

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

RECEIVED

Thomas A. Russo, Circuit Court Judge

JUL 05 2018

Case No. 2016-CP-40-1651

SC Court of Appeals

Sisters of Charity Providence Hospitals, Respondents,

v.

Palmetto Health, Appellant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES

1. The trial court erred in ordering Palmetto Health to produce the requested documents to Providence, because Palmetto Health is not a “public body” under the South Carolina Freedom of Information Act (FOIA) and therefore is not subject to the disclosure requirements of FOIA.
2. Palmetto Health is not subject to FOIA, because it is not supported by public funds.
3. Palmetto Health is not subject to FOIA, because it is not expending public funds.
4. Palmetto Health is not subject to FOIA, because all public funds received by Palmetto Health were in exchange for and in payment for Palmetto Health providing specified goods and services as required by the grant documents.
5. Assuming the receipt of public funds made Palmetto Health a “public body,” FOIA’s resulting reach into Palmetto Health was limited in scope to that which is necessary to serve the purpose of FOIA and did not include the private documents that the trial court ordered Palmetto Health to produce to Providence.
6. The trial court erred in finding that Palmetto Health is supported by public funds, and in using a federal tax law “public benefit” test to support its finding.
7. The trial court erred in finding that Palmetto Health is expending public funds.
8. The trial court erred in finding that Palmetto Health is a public body based upon a history of voluntary compliance with FOIA.
9. The trial court erred in awarding costs and attorney’s fees to Providence.

STATEMENT OF THE CASE

The Respondent (Providence) and the Appellant (Palmetto Health) are private hospital corporations that competed with each other in providing hospital services to the Columbia, South Carolina service area. In 2015, Palmetto Health hired a group of orthopedic physicians that had been employed at Providence. In 2016, Providence filed a federal antitrust lawsuit against Palmetto Health making state and federal claims based on allegations that Palmetto Health had improperly hired these physicians. See *SCPH Legacy Corp. v. Palmetto Health*, 2018 U.S. App. LEXIS 15306 (4th Cir. 2018). In 2017, the United States District Court dismissed the federal claims for failure to state a cause of action and declined to exercise jurisdiction over the state law claims. *Id.* Thereafter, Providence filed an action in South Carolina Circuit Court making these state law claims. Providence appealed the dismissal of its federal claims. The Fourth Circuit Court of Appeals affirmed the dismissal of Providence’s federal claims. *Id.*

In 2016, Providence brought the instant lawsuit against Palmetto Health under the South Carolina Freedom of Information Act (FOIA).¹ Providence alleged that Palmetto Health had improperly refused its FOIA request for documents related to the alleged improper hiring of the former Providence physicians. (Cmplnt). Providence sought only these “hiring” documents in its FOIA request – it did not request any documents related to any other subject, including any documents related to Palmetto Health having received any public funds or grant funds. (Cmplnt. Exhs. A and B). As Providence has admitted, “the documents at issue in [this] FOIA case are the heart and core of proof in the [federal] Antitrust action.” (8/31/17 Email Letter at p. 2).

¹ See S.C. Code Ann. §§ 30-4-10 to – 165 (Rev. 2007 & Supp. 2017).

The trial court held that Palmetto Health was a “public body” as defined by S.C. Code Ann. § 30-4-20(a) based on Palmetto Health having been paid with grant monies for providing goods and services to the granting authority. The court therefore ordered Palmetto Health to produce the “hiring” documents requested by Providence. (July 2017 Order). In a separate order, the trial court also awarded fees and costs to Providence under § 30-4-100(b). (November 2017 Order). Palmetto Health timely appealed both orders.

STANDARD OF REVIEW

The principal question presented here is the meaning of “public body” as defined by FOIA § 30-4-20(a). This is a question of law over which this Court undertakes a de novo review with no deference to the lower court. *DomainsNewMedia.com, LLC v. Hilton Head Isl. – Bluffton Chamber of Commerce*, ___ S.E.2d ___, ___ (S.C. 2018), hereinafter cited as *Domains*, ___ S.E.2d ___. The relevant facts are undisputed, and the application of the law to undisputed facts also presents a question of law over which this Court undertakes a de novo review with no deference to the lower court. *Williams v. Government Employees Ins. Co.*, 762 S.E.2d 705, 709 (S.C. 2014); *Nationwide Mut. Ins. Co. v. Rhoden*, 728 S.E.2d 477, 480 (S.C. 2012).

