

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

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SC Court of Appeals

Appellate Case No. 2016-001112

South Carolina Lottery Commission,Respondent,

v.

George S. Glassmeyer,Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. Whether the South Carolina Court of Appeals should affirm the circuit court's order holding that the public disclosure of lottery winners' personal identifying information, such as the (1) full names, (2) addresses, (3) telephone numbers, and (4) forms of identification of claimants, constitute an unreasonable invasion of personal privacy and is therefore exempt from FOIA pursuant to S.C. Code Ann. § 30-4-40(a)(2).

STATEMENT OF THE CASE

Statement of the Facts

Respondent South Carolina Lottery Commission (“SCLC”) is an “instrumentality of the State and public body, corporate and politic, . . . [with] powers as generally exercised by commissions engaged in entrepreneurial pursuits” and was created pursuant to Act 59 of 2001 (South Carolina Education Lottery Act), S.C. Code Ann. §§ 59-150-10 *et seq.* (Compl. ¶ 1.) Appellant George S. Glassmeyer (“Appellant”) is a citizen and resident of Richland County, South Carolina, who submitted “a long line of FOIA requests to the SCLC, seeking personal information relating to ‘all bona fide claims’” for an extensive amount of SCLC prizes. (Nov. 17, 2015 Cir. Ct. Order 1.) The leadership of SCLC cares deeply about its winners and endeavors to protect their personal privacy, safety, and security while balancing the agency’s obligations under the South Carolina Freedom of Information Act (“FOIA”), S.C. Code Ann. §§ 30-40-10 *et seq.* (Compl. ¶ 4.) Appellant’s unreasonable and intrusive requests for lottery winners’ personal identifying information undermine and impede SCLC’s discretion to prevent the disclosure of “[i]nformation of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy.” S.C. Code Ann. § 30-4-40(a)(2).

In 2003, SCLC adopted a policy concerning the release of winners’ information in response to FOIA requests which allowed winners, upon notification, to seek judicial relief from the release of all or part of their personal information. Under that policy, SCLC would provide information appropriate for release under FOIA if no such judicial relief was sought by winners within fifteen (15) business days of receiving notice from SCLC. (Compl. ¶ 2.) In most instances over the years, SCLC staff has been able to successfully work with FOIA requestors to provide them with the

information they are seeking while still protecting to the greatest degree possible the personal privacy and safety of its winners and their families. (*Id.* ¶ 6.) On or about March 31, 2014, Appellant submitted his first in a series of FOIA requests to SCLC, seeking certain information relating to “all bona fide claims” for any SCLC prize equal to or exceeding One Million Dollars (\$1,000,000) in gross proceeds from March 1, 2013 to March 20, 2014. (*Id.* ¶ 7.) Specifically, for all such claims Appellant requested the claimant’s full name, address, and telephone number; the date and gross amount of the claim; and a copy of any and all forms of identification obtained from the claimants. (*Id.* ¶ 8.) On April 11, 2014, the Executive Committee of the SCLC Board of Commissioners met and reconsidered its eleven-year-old policy concerning the release of lottery winners’ information in response to FOIA requests.¹ (*Id.* ¶ 9.)

Since the FOIA policy’s adoption in 2003, issues related to data security and the heightened need to protect individual privacy have rapidly evolved due to a number of factors, including technological advances and the relative ease of accessing personal information. (*Id.* ¶ 10.) In addition, large-scale data breaches in both the public and private sector, such as the 2012 breach of the South Carolina Department of Revenue computer system that compromised millions of taxpayers’ personal identifying information, have brought increased scrutiny and awareness of the importance of the government’s obligation to protect the security of the personal identifying information of its citizenry. (Compl. ¶10.) Furthermore, numerous cases of threats against the personal safety and security of lottery winners have been well-documented across the country in both media reports and case law.² (*Id.* ¶ 11.) In light of growing privacy and security concerns

¹ Contrary to Appellant’s allegations in his initial brief, this reconsideration was not initiated in response to Appellant’s FOIA requests, but rather in light of the growing privacy and security concerns expressed to SCLC by recent lottery winners and in recognition of the changing environment regarding the protection of personal information. (Compl. ¶ 12.)

