THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Judge

Appellate Case No. 2016-001112

South Carolina Lottery Commission,.....Respondent,

v.

George S. Glassmeyer,.....Appellant.

FINAL REPLY BRIEF OF APPELLANT

Andrew S. Radeker
S.C. Bar No. 73743
Taylor M. Smith IV
S.C. Bar No. 101584
Harrison & Radeker, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

SOUTH CAROLINA STATUTES

OTHER STATUTES

COURT RULES

OTHER SOURCES

STATEMENT OF ISSUES

I. **Did the circuit court err in rendering a judgment that did away with Appellant's counterclaims without ever having had a trial on them or hearing any motion directed at them and without analysis of those claims?**

II. **Did the circuit court err in entering judgment on the pleadings against Appellant on the basis of so-called facts that were neither admitted nor alleged by Appellant in his answer and counterclaim?**

III. **Did the circuit court err in rendering judgment on the pleadings for the Respondent on its declaratory judgment claim about whether information is exempt from disclosure under the South Carolina Freedom of Information Act where the Respondent's own complaint showed the Respondent is a government public body, not a citizen, and has no standing to bring such a claim?**

IV. **Did the circuit court err in rendering judgment on the pleadings for the Respondent on its claim seeking an injunction to prevent Appellant from seeking information where the Respondent's own complaint showed the Respondent has no standing to bring such a claim?**

V. **Did the circuit court err in failing to dismiss the Respondent's declaratory judgment claim about whether information is exempt from disclosure under the South Carolina Freedom of Information Act where the Respondent's own complaint showed the Respondent is a government public body, not a citizen, and has no standing to bring such a claim?**

VI. **Did the circuit court err in failing to dismiss the Respondent's claim seeking an injunction to prevent Appellant from seeking information where the Respondent's own complaint showed the Respondent has no standing to bring such a claim?**

ARGUMENT

Appellant, George S. Glassmeyer (hereinafter "Glassmeyer"), disagrees with how the Respondent, the South Carolina Lottery Commission (hereinafter "the Lottery Commission"), characterizes this appeal. While Glassmeyer agrees that this appeal concerns the South Carolina Freedom of Information Act, S.C. Code Ann. § 30-4-10, *et seq.*, (hereinafter "FOIA") and S.C. Code Ann. § 30-4-40(a)(2), the similarity between the way that the Lottery Commission sees this case and the way things actually happened basically ends there.

This is a case in which a government body sued a man merely for making FOIA requests and in which a circuit court gave that government body what it wanted on the basis of "factual findings" that are supported by nothing at all, since the circuit court never received any evidence. *That* is what this case is about.

I. The Lottery Commission's brief references an inapplicable standard of review. This case was never tried, no factual record was ever made, and there is, accordingly, no evidence to support any of the circuit court's findings of fact.

The Lottery Commission acknowledges in its brief that this case was not tried and that "only pre-trial motions were heard" on the day that had been set for trial. (Initial Brief of Respondent p. x.) Despite this, the Respondent recites a standard of review that would be applicable to a trial court's findings of fact made on the evidence adduced at the trial of an action at law. (Initial Brief of Respondent p. xi.)

The circuit court's judgment in this case was made upon the Lottery Commission's motion for judgment on the pleadings. (R. p. 13, p. 218 ln. 5-7.) There was no trial in this case, and no factual record was ever made. (R. p. 235 ln. 12-18.)

No party presented any evidence to the circuit court. There is no evidence to support any of the circuit court's findings of fact. Evidence is something that the record in this case lacks completely.

