

EXHIBIT A

STATE OF SOUTH CAROLINA
COUNTY OF NEWBERRY

IN THE COURT OF COMMON PLEAS

ADELE POPE,
plaintiff,

C.A. No
11-CP-36-379

-v-

ORDER

ALAN WILSON, *in his*
capacity as Attorney
General,
defendant.

RECEIVED

AUG 18 2016

SC Court of Appeals

THIS MATTER ORIGINALLY CAME BEFORE THE COURT for a hearing on October 26, 2011. Plaintiff moves this Court for summary judgment on her claim that she is entitled to the production of certain documents from the Defendant Attorney General under the State of South Carolina's Freedom of Information Act (hereinafter "FOIA"), S.C. Code Ann. § 30-4-10 *et seq.* Defendant opposes Plaintiff's motion and moves to dismiss the Plaintiff's complaint and to strike the attached affidavits. I find as follows:

I. Facts of the Case.

Although not directly arising out of pending litigation, this matter is otherwise closely related to litigation already pending in Richland County¹. See *Bauknight v. Pope*, 2010-CP-40-04900 (Richland 2010) (hereinafter "fiduciary litigation"). The fiduciary litigation arises out of the Plaintiff's fiduciary responsibilities in relation to the James Brown Legacy Trust. Furthermore, the fiduciary litigation is presently stayed pursuant to an oral order by the

¹ The defendant in this action is one of several plaintiffs in that action, wherein the plaintiff in this action is one of several defendants.

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Honorable Casey L. Manning.² At the time of the stay, the parties to the fiduciary litigation (hereinafter "McMaster parties") were in the midst of claims and cross-claims regarding, among other things, the disqualification of the firm Sweeney Wingate & Barrow, P.A. (hereinafter "Sweeney").

During the pendency of the stay, the Plaintiff made an FOIA request for documents pertaining to, *inter alia*, Sweeney's fee agreement with the Defendant's office, documents outlining the Defendant's policies for retaining outside counsel, and documents dealing with the policy of outside counsel speaking on behalf of the Defendant. Because of Judge Manning's earlier ruling, Defendant understandably declined to disclose the requested documents. Thereafter, Plaintiff brought this action and, before the Defendant filed an answer, moved for summary judgment.

Plaintiff asseverates that she is entitled to production of these documents regardless of the status of the fiduciary litigation. Defendant contends that venue is not proper in Newberry County, that the Newberry Court is without subject matter jurisdiction to hear this matter, and that the Plaintiff may not avail herself of FOIA for the production of documents at issue.

² At the hearing on this matter, there was some dispute as to whether Judge Manning's ruling amounted to an absolute stay. According to the transcript of the hearing in question, the following transpired:

Mr. Wingate: You Honor, just one clarification. When you say maintain the status quo, the status quo is that the case is effectively stayed at this point. [sic]

The Court: Yes, I mean it might last for a week or so. I just need to go chitchat with Judge Lee and say, this is what I have done. How do you want to proceed from here. [sic] And she will either say, bring them back in or whatever. But the idea, if I were Judge Lee I would want her to do the same thing I am doing for my benefit. Thank you all very much.

Judge Manning's ruling will be considered and understood by this court as a stay of proceedings, although the exact legal effect of his comments may be subject to debate. Subsequent to the hearing before this court, the court contacted Judge Lee who informed this judge that she and Judge Manning had agreed that Judge Manning would be handling all the fiduciary litigation.

II. Subject Matter Jurisdiction & Rule 12(b)(8)

Because a court may not act without subject matter jurisdiction, *DeWitt v. S.C. Dep't of Pub. Transp.*, 274 S.C. 184, 187, 262 S.E.2d 28 (1980) (citing *State v. Funderburk*, 259 S.C. 256, 191 S.E. (2d) 520 (1972); *Ross v. Richland County*, 270 S.C. 100, 240 S.E. (2d) 649 (1978); *Ex parte Harte*, 186 S.C. 125, 195 S.E. 253 (1938)), it is incumbent on the Court to first determine whether it has jurisdiction to resolve the matter before it. "The question of subject matter jurisdiction is a question of law for the court." *Chew v. Newsome Chevrolet, Inc.*, 315 S.C. 102, 104, 431 S.E.2d 631 (Cl.App.1993) (citing *Bargesser v. Coleman Co.*, 230 S.C. 562, 96 S.E.2d 825 (1957)). Defendant argues that because the Richland Court has exercised jurisdiction over the fiduciary litigation, principles of law preclude this Court from exercising subject matter jurisdiction. Accordingly, the Defendant contends that this Court should dismiss this action pursuant to Rule 12(b)(8), SCRC. I disagree.