ARGUMENT

I. Palmetto Health is not subject to FOIA, because it is not a “public body” for purposes of FOIA.

FOIA applies to a “public body.” There are two basic types of public bodies under FOIA. See § 30-4-20(a). First, FOIA defines “public body” to include all governmental entities, agencies, etc. *Id.* It is undisputed that Palmetto Health is not a “public body” under this definition. Second, FOIA defines “public body” to include a private corporation if that corporation is “supported” by public funds or is “expending” public funds. *Id.* Here, the question is whether Palmetto Health’s receipt of grant monies made it a “public body” under FOIA.²

The South Carolina Supreme Court has made it clear that “FOIA does not always and automatically apply when public funds are received by [a private] organization,” and any such rule would be “contrary to [the Supreme Court’s] discernment of legislative intent” on FOIA. *Domains*, ___ S.E.2d at ___, n.7, *applying Weston v. Carolina Research & Dev. Found.*, 401 S.E.2d 161 (S.C. 1991). The Supreme Court has also made it clear that merely receiving or expending public funds does not subject a private corporation to FOIA: “We reject[] the suggestion that the *mere receipt or expenditure* of public funds automatically and categorically transform[s] an otherwise private entity into a public body triggering the full panoply of FOIA requirements.” *Domains*, ___ S.E.2d at ___ (emphasis

² Section 30-4-20(a) provides in pertinent part: “Public body” means any department of the State, a majority of directors or their representatives of departments within the executive branch of state government as outlined in Section 1-30-10, any state board, commission, agency, and authority, any public or governmental body or political subdivision of the State, including counties, municipalities, townships, school districts, and special purpose districts, or any organization, corporation, or agency supported in whole or in part by public funds or expending public funds”

added), *applying Weston, supra.*³ Rather, the Supreme Court “has recognized that the applicability of FOIA to a non-governmental entity is more involved than classification as a public body due to the receipt of public funds.” *Domains*, ___ S.E.2d at ___. In short, FOIA has “limited application” beyond “traditional governmental entities.” *Disabato v. South Carolina Ass’n of Sch. Adm’rs*, 746 S.E.2d 329, 340, 341 (S.C. 2013).

Palmetto Health is not “supported” by public funds, because it is the “*general* support of an entity though public funds [that] brings it within the class of entities to which FOIA applies.” *Disabato*, 746 S.E.2d at 341 (also stating FOIA applies to a “private organization that is *generally* supported by public funds”) (emphasis added). Palmetto Health is not “expending” public funds, because it is the “*general* expenditure of public funds” that triggers FOIA. *Domains*, ___ S.E.2d at ___, ___ (emphasis added). All public funds received by Palmetto Health were for specific purposes, goods, or services at the specific request of the granting authority. A private organization is not a “public body” when it receives public funds for a “specific purpose” or in exchange for “identifiable goods and services.” *Domains*, ___ S.E.2d at ___ (goods and services); *Disabato*, 746 S.E.2d at 341 (specific purpose); *Weston*, 401 S.E.2d at 165 (goods and services). As shown below, the undisputed evidence and facts demonstrate that Palmetto Health’s receipt of grant monies does not make it a “public body” under FOIA. Palmetto Health has not been supported by public funds, nor has it been expending public funds. Rather, Palmetto Health has been paid with grant money after providing the goods and services requested by the granting authority and specified in the grant documents. (Tr. 37-38).

³ See also *Domains*, ___ S.E.2d at ___, n.7, rejecting view that a private corporation becomes a “public body” under FOIA “simply as a result of its receipt of public funds,” and rejecting view that FOIA applies “to any organization that receives any public funds.”

