THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2016-000460

DomainsNewMedia.com, LLC.....Respondent,

v.

Hilton Head Island-Bluffton Chamber of Commerce .....Appellant.

PETITION FOR REHEARING

The Respondent, DomainsNewMedia.com, LLC, hereby respectfully moves and petitions, pursuant to Rule 221(a), SCACR, as well as all other applicable law, for an order granting rehearing in this case and submits the memorandum below in support of the same.

In an opinion issued on May 23, 2018, this Court held that the General Assembly did not intend the Appellant to be considered a "public body" for purposes of the Freedom of Information Act ("FOIA") as a result of its receipt and expenditure of public funds. S.C. Code Ann. § 30-4-20(a). The Court so ruled despite the fact that the definition of public body under FOIA expressly includes "any organization, corporation, or agency supported in whole or in part by public funds or expending public funds," id., and despite the fact that the Appellant and the Court have

acknowledged that the Appellant expends public funds in the form of accommodations tax ("A-Tax") revenues. The rationale expressed in the opinion for this is that provisions in the A-Tax statute, S.C. Code Ann. §§ 6-4-5 to -35 (2004 & Supp. 2017), and perhaps also Proviso 39.2 of the Appropriation Act for Budget Year 2012–2013, impliedly repealed or altered FOIA's definition of "public body" with regard to designated marketing organizations ("DMOs"), like Appellant, that expend A-Tax revenues.

Respondent respectfully urges the Court to reexamine its holding in this case. FOIA and the A-Tax statutes address different subjects; moreover, there is no inherent conflict between them. They can be read consonantly with one another, and their language does not contradict. The Court's determination that these statutes are in conflict may have far-reaching and unwanted consequences to our state's jurisprudence about statutory interpretation, far beyond the statutes that happen to be involved in this case. In addition, as a policy matter, the opinion issued in this case has, surely inadvertently, engendered conditions of the sort that FOIA was designed to remedy.

Further, the reasoning adopted by the Court in this case does not come from any argument that was advanced and preserved for review by the Appellant.

Respondent respectfully submits that the Court may have overlooked or misapprehended certain points in this case, as the following shows:

I. The Court's opinion has far-reaching negative implications for the law of statutory construction.

The holding in this opinion is inconsistent with the Court's longstanding jurisprudence about the meaning of statutes, which dictates that when a statute's terms

are clear and unambiguous on their face, there is no need to resort to tools of statutory construction.

The statutory definition of "public body" in FOIA, in pertinent part, is that "'[p]ublic body' means . . . any organization, corporation, or agency supported in whole or in part by public funds or expending public funds, including committees, subcommittees, advisory committees, and the like of any such body by whatever name known[.]" S.C. Code Ann. § 30-4-20(a). By the plain language of the statute, private corporations that are wholly or partly supported by public funds or that expend public funds fall within the definition of a "public body" for the purposes of FOIA. This Court has acknowledged as much in its opinion, in noting that the plain words of S.C. Code Ann. § 30-4-20(a) bring the Appellant within the definition of public body under FOIA.

"It is axiomatic that statutory interpretation begins (and often ends) with the text of the statute in question." Smith v. Tiffany, 419 S.C. 548, 799 S.E.2d 479, 483 (2017). "When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning." Sloan v. Hardee, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007). When a court interprets a statute, "[w]ords must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." Id. at 499. "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. If a statute's language is plain, unambiguous, and conveys a clear meaning[,] the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Wigfall v. Tideland

Utilities, Inc., 354 S.C. 100, 580 S.E.2d 100, 105 (2003) (internal citation and quotation marks omitted).

> Absent an ambiguity, there is nothing for a court to construe, that is, a court should not look beyond the statutory text to discern its meaning. "[T]here is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning" unless a statutory provision is ambiguous. Paschal v. State Election Comm'n, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995).

Smith, 799 S.E.2d at 483.

The opinion issued in this case, however, did venture beyond the plain and unambiguous language of S.C. Code Ann. § 30-4-20(a). Respectfully, that was an error that led the analysis in the opinion down the wrong path.