In support defendant's position, Defendant cites the cases of *Tucker v. Tucker*³ and *Richardson, Plowden, Grier & Howser v. Pyle*.⁴ These cases are not entirely on point with the issues in this case. Both *Tucker* and *Richardson* deal with the jurisdictional overlap between the Circuit Court and inferior courts over the same subject matter. *Tucker* involved the administration of a probate estate by two executors. *Tucker*, 264 S.C. at 175. The plaintiff brought suit in the Circuit Court to remove the co-executor. *Id.* Citing provisions of the South Carolina Constitution and the South Carolina Probate Code, our Supreme Court held that once an administration of an estate was begun in the Probate Court, all other courts of concurrent jurisdiction were without jurisdiction to hear matters pertaining to that case. *Id.* at 175-78.

The issue in *Richardson* was whether the Fee Disputes Board held exclusive jurisdiction over a matter originally brought in the Circuit Court. *Richardson*, 322 S.C. at 372-73. In that case, after the plaintiff initiated the breach of contract action in Circuit Court, the defendant attempted transfer the case to the board. *Id.* Relying on Rule 2 of Rule 416, SCACR,⁵ the

³ 264 S.C. 172, 213 S.E.2d 588 (1975).

⁴ 322 S.C. 371, 472 S.E.2d 232 (1996).

⁵ This Rule states, in pertinent part, that

Under no circumstances will the Board participate in: (1) a fee dispute involving an amount in dispute of \$50,000 or more; or (2) disputes over which, in the first instance, a court, commission, judge, or other tribunal has jurisdiction to fix the fee.

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Supreme Court found that the board could not take jurisdiction over the matter when the matter had already been submitted to the Circuit Court. *Id.* at 374. The Court further held that:

[t]o allow a client to unilaterally remove a fee dispute to the Board when a contract action is pending in circuit court to collect attorney's fees would be inconsistent with the well-settled rule that where there is concurrent jurisdiction, the first tribunal to acquire jurisdiction has exclusive jurisdiction.

Id. (citing *McDonald v. McDonald*, 276 S.C. 573, 281 S.E.2d 109 (1981)). The present case does not involve any inferior court; rather, it involves two circuit courts addressing issues that concern one another. There is no case directly on point to address this issue.

The rule of law, as delineated by cases such as *Tucker* and *Richardson*, is that where the same parties litigate the same matter before courts of concurrent jurisdiction, the court which first takes jurisdiction has exclusive jurisdiction. See *McDonald*, 276 S.C. at 575 (“Here, actions involving the same parties, substantially the same issue (the parties' respective interests in the marital residence), were pending in the family court and circuit court, courts of concurrent jurisdiction.”). This judicial principle a great resemblance to the Rule 12(b)(8) standard announced by the Court of Appeals in *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 674 S.E.2d 524 (Ct. App. 2009). The rule stated in *Capital City* is that “[i]n South Carolina, dismissal under Rule 12(b)(8) may be proper when there is (1) another action pending, (2) between the same parties, (3) for the same claim.” *Id.* at 105. Thus, an analysis of the Rule 12(b)(8) case law, as applied to the defendant's *Tucker/Richardson* claims, leads me to find that this Court does, in fact, have subject matter jurisdiction.

The first two prongs of the *Capital City* test is met in this case. As already discussed, the fiduciary litigation remains pending in Richland County Circuit Court. Both this litigation and the fiduciary litigation involve many of the same parties, and the Plaintiff and the Defendant are both involved in the exact same capacities, albeit with adversarial roles reversed. In both instances, the Plaintiff is a party in her individual capacity and the Defendant is a litigant in his official capacity. Thus, the parties are the same. See *Cricket Cove Ventures, LLC v. Gilland*, 390 S.C. 312, 321-22, 701 S.E.2d 39, 44-45 (Ct. App. 2010) (stating that where the plaintiffs sue

Rule 416, SCACR (emphasis supplied).

defendants in their official capacities in one suit and in their individual capacities in another, then the identities of the parties are different, even when both suits center on the same set of facts).