² See, e.g., *People v. Bennett*, 2013 WL 967583 (Mich. App. Mar. 7, 2013) (unpublished) (considering the case of a defendant who robbed a home, murdered one person, shot and severely injured another person, and physically assaulted a ten-year-old child in an attempt to steal a lottery ticket worth \$2,700.00); *State v. Bradford*, 2003 WL

expressed to SCLC by recent lottery winners and in recognition of the changing environment regarding the protection of personal information, on April 11, 2014, the Executive Committee of SCLC unanimously voted to suspend the 2003 policy regarding the release of lottery winners' information in response to FOIA requests and, in turn, unanimously adopted a new policy authorizing the Executive Director to determine the appropriate response(s) to pending or future requests for information made pursuant to FOIA. (*Id.* ¶ 12.) The Executive Committee also designated the Chairman of the Board of Commissioners (or the Executive Director in his absence) to act with full authority and on behalf of the Board regarding the defense or initiation of lawsuits related to FOIA. (*Id.* Ex. A (Minutes of Apr. 11, 2014 Meeting of the SCLC Executive Committee)).

Consistent with the newly-adopted policy concerning the release of lottery winners' information in response to FOIA requests and consistent with its past practice of attempting to work with requestors, on or about April 16, 2014, SCLC provided a written response to Appellant's request, wherein SCLC provided the following information: (1) gross dollar amounts of all such claims; (2) the dates of all such claims; (3) the home town and state of residence for all such

21372743 (Iowa App. June 13, 2003) (unpublished) (considering the case of a person who purchased and cashed several winning lottery tickets who was choked until she passed out and suffered injuries requiring hospitalization when she was robbed for cash received from the winning tickets).

There are also numerous media reports regarding threats of and actual harm to lottery winners. Rebecca Nelson, *The Tragic Stories of the Lottery's Unluckiest Winners*, TIME, Jan. 9, 2013 (<http://newsfeed.time.com/2012/11/28/500-million-powerball-jackpot-the-tragic-stories-of-the-lotterys-unluckiest-winners/>) (discussing a lottery winner's death from cyanide the day after his lump sum check was issued being treated as homicide); JuJu Kim, *The Tragic Stories of the Lottery's Unluckiest Winners*, TIME, Nov. 27, 2012 (<http://newsfeed.time.com/2012/11/28/500-million-powerball-jackpot-the-tragic-stories-of-the-lotterys-unluckiest-winners/>) (discussing a lottery winner's murder in a robbery plot); Andy Campbell, *Killer of Lottery Winner Abraham Shakespeare Can't Keep his Home, Judge Rules*, HUFFINGTON POST CRIME, Oct. 4, 2013 (http://www.huffingtonpost.com/2013/10/04/abraham-shakespeare-murdered-lottery-winner_n_4042811.html) (discussing a woman who befriended a lottery winner to take control of his wealth being convicted of first-degree murder in his death); Ron Dicker, *Virginia Lottery Winner Who Uses Wheelchair Robbed After Cashing Ticket*, HUFFINGTON POST CRIME, Feb. 7, 2013 (http://www.huffingtonpost.com/2013/02/07/virginia-lottery-winner-wheelchair-robbed-ticket_n_2638978.html) (discussing a wheelchair-bound lottery winner who was robbed while leaving a store after cashing ticket).

claimants; and (4) the game associated with the prize won. (*Id.* Ex. B (SCLC Ltr. to Appellant)). In addition, in its April 16, 2014 response, SCLC notified Appellant that the (1) full names; (2) addresses; (3) telephone numbers; and (4) forms of identification of all such claimants (collectively and hereinafter, “personal identifying information”) are specifically exempted from disclosure by S.C. Code Ann. § 30-2-310(A)(1)(e), which in turn made this information exempt from disclosure under S.C. Code Ann. § 30-4-40(a)(4). (*Id.* ¶ 14.) Moreover, SCLC notified Appellant that it had determined that all such information is also exempt from disclosure pursuant to S.C. Code Ann. § 30-4-40(a)(2), because it is of a personal nature and its public disclosure would constitute an unreasonable invasion of privacy. (Compl. ¶ 14.) On or about April 17, 2014, Appellant notified SCLC that he believed the response of April 16, 2014 did not satisfy his March 31, 2014 FOIA request, thus making this matter ripe for adjudication. (*Id.* ¶ 15.) Appellant further demonstrated his relentless manner in seeking to obtain the personal identifying information of lottery winners by also submitting an additional request seeking only the claimant’s full name for all claims for any SCLC prize equal to or exceeding One Million Dollars (\$1,000,000) in gross proceeds from March 1, 2013 to March 20, 2014.³ (*Id.*) Whether the public disclosure of lottery winners’ personal identifying information is exempted by FOIA is the subject of this litigation and appeal.