The standard of whether a motion for judgment on the pleadings should be granted is the same as for a motion under Rule 12(b)(6), SCRCP, and the appellate court applies the same standard to the review of an order granting such a motion. See Russell v. City of Columbia, 305 S.C. 86, 406 S.E.2d 338 (1991); Falk v. Sadler, 341 S.C. 281, 533 S.E.2d 350 (Ct. App. 2000); Fireman's Ins. Co. v. Cincinnati Ins. Co., 302 S.C. 234, 394 S.E.2d 855 (Ct. App. 1990). In deciding a motion for judgment on the pleadings, the trial court may not consider matters outside the allegations of the pleadings, and the appellate court is limited to the content of the pleadings in just same way. Falk, 341 S.C. at 281; Firemen's Ins. Co., 302 S.C. at 234. An appellate court must reverse the grant of a motion for judgment on the pleadings if, when viewed in the light most favorable to the non-moving party, "the facts alleged [in the non-moving party's pleadings] and inferences reasonably deducible therefrom would entitle the [non-moving party] to any relief on any theory of the case." Stiles v. Onorato, 318 S.C. 297, 300, 457 S.E.2d 601 (1995). Accordingly, the standard applicable here is whether, based on what is alleged in Glassmeyer's answer and counterclaim and viewing that in the light most favorable to him, it was possible for Glassmeyer to prevail under any theory. Id.; Toussaint v. Ham, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987).

In addition, the Lottery Commission confuses whether something is an action at law, as opposed to an action in equity, with the very different question of whether something is a *matter* of law. (Initial Brief of Respondent p. 3.) A matter of law is

"[a] matter involving a judicial inquiry into the applicable law." Black's Law Dictionary 1067 (9th ed. 2009). An action at law is "[a] civil suit stating a legal cause of action and seeking only a legal remedy[,]" as opposed to an action in equity (which this actually is as to the Lottery Commission's injunction claim). Id. at 33.

As discussed at length in Glassmeyer's appellant's brief, the circuit court made its ruling based on findings of fact, but, since no evidentiary record was made in the case, it would be impossible for any of those findings to satisfy even the standard of review advanced by the Lottery Commission, as none of the findings are supported by any evidence at all. See Branche Builders, Inc. v. Coggins, 386 S.C. 43, 47, 686 S.E.2d 200, 202 (Ct. App. 2009) (in action at law tried without a jury, appellate court "will not disturb the trial court's findings of fact unless no evidence reasonably supports the findings").

Applying the correct standard of review or the incorrect one cited by the Lottery Commission, the conclusion is the same: when, on the Lottery Commission's motion for judgment on the pleadings and in the absence of any evidentiary record, the circuit court viewed the case in a light highly favorable to the Lottery Commission and made findings of fact in favor of the Lottery Commission, that was reversible error.

II. The Lottery Commission incorrectly characterizes this case and relies on unproven "facts" outside Glassmeyer's pleadings to argue that the disclosure to Glassmeyer of the names of lottery claimants is inherently dangerous or would be an unreasonable invasion of their privacy.

The Lottery Commission's argument seems premised upon the notion that, statistically, there is grave danger of physical harm that faces anyone known to have

won the lottery. The circuit court's order is premised upon that same thing. (R. pp. 1-12.) That premise is anything but established, however.

In addition to citing unpublished opinions and orders (that were not even rendered by any appellate court of this state), which is prohibited by rule, Rule 268(d)(2), SCACR, the Lottery Commission also cites as a "fact" that "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." (Initial Brief of Respondent pp. vii-viii.) In support of this, the Lottery Commission lists four "media reports" that it alleged in its complaint in this case. (Initial Brief of Respondent p. viii; R. p. 22.) (Apparently, out of all the lottery winners out there, the Lottery Commission could find only four media reports about any of them being harmed.) It has actually never been shown that these articles even exist, much less that what is in them is accurate. The Lottery Commission even cites these articles as though they were legal authorities. (Initial Brief of Respondent p. iv.) They are not, nor are they facts. What they are right now and were before the circuit court are unproven facts alleged by the Lottery Commission, the party that made the motion for judgment on the pleadings that resulted in the judgment subject of this appeal. (R. pp. 13, 22, p. 218 ln. 5-7.) The only way they could be considered by the circuit court or in this appeal as being facts would be if they had been pled by Glassmeyer, the non-moving party, or admitted by him in his responsive pleading to the complaint. Rule 12(c), SCRCP; Falk, 341 S.C. at 281; Firemen's Ins. Co., 302 S.C. at 234. They were not.

