THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM HORRY COUNTY

Court of Common Pleas

The Honorable Clifton B. Newman, Presiding Judge

Case No.: 2010-CP-26-10848
Appellate Court Case No.: 2015-001398

PAUL CURRY,

Appellant,

v.

TOWN OF ATLANTIC BEACH,

Respondent.

FINAL BRIEF OF APPELLANT

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July 5, 2016

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STATEMENT OF THE CASE

Appellant brought this action against Respondent on November 17, 2010, seeking a declaratory judgment and injunctive relief relating to the failure of Respondent to codify and index

the Ordinances of Respondent Town, reflecting all amendments and repeals thereto and to provide for the public inspection of the codified ordinances. Respondent filed an Answer to Appellant's Summons and Complaint on January 21, 2011 containing a general denial, specific denial and an affirmative defense of laches. Subsequently, Appellant, on February 18, 2011 propounded interrogatories, requests for production and requests for admission to Respondent. Respondent failed to respond to Appellant's discovery requests, prompting Appellant to file a Motion to Compel discovery against Respondent on April 7, 2011. On July 27, 2011, the Honorable Benjamin H. Culbertson held a hearing on Appellant's Motion to Compel which resulted in an Order filed September 16, 2011 ordering Respondent to provide responses to Appellant's discovery requests within Thirty (30) days and awarding Appellant attorney's fees in the amount of Eight Hundred Seventy One and 52/100ths Dollars ($871.52) for Respondent's failure to comply. Respondent failed to provide any responses to Appellant's discovery requests contrary to Judge Culbertson's Order filed September 16, 2011.

On January 13, 2014, the matter was called for trial before the Honorable Clifton B. Newman, sitting without a jury. Prior to the commencement of the trial, Respondent announced that it intended to call Three (3) witnesses, namely, Linda Cheatham, William Booker and Cheryl Pereire, on behalf of Respondent. Appellant objected to Respondent calling these witnesses and made an oral motion in open Court to exclude these witnesses based upon the ground of unfair surprise in that Respondent had failed to identify any witnesses in discovery and failed to prepare a trial brief identifying any proposed witnesses. The Trial Court denied Appellant's motion, but instead offered Appellant a short opportunity to informally question Respondent's proposed witnesses to determine the subject matter of their testimony prior to the commencement of the trial

while the Trial Judge qualified the jury panel for other cases on the jury trial roster during that term of Court.

After the Trial Judge returned from qualifying the jury panel, Appellant again objected to Respondent utilizing the proposed witnesses and renewed their Motion to Exclude the witnesses proposed by Respondent, which was denied. At the conclusion of the trial, the parties were instructed to prepare proposed Orders and submit them to the Trial Judge within Thirty (30) days of the trial. The Trial Judge took the matter under advisement and did not render any oral rulings from the Bench.

The Trial Court issued its Order Denying Injunction and Declaratory Relief on September 8, 2014 finding that Appellant was collaterally estopped from litigating the matter based upon a prior Order which was not identified in the September 8, 2014 Order and that there was not a justiciable controversy allowing for a declaratory judgment to be entered. Appellant received a copy of the Trial Court's Order on September 15, 2014 and filed a Motion to Reconsider the September 8, 2014 Order of the Trial Court on September 24, 2014. A hearing on Appellant's Motion to Reconsider was held on April 13, 2015. On May 22, 2015, the Trial Judge issued an Order Denying Appellant's Motion to Reconsider, although in its Order, the Trial Court clarified that the prior Order referenced in the September 8, 2014 Order was an Order Granting Declaratory Judgment and Permanent Injunction filed January 27, 2010 in a separate case between the parties in Civil Action Number 2005-CP-26-1091 issued by the Honorable Cynthia Graham Howe, Master in Equity for Horry County. This appeal follows.

FACTS

Appellant was a resident of the Town of Atlantic Beach from approximately 2002 until 2012. (R. p. 66, lines 10-16; p. 95, lines 5-13). In 2003, Appellant was cited by the Town of Atlantic Beach Police Department for violation of a Town Ordinance prohibiting drinking an alcoholic beverage in public and convicted by the Municipal Court for the Town of Atlantic Beach. (R. p. 95, lines 19-22; p. 66, line 23- p. 67, line 10). As a result of receiving the citation, Appellant, acting *pro se*, requested, on multiple occasions, an opportunity to inspect and review the Town Ordinance which he was charged of violating. (R. p. 67, lines 11-20). As a result of a request made of Respondent to inspect the Town Ordinances, Appellant received a response from Respondent dated June 25, 2003, asking Appellant to specify what exactly he was asking to inspect. (R. p. 16; p. 68, lines 2-16; p. 95, line 25- p. 96, line 16; lines 20- 25). Appellant testified that at no time was he shown a copy of the Ordinance he was convicted of violating. (R. p. 97, lines 7-11). Ultimately, Appellant appealed the conviction from the Municipal Court of the Town of Atlantic Beach to the Circuit Court for the Fifteenth Judicial Circuit. (R. p. 97, lines 12-19). On appeal, Appellant's conviction was reversed by the Honorable Steven H. John, purportedly based upon Respondent's lack of jurisdiction over the private property for the enforcement of Town Ordinances. (R. p. 97, line 20- p. 98, line 16).

Subsequently, Appellant made several intermittent requests of Respondent to review and inspect the codified Ordinances of the Town of Atlantic Beach, between 2003 and 2010. (R. p. 67, lines 16-20; p. 68, line 17-p. 69, line 10; line 16- p. 70, line 17; line 24- p. 72, line 10; line 17- p. 74, line 25; p. 75, line 13- p. 76, line 16; line 22- p. 77, line 11; lines 15-22; p. 78, lines 5-17; pp. 16-22; p. 280; p.26). That in response to the numerous requests made by Appellant to Respondent to allow Appellant to inspect and review the codified Ordinances of the Town, Appellant testified

that Respondent only formally responded to Appellant's requests on Two (2) occasions: June 25, 2003 and May 12, 2009. (R. p. 68, lines 3-7; p. 75, line 25- p. 76, line 16; p. 76, line 25- p. 77, line 16; p. 96, lines 3-16; p. 115, lines 2-12; p. 16). The June 25, 2003 response from Respondent requested Appellant specify what he was requesting, although Appellant's request was to inspect the Town's Ordinances, which Respondent's response references. (R. p. 16). In the May 12, 2009 correspondence, then-Town Manager, Kenneth McIver responded to a request made by Appellant to inspect the codified Ordinances of the Town of Atlantic Beach by informing Appellant that the Ordinances were not codified, but that Respondent had included an item in its 2009-2010 Budget to codify the Ordinances. (R. p. 115, lines 2-20). Ultimately, although the codification of the Town of Atlantic Beach's Ordinances was included as a line item in Respondent's Budgets for the years 2009-2010 and 2010-2011, it is uncontested that Respondent has not codified the Town's Ordinances. (R. p. 115, lines 17-20; p. 116, lines 2-8; line 22- p. 117, line 17; p. 54, lines 9- 13; p. 60, lines 3-10; p. 64, line 23- p. 65, line 9; p. 73, lines 9-13; p. 74, lines 6-10; p. 132, lines 5-9; p. 159, lines 4-10; p. 200, lines 3-9; p. 201, lines 14-15; p. 207, line 25- p. 208, line 24; p. 217, lines 9-17; p. 218, lines 2-6; p. 219, lines 14-19; p. 220, line 3- p. 221, line 2; p. 232, lines 11-23; pp. 290- 298).

