

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2017CP4002523

State Media Company

South Carolina House Republican Caucus

Post And Courier Inc

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : Plaintiff Defendant or Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other _____
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case. Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge _____ Judge Code 2126 Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 14 day of Dec, 2017 to attorneys of record or to parties (when appearing pro se) as follows:

Jerry Jay Bender

Mark Carroll Moore

Russell Thomas Burke

Jennifer Joan Hollingsworth

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court _____

RECEIVED
JAN 02 2018
SC COURT OF APPEALS

2017 DEC 14 AM 11:30
RICHLAND COUNTY

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Circuit Court Judge _____ Judge Code 2126 Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20 _____ and a copy mailed first class or placed in the appropriate attorney's box on this 13 day of Nov., 20 17 to attorneys of record or to parties (when appearing pro se) as follows:

Jerry Jay Bender

Mark Carroll Moore

Russell Thomas Burke

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court

Jeanette W. McBride

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)
)
 STATE MEDIA COMPANY, THE POST)
 AND COURIER, INC., GANNETT GP)
 MEDIA, INC., SOUTH CAROLINA)
 PRESS ASSOCIATION, SOUTH)
 CAROLINA BROADCASTERS)
 ASSOCIATION, THE ASSOCIATED)
 PRESS.)
)
 PLAINTIFFS)
)
 VS.)
)
 SOUTH CAROLINA HOUSE)
 REPUBLICAN CAUCUS,)
 DEFENDANT)

IN THE COURT OF COMMON PLEAS

2017-CP-40-02523

ORDER DENYING
 DEFENDANT'S MOTION TO DISMISS

RECEIVED
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 SC Court of Appeals

2017 NOV -9 PM 1:15
 JEANNETTE W. MCBRIDE
 C.C.P. & G.S.
 RICHLAND COUNTY
 FILED

BACKGROUND

Plaintiffs initiated the within-captioned action seeking a declaratory judgment and injunctive relief under the South Carolina Freedom of Information Act (FOIA). S.C. Code Ann. §§30-4-10 *et seq.* (1976). Prior to the time defendant responded to the Summons and Complaint, plaintiffs filed an Amended Complaint. Defendant responded to the Amended Complaint with the filing and service of a Motion to Dismiss pursuant to Rule 12(b)(1) and (6), SCRC.P. Plaintiffs allege defendant is by statute recognized as a “committee” of the General Assembly, S.C. Code Ann. §2-17-10(11) (1976), and, therefore subject to the FOIA. S.C. Code Ann. §30-4-20(a) (1976).

Plaintiffs requested from Defendant records relating to activities of Defendant. Defendant responded to Plaintiffs’ request stating it was not the appropriate entity from which to obtain the requested records, and taking the position that as a consequence of the adoption of a proviso in Rule 4.5 by the House of Representatives, it is exempt from the requirements of the

FOIA. The underlying premise of Defendant's Motion to Dismiss is that this court is precluded from ruling on Plaintiffs' suit because once the House of Representatives adopted Rule 4.5, any challenge to that rule or any portion of that rule presents a non-justiciable political question.

A hearing was held in open court in Richland County on October 25, 2017 at which time the parties appeared through counsel.

DISCUSSION

The determination of whether a matter is a non-justiciable political question requires an evaluation of whether an adjudication of the matter would place a court in conflict with a coequal branch of government. *S.C. Pub. Interest Found. v. Judicial Merit Selection Comm'n.*, 369 S.C. 139, 632 S.E.2d 277 (2006). In an instance where there is "a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority," a court "is duty bound to review the actions of the Legislature" to determine if the actions taken are constitutional. *Alexander v. Houston*, 403 S.C. 615, 744 S.E.2d 517, 519 (2013), quoting *Segars-Andrews v. Judicial Merit Selection Comm'n.*, 387 S.E. 109, 122, 691 S.E.2d 453, 460 (2010). Plaintiffs argue that the proviso portion of House Rule 4.5 seeking to exempt Defendant from the disclosure requirements of the FOIA is unconstitutional.

Defendant, relying on *State ex rel. Coleman v. Lewis*, 181 S.C. 10, 186 S.E.625 (1936), argues that this court cannot consider whether the adoption by the House of Representatives of its Rule 4.5 is constitutional on grounds that such an inquiry would intrude on legislative prerogatives. Defendant overstates that decision's limitation on judicial inquiry. The Supreme Court of South Carolina explained that a court could not consider whether a rule adopted by the General Assembly could have been "better," "more accurate" or "more just," as such a consideration would put a court in conflict with the policy choice made by the Legislature.