The grant money that granting authorities have used to pay Palmetto Health is restricted to highly specific purposes, goods, and services that Palmetto Health must provide and perform before being paid by the granting authority. (Tr. 72, 95-97, 107, 112-116). The grant documents provide excruciating specificity on the purpose of the grant money, as well as the goods and services that the granting authority can purchase with the grant money. (*Id.*, see also Def's. Exhs. 6-8). Palmetto Health has never received any public funds from any government source that were unrestricted, *i.e.*, that were not received in payment for goods or services specified in the grant documents and provided to the granting authority. (Tr. 72-73, 116).

Upon receiving the grant money, Palmetto Health places it in a restricted fund where it is held until after Palmetto Health incurs and pays the costs of providing the goods and services required by the grant documents. (Tr. 70-71, 73, 94). Thereafter, Palmetto Health is reimbursed from these restricted funds for those costs and payments, and Palmetto Health reports all of this to the granting agency as required by the grant documents. (Tr. 70-74, 91-97, 103, 107-109, 112-116). Any unused funds must be returned to the governmental agency making the grant. (Tr. 107).

Because the grant monies are received for the reimbursement of actual costs incurred, the grant money provides no net income to Palmetto Health. (Tr. 74, 94). In fact, if any reimbursements are not approved by the granting agency, there is a negative effect on Palmetto Health's net income. (*Id.*). Thus, the grant money received by Palmetto Health does not create any positive cash flow, does not contribute to its net income, and has no positive impact or effect on its ability to conduct its ordinary, private business operations.

(Tr. 74-75). Absent the grant money or some other outside funding source, Palmetto Health would not provide these goods or services. (Tr. 75).

The grant funds received by Palmetto Health are de minimus in comparison to the revenue from its private business operations. (Tr. 74-75). For example, from 2008-2015, Palmetto Health received \$28,736,137.00 in grant funds, which is only one-half of one percent (0.005) of its total revenue of \$5,742,187,000.00 for the same time period. (Merits Order at 3; Tr. 44-45; Part VIII(1)(e) of Form 990's; Pl. Exh. 10-14, 19).

As demonstrated above, every dollar of grant money (public funds) received by Palmetto Health has been in exchange for specific purposes, goods, and services. Palmetto Health has never received any unrestricted funds or money from any governmental entity. Therefore, as a matter of well-settled law under FOIA, Palmetto Health is not a "public body" as defined by § 30-4-20(a), because it provided specific goods and services in exchange for the grant monies. *Domains*, ___ S.E.2d at ___ (FOIA does not apply when a private enterprise receives payment for supplying specific goods or services); *Disabato*, 746 S.E.2d at 341 (FOIA does not apply to a private entity that receives public funds for a specific purpose); *Weston*, 401 S.E.2d at 165 (FOIA does not apply to a business enterprise that receives payment from a public body for supplying goods or services). Accordingly, the appealed orders should be reversed.

To be "supported" by public funds, Palmetto Health would have to receive unrestricted funds that it could use for any purpose or, at the very least, that it could use for its general, private business operations and purposes. The undisputed evidence, however, demonstrates that all grant monies received by Palmetto Health were restricted to uses specified in the grant documents. No grant money was given to Palmetto Health for its

general or private business use. Palmetto Health never received any unrestricted funds from any governmental source. Accordingly, Palmetto Health has not been “supported” by public funds and, therefore, the appealed orders should be reversed.

In addition, Palmetto Health is not “expending” public funds – it is not paying public funds to third parties on behalf of a public body – it is not the payor of any public funds. Rather, as demonstrated by the undisputed evidence, Palmetto Health is the payee of public funds, *i.e.*, the public agency uses the grant money to pay Palmetto Health for providing goods and services to the granting authority. Accordingly, Palmetto Health is not “expending” public funds and, therefore, the appealed orders should be reversed.

II. Assuming Palmetto Health’s receipt of grant monies makes it a “public body,” FOIA’s reach into Palmetto Health is limited to the information and documents necessary to serve the purpose of FOIA, and does not extend to Palmetto Health’s private activities and private documents.