ARGUMENT

"Declaratory judgments in and of themselves are neither legal nor equitable." *Brock v. Town of Mount Pleasant*, 411 S.C. 106, 767 S.E.2d 203 (Ct. App. 2014) citing *Campbell v. Marion Cnty. Hosp. Dist.*, 354 S.C. 274, 279, 580 S.E.2d 163, 165 (Ct. App. 2003). "The standard of review for a declaratory judgment action is therefore determined by the nature of the underlying issue." *Id.* citing *Weidemann v. Town of Hilton Head Island*, 344 S.C. 233, 236, 542 S.E.2d 752, 753 (Ct. App. 2001). "Actions for injunctive relief are equitable in nature." *Id.* citing *Grosshuesch*

v. Cramer, 367 S.C. 1, 4, 623 S.E.2d 833, 834 (2005). "In equitable actions, an appellate court may review the record and make findings of fact in accordance with its own view of the preponderance of the evidence." *Id.* citing *Denman v. City of Columbia*, 387 S.C. 131, 140, 691 S.E.2d 465, 470 (2010). "Determining the proper interpretation of a statute is a question of law and this Court reviews questions of law *de novo*." *Perry v. Bullock*, 409 S.C. 137, 761 S.E.2d 251 (2014) citing *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008). "The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible. " *Id.* citing *State v. Baucom*, 340 S.C. 339, 342, 531 S.E.2d 922, 923 (2000). "The plain language of a statute is considered the best evidence of the legislature's intent." *Id.* citing *Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 538, 725 S.E.2d 693, 697 (2012). "When interpreting an undefined statutory term, the Court must look to its usual and customary meaning." *Id.* citing *Strother v. Lexington Cnty. Recreation Comm'n*, 332 S.C. 54, 62, 504 S.E.2d 117, 122 (1998).

This appeal presents what appears to be a case of first impression as it relates to the interpretation of the underlying statute in this matter, namely §5-7-290, S.C. Code Ann. (Rev. 2004). Specifically, the matter rests upon the definition of the undefined terms "codified" and "codification" contained in §5-7-290, S.C. Code Ann. (Rev. 2004) as those terms relate to municipal ordinances which Appellant requested to inspect. Section 5-7-290, S.C. Code Ann. (Rev. 2004) states:

> Each municipal council ***shall provide by ordinance for the codification and indexing of all ordinances***, either typewritten or printed, and the maintenance of ordinances in a current form ***reflecting all amendments and repeals***. All ordinances as codified ***shall be available for public inspection at reasonable times***.

(Emphasis added). In the instant action, Appellant has requested an opportunity to inspect the codified ordinances of the Town of Atlantic Beach on myriad occasions between 2003 and 2010.

(R. p. 67, lines 16-20; p. 68, line 17- p. 69, line 10; line 16- p.70, line 17; line 24- p. 72, line 10; line 17- p. 74, line 25; p. 75, line 13- p. 76, line 16; line 22- p. 77, line 11; lines 15-22; p. 78, lines 4-17; pp. 16-22; p. 280; p. 26). Although numerous requests were made of Respondent for the inspection of its codified ordinances, Respondent has never produced codified ordinances for inspection, in violation of §5-7-290, S.C. Code Ann. (Rev. 2004). It is important to note that during the trial of this matter, Respondent's trial counsel and Three (3) witnesses presented by Respondent in defense of this matter stated on at least Eighteen (18) occasions that Respondent's ordinances were not codified. (R. p. 115, lines 17-20; p. 116, lines 2-8; line 22- p. 117, line 17; p. 54, lines 9-13; p. 60, lines 3-10; p. 64, line 23- p. 65, line 9; p. 73, lines 9-13; p. 74, lines 6-10; p. 132, lines 5-9; p. 159, lines 4-10; p. 200, lines 3-9; p. 201, lines 14-15; p. 207, line 25- p. 208, line 24; p. 217, lines 9-17; p. 218, lines 2-6; p. 219, lines 14-19; p. 220, line 3- p. 221, line 2; p. 232, lines 11-23; pp. 290- 298). Notwithstanding the admissions that Respondent's ordinances were not codified as required by §5-7-290, S.C. Code Ann. (Rev. 2004), Respondent argued that Appellant was afforded an opportunity to request copies of the Town's ordinances, and that on at least One (1) occasion, had provided Appellant with a copy of an ordinance. (R. p. 100, lines 7-25).

The Trial Court ultimately denied the relief sought by Appellant based upon Two (2) grounds: first, that a previous Order Granting Declaratory Judgment and Permanent Injunction issued by the Honorable Cynthia Graham Howe in a separate case between the parties concerning Respondent's failure to abide by the South Carolina Freedom of Information Act, §30-4-10, *et seq.*, S.C. Code Ann. (Rev. 2007) collaterally estopped Appellant from maintaining the present action and second, that no justiciable controversy exists between the parties to allow for a declaratory judgment to be entered. (R. pp. 2-8).

In a general sense, the crux of the matter at issue in this appeal is the statutory meaning of the terms "codified" and "codification" for the purposes of the requested inspection of the ordinances of a municipality pursuant to the South Carolina Freedom of Information Act, §30-4-10, *et seq.*, S.C. Code Ann. (Rev. 2007). Once the foregoing is established, the secondary questions then become whether an Order issued in a separate case between the parties which does not reference the matter specifically before the Trial Court, can bar relief to a litigant under the theory of collateral estoppel and whether the failure to respond to a request made pursuant to the South Carolina Freedom of Information Act presents a justiciable controversy allowing for the issuance of a declaratory judgment. Appellant will address each of these issues separately below.

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING APPELLANT'S REQUEST FOR AN INJUNCTION REQUIRING RESPONDENT TO CODIFY THE TOWN ORDINANCES AND ALLOW FOR THE PUBLIC INSPECTION THEREOF IN ACCORDANCE WITH §5-7-290, S.C. CODE ANN. (REV. 2004) WHERE RESPONDENT HAS FAILED TO SHOW THAT THE ORDINANCES ARE CODIFIED IN COMPLIANCE WITH §5-7-290, S.C. CODE ANN. (REV. 2004) AND WHERE RESPONDENT FAILED TO RESPOND TO REQUESTS FOR ADMISSION CONCERNING THE CODIFICATION OF TOWN ORDINANCES.

The Trial Court held that Appellant was not entitled to injunctive relief requiring Respondent to allow the public inspection of Respondent Town's codified ordinances on the theory of collateral estoppel. (R. p. 6; p.8). In support of its conclusion, the Trial Court stated:

> For an action to be barred by collateral estoppel, Defendant must show that the issue in the present lawsuit was: '(1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment.' *Carolina Renewal, Inc. v. S.C. Dep't of Transp.,* 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009). The doctrine only bars particular issues that were actually litigated; therefore, collateral estoppel is inapplicable when a party argues that the other party should have litigated a particular issue in the prior action. See *Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201, 216, 493 S.E.2d 826, 835 (S.C. 1997).