In response to these allegations in the Lottery Commission's complaint, Glassmeyer's answer and counterclaim states that he "denies that such instances are

truly numerous, particularly in light of the aggregate number of lottery winners; rather, what the Plaintiff cites are at most isolated instances of unfortunate occurrences." (R. p. 149.) Accordingly, for purposes of motion against Glassmeyer for judgment on the pleadings, the circuit court had to adopt the truth of the statements in *Glassmeyer*'s pleading about these things: that such instances are not "truly numerous, particularly in light of the aggregate number of lottery winners" and that "what [the Lottery Commission] cites are at most isolated instances of unfortunate occurrences." (R. p. 149.)

Further, the Lottery Commission's brief totally ignores the words of the Lottery Commission's form on which the lottery claimants voluntarily write the information in question, which they then voluntarily submit to the Lottery Commission, thus creating the public records at issue. (R. p. 160.) The form contains the following, in bold type, displayed prominently above the line for the claimant's signature:

> **INFORMATION FROM THIS FORM MAY BE SUBJECT TO DISCLOSURE UNDER THE S.C. FREEDOM OF INFORMATION ACT (FOIA). I release SCEL from all liability or claims relating to information provided to or used by a party obtaining information pursuant to FOIA.**

(R. p. 160.)

The Lottery Commission cites FOIA precedent that notes that the reason the General Assembly enacted FOIA and provided citizens with a right to access government information "is to protect the public from secret government activity." Perry v. Bullock, 409 S.C. 137, 141, 761 S.E.2d 251, 253 (2014). The Lottery Commission attempts to argue that "[t]his case has nothing at all to do with the public's

right to be protected from secret government activity[.]" (Initial Brief of Respondent p. 13.)

Right now, because of the failure of the Lottery Commission and the circuit court to follow the law, the Lottery Commission is keeping secret the identities of persons to whom it has paid millions of dollars in public funds. For that reason alone, the type of information sought here would fall within the public interest; further, this sort of information has the potential to lead to the uncovering of corruption, if there has been any, at the Lottery Commission. "FOIA was enacted for the purpose of making it 'possible for citizens, or their representatives, to learn and report fully the activities of their public officials.'" Bellamy v. Brown, 305 S.C. 291, 293, 408 S.E.2d 219, 220 (1991) (quoting S.C. Code Ann. § 30-4-15). "The purpose of the Act is to protect the public by providing for the disclosure of information." Id. at 295. Right now, because of the failure of the Lottery Commission and the circuit court to follow the law, it is impossible for Glassmeyer to learn and fully report the activities of Lottery Commission officials in paying out very large sums of public money. (R. p. 12.)

But perhaps just as important in countering the Lottery Commission's argument is that a citizen requesting information under FOIA is not required to supply a reason or even have any particular reason why he wants the information. S.C. Code Ann. § 30-4-30(a). The Lottery Commission attempts to conflate the reason why FOIA exists with some imagined requirement about the purpose of the particular requesting citizen. The law does not support such a reading. See S.C. Code Ann. §: 30-4-15, 30-4-30(a); Bellamy, 305 S.C. at 293.

III. Authorities cited by the Lottery Commission do not mean what the Lottery Commission argues they do, and many actually help illustrate the wrongness of the Lottery Commission's position.

The Lottery Commission cites Bellamy v. Brown, but that case not only undercuts one of its arguments as discussed above, it also illustrates that an implied premise of the Lottery Commission's arguments – that it owes a duty to lottery claimants to keep secret the government records those claimants created – does not have support in the law. Id. at 295. The Supreme Court held in Bellamy that "no special duty of confidentiality is established by the FOIA." Id.