However, this case fails to meet the third prong of the *Capital City* test in that the claims in this case and in the fiduciary litigation are not the same. In order for claims to be identical, they "must be *precisely or substantially the same in both proceedings* in order for the drastic remedy of dismissal to be appropriate under Rule 12(b)(8)." *Capital City*, 382 S.C. at 105-06 (emphasis supplied). In *Cricket Cove*, the plaintiffs sought a declaratory judgment and writ of *mandamus* against the defendant municipality and subsequently brought another suit against county officials in their individual capacities for civil conspiracy and injunctive relief. *Cricket Cove*, 390 S.C. at 317-18. Reversing the lower courts dismissal of the latter case under Rule 12(b)(8), the Court of Appeals found that the claims asserted in either action were not identical. *Id.* at 322-23. "Here, the cause of action for civil conspiracy is not covered in the first case, and the writ of *mandamus* cause of action in the present case seeks relief that is different from the relief sought in the causes of action in the first case." *Id.* at 323.

The *Cricket Cove* decision followed the then newly announced standard set forth in *Capital City*. The *Capital City* case concerned a dispute over a modifier to the plaintiff's worker's compensation coverage. *Capital City*, 382 S.C. at 96-97. There, while the modifier issue was on administrative appeal, the plaintiff brought suit against the defendant insurer for breach of contract and fraud. *Id.* at 97. Finding the lower court's dismissal improper, the Court of Appeals concluded that

[h]ere, while we respectfully recognize that the administrative claim may have some relationship or impact upon the circuit court action, we also recognize that the administrative proceeding and the circuit court action are fundamentally and structurally different from each other.

Id. at 106.

The conclusions reached in *Capital City* and *Cricket Cove* are similar to that reached by this Court. The Defendant contends that this action is merely an extension of the discovery dispute in the fiduciary litigation. Looking at the law, this is not the case. Substantively, a FOIA request is a different animal than that of a discovery request. In some instances, a FOIA request may be proper in circumstances where a discovery request would be improper and *vice versa*. See *Columbia v. ACLU of South Carolina*, 323 S.C. 384, 388-89, 475 S.E.2d 747, 749-50 (1996)

(holding that where documents are the subject matter of FOIA litigation, these documents are not discoverable). Procedurally, discovery in civil actions is governed by Part V of the South Carolina Rules of Civil Procedure, whereas the process for obtaining public documents is defined under S.C. Code Ann. § 30-4-40 *et seq.* Looking at this distinction, production of documents under FOIA is statutorily guaranteed to “any person.” S.C. CODE ANN. § 30-4-40. Discovery, on the other hand, is available only to litigants. *See* Rule 26(a), SCRPC (“Parties may obtain discovery by one or more of the following methods. . .”). Moreover, the relief afforded under discovery is dissimilar to that of discovery. If an applicant is denied under FOIA, relief may only be achieved by bringing suit in the Circuit Court. S.C. CODE ANN. § 34-4-100(a). If a party is denied discovery, they must bring a motion to compel, which, if denied, may only be appealed at the conclusion of the case. *Lowndes Products, Inc. v. Brower*, 262 S.C. 431, 434, 205 S.E.2d 184, 185 (1974). These are some, but not all, of the distinctions between FOIA and discovery, and for these reasons, the Court concludes the claims placed before this Court and the Richland County Court are not the same. Therefore, this Court has subject matter jurisdiction.⁶

III. Consolidation.

Finding that this Court is vested with subject matter jurisdiction, the Court declines to address any of the additional motions put before it. Already, the underlying subject matter of this case bears the imprimatur of four other courts.⁷ Rule 1 of the South Carolina Rules of Civil Procedure state that the Rules “shall be construed to secure the just, speedy, and inexpensive determination of every action.” Rule 1, SCRPC. It is therefore unnecessary and repugnant to interests of expedited justice for yet another court to become involved. For this reason, this case is to be consolidated with the currently pending case of *Bauknight v. Pope*, 2010-CP-40-04900 (Richland 2010), as per the instructions set forth below. *See* Rule 42(a), SCRPC (“When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all matters in issue in the action.”); *Creighton v. Coligny Plaza Limited*

⁶ Given this analysis, Defendant’s motion to dismiss pursuant to Rule 12(b)(8) is also denied.

