT.

Section 5-7-290 provides “[E]ach municipal council shall provide by ordinance for the **codification and indexing** of all ordinances either **typewritten or printed**, and **the maintenance** of ordinances in a current form reflecting all amendments and repeals. All ordinances as codified shall be available for public inspection at reasonable times.” S.C. Code Ann. § 5-7-290.

According to *Black’s Law Dictionary*, the plain meaning of *codification* is “[t]he process of compiling, arranging, and systematizing the laws of a given jurisdiction, or of a discrete branch of law, into an ordered code; the code that results from this process.” *Black’s Law Dictionary* 252 (7th ed. 1999).

In 1978, Furman R. Gressette, Calhoun County Attorney, requested clarification from the South Carolina Attorney General and the response provided was:

Codification as the process of collecting and arranging laws into a code or complete system of positive law, scientifically ordered. Section 4-9-120, Code of Laws of South Carolina, 1976, required that all county ordinances whether permanent or temporary be codified; however, the codification can most probably be accomplished by loose leaf or

pamphlet types of volumes as well as by bound volumes.

SC Attorney General Opinion, 1978 WL 35175 (S.C.A.G.).

In 1969, the Bureau of Governmental Research and Service of the University of South Carolina requested clarification from the SC Attorney General asking “[i]n what manner or method should the temporary enactments be codified?” The Attorney General’s Opinion specifically addresses the manner or method in the following statement:

Section 47-61.3 requires that the municipality ‘shall codify and index its ordinances and bring up-to-date such ordinances annually.’ This statute is self-explanatory and merely requires that all ordinances be kept in codified form. The ordinances may be typewritten or reproduced in such manner as the governing body seems advisable. For smaller towns the most expedient means of complying with the statute would appear to be to compile all its ordinances in a loose-leaf notebook, and as ordinances are adopted, to add such ordinances to the notebook. It would appear helpful also if standard ordinances could be reproduced and made available to all smaller municipalities so as to give them a basic codification to which they could add such special ordinances as might be necessary from time to time.

SC Attorney General Opinion, 1969 WL 15452 (S.C.A.G.).

The statute does not dictate the manner or method of ordinance codification. But, the statute mandates that each municipal counsel shall provide that all ordinances are codified and indexed, either typewritten or printed, and maintained in a current form reflecting all amendments and repeals, which are made available to the public.

Further, Appellant argues that Appellant made requests to review ordinances, required by § 5-7-290, to be in a codified form, pursuant to not only § 5-7-290, but also §30-4-30 of the South Carolina Freedom of Information Act.

*(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.***

However, Respondent would assert that there was no violation of the SC Freedom of Information Act. Mr. Curry testified he received documents purported to be ordinances. (R. p. 85, lines 1-25; R.p. 67; lines 13-18.) However, the documents were not in a specific format.

In fact, Appellant introduced his letter dated May 18, 2006 into evidence regarding the regarding § 5-7-290 and stated that the request is not made under FIOA. (R. p. 65, lines 13-25; R. p. 66-67, lines 15-25; lines 1-18; Pl. Ex. # 5.) Subsequent to that letter, Appellant sent a letter without a date to Kenneth McIver requested the same inspection but it was pursuant to FIOA. Mr. McIver wrote Mr. Curry back and, based on Mr. Curry's meaning of codification, Mr. McIver indicated there were not any "codified" ordinances. (R. p. 70-71; lines 3-25; 1-25; Pl. Ex. #6.) On August 10, 2010, he made a request to then Town Manager, William Booker, to inspect codified municipal ordinances pursuant to § 5-7-290 and FOIA. Mr. Curry discussed the "codified" ordinances with Mr. Booker. (R. p. 74-75, lines 20-25; 1-25.)

Mr. Curry testified that Mr. Booker provided him copies of ordinances. However, because the ordinances were not "codified" ordinances in the form that Mr. Curry thought the ordinances should have been. Mr. Curry maintained that the Town violated section 5-7-290. On direct examination, Mr. Curry testified as to how the ordinances should be specifically kept:

A I have never been allowed to inspect the ordinances in a current form complete with all amendments and repeals with an index so I can find my way around.