Even if Palmetto Health’s receipt of public funds (grant monies) makes it subject to FOIA (and it does not as shown above), there remains the question of the scope of FOIA’s resulting “reach” into a private entity. This is a question of statutory interpretation and, like all such questions, it hinges on “a practical, reasonable, and fair interpretation *consonant with the purpose, design, and policy* of the lawmakers.” *New York Times Co. v. Spartanburg County Sch. Dist. No. 7*, 649 S.E.2d 28, 30 (S.C. 2007) (emphasis added) (interpreting FOIA). Unlike most statutes, FOIA expressly states the lawmakers’ purpose:

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 (emphasis added). As the South Carolina courts have repeatedly held, “[t]he purpose of FOIA is to protect citizens from secret government activity.” *Seago v. Horry County*, 663 S.E.2d 38, 42 (S.C. 2008); accord *Bröck v. Town of Mount Pleasant*, 785 S.E.2d 198, 200 (S.C. 2016); *Campbell v. Marion County Hosp. Dist.*, 580 S.E.2d 163, 166, 169 (S.C. App. 2003). This protection from “secret government activity” is designed to promote an informed electorate and to prevent corruption, including corruption in the expenditure of public funds:

[FOIA embodies] the principle of an open, transparent system of government, vital to maintaining an informed electorate and preventing the secret exercise of governmental power with its potential corruption.

* * *

[FOIA] serves the important governmental interests of providing transparency in governmental decision-making, preventing fraud and corruption, and fostering trust in government. An informed electorate is essential to a healthy democracy because members of the public cannot meaningfully cast their votes if they are ignorant of what actions the government has taken and the rationale for those actions. Furthermore, secret government activity creates fertile ground for fraud and corruption, *especially in the area of public expenditures where, without transparency, the public can be kept unaware of misappropriations and conflicts of interest.*

Disabato, 746 S.E.2d at 332, 338 (emphasis added); accord *Domains*, ___ S.E.2d at ___.

With respect to public funds like those paid to Palmetto Health, FOIA “mandates that the *public* be provided with information regarding the *expenditure of public funds.*” *Weston*, 401 S.E.2d at 164 (emphasis added).

Against this backdrop, the meaning, purpose, and scope of § 30-4-20(a) is clear: if and when the receipt of public funds makes a private entity subject to FOIA, the public may follow the public money into the private entity to the extent necessary to achieve the purposes and goals of FOIA, *i.e.*, to prevent secret government activity, promote an informed electorate, and detect/prevent corruption in the expenditure of those public funds.

It does not, however, allow what Providence sought and obtained here – judicial permission to rummage around in Palmetto Health’s private business documents to advance Providence’s wholly private interests in pursuing its private dispute with Palmetto Health.

Here, Providence did not seek any information on the expenditure of the public funds, did not make any complaints about the disposition of those funds, and made no complaint about the amount of detail available on the disposition of the public funds. Its sole purpose is to gain access to Palmetto Health’s private business documents and activities, none of which have anything to do with the disposition of the public funds. And Providence does this solely for the purpose of furthering its own private business interests in its private business dispute with Palmetto Health.

FOIA’s laudable purpose is to prevent secret government activity, promote an informed electorate, and detect/prevent public corruption, including corruption in the disposition of public funds. Providence seeks no such high ground, nor does it seek to advance any of FOIA’s purposes. Rather, Providence has perverted FOIA into a private tool for advancing its wholly private interests. The law should not and cannot countenance this perversion of FOIA and its underlying public policy. Accordingly, the appealed orders should be reversed.

III. The trial court erred in finding that Palmetto Health is a “public body” under FOIA and in compelling Palmetto Health to produce its private documents.

As shown above, the trial court erred in finding that Palmetto Health is subject to the requirements of FOIA and could be compelled to produce the requested documents under FOIA. As shown below, the trial court’s analysis to reach its erroneous conclusion was flawed for several reasons. It should be noted that the trial court did not have the

benefit of the Supreme Court's decision in *Domains, supra*, because that decision was not issued until after the current case was appealed to this Court.