(R. p. 6). The Trial Court further reasoned that the Order issued by Judge Howe, Master in Equity for Horry County in Civil Action 2005-CP-26-1091, by which Appellant received a permanent injunction against Respondent for violations of the South Carolina Freedom of Information Act (FOIA) established Appellant's right to review the ordinances of Respondent. (R. p. 6). Appellant does not dispute the case law cited by the Trial Court, but rather the application of the appropriate case law to the instant action.

The Trial Court incorrectly determined that the previous litigation concerning FOIA between the parties had addressed the matter presently before this Court, specifically, Respondent's denial of Appellant's numerous requests over the better part of a decade to inspect and review Respondent's codified ordinances. Upon review of the Order entered in Civil Action 2005-CP-26-1091, the Trial Court's error becomes clear. In the Order filed January 27, 2010 in Civil Action 2005-CP-26-1091, Judge Howe states:

> As the Defendant is in default and the allegations contained in the Complaint are deemed to be true, the Court finds that as alleged in the Complaint herein the Defendant, The Town of Atlantic Beach (the "Town"), has violated the South Carolina Freedom of Information Act (the "SCFOIA"), S.C. Code Ann. §§ 30-4-10, et seq., in the following respects: a. The Defendant has failed to notify the Plaintiff of the times, dates, places, and Agenda of all meetings, whether scheduled, rescheduled or called, of the Atlantic Beach Town Council (the "Town Council"). b. The Defendant has failed to note in the Minutes of the meetings of the Town Council, the efforts made to comply with Plaintiff's requests for notification of the times, dates, places, and Agenda of all meetings, whether scheduled, rescheduled, or called, of the town [sic] Council. c. The Defendant has failed to make available to the Plaintiff, for public inspection and copying, the prepared Minutes, whether "approved" or "unapproved" of meetings of the Town Council, for the six months preceding the filing of this action, during the hours of operation of the Atlantic Beach Town Hall (the "Town Hall"), without the Plaintiff being required to make a written request to inspect or copy the records, when the Plaintiff appeared in person to make such request. d. The Defendant failed to make requested public records available to the Plaintiff, for inspection and copying, after declining to provide written notification to the Plaintiff within the fifteen days (excepting Saturdays, Sundays, and legal public holidays), allowed by law, when Plaintiff returned to the Town Hall after the expiration of the above period.

(R. pp. 323-324, ¶1 a-d). From a reading of the Order filed January 27, 2010 in Civil Action 2005-CP-26-1091, it appears that Appellant's Complaint in that action related to Respondent's failure to provide Appellant with notice relating to the Town Council meetings; the failure to provide Appellant with Minutes of the Town Council meetings; and repeatedly entering executive session during Town Council meetings to conduct business which was improperly conducted in executive session. The Order issued in Civil Action 2005-CP-26-1091 further provides additional relief to Appellant including requiring agents of Respondent to read the *Public Official's Guide to Compliance with South Carolina's Freedom of Information Act* among other relief. (R. p. 325, ¶ 3- p. 331, ¶ 25). While the Order issued by Judge Howe does require Respondent to afford Appellant access to "public records", it does not once mention ordinances in the Order, much less require Respondent to provide access to its ordinances to Appellant.

It appears from the reasoning advanced by the Trial Court in the instant action, that it interpreted the prior Order's usage of the term "public records" to include Town ordinances, although the term "ordinances" is not contained in the prior Order. (R. p. 6). This issue is further compounded in that neither the Order from which this appeal emanates, nor the prior Order of Judge Howe define the term "public records". Section 30-4-20, S.C. Code Ann. (Rev. 2007) defines the term in subsection (c), which states:

> 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...

While it seems basic and obvious to include ordinances within the definition of "public records", that term is not contained in the statutory definition of "public records" as that term is defined in the SC FOIA.

In the instant action, Appellant propounded discovery requests to Respondent comprised of interrogatories, requests for production and requests for admission to which Respondent failed to answer. As a result, Appellant filed a Motion to Compel Respondent's discovery responses, which resulted in an Order issued by the Honorable Benjamin H. Culbertson, Presiding Judge of the Fifteenth Judicial Circuit and filed September 16, 2011 ordering Respondent to submit responses within Thirty (30) days of the service of the Order and awarding Appellant Eight Hundred Seventy One and 52/100ths Dollars ($871.52) in attorney's fees for Respondent's non-compliance. Although ordered to do so, Respondent failed at any point to provide responses to the discovery requests propounded in this case.[1] Additionally, Respondent failed to reply to Appellant's requests for admission, which, according to Rule 36 (a), SCRCP, is an admission of the matters sought to be admitted. Included in the requests for admission that Respondent failed to answer is a request stating: "[a]dmit that there are no codified ordinances for the Town of Atlantic Beach." Appellant proffered the unanswered requests for admission, to the Trial Court upon the commencement of the trial. (R. p.64, line 23- p. 65, line 17; p. 41).

It is clear that both parties to this appeal, regardless of the manner in which they define "codified ordinances" do not consider the ordinances of Respondent Town to be codified as required by §5-7-290, S.C. Code Ann. (Rev. 2004). As such, it is also obvious that Respondent cannot allow inspection of something that does not exist, as admitted by Respondent during the Trial of the matter Eighteen (18) times. As such, it is clear from the evidence adduced at Trial that Respondent has failed to abide by §5-7-290 by not only failing to codify its ordinances as required,

[1] At the onset of the Trial in this matter, there was a discussion concerning whether Respondent paid the ordered fees. Respondent informed the Trial Court that a check was mailed to Appellant for the awarded fees but the check had not cleared as of the date of Trial. Appellant claimed he had not received the check. No evidence was produced showing that the check was ever received by Appellant during the Trial of the matter. Respondent paid the ordered fees to Appellant's counsel after the conclusion of the Trial.

but also, by failing to allow Appellant an opportunity to inspect and review those ordinances. Obviously, failure to allow inspection and review of the codified ordinances violates §30-4-30 as well. This leads to the question of whether the prior Order in Civil Action 2005-CP-26-1091 collaterally estops Appellant from bringing the instant action which will be addressed in the next section. However, it is clear that the Trial Court committed reversible error by denying injunctive relief to Appellant insofar as the ordinances of Respondent are not codified, as admitted by Respondent, and could not be subject to public inspection and review as required under §5-7-290, S.C. Code Ann. (Rev. 2004) and §30-4- 10, *et seq.*, S.C. Code Ann. (Rev. 2007).

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING APPELLANT'S REQUEST FOR INJUNCTIVE RELIEF UNDER THE DOCTRINE OF *RES JUDICATA* WHERE PRIOR ORDER FROM COMPANION CASE BETWEEN THE PARTIES REFERENCED BY THE TRIAL COURT DID NOT ORDER RESPONDENT TO PROVIDE APPELLANT ACCESS TO CODIFIED ORDINANCES.

As discussed *supra*, the Trial Court erroneously concluded that the prior Order issued in Civil Action 2005-CP-26-1091 collaterally estops Appellant from seeking relief in this action based upon the belief that "the availability of the ordinances of Defendant for public review was an issue that the parties litigated in the prior action." (R. p. 6). While the Trial Court reached this conclusion, there is no evidence submitted during the Trial that suggests this was true.