Procedural History

On May 7, 2014, SCLC filed a complaint against Appellant in the Court of Common Pleas for Richland County, South Carolina, seeking declaratory relief and/or injunctive relief to prevent the disclosure of lottery winners’ personal identifying information. (Compl., generally.) Appellant filed an answer and counterclaims on June 9, 2014. (Ans. & Counterclaims.) The case

³ On April 16, 2014, Appellant sent a FOIA request seeking a copy of the letter SCLC sent to lottery winners after his initial request, copies of any and all “legal documents” received from any source, and copies of any and all documents from “any lawyer, law firm, or winners of any SCEL prize” relating to his initial FOIA request. (Compl. Ex. C (Appellant’s FOIA Requests to SCLC)).

was heard on December 5, 2014, though only pre-trial motions were heard that day. (Hrg. Tr. Dec. 5, 2014, generally.) On November 17, 2015, the circuit court granted judgment in favor of SCLC, and ordered that Appellant “is PERMANENTLY restrained and enjoined from seeking to obtain the (1) full names; (2) addresses; (3) telephone numbers; and (4) forms of identification of all lottery winners and claimants.” (Nov. 17, 2015 Cir. Ct. Order 12.) Appellant filed a motion to reconsider on November 30, 2015. (Mot. Reconsider.) On May 17, 2016, the circuit court denied Appellant’s motion to reconsider. (May 17, 2016 Cir. Ct. Order 3.) Appellant filed the instant appeal to the South Carolina Court of Appeals on May 25, 2016. (Not. Appeal.)

STANDARD OF REVIEW

Declaratory judgments in and of themselves are neither legal nor equitable. *See Felts v. Richland Cnty.*, 303 S.C. 354, 400 S.E.2d 781 (1991); *Campbell v. Marion Cnty. Hosp. Dist.*, 354 S.C. 274, 580 S.E.2d 163 (Ct. App. 2003); *Wiedemann v. Town of Hilton Head Island*, 344 S.C. 233, 542 S.E.2d 752 (Ct. App. 2001). Hence, the standard of review for a declaratory judgment action is determined by the nature of the underlying issue. *Campbell*, 354 S.C. at 279, 580 S.E.2d at 165; *see also Goldston v. State Farm Mut. Auto. Ins. Co.*, Op. No. 3749 (S.C. Ct. App. filed March 1, 2004) (Shearouse Adv. Sh. No. 8 at 52); *Travelers Indem. Co. v. Auto World*, 334 S.C. 137, 511 S.E.2d 692 (Ct. App. 1999); *Burton v. York Sheriff's Dep't*, 358 S.C. 339, 594 S.E.2d 888 (S.C. App. 2004).

A declaratory judgment action to determine whether certain information should be disclosed under FOIA is an action at law. *See S.C. Tax Comm'n v. Gaston Copper Recycling Corp.*, 316 S.C. 163, 447 S.E.2d 843 (1994); *Campbell*, 354 S.C. at 280, 580 S.E.2d at 165; *Burton*, 358 S.C. 339, 594 S.E.2d 888. In an action at law, the appellate court's standard of review extends only to the correction of errors of law. *Crary v. Djebelli*, 329 S.C. 385, 496 S.E.2d 21 (1998); *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976); *Okatie River v. Southeastern Site Prep*, 353 S.C. 327, 577 S.E.2d 468 (Ct. App. 2003). "Thus, the circuit court's factual findings will not be disturbed on appeal unless a review of the record discloses that there is no evidence which reasonably supports the judge's findings." *Burton*, 358 S.C. 339, 594 S.E.2d 888 (citing *Townes*, 266 S.C. at 86, 221 S.E.2d at 775; *Barnacle Broad., Inc. v. Baker Broad., Inc.*, 343 S.C. 140, 538 S.E.2d 672 (Ct. App. 2000); *Sloan v. Greenville Cnty.*, 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003)).

ARGUMENT

The South Carolina Court of Appeals should hold, as a matter of law, that the public disclosure of lottery winners' personal identifying information – i.e. the (1) full names, (2) addresses, (3) telephone numbers, and (4) forms of identification of claimants – is exempted from FOIA. Therefore, this court should affirm the circuit court's order for declaratory relief and permanent injunction against Appellant.

SCLC recognizes the balance between its affirmative duty to disclose public information and its discretion to withhold exempted materials to protect the privacy and safety of lottery winners and their families. *Compare Bellamy v. Brown*, 305 S.C. 291, 295, 408 S.E.2d 219, 221 (1991), with S.C. Code Ann. § 30-4-40(a)(2). In recognition of this balance and pursuant to case law, SCLC parsed through the information requested by Appellant and separated information that could be publicly disclosed from information that was exempt from disclosure under FOIA. *City of Columbia v. American Civil Liberties Union of S.C., Inc.*, 323 S.C. 384, 475 S.E.2d 747 (1996); *Newberry Publ'g Co. v. Newberry Cnty. Comm'n on Alcohol & Drug Abuse*, 308 S.C. 352, 417 S.E.2d 870 (1992). SCLC responded to Appellant's request and disclosed a portion of non-personal identifying information concerning past lottery winners that he requested, including (1) gross dollar amounts of all such claims; (2) the dates of all such claims; (3) the home town and state of residence for all such claimants; and (4) the game associated with the prize won. (Compl. Ex. B (SCLC Ltr. to Appellant)). However, the public disclosure of lottery winners' personal identifying information constitutes an unreasonable invasion of privacy and is therefore exempt under FOIA. S.C. Code Ann. § 30-4-40(a)(2). Thus, this court should affirm the lower court's judgment in favor of SCLC.