City of Columbia v. American Civil Liberties Union of South Carolina, Inc., 323 S.C. 384, 475 S.E.2d 747 (1996), and South Carolina Tax Commission v. Gaston Copper Recycling Corporation, 316 S.C. 163, 447 S.E.2d 843 (1994), do not stand for the proposition that a government body, which by definition cannot be a citizen, has standing to bring an action under FOIA. As discussed in Glassmeyer's appellant's brief, it is well established that "[a]ppellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked." State v. Austin, 306 S.C. 9, 19, 409 S.E.2d 811, 817 (Ct. App. 1991). A review of both these cases reveals that no one's standing was made an issue; thus, neither case held or stands for the proposition that a government body has standing to sue under FOIA. Id. Contrary to the Lottery Commission's suggestion (Initial Brief of Respondent p. 4), under South Carolina law, standing is not a matter of subject matter jurisdiction of which the Court would have been required to take notice; rather, standing goes instead to the question of a party's right to bring the lawsuit. Baird v. Charleston Cty., 333 S.C. 519, 530 & 530 n. 7, 511 S.E.2d 69 (1999) (citing Bardoon

Properties, *infra*, and noting standing requires party to be real party in interest); Bardoon Properties, NV v. Eidolon Corp., 326 S.C. 166, 170-71 & 171 n. 4, 485 S.E.2d 371, 373-74 & 374 n. 4 (1997) (holding unequivocally that whether party is real party in interest is not jurisdictional and overruling prior case law to the contrary).

The City of Columbia v. ACLU case, though, does demonstrate the wrongness of the Lottery Commission's contention that the information sought by Glassmeyer is necessarily "[i]nformation of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy" under S.C. Code Ann. § 30-4-40(a)(2) just because it contains information about lottery claimants. In that case, the City of Columbia claimed the unreasonable invasion of personal privacy exemption under S.C. Code Ann. § 30-4-40(a)(2) applied, but the Supreme Court disagreed with the "contention that the internal investigation reports of law enforcement agencies are per se exempt because they contain personal information as a matter of course. The determination of whether documents or portions thereof are exempt from the FOIA must be made on a case-by-case basis. Thus, it remains to be seen whether the report qualifies for an exception under FOIA." City of Columbia, 323 S.C. at 387. The Newberry Publishing Company case cited by the Lottery Commission analogously "reject[ed] SLED's contention that this, or any, criminal investigative report is per se exempt from disclosure" under FOIA. Newberry Pub. Co., Inc. v. Newberry Cty. Commn. on Alcohol and Drug Abuse, 308 S.C. 352, 417 S.E.2d 870 (1992). In the Burton v. York County Sheriff's Department case cited by the Lottery Commission – which does not stand for the proposition that whether a record is exempt from mandatory FOIA disclosure is a matter of law – the Court of Appeals, following the

Supreme Court precedent just discussed, ruled against a categorical determination that information was exempt under the unreasonable invasion of personal privacy exception, citing these cases to note that "the determination of whether documents or portions thereof are exempt from FOIA must be made on a case-by-case basis." 358 S.C. 339, 348, 594 S.E.2d 888 (Ct. App. 2004).

The case of State ex rel. McCleary v. Roberts, 88 Ohio St. 3d 365, 725 N.E.2d 1144 (2000), that the Lottery Commission cites determined that the information sought there did not have to be disclosed because it did not meet Ohio's (very different) definition of a record and was, thus, not a public record. It deals with another state's different law. Id.

The Lottery Commission cites United States Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989). The case is readily distinguished by reference to the statutory law at issue. Reporters Committee concerned the applicability of 5 U.S.C. § 552(b)(7)(C), an exception to disclosure under the Federal Freedom of Information Act (US FOIA). 489 U.S. at 751. The Supreme Court of South Carolina has previously noted that "federal case law interpreting the US FOIA is not binding in this state because the exemptions contained in [US FOIA] are more expansive than those contained in South Carolina's FOIA." Newberry Pub. Co., 308 S.C. at 354 n. 4. Further, Reporters Committee concerned an exemption to US FOIA that differs markedly from the unreasonable invasion of privacy exception in S.C. Code Ann. § 30-4-40(a)(2). 489 U.S. at 751. At issue in Reporters Committee was an exemption from US FOIA disclosure for "records or information compiled for law enforcement purposes, but only to the extent that the production of such law

enforcement records or information . . . (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy[.]" 5 U.S.C. § 552(b)(7)(C). The Court noted the import of the "could reasonably be expected to" language in its analysis. Reporters Committee, 489 U.S. at 778-80. This is markedly unlike the exemption to our FOIA upon which the Lottery Commission relies, under which the public body must prove that disclosure of the information would – not just *could*, but necessarily *would* – result in an unreasonable invasion of personal privacy. S.C. Code Ann. § 30-4-40(a)(2).