The opinion issued in this case assumes that the A-Tax statute impliedly repealed S.C. Code Ann. § 30-4-20(a) to the extent that its plain language covers entities that serve as DMOs under the A-Tax statute, thus creating an exception or qualification to FOIA's "public body" definition." Quoting precedent, the Court noted that "[w]here there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect." Capco of Summerville, Inc. v. J.H. Gayle Const. Co., 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006).

Respectfully, the Court overlooked that FOIA and the A-Tax statute do not address "the identical issue." Id. FOIA addresses public access to information concerning government activity. See S.C. Code Ann. § 30-4-15. It does not address the spending of A-Tax revenues or accounting and reporting requirements related to

them, which is what the A-Tax statute addresses. S.C. Code Ann. §§ 6-4-5 to -35. There is some incidental overlap in what is governed by these statutes, but, were we to show the matters subject of FOIA and the matters subject of the A-Tax statute on a Venn diagram, there would not be much area in which the circles coincide. The definition of "public body" under FOIA is plain, and the A-Tax statute does not purport to alter it or change it in any way. S.C. Code Ann. §§ 6-4-5 to -3; S.C. Code Ann. § 30-4-20(a). Neither does Proviso 39.2.

To borrow from what this Court said in another case involving FOIA's definition of public body, since the definition of "public body" under S.C. Code Ann. § 30-4-20(a) is unambiguous, "[t]his Court does not need to look any further than the language of the statute to find the [Appellant] was subject to FOIA." Quality Towing v. City of Myrtle Beach, 345 S.C. 156, 162, 547 S.E.2d 862 (2001). This Court has said before that, where, as here, "a statute's language is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for employing the rules of statutory interpretation. The court has no right to look for or impose another meaning." Miller v. Doe, 312 S.C. 444, 441 S.E.2d 319 (1994).

Respectfully, the Court perceived an inconsistency between these statutes where there is none. There is nothing inconsistent about public access to records and the submission of budgets and accountings. These things are not inconsistent; they are complementary.

Since there is no inconsistency, the A-Tax statute created no implicit repeal of, exception to, or qualification of the definition of public body under FOIA. As this Court has observed many times,

> Repeal by implication is disfavored, and is found only when two statutes are incapable of any reasonable reconcilement. Mims v. Alston, 312 S.C. 311, 440 S.E.2d 357 (1994). Moreover, the repugnancy must be plain, and if the two provisions can be construed so that both can stand, a court shall so construe them. City of Rock Hill v. South Carolina DHEC, 302 S.C. 161, 167, 394 S.E.2d 327, 331 (1990).

Capco, 368 S.C. at 142.

> The law does not favor the implied repeal of statute. Butler v. Unisun Ins., 323 S.C. 402, 475 S.E.2d 758 (1996). Statutes dealing with the same subject matter must be reconciled, if possible, so as to render both operative. Id. "It is presumed that the Legislature is familiar with prior legislation, and that if it intends to repeal existing laws it would ... expressly do so; hence, if by any fair or liberal construction two acts may be made to harmonize, no court is justified in deciding that the later repealed the first." Justice v. Pantry, 330 S.C. 37, 43-44, 496 S.E.2d 871, 874 (Ct. App. 1998) (quoting State v. Hood, 181 S.C. 488, 491, 188 S.E. 134, 136 (1936)).

Hodges v. Rainey, 341 S.C. 79, 88-89, 533 S.E.2d 578 (2000).

A touchstone of this Court's statutory construction jurisprudence is that "to repeal a statute on account of an asserted conflict or repugnancy with another, 'the repugnancy must not only be plain, but the provisions of the two statutes must be incapable of any reasonable reconcilement; for if they can be construed so that both can stand, the Court will so construe them.'" City of Rock Hill v. South Carolina DHEC, 302 S.C. 161, 167, 394 S.E.2d 327, 331 (1990) (quoting Pearson v. Mills Mfg. Co., 82 S.C. 506, 509, 63 S.E. 407, 409 (1909)). Repeal, in whole or in part, is usually not found "unless there is a direct reference to the former statute or the intent of the legislature to repeal is explicitly implied therein." Id. at 167-68.

