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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Richland County
Court of Common Pleas

The Honorable Doyet A. Early, III, Circuit Judge

Appellate Case No. 2016-001708

Adele J. Pope..... Appellant,

v.

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

REPLY BRIEF OF APPELLANT

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Statement of Issues on Appeal

- I. APPELLANT'S FOIA RIGHTS ARE NOT AFFECTED BY CIVIL DISCOVERY IN A SEPARTE CIVL ACTION.
- II. RESPONDENT'S RESPONSE TO THE FOIA REQUEST DID NOT COMPLY WITH THE REQUIREMENTS OF FOIA
- III. THE AFFIDAVITS SUBMITTED BY APPELLANT ARE PROPERLY BEFORE THE COURT, BUT CUMULATIVE
- IV. APPELLANT DID RAISE CONSTITUTIONAL ARGUMENTS TO THE LOWER COURT, AND HER ARGUMENT ON APPEAL SHOULD BE CONSIDERED
- V. RESPONDENT AG'S ARGUMENT ON ATTORNEY'S FEES IS PREMATURE AND SHOULD BE CONSIDERED BY THE LOWER COURT ON REMAND
- VI. THIS FOIA CASE IS NOT MOOT BECAUSE RESPONDENT HAS NEVER COMPLIED WITH FOIA

Argument on Reply¹

I. **Appellant's FOIA rights should not be impaired by discovery in a separate civil action.**

Respondent argues that dismissal of this FOIA action was appropriate, because potentially similar documents are being sought in a 2010 Richland County tort suit brought by Respondent AG, Respondent Legacy Trust and others against Appellant nearly 7 years ago. Appellant has presented her argument and supporting authority in her brief-in-chief and will not recite the same on reply.

Respondent supports his argument primarily by citation to the 2002 circuit court order in *Lominack v. Myers*, Case No. 2002-CP-32-1890 (October 25, 2002). The *Lominack* order is related to a criminal case; has never been reviewed by an appellate Court; and contains minimal legal analysis in reaching its conclusion. *Lominack* dealt with a FOIA request for documents related to an ongoing criminal matter, which are specifically exempted by a provision of FOIA not at issue in this case.

Respondent also relies on *Evening Post Pub. Co. v. City of N. Charleston*, 363 S.C. 469, 409 S.E.2d 404 (1991), in which the Supreme Court found that the entity making a FOIA request *was* entitled to receive material which was available through discovery to the parties to a criminal matter. Although, as Respondent acknowledges, that case is not on point with this one, Appellant submits that the implied logic for the decision therein would support *Appellant's* argument.

¹ Appellant incorporates the arguments made in her Brief.

Respondent's remaining arguments regarding discovery are composed of citations to authority on the trial court's discretion and control over discovery matters. Simply put, these authorities do not relate to this case, where the lower court was tasked only with deciding a FOIA compliance claim. The lower court did not undertake any analysis of the discoverability of any document requested, although Respondent's argument would appear to require the FOIA court to analyze and determine that issue. Further, the fact that discovery in Respondent's 2010 case has been ongoing for more than 6 years makes clear the inconsistency of civil discovery and the purposes of FOIA.

The lower court did not delve into its finding that the documents requested might also be exchanged in discovery in this long-ago-filed civil tort suit, instead dismissing Appellant's FOIA claims on that basis alone.

Appellant submits that FOIA and the civil discovery process are separate and distinct, even where documents might be obtained through either or both. This matter should therefore not have been dismissed. The delays in the AG's civil suit highlight its inconsistency with FOIA.

II. Respondent's response to the FOIA request did not comply with the requirements of FOIA.

Respondent argues that it timely responded to the FOIA request, but the response received was insufficient. Instead of setting forth what public documents would be produced; what documents would not be produced; and the specific exemption claimed for any document withheld, Respondent's office indicated that "the wisest thing to do" would be to await a determination of discovery motions in the civil case. (Complaint, Ex. C)

This response was similar to that given by the Department of Revenue, which gave rise to *Sloan v. SCDOR*, 409 S.C. 551, 762 S.E.2d 687 (2014). Therein, the Court found that the Department of Revenue's response - indicating a wait-and-see approach - was "equivocal and evasive." Respondent's response does not identify documents to be produced or withheld, instead suggesting that Appellant wait for the conclusion of a civil action. Appellant therefore submits that Respondent did not timely make an adequate response to her FOIA request.