The Order issued by Judge Howe in Civil Action 2005-CP-26-1091 was introduced at Trial as Plaintiff's Exhibit 17 and Defendant's Exhibit 1. After reviewing the entire Order, it does not contain a single reference to the ordinances of Respondent Town. Although the Order does not indicate the causes of action alleged against Respondent nor a recitation of facts, the Order does indicate the specific violations of SC FOIA by Respondent in that case. As discussed earlier, the Order in Civil Action 2005-CP-26-1091 indicates that Respondent's violations of SC FOIA related to failing to give Appellant access to the Minutes of the meetings of Town Council; Respondent's

failure to give Appellant notice of the time, date and place of all Town Council Meetings; Respondent's refusal to make the Minutes of the meetings of Town Council available for public inspection and copying; and failing to make "public records" available to Appellant after failing to provide written notification within Fifteen (15) days. As a result of those SC FOIA violations by Respondent, Judge Howe permanently enjoined the Town from further violations of SC FOIA relating to those issues. The Order from the 2005 case additionally provides several other requirements as additional relief relating to those issues, including but not limited to requiring Respondent to mail notices and agenda for each Town Council meeting to Appellant; requiring Respondent to notify the media with that information; prohibiting Respondent from amending the agenda for any Town Council meetings; and prohibiting the Town Council from entering executive session to vote on matters, among other things. Yet, not once in the Ten (10) page Order does the Master in Equity mention any relief relating to the ordinances of the Town of Atlantic Beach. It would seem that had the issue of the codification of the ordinances been addressed or even raised during the previous litigation, the Order would have reflected that. Any reference to the matter specifically before the Trial Court in this matter is conspicuous in its absence from the Order in the 2005 case.

Moreover, it would have been impossible for the Master in Equity to have addressed the matters before the Trial Court in this action in the Order in the 2005 case due to the fact that half of the requests made by Appellant to inspect the codified ordinances of the Town of Atlantic Beach occurred after the filing of the 2005 action. As Appellant testified, of the Six (6) requests made of Respondent to inspect the codified ordinances, Three (3) of them were made after the 2005 action was commenced; including the last request dated August 10, 2010. (R. p. 26). While the Trial Court below seems to have interpreted the permanent injunction to have included the ordinances

within its view of "public records", the Master in Equity does not seem to have held the same view, as that Order is silent with respect to the requests to inspect the ordinances.[2] As the Trial Court correctly pointed out in its September 8, 2014 Order: "[t]he doctrine only bars particular issues that were actually litigated; therefore, collateral estoppel is inapplicable when a party argues that the other party should have litigated a particular issue in the prior action. See *Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201, 216, 493 S.E.2d 826, 835 (S.C. 1997)." (R. p. 6). Since the instant issue was not raised in the 2005 action, Appellant could not be collaterally estopped in this action from litigating the issues concerning the codification of the Town ordinances. Therefore, the Trial Court's ruling that Appellant was collaterally estopped from seeking relief in this action constitutes reversible error.

III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING APPELLANT'S REQUEST FOR DECLARATORY JUDGMENT DECLARING RESPONDENT TO BE IN VIOLATION OF THE SOUTH CAROLINA FREEDOM OF INFORMATION ACT FOR FAILING TO PROVIDE CODIFIED ORDINANCES OF RESPONDENT TOWN FOR PUBLIC INSPECTION, IN VIOLATION OF §30-4-100, S.C. CODE ANN. (REV. 2007) AND §5-7-290, S.C. CODE ANN. (REV. 2004).

In addition to ruling that Appellant was collaterally estopped from seeking injunctive relief, the Trial Court ruled that Appellant "has failed to make a clear showing of the existence of an actual controversy and he is not entitled to the relief sought. *Ott v. Tindal*, 297 S.C. 395, 398, 377 S.E.2d 303, 305 (1989)."(R. p. 7). In reaching its conclusion, the Trial Court reasoned that a judgment in the instant case before this Court "would not settle legal rights of the parties, the judgment would be merely advisory, and therefore beyond the scope of the purpose of declaratory judgment." Citing to *Tourism Expenditure Review Committee v. City of Myrtle Beach*, 403 S.C. 76, 81, 742 S.E.2d 371, 374 (2013). (R. p. 7). The Trial Court erroneously determined that the

[2] While the Order from Civil Action 2005-CP-26-1091 was introduced into evidence at the Trial of the instant case, the Pleadings from that case were not introduced nor discussed during the Trial.

controversy arising in the instant case concerned whether the ordinances of Respondent Town were organized in a bound volume or an unbound volume; concluding that the nature of the organization of Respondent's ordinances was inconsequential. Not only did the Trial Court fail to correctly ascertain the controversy arising in this action, but also misapprehended the appropriate standard for standing as it relates to a justiciable controversy under the South Carolina Freedom of Information Act.

"Generally this Court only considers cases presenting a justiciable controversy." *Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 630 S.E.2d 474 (2006) citing *Byrd v. Irmo High School*, 321 S.C. 426, 430, 468 S.E.2d 861, 864 (1996). "A justiciable controversy exists when there is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute that is contingent, hypothetical, or abstract." *Id.* "Generally, a party must be a real party in interest to the litigation to have standing." *Sloan*, 369 S.C. 20, 630 S.E.2d 474 (2006) citing *Evins v. Richland County Historic Pres. Comm'n*, 341 S.C. 15, 21, 532 S.E.2d 876, 879 (2000) (citing *Glaze v. Grooms*, 324 S.C. 249, 478 S.E.2d 841 (1996)). "A real party in interest is a party with a real, material or substantial interest in the outcome of the litigation." *Sloan*, 369 S.C. 20, 630 S.E.2d 474 (2006) citing *Baird v. Charleston County*, 333 S.C. 519, 530, 511 S.E.2d 69, 75 (1999). "However, the South Carolina General Assembly addressed the issue of standing in FOIA cases in a specific statutory provision." The statute provides:

> [a]ny citizen of the State may apply to circuit court **for either or both a declaratory judgment and injunctive relief to enforce the provisions of the 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.**

Sloan, 369 S.C. 20, 630 S.E.2d 474 (2006) citing S.C. Code Ann. §30-4-100(a) (1991). "Additionally, this Court has held that standing under FOIA does not require the information seeker to have a 'personal stake in the outcome.'" *Sloan*, 369 S.C. 20, 630 S.E.2d 474 (2006) citing *Fowler v. Beasley*, 322 S.C. 463, 466, 472 S.E.2d 630, 632 (1996); see also *Bus. License Opposition Comm. v. Sumter Cnty.*, 304 S.C. 232, 403 S.E.2d 638 (1991). "The legislature has conferred standing upon any citizen of South Carolina to bring a FOIA claim against a public body for declaratory or injunctive relief, or both." *Freemantle v. Preston*, 398 S.C. 186, 728 S.E.2d 40 (2012). "Appellant has pled that he is a citizen of the State and that FOIA has been violated. Nothing more is required." *Id.*

Here, it is evident from a review of the pleadings in this matter that appellant had made his requests to review ordinances, required by §5-7-290, to be in codified form, pursuant to not only §5-7-290, but also §30-4-30 of the South Carolina Freedom of Information Act. It is likewise evident that the South Carolina General Assembly specifically granted all citizens, like Appellant in this instance, standing to bring an action seeking declaratory and/ or injunctive relief for the failure of a public body to abide by the provisions of FOIA. It is clear that Respondent is a public body to which FOIA applies. Likewise, it is obvious that the information sought by Appellant in this matter would be information subject to production as a result of a FOIA request being made of Respondent. However, due to the fact that Respondent, admittedly, does not have codified ordinances, Respondent was unable to produce the information sought by Appellant. Surely, it is evident that a failure to produce information validly sought pursuant to a request made under the provisions of the South Carolina Freedom of Information Act presents a "justiciable controversy", entitling Appellant not only to declaratory relief, but also injunctive relief as well.