There is no conflict between providing public access to records and submitting accounting and budget documents to government boards of oversight. Providing records to a requesting member of the public does not mean that an entity like the Appellant cannot submit its budget and accounting documents as well. FOIA and the A-Tax statute can be construed so that both can stand. That is the way our precedent requires them to be construed. Id. at 167.

A hidden danger lurking here is that if what was present in this case in the relation between statutes constitutes repugnancy for statutory construction purposes, repugnancy may be found practically anywhere that the subjects of statutes barely touch one another. If what was present in this case in the relation between statutes constitutes identity of issues for statutory construction purposes, such identity will be easily found by the clever lawyer, even where the statutes in question address subjects and issues that are far afield. The interpretive door is open wide for all manner of creative, but perverse, statutory interpretations.

This Court, adhering to time-honored and "well-established rules of statutory interpretation," rejected such an interpretation just last year in Smith v. Tiffany, 419 S.C. 548, 799 S.E.2d 479 (2017). This Court's decision in that case turned upon whether the plain language of the South Carolina Contribution Among Joint Tortfeasors Act in S.C. Code Ann. § 15-38-15(C)(3), which "directs the fact-finder to apportion one-hundred percent of the fault between the plaintiff and 'each defendant whose actions are the proximate cause of the indivisible injury[,]'" Smith, 799 S.E.2d at 481, permitted apportionment of fault to a non-party. In applying this chief principle of statutory construction to the Act, the Court stated the following:

> In light of these well-established rules of statutory interpretation, we are unwilling to accept Appellants' invitation to look outside the text of the Act to justify the assumption that the legislature's use of differing terms—"defendants" and "potential tortfeasors"—in section 15-38-15 was not deliberate or that those words mean anything other than what they say. See Hodges, 341 S.C. at 87, 533 S.E.2d at 582 ("If the legislature's intent is clearly apparent from the statutory language, a court may not embark upon a search for it outside the statute." (citing Abell v. Bell, 229 S.C. 1, 91 S.E.2d 548 (1956))); see also CFRE, LLC v. Greenville Cty. Assessor, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) ("[T]he words found in the statute [must be given] their 'plain and ordinary meaning'" and "if the words are unambiguous, we must apply their literal meaning." (quoting Sloan v. Hardee, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007))).

Smith, 799 S.E.2d at 483. This Court concluded that "the unambiguous language in the Act" means what it says, and apportionment of fault to a party who is not a defendant is not allowed. Id. at 485, 488.

This Court rejected another such interpretation in Hodges v. Rainey, 341 S.C. at 88-89. In Hodges, this Court rejected the assertion that there was an "inherent conflict" (and, thus, a repugnancy) between two statutes just because they touched on the same subject matter. One of the litigants argued that S.C. Code Ann. § 1-3-240(B), which allowed the state governor "to remove any appointed state officer at his or her discretion," even if the officer's term had not yet expired, Hodges, 341 S.C. at 84, impliedly repealed the enabling legislation for the South Carolina Public Service Authority, better known as "Santee Cooper," which provided other means of removal of members of Santee Cooper's board of directors, S.C. Code Ann. § 58-31-20. Hodges, 341 S.C. at 88-89. In ruling against that argument, the Court observed the time-honored principles of statutory construction noted above and found as follows:

> In the instant case, we find that the 1934 Santee Cooper enabling legislation and the 1993 Restructuring Act are not in conflict. On the contrary, section 1-3-240(B) and (C) of the Restructuring Act can be reconciled with section 58-31-20 of the Santee Cooper legislation because both statutes provide alternative and complimentary means of removal. In fact, it is very logical to have both statutes in effect because the provision in the Santee Cooper Act (section 58-31-20) acts as an important safety net. Pursuant to section 58-31-20 of the Santee Cooper Act, the advisory board can remove a board member for cause, which allows the advisory board to remove a member who is not properly performing in the event the Governor fails to do so. For example, if the Governor decides to appoint a political ally to the board who commits some type of malfeasance, section 58-31-20 acts as the ultimate safety net by permitting the advisory board to remove the Governor's appointee.
>
> Section 1-3-240(B) of the Restructuring Act does not affect the advisory board's removal power, it merely allows the Governor to remove a director at his or her discretion. As a matter of public policy, the Governor's discretionary removal power is important because it allows the Governor to remove a director with whom he or she cannot work. Moreover, the Restructuring Act states that the Governor's removal power is not in conflict with other removal provisions because it is merely additional to any removal powers conferred by other statutes. S.C. Code Ann. § 1-3-260 (1976) ("The power and procedure of removal conferred and provided for in §§ 1-3-240 and 1-3-250 are *additional* to any other removal powers or procedure authorized by statute.") (emphasis added).

Hodges, 341 S.C. at 89 (footnote omitted).

It is materially the same here. FOIA's record disclosure requirements and the A-Tax statute's requirements for submitting budgets and accountings are not in conflict; they are complementary to one another. A DMO can provide records to a FOIA requester and still meet its reporting requirements under the A-Tax statute (and

Proviso 39.2), and vice-versa. There is no conflict, and certainly no repugnancy. The A-Tax statute's reporting requirements are "merely additional to" the record disclosure requirements of FOIA. Hodges, 341 S.C. at 89. Implicit repeal comes into play as a statutory construction possibility only when "'the provisions of the two statutes [are] incapable of any reasonable reconcilement; for if they can be construed so that both can stand, the Court will so construe them.'" City of Rock Hill, 302 S.C. at 167 (quoting Pearson, 82 S.C. at 509).

"Courts must take a statute as it is drafted and give effect to the legislative intent as expressed in its language." Goldston v. State Farm Mut. Auto. Ins. Co., 358 S.C. 157, 177, 594 S.E.2d 511 (Ct. App. 2004). With great respect for this Court and the heavy responsibility it bears, Respondent must point out that the Court did not do that in this case.

Respondent respectfully submits that this Court overlooked or misapprehended that this case goes out on an application of the plain language of S.C. Code Ann. 3-4-20(a), which is in no way repugnant to any provision in the A-Tax statute or Proviso 39.2. To reverse on this basis was error. The Court should take another look at this case.

II. The opinion has inadvertently fostered conditions like those that FOIA was designed to change.

"FOIA is remedial in nature and should be liberally construed to carry out the purpose mandated by the legislature." Quality Towing, 345 S.C. at 161 (citing S.C. Dept of Mental Health v. Hanna, 270 S.C. 210, 241 S.E.2d 563 (1978)).

What are the conditions that FOIA was enacted to remedy? Our legislature told us the following:

> The General Assembly finds that it is vital in a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy. Toward this end, provisions of this chapter must be construed so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their public officials at a minimum cost or delay to the persons seeking access to public documents or meetings.

S.C. Code Ann. § 30-4-15. FOIA was enacted to combat an attitude and practice of the exclusion of the public from information about the activities their tax dollars fund. FOIA addressed and repudiated a just-trust-us stance taken by public officials when faced with inquiries by the public about government activities, including government spending.

Respondent doubts that this Court intended to roll back progress toward those objectives, but, intended or not, at least a partial return to the secrecy of yesteryear is what the opinion in this case permits. The citizens of Hilton Head and Bluffton are at the mercy of their public officials when it comes to getting information of any real detail about how the Appellant has spent their money. Citizens can, through FOIA, obtain records that the governments served by a DMO have obtained from that DMO, but the governments are under no obligation to go out and get any specific information or records from a DMO just because a citizen requests it from the government. S.C. Code Ann. § 30-4-30. Those governments are only required under FOIA to produce the documents that they have already received from a DMO. Id. As the record shows in this case, the level of detail typically provided in those documents is quite low.