⁷ In addition to the fiduciary litigation, aspects of this case have been litigated in the Aiken Circuit Court as well as in federal district court. The Aiken matter is currently on appeal to the Supreme Court. I was subsequently informed that apparently another case in Newberry, 11-CP-36-364, involves apparently identical claims. While that case is currently not before this court and is therefore beyond the scope of this order, the court would strongly encourage all concerned to consent to consolidating that matter in Richland or for Plaintiff to dismiss that case, as it appears duplicative of issues addressed in this order.

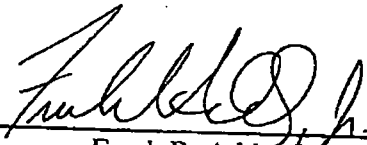
Partnership, 334 S.C. 96, 119-20, 512 S.E.2d 510, 522 (Ct. App. 1998) (“Under Rule 42(a), a trial judge may order the consolidation of actions involving a common question of law or fact.”).

IV. Conclusion.

It is the Order of the Court that:

1. The Defendant in this matter will answer Plaintiff’s complaint;
2. At the conclusion of the pleadings phase of this case, this matter will be consolidated with *Bauknight v. Pope*, 2010-CP-40-04900 (Richland 2010);
3. Any motions and issues hereafter outstanding, including an oral motion to intervene by an arguably interested party, will thereby be taken up by Richland County Court; and
4. Any claim to attorney’s fees, as permitted under the South Carolina Freedom of Information Act, will be preserved for resolution by the Richland County Court.

IT IS SO ORDERED.



Frank R. Addy, Jr.
Eighth Judicial Circuit

November 22, 2011
Greenwood, South Carolina

EXHIBIT B

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Adele J. Pope,
Plaintiff,

v.

Alan Wilson, in his capacity as
Attorney General of South Carolina and
James Brown Legacy Trust, by
Russell L. Bauknight, its Trustee,

Defendants.

IN THE COURT OF COMMON PLEAS

Case No. 2010-CP-40-4900
[formerly Newberry Co. Case No.
2011-CP-36-379]

ORDER

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SC Court of Appeals

This matter has come before this Court pursuant to various motions of the parties including a motion for judgment on the pleadings of the Defendant Attorney General and a motion for summary judgment of the Plaintiff. After carefully reviewing the filings of the parties and considering the arguments of counsel concerning the motions in Aiken on May 17, 2016, this Court grants the Attorney General's Motion for Judgment on the Pleadings.

The Plaintiff has brought this action under the Freedom of Information Act, S.C. Code Ann. §30-4-10, et seq. seeking the following:

1 and 2. Published policies of the Office of the Attorney General regarding engagement of private attorneys including contingency fee counsel in effect in May, 2010 and in effect on July 19, 2011.

3. The contract of then-AG Henry McMaster and / or the State engaging Kenneth B. Wingate and Everett Kendall, II to commence Civil Action 2010-GC-4000073 in the Probate Court for Richland County on behalf of the AG.

4. Any contract and / or other document authorizing Russell Bauknight to commence case 40000073 on behalf of the AG and/ or the State.

Plaintiff brought suit in Newberry County, but her case was transferred to Richland County and

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consolidated with case 2010-CP-40-4900. This Order addresses only the FOIA case.

These documents are potentially discoverable documents under pending litigation in Richland /Aiken counties and will be governed by the South Carolina Rules of Civil Procedure. FOIA is not a tool that may be used to bypass civil discovery in a pending case. The Order of the late Marc Westbrook submitted by the Defendant Wilson (*Lominack v. Myers*, 2002-CP-32-1890, October 25, 2002) stated that "it is well settled case law that the FOIA is not intended as a substitute for discovery and was not enacted to provide procedures for obtaining information during litigation or to benefit private litigants." (copy on file in this case). Although the FOIA at issue in Judge Westbrook's case related to a post conviction case, the reasoning applies to civil cases such as the pending litigation in Richland and Aiken.