- A. The trial court erred in finding that Palmetto Health is supported by public funds under FOIA by applying a "public benefit" test derived from the Internal Revenue Service's interpretation of irrelevant federal tax law.

The trial court found that Palmetto Health is "supported by public funds" based solely upon the following analysis (Order at 2-4):

1. Palmetto Health's federal tax return filings includes federal tax Form 990. (Order at 2).
2. The Form 990 instructions require the reporting of a grant or other payment from a governmental unit "if its primary purpose is to enable the organization to provide a service to, or maintain a facility for, the direct benefit of the public rather than to serve the direct and immediate needs of the governmental unit, [*i.e.*,] if the general public receives the primary and direct benefit from the payment and any benefit to the government unit is indirect and insubstantial as compared to the public benefit." (Id. at 2).
3. Palmetto reported grants on the Form 990, so the government grants received by Palmetto Health "are for the general benefit of the public and not for the benefit of the governmental unit." (Id. at 3).
4. "Accordingly, the Court finds that [Palmetto Health] is supported by public funds." (Id. at 4).

The trial court's ruling is erroneous for the reasons set forth in Arguments I and II, *supra*.

It is also erroneous for the additional reasons set forth below.

The trial court's novel interpretation of "public body" has no basis in FOIA or the Supreme Court's decisions in *Domains, Disabato*, and *Weston*, all *infra*. Rather, it is derived exclusively from the "public benefit" test for tax-exempt status under the Internal Revenue Code. This test relates solely to whether the grant money is taxable income for federal tax purposes, a concern that is wholly unrelated to the concern that prompted FOIA, *i.e.*, dealing with the potential problem of secret government activity in South Carolina.

As shown earlier, the proper application of the Supreme Court’s interpretation of FOIA, rather than the IRS’s interpretation of irrelevant federal tax law, demonstrates that Palmetto Health is not a public body within the meaning of FOIA. The trial court’s contrary conclusion is also erroneous for several other reasons.

First, the IRS Form 990 and attending instructions are wholly irrelevant to the issue of whether FOIA applies to Palmetto Health. The “public benefit” test is imposed by a different sovereign (the United States) for a different reason (federal tax law and policy). It has nothing to do with FOIA, nor does it purport to do so. The irrelevance of the “public benefit” test under federal tax law is demonstrated by the fact that nothing in FOIA or the case law decided under FOIA mentions the IRS, Form 990, the instructions for Form 990, or any version of a “public benefit” test under FOIA.

Second, the relevant and controlling questions under FOIA, as explained by the Supreme Court in *Domains*, *Weston*, and *Disabato*, all *supra*, are the questions addressed in Arguments I, *supra*. The answers to these questions under the undisputed evidence demonstrate that Palmetto Health is not a “public body” under FOIA.

Third, the General Assembly did not refer to the Internal Revenue Code or the IRS for any purpose in FOIA. Approving and adopting the trial court’s “public benefit” analysis results in the IRS determining which entities are subject to FOIA. Judicially granting the IRS authority to do so when the General Assembly did not choose to do so would violate the separation of powers doctrine, as well as the fundamental concepts of federalism and states’ rights. These violations are particularly egregious given that the definition of “public body” is the key component in determining the applicability and scope of FOIA under South Carolina law.

- B. The trial court erred in finding that Palmetto Health is subject to FOIA because it expends public funds and manages the expenditure of public funds.

The trial court found that Palmetto Health “has expended and managed the expenditure” of public funds and grants based solely upon the following analysis:

1. David Lee, “Palmetto Health’s director for financial forecasting, testified that his department provides financial record management for the expenditures of monies from government grants.” (Order at 4).
2. The trial court then listed several partial quotations from Mr. Lee to supporting this characterization of Mr. Lee’s testimony. (Order at 4-5).
3. The trial court then concluded without analysis that Palmetto Health “had expended and managed the expenditure of” public funds. (Order at 5).

The trial court’s ruling is erroneous for the reasons set forth in Arguments I and II, *supra*.