In addition to the misapprehension of the appropriate standard, it appears from the Order issued by the Trial Court that it also misapprehended the basis for the action. The issue at trial was not whether the ordinances of Respondent Town were contained in a bound volume or unbound notebook; but rather whether the ordinances are codified, indexed, and validly enacted laws, adopted pursuant to the proper procedures commensurate with the requirements of §5-7-290, and if so, to require Respondent to allow for the public review and inspection thereof. It appears that the Trial Court adopted the misstated purpose for the action advanced by Respondent which sufficiently confused the issues before the Court. Respondent partially accomplished this by presenting a defense during the Trial which was inconsistent with its Answer, in which Respondent contended that the municipal ordinances at issue were in fact codified and indexed, but admitted at Trial that they were not in compliance.

As the terms "codified" and "codification" are undefined in §5-7-290, it presents an interesting question for this Court; that is to say, what did the Legislature mean when it used the terms "codification" and "codified" to describe the ordinance requirements in §5-7-290. According to *Black's Law Dictionary*, the term "codification" is defined as: "the process of compiling, arranging, and systematizing the laws of a given jurisdiction, or of a discrete branch of the law, into an ordered code; the code that results from this process." 252 (Bryan A. Garner, ed., 7th ed., West 1999). Additionally, at the hearing on the Motion to Reconsider, Respondent's counsel referenced a South Carolina Attorney General opinion for the definition of the term "codification". (R. p. 273, line 15- p.274, line 2). In that opinion, the Office of the South Carolina Attorney General, referring to §4-9-120, S.C. Code Ann. (1976) concerning the process of the codification of County ordinances stated:

> I think that Section 4-9-120, Code of Laws of South Carolina, 1976, requires that all county ordinances whether permanent or temporary be codified; however, the codification can most probably be accomplished by loose leaf or pamphlet types of volumes as well as by bound volumes.

(Emphasis included in original) 1978 WL 35175 (S.C.A.G.). Additionally, when Respondent submitted its proposed Order to the Trial Judge for consideration, Respondent included Two (2) other South Carolina Attorney General Opinions apart from the 1978 opinion with the proposed Order. In 1969, the South Carolina Attorney General issued an opinion concerning whether political subdivisions could adopt a national or regional code by reference and the manner in which temporary enactments should be codified. In this opinion, the Attorney General opined concerning the temporary enactments:

> Section 47-61.3 requires that the municipality 'shall codify and index its ordinances and bring up-to-date such ordinances annually.' This statute is self-explanatory and merely requires that all ordinances be kept in codified form. The ordinances may be typewritten or reproduced in such manner as the governing body seems advisable. For smaller towns, the most expedient means of complying with the statute would appear to be to compile all its ordinances in a loose-leaf notebook, and as ordinances are adopted, to add such ordinances to the notebook. It would appear helpful also if standard ordinances could be reproduced and made available to all smaller municipalities so as to give them a basic codification to which they could add such special ordinances as might be necessary from time to time.

1969 WL15452 (S.C.A.G.). In 1960, the South Carolina Attorney General issued an opinion regarding compliance with 1960 Act 613. In the opinion, it was stated:

> Act #613 which is now codified as Section 47-60, Code of Laws of South Carolina (1960 Supplement) requires each municipality to codify and index its ordinances by January 1, 1961. Ordinances not codified and indexed by that date are repealed. As you observe, from the Act, the only requirement is that these ordinances be codified and indexed by January 1, 1961. This is the only requirement placed on municipalities and it is the opinion of this office that after the ordinances have been codified and indexed they should be filed with the City Clerk so that they might be available to any person wishing to make references to them. There is no requirement that these ordinances be filed with any state agency or in manner other than as previous ordinances were filed, that is, with the City Clerk.

1960 WL 11987 (S.C.A.G.). While it is universally accepted that municipal ordinances are required to be codified and indexed, it is less clear by what manner this can be accomplished. As of the writing of this brief, Appellant can find no case law in this State interpreting the meaning of the terms "codified" or "codification" for compliance. Furthermore, not only are ordinances required to be codified, but indexed as well. Based on the admissions of Respondent during the Trial of this matter, it does not believe the Town Ordinances to be in compliance with these requirements.

However, as stated earlier, the matter Appellant sought to have adjudicated is not whether the ordinances were actually contained in a bound or unbound volume. In fact, many municipalities and counties in this State have chosen to make their ordinances available in electronic form through the use of services like www. municode.com or other similar services.[3] The questions Appellant sought to be adjudicated concerned whether Respondent Town had ordinances that showed that the Town properly enacted the ordinances; whether the ordinances were current, reflecting all amendments and repeals; and whether the ordinances as constituted were indexed, searchable and validly cross-referenced. As Respondent has failed to respond to Appellant's requests; the request made by Appellant's counsel; and the discovery requests propounded in this action, Respondent has not produced any evidence that suggests the ordinances they claim are currently in force, comport with those characteristics. Additionally, while Respondent's Answer claimed that the ordinances were codified and indexed; at Trial, however, Respondent admitted, inconsistently with its Answer, numerous times that the ordinances did not comply with the requirements of §5-7-290. Notwithstanding the foregoing, even if the ordinances of Respondent Town did in fact exist and

[3] See www.municode.com/library/sc for a list of all municipalities and counties who have posted their ordinances online with Municode.com. As of the writing of this brief, 101 counties and municipalities in South Carolina used the Municode.com service.

comport with these specifics, Respondent Town still failed to provide Appellant access to the ordinances for public inspection, in violation of §§5-7-290 and 30-4-30.

From the ancient Sumerians and the Codes of Ur-Nammu and Lipit-Ishtar of Isin, to the Code of Hammurabi, the codification of the laws of the Hittites, the Assyrians and the Mosaic laws, society has long regarded the fundamental importance of written laws. Of paramount importance is the understanding that in order for an individual or groups of persons to be expected to abide by the rules of a society, those individuals must be able to ascertain what those rules are. Certainly, it is true that one cannot be in compliance with a law if the laws are kept secret. As the acclaimed jurist Learned Hand said: "the language of law must not be foreign to the ears of those who are to obey it."