Q Do you know where the ordinances are physically located?

A I'm told they are kept in the public lobby area of the town hall in an area where town personnel have access to them.

(R. p. 34-35, lines 23-25; 1-6.)

Specifically, the Appellant testified:

Q I need you to answer the question, yes or no. Have you received a copy of those ordinances, any of those ordinances, any one, two, ten of those ordinances [,] that are not kept appropriately as you are sitting here today? Have you ever gone to the town and asked them for a copy of one of those ordinances out of their notebooks?

A I have asked for copies of ordinances, specific ordinances, yes. One in particular I recall was the fireworks ordinance, whether they were allowed in town or not.

Q And you've received a copy of it?

A Ma'am, what I received was some photocopy pages that had absolutely no indication as to that was what the town council voted on, whether it went through first reading, second reading, whether it was advertised to the public, whether the public attended, whether it had ever been amended in a later year, repealed in a later year. They were simply pages. I don't know where they came from.

Q While you were down there, when you asked them for a copy of the ordinance, whatever they gave you, did you ever -- just like you gave me that list, did you ever tell them all of the things you needed to go along with that piece of paper?

A You prefaced your question about a list I gave you?

Q You just testified -- gave me a list of things that is supposed to come along with your copy of the ordinances.

A Are you referring to the signatures and the first and second reading dates?

Q Yes.

A And so now that we've established that, your question is what?

Q When you received a piece of paper that was purported to be the ordinance for the town, and it was not to your liking, did you ask them specifically for the second reading information, the appeal, repeal of the ordinance, or what have you, whatever information you felt should have been on that piece of paper, did you ask them for it?

A Ma'am, I believe there is admitted into evidence at least four requests to four different town managers.

(R. p. 56-57, lines 6-25; 1-25.)

Appellant's dissatisfaction was that the Town **did** provide him with a copy of the ordinance that were photocopied pages "that had absolutely no indication as to that was what the town council voted on, whether it went through first reading, second reading, whether it was advertised to public, whether the public attended, whether it had ever been amended in a later year, repealed in a later year. They were simply pages." However, Appellant's silence to a direct questions equates to he **did not** tell the Town Manager. Appellant's dissatisfaction does not mean that the Town violated § 5-7-290 and FIOA. In addition, Appellant submitted into evidence photographs of the Town's Ordinances in bounded notebooks by years. (Pl. Ex. #18.)

Respondent presented witnesses that testified about the process for a proposed ordinance's passing is through three (3) readings by the Town Council and Appellant has attended, videotaped and received notices of the Town meetings at some point during his residency. The Respondent presented testimony from Ms. Cheryl Pereire, a town employee for approximately 13 years and the former Town Clerk for the Town Council from 2007 until July 2011. Ms. Pereire testified that her job responsibilities involved drafting the Town's ordinances, and she maintained the ordinances on her assigned Town computer, in loose-leaf notebooks and filing cabinets. Also, Ms. Periere provided

testimony regarding [1] the enactment process for ordinances; [2] the manner or method; and [3] maintenance the Town's ordinances. When asked, Mrs. Periere responded:

Q Okay. So was that your responsibility to keep up with first and second readings?

A Yes. Like having ordinances available if council or anyone needs to go back to an ordinance to see when it was passed or someone from the public requests to see it.

Q Okay. So was that your responsibility to keep up with first and second readings?

A Yes. Like having ordinances available if council or anyone needs to go back to an ordinance to see when it was passed or someone from the public requests to see it.

Q What, if anything, is kept with the ordinance or on the ordinance that indicates the first reading?

A On the -- well, on all of the pages, on the right-hand side, you will have first reading on the top of the page. On the last page of an ordinance you have the signatures of all of the council members and, plus, you have a line for the town clerk to sign, and then you have two lines that states it's the first reading and the date, the second reading and the date.

Q Now, is that something -- how long have you all done it or proceeded with the ordinance in that form?

A From what I can recall, since I was in in 1995. I have seen other town clerks do the same thing.

