THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Appellate Case No.: 2014-002221

George S. Glassmeyer,.....Respondent,

v.

City of Columbia,.....Appellant.

RESPONDENT'S RETURN TO APPELLANT'S PETITION FOR REHEARING

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On August 24, 2016, this Court filed an unpublished opinion, 2016-UP-404 ("Opinion"), affirming the lower court's decision dated July 23, 2014, mandating City of Columbia ("City") provide access to certain documents requested by George S. Glassmeyer ("Glassmeyer") pursuant to the South Carolina Freedom of Information Act, S.C. Code Ann. § 30-4-10, *et seq.* (Rev. ed. 2007, as amended) ("FOIA").[1]

On September 1, 2016, City filed a Petition for Rehearing pursuant to Rule 221(a) of the *South Carolina Rules of Appellate Procedure.* For the following reasons, City's Petition for Rehearing should be denied.

ARGUMENTS

A petition for rehearing must state with particularity the points the court supposedly overlooked or misapprehended. Rule 221(a), SCACR; *See Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 564 S.E.2d 322 (2001). The purpose of a petition for rehearing is not to present points not presented to the court in its briefs nor is the purpose of a petition for rehearing to have the case tried in the appellate court a second time. *Id.* at 532, 564 S.E.2d at 322.

Although City purports to challenge all five this Court's holdings, the thrust of its dissatisfaction with the Opinion is expressed in two principal assertions: (i) the allegations against former Police Chief Randy Scott ("Scott") do not relate or refer to "the activities of a public official" because, according to City, the complaints only pertain

[1] The lower court also granted Glassmeyer's request for attorney's fees and costs pursuant to the FOIA but left the record open as to how much to award. (R. pp. 1-9.) The validity of the lower court's award of Glassmeyer's fees and costs is no longer disputed. *See Tench v. S.C. Dep't of Educ.*, 347 S.C. 117, 553 S.E.2d 451 (2001) (holding that the failure to petition the Court of Appeals for rehearing effectively resulted in the abandonment of a party's right to relitigate the issue on remand).

to Scott's "off-duty,"[2] "private" "sexual practices and activities,"[3] rather than his official activity as police chief; and (ii) the complaints City received[4] were not "presented through/to the City's Police Department"[5] or pursuant to "established channels for submitting complaints."[6]

Because City has furnished the Court with no basis for rehearing this matter, the Petition for Rehearing should be denied.

I. THE COURT DID NOT MISAPPLY APPLICABLE LAW OR MISCONSTRUE FACTS IN THE RECORD BY HOLDING FOIA APPLIES TO THE DOCUMENTS IN CITY'S POSSESSION.

This Court held FOIA applies because the allegations in the complaints refer to Mr. Scott's activities during his time as City's police chief and, thus, "regard the activities of a public official." Implicit in this holding is the notion the documents Glassmeyer sought meet FOIA's definition of "public records,"[7] which is not limited to documents regarding the activities of public officials. City claims the Opinion ignores controlling law of this state, including *Burton v. York County Sheriff's Department*, 358 S.C. 339, 594 S.E.2d 888 (Ct. App. 2004), which, according to City, held not all activities of public officials relate to their public office or duties. (*See* Petition at pp. 4-6.)

Although not referenced by the Court in its first holding, the Court did expressly consider and apply *Burton* to the facts of this case. (*See* Opinion at ¶ 4.) The facts and legal analysis in the *Burton* case were fully briefed by both parties and this Court

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[2] Petition for Rehearing at p. 5.

[3] *Id.* at p. 5.

[4] There is no dispute all complaints against Mr. Scott were actually received by City and were in City's possession at the time Glassmeyer submitted his FOIA request on April 3, 2013.

[5] Petition for Rehearing at p. 5.

[6] *Id.* at 5.

[7] S.C. Code Ann. § 30-4-20(c) (Rev. ed. 2007).

questioned counsel about *Burton*'s application to this case during oral argument on March 9, 2016.

City argues *Burton* and the "FOIA require a link between the action complained of and the law officers' law enforcement activities." (Petition at p. 5.) However, City cites no FOIA provision supporting this proposition. To the contrary, the FOIA is clear that a public body cannot withhold information sought by a citizen *unless* the information falls into one of the fifteen exemption categories contained within § 30-4-40, or is otherwise exempt from disclosure under other FOIA provisions. S.C. Code Ann. § 30-4-40 (Rev. ed. 2007). The Supreme Court confirmed in *Evening Post Pub. Co. v. City of North Charleston*, 363 S.C. 452, 611 S.E.2d 496 (2005), that if a document does not fall within one of the enumerated exemptions, it cannot be withheld. Nothing in the FOIA permits a public body to withhold documents based on its subjective view that the documents do not "regard the 'activities of their public officials,'" as City suggests.