Here, Respondent Town has created, purportedly, a body of rules, regulations, and ordinances to which the public, in this specific instance, Appellant, has been denied access. How then, can Respondent enforce the provisions it claims has been validly enacted, if it is unwilling, or unable to produce them for public inspection and review? Of what use and benefit are the rules, if no one knows what the rules are? It is clear that the Trial Court's ruling denying Appellant's request for a declaratory judgment is reversible error in light of the South Carolina Freedom of Information Act.

IV. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING APPELLANT'S MOTION TO EXCLUDE WITNESSES PROPOSED BY RESPONDENT WHERE RESPONDENT FAILED TO IDENTIFY WITNESSES IN DISCOVERY AND ANNOUNCED THE WITNESSES IMMEDIATELY PRIOR TO THE COMMENCEMENT OF THE TRIAL AND WHERE THE TRIAL COURT ALLOWED APPELLANT LESS THAN AN HOUR TO INFORMALLY INTERVIEW THE PROPOSED WITNESSES OFFERED BY RESPONDENT PRIOR TO THE TRIAL OF THE MATTER.

As has been discussed earlier, Respondent failed to provide answers to discovery requests propounded by Appellant to Respondent in this action. Prior to the Trial of this matter, Appellant was forced to file a Motion to Compel against Respondent which resulted in an Order compelling Respondent to respond to the unanswered discovery requests. (Plaintiff's Exhibit 9). Even though Respondent was ordered to answer the discovery requests, Respondent failed to acquiesce. Additionally, while Appellant prepared and submitted a pre-trial brief to the Trial Court, in accordance with Rule 16 (c), South Carolina Rules of Civil Procedure; Respondent failed to do so. As Respondent failed to present this information to Appellant prior to the matter being called for Trial, Appellant was placed in a decidedly disadvantaged position.

When the Trial Court called the matter for Trial, Appellant objected to Respondent's proposed submission of witnesses in the matter based upon the ground of unfair surprise, after which a discussion between the Trial Court and counsel ensued. (R. p. 48, line 3 – p. 49, line 1; line 23- p. 50, line 5; line 23- p. 54, line 25; p. 56, line 7- p. 57, line 25). The Trial Court expressed its reluctance to exclude witnesses based upon an opinion the Trial Court had just reviewed[4], but allowed Appellant the opportunity to informally question the Three (3) witnesses proposed by Respondent during a recess of approximately One (1) hour's duration while the Trial Judge qualified the jury panel in other cases on the Court's docket. The Trial Court reasoned that the scenario in this matter was similar to that in the *Teseniar* case. (R. p. 56, line 15- p. 57, line 2; lines 10-25).

In *Teseniar*, this Court reversed the Trial Court's decision to decline to qualify a witness as an expert. The factual scenario in *Teseniar* is as follows. Appellant failed to produce some material

[4] It was determined later that the Trial Court was referring to the case of *Teseniar v. Prof'l Plastering & Stucco*, 407 S.C. 83, 754 S.E.2d 267 (Ct. App. 2014).

they intended to rely upon at trial to the Respondents and upon realizing the error, Appellant agreed not to utilize the undisclosed information at the Trial of the matter. Appellant had, however, disclosed the expert witness in question approximately a year prior to trial on the issue of liability, although Respondent failed to depose the witness, they were afforded the opportunity to do so. After Appellant sought to have the witness qualified as an expert, the Respondents objected and moved to disqualify the witness as an expert because the witness had not been licensed in South Carolina and had not been identified as an expert on the specific issue they sought have him qualified on. While the Trial Court took the issue of whether to exclude the expert witness under advisement overnight, Appellant offered to allow Respondents the opportunity to depose the witness overnight, which was accepted by one of Respondents' attorneys. When the trial resumed, the Trial Court declined to qualify the witness as an expert and limited the witness' testimony to his personal observations. The instant case is, however, factually distinct from the *Teseniar* case in many respects which will be addressed at length below.

In the instant case, upon returning from recess, Appellant renewed their oral motion to exclude the witnesses based upon the ground of unfair surprise, which the Trial Court denied. (R. p. 58, line 2- p. 64, line 22). Thereafter, Appellant renewed their objection to the presentation of the witnesses during Respondent's case in chief, which the Trial Court deemed continuing upon request from Appellant's counsel, and Respondent was allowed to present its case. (R. p. 149, line 9- p. 150, line 3).

This Court in *Teseniar* set forth the applicable case law concerning discovery sanctions and the exclusion of witnesses. "A trial court's decision on whether or not to impose discovery sanctions is reviewed for abuse of discretion." 407 S.C. 83, 754 S.E.2d 267 (Ct. App. 2014) citing *CFRE, LLC v. Greenville Cnty. Assessor* 395 S.C. 67, 82, 716 S.E.2d 877, 885 (2011) (citing

Jamison v. Ford Motor Co., 373 S.C. 248, 270, 644 S.E.2d 755, 766 (Ct. App. 2007)). "'In deciding what sanction to impose for failure to disclose evidence during the discovery process, the trial court should weigh the nature of the interrogatories, the discovery posture of the case, willfulness, and the degree of prejudice.'" *Id.* citing *Jamison*, 373 S.C. at 270, 644 S.E.2d at 767 (quoting *Samples v. Mitchell*, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct. App. 1997)). "A failure to weigh the required factors demonstrates a failure to exercise discretion and amounts to an abuse of discretion." *Id.* citing *Samples*, 329 S.C. at 112, 495 S.E.2d at 216. This Court further identified the appropriate factors for consideration before imposing a sanction of excluding witnesses are:

> (1) the type of witness involved; (2) the content of the evidence emanating from the proffered witness; (3) the nature of the failure or neglect or refusal to furnish the witness' name; (4) the degree of surprise to the other party, including the prior knowledge of the name of the witness; and (5) the prejudice to the opposing party.

Id. citing *Jumper v. Hawkins*, 348 S.C.142, 152, 558 S.E.2d 911, 916 (Ct. App. 2001). "The sanction of exclusion of a witness should never be lightly invoked." *Id.* citing *Barnette v. Adams Bros. Logging, Inc.*, 355 S.C. 588, 592, 586 S.E.2d 572, 574 (2003) (quoting *Jackson v. H&S Oil Co.*, 263 S.C. 407, 411, 211 S.E.2d 223, 225 (1975)).

In the instant action, Respondent failed to identify *any* witness prior to the matter being called for trial, nevertheless the Three (3) witnesses it produced at trial. All Three (3) witness were purported fact witnesses, although none of the witnesses were employed by Respondent for the entire duration of the issues between the parties. Additionally, Respondent had been aware of this particular lawsuit for more than Three (3) years by the time of trial, but had failed to identify any potential witnesses. In fact more than Two (2) years prior to the Trial, Respondent had been ordered to provide responses to discovery requests, which included interrogatories related to any potential witnesses. Yet Respondent consciously *chose* not to participate in the process.