Q So what, if anything, does the town do to keep the ordinances together or in a place where you would be able to find the ordinances?

A We have a condenser (sic) where it is the only ordinances, resolutions and minutes are kept. They are kept by year, 1995 up to present, 2013.

Q There are no ordinances before 1995?

A Yes, there are ordinances before 1995. I'm just responding to when I've been there.

Q So you kept all of the ordinances by year. Any other format or way you keep the ordinances?

A No. That is what I know so far.

Q Where would the ordinances be kept?

A The ordinances were kept in the office in a condenser (sic) when I was there in -- when I was there in 2011, when I came back in 2013, it was moved to the reception area.

Q So when you say it was kept in a condenser (sic), what room or what floor of the town hall --

A You only have one floor, and it was kept more in the administration building. The way it is, in the reception area, the public can see any of those ordinances, plus they also keep the originals inside the office in cabinets.

Q When you say "inside the office" --

A The administration office. So there are two sets of ordinances. In case the public comes someone goes through the ordinances and they remove it, we can simply replace it because we have originals.

Q Okay. And how are the originals kept?

A The originals are kept in files listing the dates and everything so it is easy for us to go in those cabinets and pull out what year and replace it if any has been removed from the public.

Q Is there any other way you keep the ordinances?

A Not that I'm aware of.

Q So how do you -- what, if anything, do you have to do to find a specific ordinance?

A I will know an ordinance by the year. Usually, from what I have experienced, if it is a request for an ordinance, it is because someone came to a meeting and is interested in what ordinance was passed, and they would say I would like to get that ordinance that was passed for the first meeting in February, or whatever.

Q They give you a title?

A Yeah. They will say a title, because at the meetings we usually give out copies of the ordinances for the public.

Q So where would you look if you had to find a criminal ordinance?

A A criminal ordinance?

Q Yes.

A Could you be specific?

Q If someone asked you for an ordinance that deals with a criminal act in the town?

A Oh, right. There is a binder, it is in the administrative office. I think there is one in the police department that we go through if we're looking for anything with criminal intent.

Q Is it listed by the year? How is it listed?

A Listed by the year. I believe it is by the year.

(R. p. 108-112, lines 23-25; 1-3.)

In addition to Ms. Periere, the Respondent presented Mrs. Linda Cheatham, Assistant Town Manager,¹⁷ to testify as to the manner/method the ordinances have been maintained by the Town. Specifically, Mrs. Cheatham testified:

Q Now, as to the ordinances that are within the town's -- town hall, how are they set up? To your knowledge, how are they set up?

A To my knowledge, the ordinances are kept in a number of ways in the front office, in the reception area. The ordinances are kept by year. Back in the administrative area, the ordinances are kept by title. For example, Title 1 would

¹⁷ Mrs. Linda Cheatham served, at one point, Interim Manager and the Appellant was aware Mrs. Cheatham was a witness per a January 14, 2013 Pretrial Brief submitted by Kenneth Davis, Esquire.

be administration, elections, finance, procurement. There is a title regarding land use. There is a title regarding public safety issues. So they are indexed, if you will, by title, and those are kept in the back in binders. We also have copies of all of the ordinances in a filing cabinet in case someone takes one out of the front, we're able to replace it.

Q These three different places that the ordinances are kept, are they unsigned copies of the ordinances, or are they signed copies?

A I would say the majority are signed. There are some unsigned ones.

Q What are the unsigned ones?

A I don't know. Recently, they have all be signed. I've seen some older ones that don't have the signatures of all of the council people on it.

Q What else --

A To the best of my knowledge, they all say in the right-hand corner "first reading" or "second reading" and the date. They would also address any ordinance that was amended. So, for example, the business license ordinance was first adopted in December of 2004, and it is probably been amended five or six times. So all of those amendment dates would be listed in the upper right-hand corner so that one can see that you are looking at the latest one and also go back and find what happened before it was amended.

Q So this is on the ordinances that are kept in the front?

A Yes.

Q And also in the administrative office?

A Yes.

Q And then obviously on the original?