Even though the Court's Opinion did not directly apply *Burton* to its first holding, the Court's holding was not in error. As City acknowledges, *Burton* does not even deal with the threshold issue of whether documents are "public records" within the meaning of the FOIA, but rather, whether documents meeting the FOIA's definition of "public records" contain "information of a personal nature where the public disclosure thereof would constitute an unreasonable invasions of personal privacy." S.C. Code Ann. § 30-4-40(a)(2) (2007). *Burton*, 358 S.C. at 352, 594 S.E.2d at 895. This Court appropriately applied *Burton* to its fourth holding, which affirmed the lower court's decision that the documents are not exempt from disclosure due to the FOIA's privacy exemption.

In addition to lacking any legal foundation, City's argument that the requested

documents do not "regard the 'activities of . . . public officials'" is substantively meritless. (*See* Appellant's Brief at p. 6 (citation omitted); Petition at p. 5.) The gravamen of Glassmeyer's FOIA request was to copy or inspect complaints received by City regarding alleged wrongdoing of its public officials. (R. pp. 65-68.) Alleged wrongful conduct or violations of the law by former police chief Scott that were undisputedly in City's possession unquestionably pertain to "activities" of a "public official," as this Court concluded in its Opinion.

No distinction needed to be drawn by this Court "between alleged off-duty personal activity and claims that the former police chief was derelict in his public duties." (*See* Petition at p. 5.) This Court appropriately considered, and rejected, City's argument that its subjective review and analysis of the requested documents, based on its own interpretation of *Burton*, permitted it to withhold documents from Glassmeyer.

City's suggestion that because the documents at issue were not "contained in [City's] personnel files" or connected to any "investigative report" prepared by City the documents were not "public records," is nonsensical and contrary to FOIA. (Petition at p. 6.); *see* S.C. Code Ann. § 30-4-20(c) (Rev. ed. 2007).) Pursuant to its own policies and procedures, City had an express obligation to investigate *any* complaint it received. (R. p. 72 at ¶ 9; p. 100 at Sect. 6, Chap. 2 ¶ 1.0 ("Directive").) There is no dispute the documents were in City's possession at the time of Glassmeyer's FOIA request. (*See* Petition at FN 1.) That City failed or refused to file the documents in Scott's personnel folder and ignored its own written policy by refusing to conduct a formal investigation provides City no legal protection. Furthermore, it ignores the fact that the documents plainly meet FOIA's definition of "public records," regardless of where City kept them.

S.C. Code Ann. § 30-4-20(c) (Rev. ed. 2007) ("'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").

Finally, City's implication that no documents were or should have been provided to Glassmeyer because City did not have time or an opportunity to investigate is directly opposed by City's own pronouncement to the lower court that it deliberated regarding the complaints and determined not to undertake any official investigation into the allegations (R. p. 36, lines 10-15).

II. THE COURT DID NOT MISAPPLY APPLICABLE LAW OR MISCONSTRUE FACTS IN THE RECORD BY HOLDING CITY FAILED TO TIMELY PRESENT ITS ARGUMENT THAT THE WITHHELD DOCUMENTS WERE NOT PRESENTED TO THE CITY THROUGH ESTABLISHED PROCEDURES.

This Court appropriately affirmed the lower court's decision rejecting City's argument that no proper complaint was brought to the Police Department sufficient to initiate a formal investigation. City's argument was first raised to the lower court in its Motion to Alter or Amend. (R. pp. 132-133.) The lower court recognized City's arguments had not been previously presented to it and were therefore waived. (R. pp. 12-13.) *Hickman v. Hickman*, 301 S.C. 455, 392 S.E.2d 481 (Ct. App. 1990) ("A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not.") (citation omitted).

In its Petition for Rehearing, City implies the lower court could have inferred the complaints were not filed through the proper or recommended channels based on the "source and the recipient" of the documents submitted to the lower court for *in camera*

review. (Petition at p. 6.) However, South Carolina law is clear that to preserve an issue for appeal, a party must make an argument with "sufficient specificity to inform the trial court of the point being urged." *Allegro, Inc. v. Scully*, 400 S.C. 33, 44, 733 S.E.2d 114, 120 (Ct. App. 2012) (quoting *Wilder Corp. v .Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (internal quotations omitted)). A party cannot rely upon a Court to discern what arguments might be available to it that are not expressly raised. Moreover, the lower court must rule on the issue to be preserved. *State v. Dunbar*, 356 S.C. 138, 587 S.E.2d 691 (2003). "A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument that has been presented on that ground." *Id.* at 142, 587 S.E.2d at 694 (citation omitted). City's argument on this issue should be rejected.