Our Supreme Court has not expressly addressed the issue in the civil context, it has recognized that FOIA is not to be used to bypass limits on discovery in criminal proceedings. *State v. Robinson*, 305 S.C. 469, 476-77, 409 S.E.2d 404, 409 (1991); *Evening Post Pub. Co. v. City of N. Charleston*, 363 S.C. 452, 459, 611 S.E.2d 496, 500 (2005). The Supreme Court has also recognized that "[i]n construing the federal FOIA, the United States Supreme Court has held that the FOIA does not supplement or displace the applicable rules of discovery. *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 153 (1989)¹; *National Labor Relations Board v. Robbins Tire and Rubber Co.*, 437 U.S. 214 (1978)." *State v. Robinson*, 409 S.E.2d at 409.

¹ "[A] court must be mindful of this Court's observations that the FOIA was not intended to supplement or displace rules of discovery. See *Robbins Tire*, 437 U.S., at 236-239, 242; *id.*, at 243, 98 S.Ct., at 2327 (STEVENS, J., concurring). See also *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 801-802 (1984). Indeed, the Court of Appeals acknowledged that this was not a principal intention of Congress. 850 F.2d, at 108." *Id.*


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Although *Robinson* involved criminal proceedings, our Supreme Court's recitation of the federal rule suggests that it would apply the same limitation on the use of FOIA as a discovery tool as Judge Westbrook did.

Moreover, FOIA, itself, exempts matters covered by the Rules of Civil Procedure via S.C. Code Ann. §30-4-40(4) for "[m]atters specifically exempted from disclosure by statute or law." (emphasis added). These exemptions under law would include discovery which is strictly controlled by the Rules of Civil Procedure because court rules of procedure are "law." *Magnuson v. Billings*, 152 Ind. 177, 52 N.E. 803, 804 (1899)²; *United States v. Hyass*, 355 U.S. 570, 575 (1958)³; *State ex rel. Beacon Journal Publ'g Co. v. Waters*, 67 Ohio St. 3d 321, 323, 617 N.E.2d 1110, 1113 (1993).⁴

Because the above documents may be sought through discovery in the pending litigation and for the reasons set forth above, IT IS ORDERED that this FOIA case be dismissed.

AND IT IS SO ORDERED.


DOYET A. EARLY, III
PRESIDING JUDGE


 South Carolina

² "[Rules of court] have the force and effect of law, and are obligatory upon the court, as well as upon parties to causes pending before it. . . A rule of court is a law of practice, extended alike to all litigants who come within its purview, and who, in conducting their causes, have the right to assume that it will be uniformly enforced by the court, in conservation of their rights . . ." *Id*

³ "The phrase 'a law of the United States,' as used in the perjury statute, is not limited to statutes, but includes as well Rules and Regulations which have been lawfully authorized and have a clear legislative base . . ." *Id*

⁴ "[E]xception [under Ohio discovery statute] for other 'state law' may include procedural court rules, and does include [Ohio] Crim.R. 6(E)." *Id*

EXHIBIT C

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SC Court of Appeals

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2010 CP-40-4900

Adele J. Pope

Alan Wilson, in his capacity as Attorney
General of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for : Plaintiff Defendant
or
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41, SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other

RICHLAND COUNTY
FILED
2016 AUG 10 AM 9:22
JEANETTE W. McBRIDE
C.P. & G.S.

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court: Based on the written motion by the Plaintiff, the Motion to Alter, Amend and/or Vacate the June 14, 2016 Order granting the Attorney General's Motion to Dismiss is hereby DENIED.

ORDER INFORMATION

This order ends does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

SCANNED

WBE

Circuit Court Judge

0136
Judge Code

7-27-16
Date

For Clerk of Court Office Use Only

This judgment was entered on the *11* day of *August*, 20 *16* and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

Jeanette W. ...

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

SCANNED