A Yes.

(R. p. 147-148, lines 6-25; 1-22.)

Lastly, Respondent presented Mr. William Booker, the current Town Manager. Mr. Booker testified that he had been the Town Manager since July 2013. Prior to July 2013, Mr. Booker served as the Town Manager from June 2009 to July 27, 2011.¹⁸ Mr. Booker testified that he signed on behalf of the Town the Settlement with the prior attorney, John Zilinsky. (R. p. 80-81; R. p. 172, lines 14-16; 1-25; and Def. Ex. #1.) Also, Mr. Booker testified that he personally "show[ed] him [Curry] a book that I used in my office which has an index of all the titles with the particular subjects under the title." Further, the index is in the Town's reception area as evidenced by photographs of books and cabinets in the Town's reception area. (R. p. 174, lines 9-14; Pl. Ex. #15, 16 and 18.)

¹⁸ Prior to 2009, Mr. Booker was a production manager for a business in Richmond, Virginia.

Further, Mr. Booker testified that “[o]ver time, there have been amended variants of these ordinances, and so what we have in the lobby is the amendments to the original set of ordinances, but we still have a set of books that are in the back that we put in some of the amendments. We keep the amendments in the filing cabinets as well.” (R. p. 175, 4-10.)

While the Town **does not** have a bound set of books produced by a 3rd party vendor, the Town **does have** the ordinances arranged in loose-leaf notebooks, with an index, organized in a system made available to the public. This complies with Section 5-7-290 of SC Code of Laws, as amended.

In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other.

IV. THE TRIAL COURT DID NOT ERR IN DENYING CURRY’S MOTION TO EXCLUDE THE TOWNS WITNESSES PROPOSED WHERE CURRY WAS PLACED ON NOTICE AND AWARE OF THE NAMES OF EACH WITNESS.

Pursuant to *Jumper v. Hawkins*, the court should not solely focus rely on a pretrial order or a party’s lack of response through discovery. 558 S.E.2d 911, 348 S.C. 142 (Ct. App. 2001). “[A] trial judge is required to consider and evaluate the following factors before imposing the sanction of exclusion of a witness:

- (1) the type of witness involved;
- (2) the content of the evidence emanating from the proffered witness;

- (3) the nature of the failure or neglect or refusal to furnish the witness' name;
- (4) the degree of surprise to the other party, including the prior knowledge of the name of the witness; and
- (5) the prejudice to the opposing party.”

Id. at 153.

The Appellant raised a pre-trial motion for the exclusion of the Respondent's witnesses, William Booker, Linda Cheatham and Cheryl Piera and the court denied his motion. (R. p. 20, line 20-22.)

Appellant stated to the court that Appellant sent his Pre-trial Brief on Friday and had an extra copy for the court and opposing counsel. (R. p.4, lines 1-13.) Appellant informed the court that a year-and-a-half order was in place and Appellant had not received a response to the interrogatories and request to produce as order by the court. (R. p. 4, lines 14-16; Pl. Ex. #9.) Appellant sent a letter to the Town that indicated that the Town failed to submit a payment also order in the order with interest. (R. p. 5-6, lines 6-22; 8-12; Pl. Ex. #12.) Respondent's counsel stated that she obtained the Town's file from the previous attorney's office and no discovery requests were in the file. (R. p. 6, lines 1-5.) However, in her efforts to resolve the unpaid amount of money to the Appellant, she found discussions regarding payments to the Appellant. (R. p. 6, lines 6-8.) Respondent's counsel informed the court that the previous attorney submitted some documents with his Pre-trial Brief that came from Town and some documents Respondent would object to use by the Appellant as the documents had no bearing in the matter. (R. p. 6, lines 17-22.) Respondent made no object to responding to the interrogatories and request for documents. (R. p. 6, lines 15-17.) In response to the

court, the Respondent provided the witnesses names and positions at the Town. (R. p. 7, lines 13-18.) The court questioned the Respondent regarding the testimony and Respondent provided that the witnesses would testify regarding providing Town records pursuant to the FIOA and Town ordinances. (R. p. 7-8, lines 19-25; 1.) Respondent's counsel offered to review the request and respond. (R. p. 10, lines 7-25.) The court noted that the pleadings were to be served on Mr. Booker in an order issued by Judge Hyman and Mr. Booker was a potential witness. (R. p. 13, lines 3-8.) There was no failure to provide any witnesses' names as the Appellant independently had two of the witnesses' names and was on notice of the third witness a year prior to this trial.