The purpose behind Rule 59(e) is to allow a party to correct misapplications of law or fact or to preserve legal issues for appeal. *Elam v. S.C. Dept. of Transp.*, 361 S.C. 9, 602 S.E.2d 772 (2004). "[A] great number of reported cases in South Carolina for at least four generations, and more recently the appellate court rules and rules of civil procedure, have emphasized the great importance and absolute necessity of ensuring that all issues and arguments are presented to the lower court for its consideration. Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court." *Id.* at 779-780 (citation omitted). Issue preservation rules are designed to give the lower court a fair opportunity to rule on the issues, and thus provide the appellate courts with a platform for meaningful review. *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (quotation omitted).

Even if there were some merit to City's contention, the lower court had no ability

to discern the appropriate or recommended procedure for filing complaints until City filed its Motion to Alter or Amend the lower court's order granting summary judgment to Glassmeyer. Prior to City's Motion to Alter or Amend, the only documents in the record were the complaints which were submitted by the City for *in camera* review and the City's Directives and Procedures Manual, introduced by Glassmeyer. (R. p. 58; R. pp. 79-103.) As pointed out by City, the Directives and Procedures Manual stated: "The Internal Affairs Unit will post a brochure in a public location in every police station or substation that outlines the procedures the public will follow in lodging a complaint against the Department or its employees. Complaints may also be submitted on-line via the Police Department website." (R. p. 100 at Sect. 2, Chap. 6 ¶ 3.0.) The Directives and Procedures Manual also provided: "Complaints received by mail by the Office of the Chief or Internal Affairs will be handled as *any other complaint*." (R. p. 101 at Sect. 2, Chap. 6 ¶ 4.1 (emphasis added).) City did not submit any published instructions for submitting a complaint until filing its Motion to Alter or Amend. (R. p. 132 (referencing Attachment B at R. pp. 141-143).)[8]

Moreover, City's assertion that because there are recommended procedures for filing complaints, any complaints submitted to the City *outside* of the recommended method can simply be ignored without further investigation or inquiry should be rejected. City's own Directives and Procedures Manual makes clear it is "require[d] [to] investigate[] . . . all citizen complaints, including anonymous complaints." (R. p. 72 at ¶

[8] Even more absurd, City's published instructions suggest a citizen intending to file a grievance should, but is not required to, "[w]rite a letter to either the Chief of Police or the Internal Affairs Division." (R. p. 132 (referencing Attachment B at R. pp. 141-143).) A citizen intending to complain about the police chief himself, as is the case here, should not be constrained to file a grievance with the subject or someone under his supervision.

9; R. p. 100 at § 1.0 ("Directive").) There is no stated exception to this rule and there is no authorized procedure for City to ignore complaints that it receives outside of its own recommended avenues.

III. THE COURT DID NOT MISAPPLY APPLICABLE LAW OR MISCONSTRUE FACTS IN THE RECORD BY HOLDING CITY ABANDONED ITS ARGUMENT CONCERNING FAMILY COURT DOCUMENTS.

Throughout the case, City argued the documents requested by Glassmeyer were subject to the personal privacy exemption of the FOIA, S.C. Code Ann. § 30-4-40(a)(2) (Rev. ed. 2007). Glassmeyer argued complaints of impropriety made by third parties should not be considered "[i]nformation of a personal nature where public disclosure thereof would constitute unreasonable invasion of personal privacy." *Id.* Rather, such complaints were mere representations or allegations made by others, whether true or untrue, regarding violations of the law or City policy by City employees.

During the hearing on the parties' cross motions for summary judgment, City admitted some of the complaints were publicly available documents, including court records. (R. p. 33, line 15 – p. 34, line 25; p. 36, lines 5-15; Appellant's Brief at p. 10, n. 5.) The lower court noted in its Summary Judgment Order that "copies of records from family court proceedings . . . are available to the public unless sealed." (R. p. 5 (*citing Ex parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 10, 630 S.E.2d 464, 469 (2006)).) "Therefore, there can be no level of privacy expected in those specific documents." (*Id.*)

On appeal, City referenced in footnote 5 of its Brief that it "provided [Glassmeyer] the civil action number of the [family court] proceedings in question." (*See* Appellant's Brief at p. 10, n. 5.) In its Opinion, this Court concluded City abandoned its argument concerning disclosure of the family court documents because it failed to

provide any citation to legal authority. The Supreme Court has made clear that when a party fails to cite authority or when the argument is simply a conclusory statement, the party is deemed to have abandoned the issue on appeal. *State v. Lindsey*, 394 S.C. 354, 363, 714 S.E.2d 554, 555 (Ct. App. 2011) ("issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority"); *State v. Jones*, 344 S.C. 48, 58-59, 543 S.E.2d 541, 546 (2001) (stating an argument is deemed abandoned on appeal when conclusory and without supporting authority); *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994). City cited no case law or other authority for its argument (*see* Appellant's Brief at note 5), and indeed, under this Court's precedent, abandoned its argument.[9]

Even if City were not deemed to have abandoned its argument on appeal, the argument should nonetheless be rejected on its merits. City's footnote implies that providing Glassmeyer with the family court action number is the equivalent of fulfilling the statutory mandate to provide public records. While furnishing such information might allow Glassmeyer to verify whether documents in City's possession were indeed filed in court, Glassmeyer would have no ability to confirm which specific documents were in City's possession and would be unable to confirm their veracity. Nothing in the FOIA allows a public body to meet its obligations to the public merely by pointing a citizen to another repository where the records may be found.