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Lewis, supra, 186 S.E.2d at 630. In contrast to this deferral to legislative policy choices, the Supreme Court in *Lewis* stated clearly that while our state's constitution "empowers each House [of the General Assembly] to determine its rules and proceedings[,] Neither House may by its rules ignore constitutional restraints or violate fundamental rights...." *Id.*

Rule 4.5 provides in its pertinent provision:

All meetings of all committees shall be open to the public at all times, subject always to the power and authority of the Chairman to maintain order and decorum with the right to go into Executive Session as provided for in the South Carolina Freedom of Information Act, Title 30, Chapter 4 of the 1976 Code of Laws of South Carolina, as amended. Provided, a legislative caucus as defined by Section 2-17-10 of the 1976 Code of Laws of South Carolina, as amended, and its meetings are not subject to the provisions of Title 30, Chapter 4 of the 1976 Code of Laws of South Carolina, as amended. [Emphasis supplied.]

This court is satisfied this case presents a bona fide controversy regarding whether the proviso portion of House Rule 4.5, highlighted above, which exempts Defendant from the requirements of the FOIA, is constitutional. If the adoption of the proviso is constitutional, no additional inquiry by the court is permitted. If the adoption of the proviso "ignore[s] constitutional restraints or violates fundamental rights..." this court, pursuant to the authority of *Lewis, supra*, may declare the proviso unconstitutional and void.

Defendant argues the adoption of the proviso to exempt it from compliance with the FOIA is authorized by Art. III, section 12 of the South Carolina Constitution which provides:

Each house shall choose its own officers, determine its rules of procedure, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member, but not a second time for the same cause.

Defendant also argues that the adoption of the proviso to Rule 4.5 is supported by Art. III, section 23 of the South Carolina Constitution which states:



The doors of each house shall be open, except on such occasions as in the opinion of the House may require secrecy.

It seems clear that Art. III, section 23 of the South Carolina Constitution has no application to this matter as Plaintiffs' allegation is that Defendant, as a committee of the House of Representatives, is acting in conflict with the FOIA, not that the House of Representatives as a body is closing its doors in violation of the law. Defendant is not the branch of the General Assembly "styled" the "House of Representatives," S.C. Const. Art. III, section 1, and, the House of Representatives is not the defendant here.

Plaintiffs assert that the proviso language in Rule 4.5 is a unilateral attempt by the House of Representatives to limit the application of a duly enacted law, and is thus unconstitutional. Adoption of a law by the General Assembly requires approval by each the Senate and the House of Representatives after three readings on three separate days, the placement of the Great Seal of the State and the signatures of the President of the Senate and the Speaker of the House of Representatives. S.C. Const. Art. III, section 18. After approval by both houses of the General Assembly, a bill becomes law only upon approval by the Governor, except in those instances when the passage of time without action after receipt of the bill by the Governor indicates approval as a matter of law. S.C. Const. Art. IV, section 21. The South Carolina Constitution also requires that all laws shall be styled, "Be it enacted by the General Assembly of the State of South Carolina." S.C. Const. Art. III, section 16. The rules of the House of Representatives are not subject to the same formalities and requirements as legislation, and may be amended by a simple majority vote of the members at any time during the month of January. Rule 4.15, Rules of the House of Representatives of South Carolina.

Plaintiffs directed the court's attention to Act. No. 593 of 1978 by which the FOIA was adopted. As reflected in the 1978 *Acts and Joint Resolutions of the General Assembly*, the Act

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starts with "Be it enacted by the General Assembly of the State of South Carolina," Act No. 593, 1978 Acts 1736, as required by Article III, section 16 of the South Carolina Constitution. The report of the action of the General Assembly with respect to Act 593 closes with "Approved the 18th day of July, 1978" as required by Article IV, section 21 of the South Carolina Constitution.

Id. In other words, the FOIA was adopted as an Act in conformity with the South Carolina Constitution and codified as a statute. In contrast the House Rule which seeks to amend that Act does not comply with the constitutional requirements for the adoption of legislation.

The portion of Rule 4.5 that precedes the proviso makes clear that the House of Representatives acknowledges that its committees are subject to the FOIA. This acknowledgement is consistent with both the definition of "public body" in the Code of Laws, and the decision of the Supreme Court of South Carolina holding that committees of public bodies are themselves public bodies under the FOIA. S.C. Code Ann. §30-4-20(a) (1976); *Quality Towing, Inc. v. City of Myrtle Beach*, 345 S.C. 156, 547 S.E.2d 862 (2001). The General Assembly by statute has also acknowledged that a political caucus of either house of the General Assembly is "a committee of either house of the General Assembly." S.C. Code Ann. §2-17-10(11) (1976). Absent the proviso in Rule 4.5, Defendant would without question be a public body and subject to the FOIA.