Prior to the trial beginning, the court gave the Appellant the opportunity to speak with the witnesses and decide if Appellant needed to depose the witnesses. (R. p. 13, lines 10-16.) After the opportunity to speak with the three witnesses, Appellant informed the court that the Appellant was "unfairly prejudiced by having to proceed—by having these witnesses at the last minute after a year-and-a half delay." (R. p. 14, lines 4-13.) Specifically, Appellant wanted written responses to the interrogatories and request to produce. (R. p. 15, lines 14-16; R. p. 19, lines 5-15.)¹⁹ Appellant was on notice that the witness, Interim Town Manager Linda Cheatham, would testify in the trial since January 14, 2013 and failed to take any deposition from that time until the day of the trial. Therefore, the Appellant was not surprised nor prejudiced.

As to the Town Manager, William Booker, the Appellant knew of this witness as the court previously ordered the Plaintiff to serve Mr. Booker and Appellant requested

¹⁹ Appellant interrogatories producing legal actions that the Town has ever been involved and the remaining interrogatories would have been the standard interrogatories; "codified" ordinances; copy or inspection of "codified ordinances"; town minutes; personnel and/or employee files for... Cheryl Pereira... William Booker... Town council member,... estimate proposals for "codified" ordinances...")

Mr. Booker's personnel file in his interrogatories. (R. p. 17, lines 5-10.) Appellant had prior knowledge of both witnesses' names was not surprised. (R. p. 34, lines 6-10.) Likewise, Appellant was aware of the Clerk of the Town and her name, Cheryl Pereira, as Appellant submitted a letter from Mrs. Pereira into evidence and requested her personnel file in his interrogatories. (R. p. 17, lines 7-8; Pl. Ex. #2.) Further, none of the witnesses was experts.

Respondent would assert that there was no surprise nor prejudice to the Appellant, as evidenced by the Appellant submitted exhibits- letters regarding his prior communication with Mr. Booker and Mrs. Pereira.²⁰ The Appellant strategy was disingenuous as Appellant's counsel had the multiple opportunities since the first continuance with Respondent's counsel to resolve any discovery issues and made no attempt.

When asked if Appellant wanted a continuance, Appellant refused to not make the request for his continuance to depose the witnesses. (R. p. 14, lines 14-16.) The court denied the motion. However, the court ruled "because of unavailability of any documents or witnesses, or whatever, if there needs to be a continuance, an adjournment or anything of the proceedings, the court would entertain that." (R. p. 20, lines 13-19.) Appellant did not object nor make a motion at the end of the trial as to unavailable witnesses or documents. Therefore, Respondent asserts that the Appellant waived this issue and it is not preserved.

²⁰ Respondent would object to the personnel records production.

V. THE TRIAL COURT DID NOT ERR IN DENYING CURRY ATTORNEY FEES AND COST PURSUANT TO FIOA WHERE COLLATERAL ESTOPPEL BARS CURRY'S ACTION.

Section 30-4-100 (b) of the South Carolina FOIA provides: "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. (Rev. 2007). "The award, however, must be reasonable and supported by adequate findings." *Burton v. York Cnty. Sheriff's Dep't*, 358 S.C. 339, 357-58, 594 S.E.2d 888, 898 (Ct. App. 2004). "No good faith exception exists for an award of attorney's fees under FOIA." *New York Times Co. v. Spartanburg Cnty. Sch. Dist. No. 7*, 374 S.C. 307, 313, 649 S.E.2d 28, 31 (2007). "Further, on appeal, an award for attorney's fees will be affirmed so long as sufficient evidence in the record supports each factor." *Jackson v. Speed*, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997).