I. The Circuit Court Properly Made Its Factual Findings and Conclusions of Law

As a preliminary matter, Appellant begins his brief with a list of perceived errors with the circuit court's order, some of which are more thoroughly discussed in separate sections of his brief, as well as complaints of erroneous factual determinations. SCLC disagrees with Appellant, and the following brief demonstrates that most of Appellant's arguments here are without merit. However, Appellant presents two general arguments that are not expounded upon in the remainder of his brief and therefore need to be addressed prior to considering the remainder of Appellant's brief.

First, Appellant contends that multiple factual findings by the circuit court were erroneous. However, a trial court's factual findings should not be disturbed on appeal unless a review of the record discloses that there is no evidence which reasonably supports the judge's findings. *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976); *Barnacle Broad., Inc. v. Baker Broad., Inc.*, 343 S.C. 140, 538 S.E.2d 672 (Ct. App. 2000); *see also Sloan*, 356 S.C. 531, 590 S.E.2d 338. In this case, the circuit court's findings are reasonably supported by the record. Further, Appellant's perceived improper factual findings are in reality nothing more than a disagreement he has with the circuit court over matters of degree. For example, Appellant admits that he submitted three FOIA requests to SCLC in this case, but he quibbles over the circuit court's determination that his submissions constitute "a long line" of such requests. (Appellant's Initial Br. 11.) Even if Appellant is correct and three FOIA requests is not "a long line" of requests, the circuit court's finding is harmless error, because it has no relevance or impact on the ultimate determination of the circuit court.

Second, Appellant asserts that the circuit court's conclusions of law were improper, inaccurate, and even not true as a matter of law. (Appellant's Initial Br. 11-13, 17.) The circuit

court's fundamental conclusion of law is that the public disclosure of lottery winners' personal identifying information constitutes an unreasonable invasion of personal privacy and therefore is exempted from disclosure under FOIA. (Nov. 17, 2015 Cir. Ct. Order, generally.) It is erroneous for Appellant to suggest that a ruling on the applicability of a FOIA exemption is not a matter of law. Numerous cases illustrate that the applicability of a FOIA exemption is a legal determination. *See, e.g., Burton v. York Sheriff's Dep't*, 358 S.C. 339, 594 S.E.2d 888 (S.C. App. 2004) ("A declaratory judgment action under the FOIA to determine whether certain information should be disclosed is an action at law.") (citing *S.C. Tax Comm'n v. Gaston Copper Recycling Corp.*, 316 S.C. 163, 447 S.E.2d 843 (1994); *Campbell v. Marion Cnty. Hosp. Dist.*, 354 S.C. 274, 280, 580 S.E.2d 163, 165 (Ct. App. 2003)). Further, Appellant fails to provide substantive facts or law to demonstrate error in the circuit court's conclusions of law. Accordingly, both of Appellant's generalized allegations concerning the circuit court's factual findings and conclusion of law are without merit.

II. SCLC Has Standing In This Case

SCLC has standing to seek declaratory judgment and injunctive relief. First, Appellant claims that only South Carolina citizens may bring suit under FOIA. To support this claim, Appellant cites Subsection (a) of S.C. Code Ann. § 30-4-100, which states:

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 an irreparable injury for which no adequate remedy at law exists.

S.C. Code Ann. § 30-4-100(a). However, Appellant has ignored the immediately following Subsection (b), which states:

If a person *or entity* seeking such relief prevails, he *or it* may be awarded reasonable attorney fees and other costs of litigation. If such person *or entity* prevails in part, the court may in its discretion award him *or it* reasonable attorney fees or an appropriate portion thereof.

S.C. Code Ann. § 30-4-100(b) (emphasis added). Had the legislature intended for only “citizen[s] of the State” to seek declaratory judgment or injunctive relief under FOIA as outlined in Subsection (a), the legislature would not have incorporated the broader categorization of “a person or entity” without reference to the citizenship of either said person or entity in the immediately succeeding Subsection (b) of S.C. Code Ann. § 30-4-100. The plain meaning of S.C. Code Ann. § 30-4-100, in its entirety, demonstrates that the legislature intended to enable a non-citizen public entity, such as SCLC, to seek declaratory judgment or injunctive relief under FOIA.