It is also erroneous for the additional reasons set forth below.

The partial quotations cited by the trial court simply do not support its conclusion. Mr. Lee’s quoted testimony was part of his explanation about how Palmetto Health was paid by the granting agency with the grant money for the goods and services provided by Palmetto Health under the specific requirements of the grant documents. As shown earlier, and as shown by the quoted testimony when read in the context of Mr. Lee’s entire testimony and Mr. Duane’s testimony (Tr. 17-116, *passim*), Palmetto Health first incurs and pays the costs of providing the goods and services specified in the grant documents with Palmetto Health’s own money, and it is thereafter reimbursed (paid) for those costs with grant monies. The reporting and documentation referenced in the quoted testimony is simply part of this process. It bears no resemblance to the actual “expending” and managing of public funds as outlined and condemned in *Weston*, wherein the FOIA defendant (Foundation) took possession of funds earmarked for a public body (University)

and then spent those funds by contracting with third parties for the construction of buildings, etc. (For a fuller discussion of this *Weston* situation and the trial court's misplaced reliance on it, see Argument III(D), *infra*).

C. The trial court erred in finding that Palmetto Health is subject to FOIA, because it has a history of voluntary compliance with FOIA.

The trial court recited some evidence showing that Palmetto Health “has a history of [voluntarily] complying with FOIA.” (Order at 5, see also *id.* at 5-6). The trial court then found that “Palmetto Health *properly believed* itself subject to FOIA.” (Order at 6) (emphasis added). The trial court's ruling is erroneous for the reasons set forth in Arguments I and II, *supra*. It is also erroneous for the additional reasons set forth below.

It is unclear whether the trial court intended these findings to be a basis for finding that Palmetto Health actually is subject to FOIA. In any event, a private entity's past voluntary compliance and belief is irrelevant to the question of whether that entity is, in fact, subject to FOIA. Were it otherwise, a private entity could avoid FOIA by refusing to comply with FOIA (even when it is applicable) and then asserting it did not believe itself to be subject to FOIA. The only relevant inquiry is whether the private entity is in fact subject to FOIA under the law as pronounced by the South Carolina Supreme Court. As shown herein, applying the law to the undisputed evidence in this case demonstrates that Palmetto Health is not a “public body” under FOIA.

D. The trial court erred in finding that Palmetto Health was a “public body” under FOIA despite the undisputed evidence that Palmetto Health provided specified goods and services in exchange for all grant monies.

As demonstrated in Argument I, Palmetto Health is not a “public body,” because the undisputed evidence demonstrates that it provides specific goods and services in

exchange for all grant monies that it receives. The trial court rejected this argument based on its earlier discussed “public benefit” analysis based on federal tax law:

[T]he beneficiaries of these grants are the public at large, and that no benefit is going back to the granting authority. They do not amount to a *quid pro quo*. Accordingly, these are grants and not arm’s length transactions by which a private body sells goods and services to the government. The government does not benefit from these grants; the public does.

(Order at 8). This finding is wrong for the same reasons set forth earlier. Nothing in FOIA or the Supreme Court’s cases supports the trial court’s attempt to limit the “goods and services” rule pronounced by the Supreme Court. Adopting a “public benefit” analysis effectively overrules the Supreme Court on this issue because, as a matter of law, all public funds must be spent for the public’s benefit.

The trial court’s “no benefit” finding is wrong for a second reason: the granting authority in fact receives a direct benefit. Every governmental granting authority exists for the purpose of advancing an identified public good, and it spends grant money to do so. When the authority purchases goods and services from a third party like Palmetto Health, it thereby acquires the tools that it needs to perform its functions. This is no different than buying staples or paper. All of these purchases do the same thing – they enable the authority to do its job and thereby provide the public benefit that is the sole reason for the authority’s existence.

The trial court also sought to justify its ruling with a discussion of the Supreme Court’s decision in *Weston, supra*. That justification fails, as demonstrated below.