III. The affidavits submitted by Appellant are properly before the Court, but are cumulative.

Respondent argues that the affidavits submitted by Appellant should not be considered. While Respondent moved to strike all or nearly all of the affidavits filed in this action, the lower court did not rule on motions to strike, and the Attorney General did not seek reconsideration of the lower court's failure to address them.

The affidavits filed by Appellant are merely expressions of public support for the Attorney General's release of public documents, especially those public documents which relate to the estate of entertainer James Brown, an important public figure. (Affidavit of Spence) They are cumulative and are not necessary to a finding in her favor. Respondent argues correctly that "[a]ll that is relevant to [Appellant's] request is whether Appellant is entitled to the documents at issue under the terms of FOIA." (Respondent's Brief at 16) The affidavits, however, help demonstrate the damage to Appellant and the public at large by the Attorney General's evasive FOIA tactics.

It should be noted that the affidavits were all presented *after* Respondent declined to release documents Appellant properly requested under FOIA. They are

relevant and appropriate both to the issue of the Attorney General's efforts to avoid FOIA compliance and the legal costs Appellant was required to incur in this action.

IV. Appellant did raise constitutional arguments to the lower court, and her argument on appeal should be considered.

Respondent argues that Appellant did not address violations of her due process and equal protection rights below, but the record contradicts Respondent's assertion. Appellant's Motion to Alter, Amend or Vacate the dismissal order sets forth in plain terms her argument that the lower court violated her constitutional rights in dismissing the case. (Mot. Alter/Amend, dtd. 6/28/16, ¶11)

V. Respondent AG's argument on attorney's fees is premature and should be considered by the lower court on remand.

Respondent asserts that Appellant should not be entitled to attorney's fees. Although Appellant should be granted attorneys' fees and costs for this action, the issue of the amount or reasonableness has not yet been addressed by the lower court. At the hearing on Respondent's motion to dismiss, the AG took issue with the claim for attorneys' fees. When Appellant's counsel suggested that was a matter to be taken up after the lower court's ruling on the FOIA claims, the circuit court agreed. (Trp. 5/17/16, p. 11).

Because the lower court did not consider the amount or reasonableness of attorneys' fees and costs, that issue is appropriately taken up by the lower court on remand. Respondent's harsh argument on this point does not advance the analysis of the important principles before the Court in this FOIA matter.

VI. This FOIA case is not moot because Respondent has never complied with FOIA.

Respondent argues as an additional sustaining ground that this case was mooted by Respondent's eventually providing one of the requested documents. Appellant notes that Respondent initially refused to release *any* document to her under FOIA. Only in 2013, more than 18 months after the filing of this suit, did Respondent seek to amend its answer and provide certain responsive documents. (Respondent's Brief at 3) Respondent has continued his refusal to release the Wingate Litigation Retention Contract.

As found by the Supreme Court in *Sloan, supra*, a FOIA action is not mooted upon the subsequent production of the responsive documents. If full compliance is reached tardily, the FOIA defendant is still subject to the FOIA plaintiff's claim for attorneys' fees and costs. Here, however, Respondent has *never* complied with the FOIA request, and Appellant is entitled to both declaratory relief and an award of attorneys' fees and costs herein.

Conclusion

For the reasons set out above, Appellant asks that this Court to reverse the dismissal orders of the lower court; remand the case to the circuit court for entry of summary judgment in favor of Appellant; and direct that all relief sought in the complaint be granted. The lower court should also be directed to determine and direct an award of reasonable attorney's fees and costs against both Respondent for Appellant's pursuit of this FOIA suit and the appeal for more than five years.

Respectfully submitted,



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CERTIFICATE OF COUNSEL

The undersigned counsel for the Appellant hereby certifies that the Brief of Appellant and Appellant's Reply Brief comply with Rule 211(b).



Adam T. Silvernail