The Lottery Commission's attempt to find authority for its position in the order it helped to create in a collusive, sham proceeding (Initial Brief of Respondent p. 7) would be laughable if this were not such a serious matter.

The Lottery Commission tries to rely for support on FOIA deeming as exempt from disclosure under the unreasonable invasion of privacy exception "information relating to public records which include the name, address, and telephone number . . . 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." S.C. Code Ann. § 30-4-40(a)(2) (emphasis added). What that very specific exemption indicates, though, is that it is the handicapped status of the individuals that brings such a request within the ambit of an unreasonable invasion of personal privacy, and then only when "the information is requested for person-to-person commercial solicitation" of the handicapped because they are handicapped. Id. Further, the fact that this had to be explicitly added to the definition of such information suggests that it would have been doubtful, if this language had not

been added, that this kind of information would have qualified as the sort that it would constitute an unreasonable invasion of personal privacy to disclose. See id.

The argument advanced by the Lottery Commission based on Hackathorn v. Four Seasons Lakesites, Inc., 959 S.W.2d 954 (Mo. Ct. App. 1998), is baffling. That case concerns a question of appealability under Missouri law, which a review of that opinion makes plain is obviously quite different from South Carolina law about what is appealable. Id. Glassmeyer is appealing the circuit court's ending of his counterclaims because the circuit court ended the entire case without those claims or any motion directed at them ever having been heard. (R. p. 12.)

IV. Despite some gymnastic briefing, that the Lottery Commission lacks standing to pursue its claims is really quite plain.

The Lottery Commission now argues that it *does* have standing under FOIA to bring the claims it brought against Glassmeyer. (Initial Brief of Respondent pp. 3-7.) At the beginning of the hearing on its motion for judgment on the pleadings, however, the Lottery Commission clarified that it sought declaratory relief under the Uniform Declaratory Judgments Act, S.C. Code Ann. § 15-53-10, *et seq.*, rather than under FOIA, as its complaint indicated. (R. p. 25 p. 213 ln. 2-4.) The Lottery Commission abandoned FOIA as a basis for its declaratory judgment action and proceeded on its injunction claim as seeking it under general equity principles. The circuit court's order reflects those as the bases for the Lottery Commission's claims. (R. pp. 1-12.)

Review of the Lottery Commission's arguments shows that they fall short. The arguments the Lottery Commission advances are quite creative; however, they are just incorrect. The legal support for them is just not there.

The Lottery Commission plainly lacks standing to assert either of the two claims it brought against Glassmeyer in this case.

a. The Lottery Commission argues a strained interpretation of S.C. Code Ann. § 30-4-100.

The Lottery Commission bases its argument upon the two subsections of S.C. Code Ann. § 30-4-100. That statute reads as follows:

> (a) Any citizen of the State may apply to the circuit court for either or both a declaratory judgment and injunctive relief to enforce the provisions of this chapter in appropriate cases as long as such application is made no later than one year following the date on which the alleged violation occurs or one year after a public vote in public session, whichever comes later. The court may order equitable relief as it considers appropriate, and a violation of this chapter must be considered to be an irreparable injury for which no adequate remedy at law exists.
>
> (b) If a person or entity seeking such relief prevails, he or it may be awarded reasonable attorney fees and other costs of litigation. If such person or entity prevails in part, the court may in its discretion award him or it reasonable attorney fees or an appropriate portion thereof.

S.C. Code Ann. § 30-4-100.

That subsection (b) provides the remedies for "a person or entity" that prevails in an action under FOIA merely demonstrates that the General Assembly did not intend to restrict the definition of "citizen" under this statute to only natural persons. Id. FOIA created a right to get information from government that did not exist previously. See S.C. Code Ann. § 30-4-30(a). FOIA did not create a right or remedy for anyone other than a citizen. S.C. Code Ann. §§ 30-4-30, 30-4-100. That a citizen (someone who may bring an action under FOIA) may be a natural person or some other kind of entity

does not somehow vest the Lottery Commission, which is a part of state government, with standing to sue under this statute.