Even more disturbing is the fact that this behavior is not an isolated incident, but rather a pattern of behavior on behalf of Respondent. As was adduced at Trial, Respondent failed to respond to the myriad requests made by Appellant and on Appellant's behalf to review the codified ordinances of Respondent Town (R. p. 67, lines 16-20; p. 68, line 17- p. 69, line 10; line 16- p.70, line 17; line 24- p. 72, line 10; line 17- p. 74, line 25; p. 75, line 13- p. 76, line 16; line 22- p. 77, line 11; lines 15-22; p. 78 lines 4-17; pp.16- 22; p. 280; p. 26); failed to file a responsive pleading in the prior action referenced by the Trial Court from Civil Action 2005-CP-26-1091 (R. p. 322); failed to provide responses to discovery requests in this action (R. pp. 281-283; p. 48, lines 6-20); had yet to satisfy an award of attorney's fees relating to the failure to participate in discovery included in Judge Culbertson's Order (R. pp. 281-283; p. 48, line 21- p. 50, line 12; p. 55, line 1- p.56, line 6); failed to abide by the provisions of the SC FOIA (R. p. 205, line 9- p. 207, line 4); and had previously failed to pay attorney's fees awarded to Appellant in another case until Appellant brought a contempt proceeding against Respondent (R. p. 83, line 2- p. 85, line 20, p. 230, line 8- p. 232, line 1; pp. 286-288). Taken in context, Respondent's deficiencies directly lead to the conclusion that the actions taken by Respondent were willful and intentional. It appears that Respondent's strategy was simply to ignore and resist Appellant's requests in the hopes that Appellant would just go away, and the Trial Court allowed them to do so with impunity. This is evident in the testimony of the witnesses when referencing Appellant, as well as the reaction on the record by the Trial Court. (R. p. 160, line 9- p. 162, line 24; p. 163, line 14- p. 165, line 13; line 25- p. 166, line 14; line 24- p. 167, line 8; p. 177, line 21- p. 178, line 16; line 19- p. 182, line 11; line 20- p. 183, line 6; p. 186, lines 7-19; p. 187, line 6- p. 189, line 6; p. 193, line 5- p. 196, line 15; p. 207, lines 8-17; p. 219, line 14- p. 220, line 8; p. 221, line 3- p. 222, line 1; p. 224, line 23- p. 226, line 8; p. 235, line 5- p. 236, line 2; p. 240, line 1- p. 241, line 11). When referencing

Appellant, the witnesses collectively described him negatively. In one instance, the following exchange took place between Mr. Booker, Town Manager, Respondent's counsel, and the Trial Court:

> QUESTION (By the Court): And do you see Mr. Curry as an overseer or ombudsman of the public good of Atlantic Beach?
>
> ANSWER: What I say about Mr. Curry is that--I didn't know this terminology, but Mr. Curry, I would consider, a gadfly, and I had to look up that word.
>
> Q: What does that mean?
>
> A: That is someone who looks at the laws of a town and then goes around the town to find people who are not in compliance with those laws and makes an issue of it.
>
> ***
>
> BY THE COURT: Mr. Booker.
>
> A: Yes, sir.
>
> Q: I looked up gadfly. A fly that bites livestock. A fly that irritates livestock by biting them and sucking their blood that is the first definition. The second one is somebody annoying, somebody regarded as persistently annoying or irritating. Is that the definition you looked up?
>
> A: No. No, sir.
>
> Q: You found a different book.
>
> A: There was another one, and I looked it up, I thought, on the Internet. In my mind, what I interpreted it as --because I know Mr. Curry and I have worked with him often, lots of times, E-mails and so forth, and I know how he is. We've discussed how he is. He wants to know the laws, constantly surveying the town and finding somebody who is violating those laws, and then he brings it to your attention, or the police's attention and he expects you to do something about it, and when you don't, then you have a problem.
>
> THE COURT: Ms. Moody.
>
> MS. MOODY: I was going to say the definition of a gadfly, Martin Luther King talked about it in Birmingham and that being someone who has the uncomfortable, annoying questions.
>
> THE COURT: So it can be good.
>
> MS. MOODY: According to Martin Luther King.

(R. p. 235, line 18-p. 236, line 2; p. 240, line 1- p. 241, line 4). Obviously, there was a negative connotation assessed to the term "gadfly" used to describe Appellant. The passage in "Letter from a Birmingham Jail" referenced by Ms. Moody, Respondent's counsel is:

> But I must confess that I am not afraid of the word tension. I have earnestly worked and preached against violent tension, but there is a type of constructive nonviolent tension that is necessary for growth. Just as Socrates felt that it was necessary to create a tension in the mind so that individuals could rise from the bondage of myths and half-truths to the unfettered realm of creative analysis and objective appraisal, we must see the need of having nonviolent gadflies to create the kind of tension in society that will help men rise from the dark depths of prejudice and racism to the majestic heights of understanding and brotherhood.

(King, Jr., Martin Luther, "Letter from a Birmingham Jail", page 5, April 16, 1963). The reference Dr. King made was to *The Apology*, by Plato, which depicted the trial of Socrates. In *The Apology*, Plato writes that Socrates, in his defense, said:

> And now, Athenians, I am not going to argue for my own sake, as you may think, but for yours, that you may not sin against the God, or lightly reject his boon by condemning me. For if you kill me you will not easily find another like me, who, if I may use such a ludicrous figure of speech, am a sort of gadfly, given to the state by the God; and the state is like a great and noble steed who is tardy in his motions owing to his very size, and requires to be stirred into life. I am that gadfly which God has given the state and all day long and in all places am always fastening upon you, arousing and persuading and reproaching you. And as you will not easily find another like me, I would advise you to spare me. I dare say that you may feel irritated at being suddenly awakened when you are caught napping; and you may think that if you were to strike me dead, as Anytus advises, which you easily might, then you would sleep on for the remainder of your lives, unless God in his care of you gives you another gadfly. And that I am given to you by God is proved by this: - that if I had been like other men, I should not have neglected all my own concerns, or patiently seen the neglect of them during all these years, and have been doing yours, coming to you individually, like a father or elder brother, exhorting you to regard virtue; this I say, would not be like human nature. And had I gained anything, or if my exhortations had been paid, there would have been some sense in that: but now, as you will perceive, not even the impudence of my accusers dares to say that I have ever exacted or sought pay of anyone; they have no witness of that. And I have a witness of the truth of what I say; my poverty is a sufficient witness.

(Plato, *The Apology*, http://classics.mit.edu/Plato/apology.html (accessed October 7, 2015). While, the idea represented by the term "gadfly" is a well-intentioned one, there is no question that there

is a negative implication in the way it was used to refer to Appellant. Certainly this cannot be ignored in this case, especially in light of the undertones of tension present in conversations involving Atlantic Beach.

Clearly, Respondent waiting until the morning of Trial to identify potential witnesses constitutes unfair surprise. This is especially true considering that although the Trial Court allowed Appellant's counsel to informally interview the potential witnesses during an hour long recess, at least one of the witnesses changed their proposed testimony during the Trial of the matter. (R. p. 173, line 3- p.174, line 16). Furthermore, as a result of producing these witnesses, Respondent completely reversed course as far as their defense of this matter. In Respondent's Answer to the Complaint, Respondent alleged that it had codified ordinances, although, at Trial Respondent admitted on numerous occasions that its ordinances were not codified. These tactics tremendously limited Appellant's counsel's ability to adequately impeach these witnesses concerning any inconsistencies and to investigate this matter fully. Obviously, given the deviation from the defense contained in Respondent's Answer and the change in Ms. Pereire's testimony, Appellant was surprised by the evidence presented by Respondent at Trial as nothing had been disclosed previously. The matter before this Court is the product of a true Trial by ambush.