Further, this statutory authority for SCLC’s standing is supported by case law as well, which Appellant himself has cited. In two previous reported opinions by the South Carolina Supreme Court, non-citizen public entities were plaintiffs in actions that sought declaratory judgment under FOIA and the South Carolina Supreme Court did not find standing to be at issue in either case. *City of Columbia v. American Civil Liberties Union of S.C., Inc.*, 323 S.C. 384, 475 S.E.2d 747 (1996); *S.C. Tax Comm’n v. Gaston Copper Recycling Corp.*, 316 S.C. 163, 447 S.E.2d 843 (1994). The Supreme Court’s silence on this issue is deafening. As Appellant himself notes, it is fundamental that only a party with standing may maintain an action. (Appellant’s Initial Br. 20 (citing *Baird v. Charleston Cnty.*, 333 S.C. 519, 511 S.E.2d 69 (1999))). Thus, the Supreme Court could not have considered the merits of the case in either *City of Columbia* or *South Carolina Tax Commission* had it not implicitly found that both public entities had standing to maintain their declaratory judgment actions in the first instance. Thus, SCLC has standing based on both statutory authority and binding legal precedent.

Alternatively, Appellant claims SCLC lacks standing, because the only irreparable harm SCLC has alleged is based on third-party lottery winners and that such harm is not sufficient to establish that SCLC itself has suffered or is likely to suffer irreparable harm. However, persuasive precedent from another state court holds that the irreparable harm analysis does not necessarily focus on the entity in question, but on those third-party individuals who are the subject of the records request. For example, in denying a records request under Ohio's Public Record Law, the Ohio Supreme Court held that "a release of the requested information by the [state entity] in this matter places those who are the subject of the records request at risk of irreparable harm, albeit not necessarily by [the state entity itself]." *State ex rel. McCleary v. Roberts*, 88 Ohio St. 3d 365, 725 N.E.2d 1144 (2000) (citing *Kallstrom v. City of Columbus*, 136 F.3d 1055 (6th Cir. 1998)). This reasoning is also implicit in the *South Carolina Tax Commission* case previously discussed, as the irreparable harm from a public records disclosure was based on a third-party entity, rather than on the Tax Commission itself. *S.C. Tax Comm'n v. Gaston Copper Recycling Corp.*, 316 S.C. 163, 447 S.E.2d 843 (1994).

Appellant suggests that the third-party lottery winners cannot establish that they have suffered or are likely to suffer irreparable harm either, because they "released the Lottery Commission from any liability in disclosing information about them in response to a FOIA request." (Appellant's Initial Br. 28.) However, this release of liability only states that the lottery winners' information "*may* be subject to disclosure" under FOIA (emphasis added). This language dilutes Appellant's argument, because it establishes that this release of liability is not a clear, absolute, or knowing waiver of public disclosure of private information. Further, the very fact that a judicial remedy to maintain anonymity exists for lottery winners (within a fifteen-day grace

period) illustrates that simply playing the South Carolina lottery is not an automatic waiver of public disclosure.

Ultimately, the irreparable harm to the third-party lottery winners in this case comes from the unreasonable invasion of privacy. The unreasonableness of Appellant's records request is demonstrated from a number of authorities: The right to privacy is the right to be left alone, or "the right to live without one's name, picture or statue, or that of a relative, made public against his will." *Holloman v. Life Ins. Co. of Va.*, 7 S.E.2d 169, 171, 192 S.C. 454, 458 (1940). Further, the South Carolina Constitution expressly recognizes the right to privacy. S.C. Const. art. I § 10. At a minimum, the state constitution therefore protects a claimant against invasions of privacy resulting from state action, including the release of personal information that would result in an unreasonable invasion of a claimant's personal privacy. A prominent example of the concern regarding improper public release of personal information is the public concern and outcry that arose following the breach of the South Carolina Department of Revenue's computer system and network, resulting in the suspected compromise of millions of taxpayers' personal identifying information and a civil lawsuit regarding the breach. *See Morgan v. S.C. Dep't of Revenue*, 2012-CP-40-07331. Recognizing the potential for harmful use of this personal information that was wrongfully accessed, the State of South Carolina has contracted for credit monitoring for affected taxpayers for two years. Moreover, the courts have also taken steps to address this concern. The South Carolina Supreme Court recently issued an order requiring the redaction of personal identifying information from documents filed with an appellate court, including but not limited to social security numbers, taxpayer identification numbers, driver's license numbers, passport numbers, or other personal identifying numbers; names of minor children; financial account numbers; home address of minors, sexual assault and abuse and neglect victims; non-parties; and