The trial court relied on an extended, fact-specific analysis of *Weston* to reject Palmetto Health’s argument that it is not subject to FOIA under the Supreme Court’s rulings that public funds received in an arms-length transaction for supplying specific

goods and services does not subject a private entity to FOIA. First and foremost, the trial court's analysis fails because the undisputed evidence in this case demonstrates the public funds received by Palmetto Health were in fact received in arms-length transactions for supplying goods and services specified by the public body providing the funding. No comparison to the facts of *Weston* can change this. Moreover, as shown below, the trial court's analysis of *Weston* overlooks or misapprehends many facts found and points made in *Weston*.

The FOIA defendant in *Weston* was the Carolina Research and Development Foundation, an eleemosynary corporation that "operate[d] exclusively for the benefit of the University of South Carolina." *Weston*, 401 S.E.2d at 162. The University of South Carolina manifestly is a "public body" under FOIA. From the outset, therefore, there was a red flag in *Weston*: the Foundation was receiving and spending public funds exclusively for the benefit of a "public body" that was subject to FOIA, *i.e.*, the University of South Carolina, but was nevertheless claiming that it (the Foundation) was not subject to FOIA. This scenario created a situation that would frustrate the purpose of FOIA, *i.e.*, public funds being spent "for" a public body and therefore necessarily "for" public purposes, but by an entity that was not subject to FOIA. There is no such "red flag" in this case. Palmetto Health does not exist for the sole benefit of a public body that is subject to FOIA. In addition, the relationship between the University and the Foundation created a "related organization" situation that was essential to the Supreme Court's analysis. See *Weston*, 401 S.E.2d at 165 (explaining that the problem was the diversion of public funds to a related organization which hid the expenditure of those funds from the public). There is no "related organization" situation in the present case, nor is there any claim of information

being hidden from the public. Indeed, Providence never sought any information from the granting agencies (all public bodies under FOIA), nor has Providence ever claimed that access to Palmetto Health's records was necessary to prevent those agencies from hiding their activities or the disposition of the public funds.

In *Weston*, the Supreme Court analyzed four transactions. Here, the trial court relied on two of those transactions, but its analysis does not support its conclusion.

First, the trial court discussed what the Supreme Court called the "second transaction." To understand the Supreme Court's ruling and the trial court's analytical misuse of it, it is necessary to quote *Weston* at length:

The second transaction involves the development of the Swearingen Engineering Center. In connection with the construction of the building, the Foundation accepted \$ 16,300,000 in federal grant money and undertook to administer the expenditure of this money. [1] *This money was originally earmarked for the University, but was redirected to the Foundation after the University's General Counsel represented to the granting federal agency that the University was "acting through" the Foundation, which in turn, was acting on "behalf" of the University as its "agent". The grant was awarded to "the University of South Carolina acting through the Carolina Research and Development Foundation.*" The trial judge held that by accepting these funds and managing their expenditure, the Foundation has received support from public funds and has expended public funds.

The Foundation first argues that the grant did not support the Foundation, but that the money went towards the cost of constructing the Swearingen Engineering Center. [2] *This may be true, but due to the protective order respondents were not able to ascertain how the grant money was actually expended.* [3] *Regardless, the Foundation used University personnel on University payroll in conjunction with the construction project.* This establishes, at a minimum, partial support from public funds for the Foundation. In addition, [4] *the Foundation clearly directed the expenditure of the funds it received.*

Weston, 401 S.E.2d at 163 (*italics* and [#s] added). The facts denoted in [1] – [3] above were controlling and have no corollary in the present case. Those differences are sufficient by themselves to distinguish this case from the *Weston* decision. That distinction is

furthered by fact number [4]: that the Foundation “clearly directed” the expenditure of the funds. Here, however, the undisputed evidence shows that the grantors “directed” the expenditure of the funds by requiring Palmetto Health to provide specific goods and services in exchange for being paid with the grant money. Moreover, the undisputed evidence demonstrates that the public funds paid to Palmetto Health were for a purpose far more specific than the construction of the Swearingen Engineering Center (a University building) and, therefore, Palmetto Health is also not subject to FOIA under the Supreme Court’s subsequent ruling in *Disabato* that “FOIA [does] not apply to a private entity that receives public funds for a specific purpose.” 746 S.E.2d at 341.