As opposed to the factual scenario in *Teseniar*, here, Appellant had no knowledge of any witnesses Respondent intended to call. In *Teseniar*, while the subject witness was not disclosed as an expert, he was disclosed as a witness. In *Teseniar,* as opposed to the instant case, the parties engaged in the discovery process. Unlike in the instant matter, the party committing the discovery violation by failing to disclose certain material to the opposing party in *Teseniar* agreed not to use the unproduced material at trial. In the instant case, Respondent's entire case was predicated upon undisclosed material. Additionally, while Appellant in this case was allowed an hour's time to

informally interview the proposed witnesses, this is substantially different than being allowed to formally depose a witness overnight, in that by being allowed to depose a witness, there is a written record of their testimony which may be used for impeachment purposes. Appellant was not afforded this opportunity. The Trial Court's ruling denying Appellant's motion to exclude the undisclosed witnesses presented by Respondent constitutes an abuse of discretion.

V. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO AWARD APPELLANT ATTORNEY FEES AND COSTS FOR RESPONDENT'S FAILURE TO COMPLY WITH THE SOUTH CAROLINA FREEDOM OF INFORMATION ACT (FOIA).

Appellant contends that the Trial Court abused its discretion and thereby, committed reversible error by failing to grant the injunctive and declaratory relief sought pursuant to §§30-4-30 and 5-7-290, S.C. Code Ann. As such, Appellant argues that, should this Court reverse the Trial Court's rulings, it is within the purview of this Court to likewise reverse the Trial Court on the issue of attorney's fees and costs. Should this Court find that Respondent violated FOIA, Appellant would be entitled to recover attorney's fees and costs as a result of §30-4-100 (b), S.C. Code Ann. (Rev. 2007).

Section 30-4-100 (b), S.C. Code Ann. (Rev. 2007) states: "If a person or entity seeking such relief prevails, he or it may be awarded reasonable attorney's 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's fees or an appropriate portion thereof." At the Trial below, Appellant submitted for the Trial Court's consideration an affidavit of attorney's fees totaling Ten Thousand Six Hundred Thirty Four and 92/100ths Dollars ($10,634.92) in attorney's fees and costs including Five Hundred Forty Nine and 94/100ths Dollars ($549.94) in costs. (R. p. 299- 309).

In this case, it is important to note that Respondent consciously refused to participate in the discovery process, after ignoring Appellant's repeated attempts to review the codified ordinances of Respondent Town. In its Answer, Respondent denied Appellants allegations that the ordinances of Respondent Town were not codified. (R. p. 32, ¶18). Yet at Trial, Respondent's witnesses and counsel specifically stated that the ordinances of Respondent Town were not codified. (R. p. 115, lines 17-20; p. 116, lines 2-8; line 22- p. 117, line 17; p. 54, lines 9- 13; p. 60, lines 3-10; p. 64, line 23- p. 65, line 9; p. 73, lines 9-13; p. 74, lines 6-10; p. 132, lines 5-9; p. 159, lines 4-10; p. 200, lines 3-9; p. 201, lines 14-15; p. 207, line 25- p. 208, line 24; p. 217, lines 9-17; p. 218, lines 2-6; p. 219, lines 14-19; p. 220, line 3- p. 221, line 2; p. 232, lines 11-23; pp. 290- 298). Additionally, Respondent Town failed to provide any evidence whatsoever at Trial showing that Respondent Town was indeed in compliance with §5-7-290, S.C. Ann. (Rev. 2004) as alleged in its Answer. Respondent Town made a concerted effort to obfuscate the litigation process by completely ignoring the matter prior to Trial and at Trial, the Respondent continued to obstruct the process by confusing the issues, changing its defense, and offering testimony which was inconsistent with previous statements made during the informal interview allowed prior to the Trial in the matter.

"The essential purpose of the FOIA is to protect the public from secret government activity." *Glassmeyer v. City of Columbia*, Op. No. 5347 (Ct. App. Filed September 2, 2015) (Shearouse Adv.Sh. No. 34 at 53) citing *Perry v. Bullock*, 409 S.C. 137, 141, 761 S.E.2d 251, 253 (2014). "The FOIA is remedial in nature and should be liberally construed to carry out the purpose mandated by the General Assembly." *Id.* citing *Quality Towing, Inc. v. City of Myrtle Beach*, 345 S.C. 156, 161, 547 S.E.2d 862, 864-65 (2001). "A governmental agency should not be allowed to stonewall an FOIA request without some penalty for its actions." *Litchfield v. Georgetown County*,

314 S.C. 30, 443 S.E.2d 574 (1994) (Toal, C.J. concurring in part and dissenting in part). In this case, Respondent has undertaken a calculated plan to stonewall Appellant's efforts to review the codified ordinances of Respondent Town by refusing Appellant access to the ordinances; refusing to participate in the discovery process; by failing to disclose potential witnesses until the morning of Trial and by changing their position at Trial from the position advanced in its pleadings. What's more is that Respondent has also set upon a course of governing in secrecy by repeatedly violating the SC FOIA, not only in this case, but in others as well. As was stated earlier, this is a pattern of noncompliance on the part of Respondent. Clearly, should this Court reverse the ruling of the Trial Court, this is an appropriate case for an award of attorney's fees and costs.

CONCLUSION

In sum, §5-7-290, S.C. Code Ann. (Rev. 2004) requires municipalities in this State to codify and index their ordinances and make the codified ordinances available for public inspection and review. By its own numerous admissions during the Trial of this matter, Respondent is in violation of these requirements. Section 30-4-30, S.C. Code Ann. (Rev. 2007) requires public bodies, like Respondent, to make public records available to the public for inspection and review. Again, by its own admissions during the Trial of this matter, if ordinances are included in the definition of public records, Respondent has not complied with the provisions of the South Carolina Freedom of Information Act in this respect. Section 30-4-100, S.C. Code Ann. (Rev. 2007) likewise allows any citizen of this State, whether having a stake in the outcome of the litigation or not, the ability to obtain injunctive relief, declaratory relief, or both, along with an award of attorney's fees and costs should they prevail. In this case, based upon the case law, statutory authority, and the evidence presented during the Trial of this matter, it is evident that the Trial Court committed reversible error in failing to grant Appellant the relief requested. As such,

Appellant respectfully requests that this Court issue an opinion reversing the Trial Court's ruling and substitute its own findings for those of the Court below. Alternatively, Appellant respectfully requests that this Court remand the matter for a new Trial on the issues presented.

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THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Clifton B. Newman, Common Pleas Court Judge

2010-CP-26-10848
Appellate Case No.: 2015-001398

PAUL CURRY,

Appellant,

v.

TOWN OF ATLANTIC BEACH,

Respondent.

CERTIFICATE OF COUNSEL

The undersigned hereby certify that the Final Brief complies with Rule 211(b) SCACR.

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PROOF OF SERVICE

I certify that I have served copies of the Final Brief of Appellant, Final Reply Brief of Appellant and Record on Appeal via regular U.S. Mail addressed to the following:

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