In *Brock*, the plaintiff argued that the trial court erred in failing to award the attorney's fees and costs necessary in bringing this action. 767 S.E.2d 203, 441 S.C. 106 (S.C. App. 2015). Among the several factors to be weighed by the trial court in setting a reasonable attorney's fee in a FOIA action is the beneficial result accomplished. The Court held, "[i]n view of our holding the Town also violated FOIA by failing to state the specific purpose for its executive session at the November 13th meeting, and remand the issue of attorney's fees for further consideration consistent with its opinion. "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.” *Sloan v. S.C. Dep't of Revenue*, 409 S.C. 551, ___, 762 S.E.2d 687, 689 (2014).

Unlike, *Brock*, the court did not error in its ruling and therefore, the Appellant is not entitled to any attorney’s fees because the Appellant did not prevail. The present relief the Appellant sought was adjudicated in the 2010 order and re-litigating the issues in this matter are barred by the doctrine of collateral estoppel.

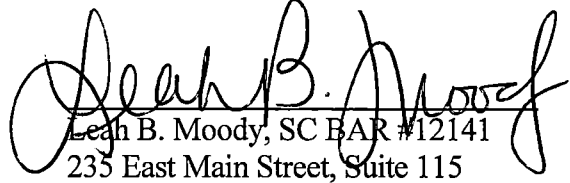
CONCLUSION

For the reasons stated, the Respondent, Town of Atlantic Beach request the Court affirm the trial court as to the denial of request by the Appellant Paul Curry for declaratory judgment and injunctive relief in this matter. The Order denying relief and ruling(s) made in this matter were proper by the trial court as follows:

1. The Appellant failed to make a clear showing of the existence of an actual controversy regarding codifying the Town’s ordinance and he was not entitled to the relief sought.
2. The trial court properly ruled as to the Appellant’s issues raised in this matter, pursuant to South Carolina FOIA, were adjudicated in the 2010 order and re-litigating the issues in this matter are barred by the doctrine of collateral estoppel. Further, Appellant is not entitled to an award of attorney fees.
3. The Appellant did not preserve for the record res judicata for the Court to address.

4. The trial court properly considered and evaluated the Appellant's motion exclusion of Town witnesses. Further, that the Appellant suffered no surprise, as he had prior knowledge of each witness, nor prejudice in this matter.

Respectfully submitted,
LAW OFFICE OF LEAH B. MOODY, LLC

A handwritten signature in black ink, appearing to read "Leah B. Moody", is written over the printed name and address.

Leah B. Moody, SC BAR #12141
235 East Main Street, Suite 115
Post Office Box 1015
Rock Hill, South Carolina 29730
Attorney for the Town of Atlantic Beach

This 11 day of February 2016

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
Court of Common Pleas
The Honorable Clifton Newman, Presiding Judge

APPELLATE CASE NO.: 2015-001398
CIVIL ACTION NO.: 2010-4-CP-26-10848

RECEIVED

FEB 11 2016

SC Court of Appeals

PAUL CURRY,

APPELLANT,

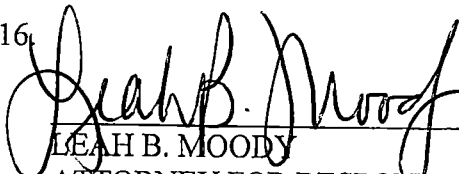
V.

TOWN OF ATLANTIC BEACH,

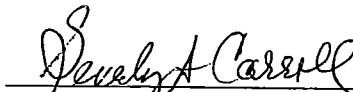
RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the **Initial Brief of Respondent and Designation of Matter** in the above referenced case has been served upon Randall K. Mullins, Esquire, at Mullins Law Firm, P.A., 1312 Madison Drive, North Myrtle Beach, SC 29582, this 11 day of February, 2016.


LEAH B. MOODY
ATTORNEY FOR RESPONDENT

SUBSCRIBED AND SWORN TO before me
this 11th day of February, 2016.


Notary Public for South Carolina (L.S.)
My Commission Expires: 12/15/2025