date of birth. *In re Revised Order Concerning Pers. Identifying Info. & Other Sensitive Info. in Appellate Court Filings*, 2013-002681, 2014 WL 1464413 (S.C. Apr. 15, 2014). The federal courts likewise recognize a similar need for privacy in court filings, generally requiring the redaction of personal identifying information. Fed. R. Civ. P. 5.2. Further, the United States Supreme Court has held that “as a *categorical matter* . . . a third party’s request for law enforcement records or *information about a private citizen* can reasonably be expected to invade that citizen’s privacy” *United States Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) (emphasis added). Lastly, a lower South Carolina court has held that a release of a lottery winner’s personal identifying information constitutes an unreasonable invasion of personal privacy within the meaning of S.C. Code Ann. § 30-4-40(a)(2). *John Doe v. S.C. Lottery Comm’n*, 2014-CP-40-2446. Thus, the irreparable harm to the third-party lottery winners, who are the subjects of the Appellant’s record request, is sufficient to establish SCLC’s standing.

III. The Circuit Court’s Injunction Is Not Overly Broad

The circuit court’s injunction is not broader in scope than what is necessary to stop the harm it is designed to prevent. *See Goldberg v. Trakas*, 206 F.Supp. 867 (E.D.S.C. 1962). Appellant argues the scope of the injunction is too broad for three reasons, none of which are meritorious. First, Appellant offers a hypothetical: he asserts that the injunction is overly broad, because it prevents him from unwillingly receiving the personally identifying information from a lottery winner, who could hypothetically contact him in order to freely divulge his or her personal identifying information. (Appellant’s Initial Br. 30.) SCLC disagrees with the assumption that this hypothetical passive activity violates the injunction. The circuit court’s injunction reads as follows: “IT IS ORDERED that [Appellant] is PERMANENTLY restrained and enjoined from *seeking to obtain* the (1) full names; (2) addresses; (3) telephone numbers; and (4) forms of

identification of all lottery winners and claimants.” (Nov. 17, 2015 Cir. Ct. Order 12 (emphasis added)). Thus, the injunction only prohibits Appellant from “seeking” to obtain the information. Even if a lottery winner hypothetically desired to divulge his or her personal identifying information to Appellant, the Appellant’s passive action in listening to or receiving this information would not be considered actively “seeking” this information, which is expressly barred by the injunction. Thus, the injunction is not overly broad to prevent Appellant from receiving this information freely from a lottery winner. It merely prevents Appellant from seeking the disclosure of lottery winners’ personal identifying information from SCLC.

Second, Appellant argues that the injunction is overly broad because of its permanent nature, because he can never seek this information, “under any circumstances, for the rest of his days.” (Appellant’s Initial Br. 30.) This argument is both illogical and incorrect. First, if a permanent injunction is overly broad based only on the fact that it is permanent, then no permanent injunction could ever be issued. Such an outcome would be illogical, because it would frustrate the purpose of Rule 57 of the South Carolina Rules of Civil Procedure and the South Carolina Declaratory Judgment Act, S.C. Code Ann. §§ 15-53-10 *et seq.*, both of which were enacted by the legislature in order to provide permanent injunctions as a form of judicial relief. Second, Appellant’s assertion is incorrect on its face, because he is allowed to seek this information if a court modifies or vacates the permanent injunction in the future due to changed circumstances. For example, Rule 60(b) of the South Carolina Rules of Civil Procedure allows a party to seek relief from judgment if a court finds “it is no longer equitable that the judgment [such as a permanent injunction] should have prospective application.” Thus, the circuit court’s permanent injunction is not overly broad based on its permanent nature.

Third, Appellant argues that the injunction prevents him from seeking the personal identifying information of lottery winners, which is not connected to the harm perceived by the circuit court, i.e. the disclosure of such information. (Appellant's Initial Br. 30.) However, this argument merely presents a distinction without a difference, because the seeking and disclosure of this information are intimately connected. Thus, the circuit court properly tailored the injunction to serve the purpose for which it was granted, specifically to prevent the harm of seeking and disclosing lottery winners' personal identifying information. In sum, the scope of the circuit court's injunction was proper and not overly broad.