Defendant points to an opinion of the Attorney General of South Carolina which, after concluding that a political caucus and a "Majority Caucus" would be public bodies under the FOIA, noted the General Assembly could enact legislation to exempt political caucuses from FOIA, or, in the alternative, that South Carolina courts would probably defer to a legislative rule exempting a caucus from FOIA requirements. Op. S.C. Atty. Gen. 5/19/2006 (2006 WL 1574910). It is undeniable that the General Assembly could enact legislation through the

constitutional process which would exempt Defendant from the FOIA, which it has not done. The suggestion by the Attorney General that an exemption to the FOIA could be created by a rule and not legislation is not persuasive. The Opinion of the Attorney General stated that courts in other jurisdictions have accepted rulemaking by a legislative body as a device to exempt caucuses from FOIA in those states, but provides no analysis of the constitutional provisions supporting those actions in other states. This court is charged with evaluating the action of the House of Representatives in the context of the South Carolina Constitution which restricts rulemaking to "rules of procedure." S.C. Const. Art. III, section 12. Opinions of the Attorney General are not precedent, and a forecast by the Attorney General as to how a court might reach a decision is simply a prediction. Nothing in the language of the opinion relied upon by Defendant discusses the constitutionality of a rule adopted by only one house of the General Assembly which seeks to amend with respect to that house the reach of a duly enacted Act.

While it is true that the South Carolina Constitution gives each house of the General Assembly the power to adopt rules, that rulemaking power is restricted to "rules of procedure." S.C. Const. Art. III, section 12. "Procedure" is commonly defined as:

1. A way of performing or effecting something.
2. A course of action.
3. A set of established forms or methods for carrying on the affairs of a business, legislative body, or court of law.

Webster's II *New College Dictionary* (Houghton Mifflin Co. 1995).

Black's Law Dictionary distinguishes procedure as a mode of proceeding from the law which gives or defines a right. *Black's Law Dictionary* (Rev. 4th ed. 1968). In other words, process versus product. In this vein, as of the date of this order, the House of Representatives had adopted 10 rules with numerous subparts. No rule or part thereof, other than the proviso in Rule 4.5, seeks to avoid or negate a requirement of a state law. The proviso in Rule 4.5 contrasts

sharply with other rules of the House which relate to procedure, for example, specifying the method by which votes are to be cast, the steps necessary to recall a bill from committee, or specify those persons who are allowed access to the legislative chamber.¹ Of pertinence to this dispute is House Rule 10.3 which contains definitions, including the definition of an "Act":

3. "Act" An act is the term applied to a bill that has passed both Houses, been ratified by the presiding officer of each House and signed by the Governor or passed over his veto. It is a permanent measure, having the force of law until repealed. [emphasis supplied].

As discussed above, the FOIA was adopted as Act 593 of 1978. Under House Rule 10.3.3, "It is a permanent measure, having the force of law until repealed." An attempt by the House of Representatives unilaterally to repeal or amend a "permanent measure, having the force of law" by adopting a rule ignores the restraint contained in the Constitution of South Carolina that limits legislative rulemaking to "rules of procedure." S.C. Const. Art III, section 12. Defendant cannot, consistent with the Constitution, accomplish by rule that which must be accomplished by legislation adopted by both houses of the General Assembly and approved by the Governor.

CONCLUSION

Both houses of the General Assembly have the constitutional authority to adopt rules of procedure, and courts will not exercise judicial power with respect to a rule adopted by a legislative body beyond a determination of whether the rule is within the restraints of the South Carolina Constitution. However, a court is never barred from considering a controversy merely

¹ Other examples of rules of procedure adopted by the House of Representatives include: Rule 1.4 "Speaker shall decide all points of order;" Rule 2.3 Clerk shall cause to be kept a correct journal of the proceedings of the House; Rule 3.8 No member shall speak more than twice on the same question without leave of the House; Rule 4.4 Committees shall meet regularly to consider pending legislation; Rule 5.2 Every bill before presentation shall have its title endorsed; Rule 6.3 establishes the daily order of business; Rule 7.2 establishes procedures for voting; Rule 8.1 No motion shall be debated until it shall have been stated by the Speaker; Rule 9.4 a proposed amendment shall be in order regardless of the number of changes proposed. Rules of the South Carolina House of Representatives.

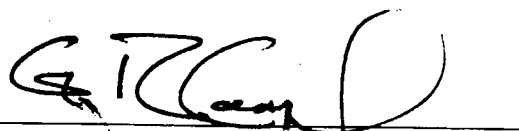
because it is characterized as “political.” Based on the foregoing, the proviso in Rule 4.5 is inconsistent with the power of the houses of the General Assembly to adopt rules of procedure because the proviso in Rule 4.5 is not a procedural rule, but a unilateral effort by one house of the General Assembly to amend state law. The FOIA cannot be amended except by legislation in the form of an “Act” meeting the requirements of the Constitution, and as described in House Rule 10.3.3.

For the reasons stated above, IT IS HEREBY ORDERED that defendant’s motion to dismiss the Amended Complaint in the within-captioned action be, and the same hereby is, DENIED.

AND IT IS SO ORDERED.

Columbia, South Carolina

[Handwritten signature], 2017



G. THOMAS COOPER, JR.
Presiding Judge
Fifth Judicial Circuit