Further, accepting the Lottery Commission's argument would produce a result that would be absurd from a policy perspective. It would permit a government body to do what the Lottery Commission did here – sue a citizen merely for making FOIA requests – and get an award of attorney's fees against that citizen if the government body wins the suit. The court should note that that is exactly what the Lottery Commission tried to do here. (R. pp. 28.)

b. The Lottery Commission has failed to cite any precedent for the notion that it has standing to seek an injunction to prevent what it perceives as harm to someone else.

The South Carolina Tax Commission case most certainly does not stand for the proposition that a government body has standing to seek an injunction because of supposed threatened harm to someone else. 316 S.C. 163. No statement or situation even remotely close to that is in that opinion. Id. The Lottery Commission has failed to cite even one case for its argument that it may seek an injunction to prevent harm to someone else.

V. *Personal* and *private* under S.C. Code Ann. § 30-4-40(a)(2) are not synonyms.

The words of the unreasonable invasion of personal privacy exemption are as follows:

> Information of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy. Information of a personal nature shall include, but not be limited to, information as to gross receipts contained in applications for business licenses and 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. This provision must not be interpreted to restrict access by the public and press to information contained in public records.

S.C. Code Ann. § 30-4-40(a)(2).

An examination of the definition at issue, "[i]nformation of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy[,]" reveals that is has two parts: the information has to be about a person, i.e., "personal," and it has to be the kind of information it "would constitute unreasonable invasion of personal privacy" to disclose. Id.

The Lottery Commission, however, has never advanced any argument about the nature of the information at issue being not just private but also so very private that disclosing it would be this kind of unreasonable invasion, other than this: the information is about the lottery claimants. All that tells us, though, is that the information is literally personal. The Lottery Commission's argument, and the circuit court's reasoning, fall down, as they always have, when it comes to explaining why it is that merely identifying information about a lottery claimant, much of which might be gleaned from other sources, is this sort of super-private information. That is because it is not.

The Lottery Commission derides Glassmeyer's discussion of State v. Counts, 413 S.C. 153, 776 S.E.2d 59, 71 n. 7 (2015), in which our Supreme Court, discussing the state constitutional prohibition on unreasonable invasions of privacy, noted that physical intrusions into "the privacy interests in one's home are precisely what our state

constitutional provision was intended to protect." The Lottery Commission misses the point of the discussion, which is that something on the order of the severity of a physical intrusion into the home is the kind of thing that would constitute an unreasonable invasion of personal privacy under S.C. Code Ann. § 30-4-40(a)(2).

Also, as discussed above, the Lottery Commission's brief totally ignores the words of its own form on which the lottery claimants voluntarily write the information in question, which they then voluntarily submit to the Lottery Commission, which is how the lottery claimants create the public records at issue. (R. p. 160.) A lottery winner has no obligation to claim his winnings. By choosing to do so, however, he himself authors the public record of his claim that contains information of the sort sought by Glassmeyer. (R. p. 160.) He knows he is doing so, knows he is submitting it to a government entity, and knows that "**INFORMATION FROM THIS FORM MAY BE SUBJECT TO DISCLOSURE UNDER THE S.C. FREEDOM OF INFORMATION ACT (FOIA)**" and that the information may be "**provided to or used by a party obtaining information pursuant to FOIA.**" (R. p. 160.) Any right he may have had to keep that information private is one he has relinquished.

To conclude that, viewing Glassmeyer's answer and counterclaim that attached this form in the light most favorable to Glassmeyer, the only way the law permitted the case to come out is that the information Glassmeyer sought is of the ultra-private sort covered by S.C. Code Ann. § 30-4-40(a)(2) is to make a conclusion that lacks any legal, factual, or logical support. That is what the circuit court did in this case. (R. pp. 1-12.)