IV. The Circuit Court Properly Held FOIA Exempted the Public Disclosure of Lottery Winners' Personal Identifying Information

The circuit court properly held that FOIA exempts the disclosure of a lottery winner's name or other personal identifying information, including, but not limited to, mailing address, phone number, social security number, and date of birth, because the disclosure of such information would constitute an unreasonable invasion of the lottery winner's personal privacy. Appellant argues that this information does not fall within a FOIA exemption. However, S.C. Code Ann. § 30-4-40(a)(2) exempts from disclosure "[i]nformation of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy." This language tracks the South Carolina Constitution, which states that "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated" S.C. Const. art. I § 10. As set forth above, a number of authorities have demonstrated that disclosure of a lottery winner's name or other personal identifying information constitutes an unreasonable invasion of personal privacy. *See supra* III. SCLC Has Standing In This Case. Most notably, a lower South Carolina court has

held that the disclosure of lottery winners' personal identifying information constitutes an unreasonable invasion of personal privacy. *John Doe v. S.C. Lottery Comm'n*, 2014-CP-40-2446.

Appellant relies on *State v. Counts*, Op. No. 27546, n.7 (S.C. Ct. App. July 8, 2015), for the proposition that physical intrusions into "the privacy interests in one's home are precisely what our state constitutional provision was intended to protect." Appellant suggests that these physical intrusions must be the only kind of action that constitutes an unreasonable invasion of privacy. However, neither the state constitution nor the FOIA exemption is so narrowly defined. In fact, the South Carolina Constitution differentiates between physical intrusions and other types of invasions of privacy. The state constitution distinguishes between "unreasonable searches and seizures," which represents intrusions of a physical nature, and "unreasonable invasions of privacy," which is a broader, catch-all provision that protects against other types of non-physical intrusions, such as the public disclosure of lottery winners' personal identifying information. Further, the FOIA exemption reasserts this broader protection against non-physical intrusions of privacy by protecting against "unreasonable invasions of personal privacy," which is mirrored language from the state constitution. Thus, it was proper for the circuit court to find that a non-physical intrusion, such as the disclosure of lottery winners' personal identifying information, would constitute an unreasonable invasion of personal privacy.

Appellant also relies on *Society of Professional Journalists v. Sexton*, 324 S.E.2d 313 (S.C. 1984), for the proposition that because death certificates, "which contain much more information of a personal nature than that sought by [Appellant] in this case," do not fall within this FOIA exemption, then neither should lottery winners' personal identifying information. (Appellant's Initial Br. 35.) However, the South Carolina Supreme Court held that such personal information disclosed on a death certificate is considered a private, "personal right[] which do[es] not survive"

the death of the individual, and therefore FOIA did not exempt this disclosure. *Soc. of Prof. Journalists*, 324 S.E.2d 313. The implication of this Supreme Court decision is that such personal information would constitute a private, personal right during the life of an individual, subject to the protections from the state constitution and FOIA against unreasonable invasions of privacy. In the case at bar, SCLC seeks to protect the personal identifying information of persons still alive. Thus, contrary to Appellant's interpretation, the *Society of Professional Journalists* decision supports SCLC's position instead. Therefore, the circuit court did not err in holding that the disclosure of still-living lottery winners' personal identifying information would constitute an unreasonable invasion of personal privacy.

Additionally, Appellant attempts to interpret legislative intent from looking at FOIA in its entirety. Appellant cites S.C. Code Ann. § 30-4-50, a completely separate code provision upon which SCLC is not relying and which states that "home addresses and home telephone numbers of *employees and officers of public bodies* revealed in response to requests pursuant to [FOIA] may not be used for commercial solicitation purposes." *Id.* (emphasis added). Clearly, the legislative intent of this provision has no interpretive impact on the disclosure of information regarding lottery winners, who are not employees or officers of public bodies.

Further, Appellant cites S.C. Code Ann. § 30-4-40(a)(2), which provides some examples of what information is exempt, such as "information relating to public records which include the name, address, and telephone number or other such information of an individual or individuals who are handicapped or disabled when the information is requested for person-to-person commercial solicitation of handicapped persons solely by virtue of their handicap." From this example, Appellant argues that the "natural interpretation" is that the legislature intended that home addresses and telephone numbers, under "ordinary circumstances," are the type of

information required to be disclosed in response to FOIA requests. (Appellant's Initial Br. 36.) However, S.C. Code Ann. § 30-4-40(a)(2) prefaces all of the examples by expressly stating "[i]nformation of a personal nature shall include, *but not be limited to*" *Id.* (emphasis added). By using the phrase "shall include, but not be limited to," the legislature evidently did not intend for any of the examples, including the one Appellant cites, to narrow or limit the overarching protection against a "public disclosure [that] would constitute unreasonable invasion of personal privacy." *Id.*; see also *S.C. Dep't of Consumer Affairs v. Rent-a-Center, Inc.*, 547 S.E.2d 881, 883-84 (S.C. Ct. App. 2001) ("The canon of construction 'expressio unius est exclusio alterius' or 'inclusio unius est exclusio alterius' holds that 'to express or include one thing implies the exclusion of another, or of the alternative.'")