[9] Furthermore, City cites no legal authority in its Petition for Rehearing on this issue.

IV. THE COURT DID NOT MISAPPLY APPLICABLE LAW OR MISCONSTRUE FACTS IN THE RECORD BY HOLDING THE DOCUMENTS ARE NOT EXEMPT FROM DISCLOSURE DUE TO THE FOIA'S PRIVACY EXEMPTION, S.C. CODE ANN. § 30-4-40(A)(2)(2007).

This Court did not err in holding the documents Glassmeyer requested are not exempt from disclosure under the FOIA's privacy exemption, S.C. Code Ann. § 30-4-40(a)(2) (Rev. ed. 2007) on the basis that (i) Scott did not have a reasonable expectation of privacy in the documents withheld, and (ii) even if he did, the interests of the public, including Glassmeyer, outweighed Scott's privacy interests where the City failed to investigate the allegations it received.

In its Petition for Rehearing, City does not contest this Court's holding that Scott did not have a reasonable privacy interest in the documents. Rather, City contests the Court's conclusion that the interests of the public outweighed any privacy interests in the requested materials. (Petition at pp. 8-9.) City repeats its argument that no citizen can have an interest in City's failure to investigate the allegations because City did not receive the complaints through recommended channels. (*Id.*) For the reasons stated above (*supra* at ¶ I), and in Respondent's Brief, City's position is untenable and should be disregarded.

V. THE COURT'S REQUIREMENT THAT CITY REDACT NAMES OF THIRD PARTIES, NOT GOVERNMENT OFFICIALS, AS WELL AS PERSONAL IDENTIFYING INFORMATION IS REASONABLE.

Although this Court's Opinion affirmed the lower court's ruling mandating that City provide access the documents requested by Glassmeyer, it modified the lower court's ruling by permitting City to "redact the names of third parties who are not governmental officials, as well as the personal identifying information such as personal telephone numbers and email addresses." (Opinion at ¶ 5 (citing S.C. Code Ann. § 30-4-

40(b)(2007); *Glassmeyer v. City of Columbia*, 414 S.C. 213, 223, 777 S.E.2d 835, 841 (Ct. App. 2015)).) In its Petition for Rehearing, City argues the Court erred by compelling disclosure of information beyond the scope of Glassmeyer's FOIA request which, City argues, "could expose allegations regarding City employees other than the former police chief to public view." (Petition at p. 4.)

This Court's ruling requiring City to produce the requested documents and redacting personal information, such as names of *private* third-parties and their identifying information, was reasonable and should be affirmed. For the same reasons the public has a legitimate interest in knowing why City failed to investigate former Police Chief Scott following City's receipt of allegations of wrongdoing, the public has an interest in knowing why City failed to investigate any other public officials named in the allegations. City's bald assertion that "[e]xposure of allegations regarding [other public] individuals . . . infringes on the[ir] privacy interests . . . and serves no legitimate public purpose," (Petition at p. 10) lacks any substantive support and should be ignored.

CONCLUSION

For these reasons, this Court should deny Appellant's Petition for Rehearing.

Respectfully submitted,

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PROOF OF SERVICE

I certify that I have served Respondent's Return to Appellant's Petition for Rehearing on Appellant City of Columbia by depositing a copy in the United States Mail, postage prepaid, on September 12, 2016, addressed to its attorney of record, W. Allen Nickles, III, Esquire, at Nickles Law Firm, LLC, 1122 Lady Street, Suite 610, Columbia, South Carolina 29201.

Victoria Moody – Paralegal

September 12, 2016.

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September 12, 2016

VIA HAND-DELIVERY:
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RE: *George S. Glassmeyer v. City of Columbia*
Case No. 2013-CP-40-3982
Appellate Case No. 2014-002221
A&R File No. 053004-000002

Dear Ms. Kitchings:

Enclosed for filing in the above-referenced matter are the original and six (6) copies of Respondent's Return to Appellant's Petition for Rehearing. I am also enclosing an extra copies which I would appreciate your file-stamping and returning to my courier delivering same. By copy of this letter, I am serving opposing counsel with the return as set forth in the enclosed Proof of Service. Thank you for your attention to this matter.

Sincerely,

Kirby D. Shealy III

KDSIII/vhm
Enclosures

cc: W. Allen Nickles, III, Esquire