Further, the governments served by Appellant in its role as DMO benefit from their citizens' ability to use FOIA to inquire into their DMO's activities. Curtailing citizens' rights to do so under FOIA means that those citizens will likely not ferret out whatever corruption, if any, may be lurking behind the veil of a DMO's summary budget and accounting entries. Instead, the entire burden of undertaking to look for such nefarious behavior is borne by already stretched-thin government officials. DMOs are, by statute, the guardians entrusted to watch over vast sums of public money. S.C. Code Ann. § 6-4-10(3). But *quis custodiet ipsos custodes*? Who watches the watchmen? The opinion issued in this case has taken off the table a kind of oversight that may be undertaken by any South Carolina citizen and placed it solely on the shoulders of a few government officials whose job is not to investigate potential corruption or theft. This opinion has policy implications that weigh heavily toward negative outcomes in the long run.

Respondent respectfully submits that this Court overlooked or misapprehended the legislative mandate to construe FOIA in accordance with its purpose to remedy the lack of transparency concerning government spending. See S.C. Code Ann. § 30-4-15.

III. The Court ruled on the basis of an argument that the Appellant never made in its briefs and did not preserve for review.

This is the Appellant's appeal. The opinion issued in this case, however, reverses the trial court on an analytical basis that the Appellant did not preserve for review. The analysis used by the Court in the opinion was not what the Appellant argued in this case.

To be preserved for appellate review, an argument must have been both raised to and ruled upon by the trial court. E.g., Wilder Corp. v. Wilke, 330 S.C. 71, 497

S.E.2d 731 (1998). "Where a matter is not ruled on by the circuit court, the issue is not preserved for appellate review unless the complaining party moves to amend the judgment pursuant to Rule 59(e)." Vespazziani v. McAlister, 307 S.C. 411, 413, 415 S.E.2d 427, 428 (Ct. App. 1992). If the appealing party made the argument to the trial court in the first instance and did not receive a ruling on it, if he presents the argument again in a Rule 59 motion, it is then preserved for review, even if the trial court does not rule on it in response to that motion. Id. Further, an appellant must make his arguments in his brief for them to be preserved for review. See S.C. Dept. of Social Servs. v. Basnight, 346 S.C. 241, 551 S.E.2d 274 (Ct. App. 2001); In re: Bruce O., 311 S.C. 514, 429 S.E.2d 858 (Ct. App. 1993). To sum it up, to preserve an argument for review, an appellant must have made it "all the way up."

Here, the Appellant made no Rule 59 motion. Even if an argument that embraces this Court's ruling in the opinion had been made to the trial court, it was abandoned when the Appellant chose to make a direct appeal after the trial court did not rule on it. Further, the Appellant did not make an argument in its brief like the reasoning employed by the Court in its opinion. The Appellant's argument in its brief was that its relationship to the governments with which it dealt as a DMO was an arm's-length relationship, and so it did not qualify as a public body for FOIA purposes. The Court did not accept that argument, for obvious reasons – there is no arm's-length relationship here, for one.

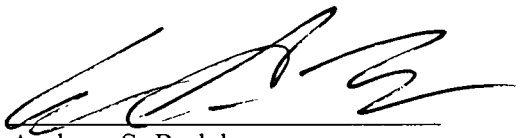
Instead, the Court ruled for the Appellant on the basis of an argument it never made: implicit repeal, exception, or qualification by the A-Tax statute of FOIA's definition of public body. The closest that the Appellant got to that in its brief was its

assertion that reporting to local governments would be unnecessary if the General Assembly had intended for a designated marketing organization to be subject to FOIA. As pointed out in the Respondent's brief, that argument was never ruled on by the trial court and is, thus, unpreserved for review. Vespazziani, 307 S.C. at 413.

Respondent respectfully submits that this Court overlooked or misapprehended that issue preservation principles require that the Appellant either win or lose on the basis of the arguments it made, not on arguments it did not make. For the Court to reverse on the basis of an unmade argument was error.

WHEREFORE Respondent prays for an order granting rehearing in this case.

Respectfully submitted,



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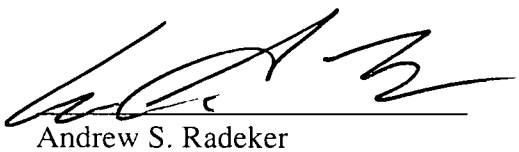

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