This maxim should be used to accomplish legislative intent, not defeat it. The maxim 'is a rule of statutory construction; it is not a rule of substantive law. Accordingly, [it] 'should be used with care.'") (internal quotation marks and citations omitted); *Hobart Corp. v. Waste Mgmt. of Ohio*, 758 F.3d 757 (6th Cir. 2014) (explaining "that the [expression unius] canon can be overcome by contrary indications that adopting a particular rule or statute was probably not meant to signal any exclusion" and declining to apply *expressio unius* where it would "defeat" the "principal purpose" of the statute); *Cintech Indus. Coatings v. Bennett Indus.*, 85 F.3d 1198 (6th Cir. 1996) (explaining that the *ejusdem generis* canon does not apply when "the provision . . . express[es] a contrary intent," by including language such as "including, but not limited to").

Further, Appellant's narrow interpretation would frustrate the legislative intent of the FOIA exemption, which seeks to prohibit broad categories of unreasonable invasions of personal privacy, rather than only the specific examples listed in the provision. Therefore, the circuit court did not err in holding that lottery winners' personal identifying information fell under the FOIA exemption

outlined in S.C. Code Ann. § 30-4-40(a)(2), which broadly protects against unreasonable invasions of privacy.

Appellant claims that SCLC and the circuit court have an ulterior motive to create a new FOIA exemption. SCLC denies that its ulterior motive is to obtain a new FOIA exemption concerning lottery winners. As the circuit court confirmed, the existing FOIA exemptions are more than sufficient to provide SCLC with the relief it sought. In sum, the circuit court correctly held that FOIA exempted the disclosure of lottery winners' personal identifying information.

Finally, Appellant completely ignores the Supreme Court precedent regarding the essential purpose of FOIA, which "is to protect the public from secret government activity." *Perry v. Bullock*, 409 S.C. 137, 141, 761 S.E.2d 251, 253 (2014). This case has nothing at all to do with the public's right to be protected from secret government activity, but everything to do with protecting the right of private citizens who are not government officials from the disclosure of personal information that would constitute unreasonable invasion of personal privacy. As a result, the circuit court reached a proper conclusion in this case, and its decision should be affirmed.

V. The Circuit Court Properly Ruled on Appellant's Counterclaims

The circuit court properly ruled upon Appellant's counterclaims by granting judgment in favor of SCLC. Appellant argues the circuit court erred procedurally and that his counterclaims survive, because there was no "motion for any sort of judgment on them and they have not yet been tried." (Appellant's Initial Br. 40-41.) However, "where a judgment implicitly resolves issues raised by a defendant's counterclaim, the judgment may constitute a final judgment, even though it makes no explicit reference to the counterclaim." *Hackathorn v. Four Seasons Lakesites*, 959 S.W.2d 954 (Mo. Ct. App. 1998). Further, the circuit court's order clearly states that its "Order concludes the . . . lawsuit and judgment is entered for [SCLC]." (Nov. 17, 2015 Cir. Ct. Order 12

(emphasis added)). Thus, the circuit court implicitly resolved the issues raised by Appellant's counterclaims, and therefore the circuit court did not procedurally err in granting judgment in favor of SCLC. Even if the circuit court's order did not rule upon Appellant's counterclaims, those counterclaims should be regarded as non-final and non-appealable.

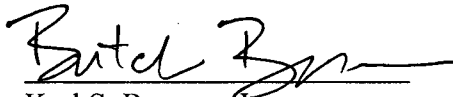
Therefore, the fact that Appellant is treating these counterclaims as final and appealable undermines his argument that the circuit court improperly ruled upon his counterclaims. To the extent the Appellant reasserts the merits of the substance of his counterclaims, the circuit court properly granted judgment in favor of SCLC for all the reasons previously discussed. Thus, the circuit court properly ruled on Appellant's counterclaims.

CONCLUSION

For the foregoing reasons, SCLC respectfully requests that the South Carolina Court of Appeals affirm the lower court's order because the public disclosure of lottery winners' personal identifying information, such as the (1) full names, (2) addresses, (3) telephone numbers, and (4) forms of identification of claimants, constitute an unreasonable invasion of personal privacy and therefore is exempt from FOIA pursuant to S.C. Code Ann. § 30-4-40(a)(2).

Respectfully submitted,

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November 30, 2016

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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
COURT OF APPEALS

FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT
Honorable Shirley C. Robinson, Judge

Case No.: 2016-001112

South Carolina Lottery Commission.....Respondent,

v.

George S. Glassmeyer.....Appellant.

RULE 211(b) CERTIFICATE

I certify that the final brief of Respondent complies with the requirements of S.C.App.Ct.
Rule 211(b).



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