VI. The absence of argument by the Lottery Commission on some points argued by Glassmeyer is telling.

The Lottery Commission does not take issue with the statements in Glassmeyer's appellant's brief that "the circuit court's order is replete with factual findings that are statements of things that Glassmeyer did not admit in response to the Lottery Commission's complaint and did not allege himself[,]" that "[i]n deciding a motion for judgment on the pleadings made by Glassmeyer's opponent, the circuit court was not permitted to look outside what Glassmeyer pled[,]" and that "[t]he circuit court made a decision on the factual merits of the case that exceeded the narrow bounds of what was before the court at the time." (Initial Brief of Appellant p. 19.) It does not take issue with Glassmeyer's argument that FOIA is a more recent and specific statute than the Uniform Declaratory Judgments Act and that FOIA thus controls over that act's broader, less specific and older language. (Initial Brief of Appellant p. 25.)

The Lottery Commission does not take issue with Glassmeyer's statement that "[p]ermitting government entities to bring suits against those who make FOIA requests would have the chilling effect of discouraging citizens from making such requests; thus, it would run counter to FOIA's purpose and its interpretive mandate." (Initial Brief of Appellant p. 26.) It does not take issue with Glassmeyer's argument that the Lottery Commission failed to allege that *it* would suffer any harm absent an injunction. (Initial Brief of Appellant pp. 26-28.) The Lottery Commission takes no issue with Glassmeyer's argument that "[i]f proven, the facts alleged in the complaint could not establish that Lottery Commission has no adequate remedy at law." (Initial Brief of Appellant p. 28.) The Lottery Commission takes no issue with Glassmeyer's argument

that he pled a sufficient abuse of process claim with regard to the Lottery Commission's collusive and abusive litigation practices. (Initial Brief of Appellant pp. 42-45.)

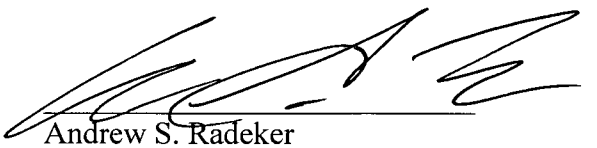
By failing to address these arguments in its brief, this court can conclude that the Lottery Commission has conceded Glassmeyer's arguments on these points are correct. First Union Nat. Bank v. FCVS Communications, 321 S.C. 496, 502, 469 S.E.2d 613, 617 (Ct. App. 1996) (where respondent fails to respond to issue in respondent's brief, court may treat failure to respond as concession that appellant is correct). The Lottery Commission certainly offers nothing that would contradict such a conclusion.

CONCLUSION

Because of the deep procedural problems with the circuit court's judgment alone, Glassmeyer would be entitled to the relief he seeks in this appeal. That the circuit court so blithely ignored substantive law, too, only heightens the need for this court's intervention in this case.

This court should reverse the circuit court, dismiss the Lottery Commission's claims against Glassmeyer, and remand Glassmeyer's claims for trial.

Respectfully submitted,



Andrew S. Radeker
S.C. Bar No. 73743
Taylor M. Smith IV
S.C. Bar No. 101584
Harrison & Radeker, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
Attorneys for Appellant

November 22, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Judge

Appellate Case No. 2016-001112

South Carolina Lottery Commission,.....Respondent,

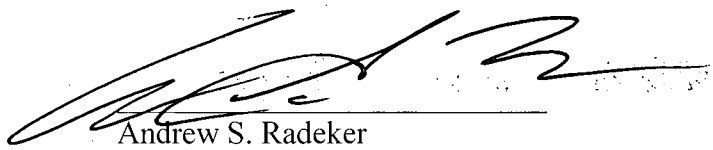
v.

George S. Glassmeyer,.....Appellant.

CERTIFICATE OF COUNSEL

I certify that the foregoing brief complies with Rule 211(b), SCACR.

Respectfully submitted,



Andrew S. Radeker
S.C. Bar No. 73743
Taylor M. Smith IV
S.C. Bar No. 101584
Harrison & Radeker, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
Attorneys for Appellant

November 22, 2016