The trial court also relied on the third transaction, which again requires a quote from *Weston*:

In the third transaction, the development of the Koger Center, the Foundation accepted a conveyance of real estate from the City of Columbia, a \$ 2,000,000 cash grant from the City of Columbia, and a \$ 3,750,000 cash grant from Richland County. The Foundation argues that these funds were given to it by the City and County pursuant to a contractual agreement and that once the City and County transferred the property in performance of their contractual agreement, the expenditure of public funds ended. This argument is not persuasive. Funds from the public coffer were given to the Foundation *which managed the expenditure of the funds and the development of the real estate. By these actions, the Foundation received support from and expended public funds.*

Weston, 401 S.E.2d at 164 (emphasis added). The Supreme Court’s ruling on the third transaction is not controlling here for several reasons. First, the Foundation received the public funds and expended them without the specific directions and accountability imposed on Palmetto Health by the grants under which Palmetto Health was paid for providing specific goods and services. Second, the Foundation was acting for the sole benefit of the University, a “public body” that is subject to FOIA. Third, the undisputed evidence

demonstrates that the public funds paid to Palmetto Health were for a purpose far more specific than the construction of the Koger Center and, therefore, Palmetto Health is not subject to FOIA under the Supreme Court's subsequent ruling in *Disabato* that "FOIA [does] not apply to a private entity that receives public funds for a specific purpose." 746 S.E.2d at 341.⁴

Here, the trial court noted that Palmetto Health has received millions of dollars in state and federal grants, and then found the following:

[T]he *beneficiaries* of these grants are the public at large, and that no benefit is going back to the granting authority. They do not amount to a *quid pro quo*. Accordingly, these are grants and not arm's-length transactions by which a private body sells goods or services to the government. The government does not benefit from these grants; the public does.

(Order at 8) (emphasis added). The trial court's "public beneficiaries" analysis harkens back to its earlier discussed reliance on IRS Form 990 and its "public benefit" requirements. As shown earlier, there is no basis in FOIA or the FOIA cases for this "public beneficiaries" analysis. In like manner, nothing in FOIA or the case law supports the imposition of the trial court's "quid pro quo requirement" that limits the rulings in *Domains*, *Weston*, and *Disabato* to situations of selling goods and services directly to the granting authority for that authority's direct or "personal" use – grants are not made for such. Moreover, imposing this requirement would mean that any grant of public funds would make the recipient automatically subject to FOIA merely by receiving these public funds, which is contrary to the plain rulings in *Domains*, *Disabato*, and *Weston*.

⁴ In its order, the trial court referred to the Supreme Court's opinion in *Disabato* as "nothing more than a summary of multiple prior holdings, and may be properly called *dicta*." (Order at 10) (italics in original). The Supreme Court's recitation of the law was not *dicta*, because it was the majority's response to the dissent; it explained why the dissent was wrong; and the majority specifically noted that it was explaining the holdings and rulings in the *Weston* case. One cannot ignore the Supreme Court's explanation of its own case.

IV. The trial court erred in awarding fees and costs to Providence.

FOIA provides that a person who “prevails” in a FOIA action to compel compliance with a FOIA request may be awarded reasonable attorney’s fees and costs. §30-4-100(B). As shown above, Providence should not have prevailed in this action, and the trial court’s order on the merits should be reversed. Therefore, the trial court’s award of fees and costs should also be reversed.

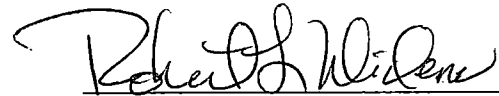
CONCLUSION

This is a FOIA action, but in name only. Providence does not seek to expose secret government activity; it does not question the legitimacy or legality of the disposition of the grant monies used to pay Palmetto Health; it does not question the adequacy of the information about the disposition of the grant money for goods delivered and services rendered at the specific request of the granting authority; and it does not seek any information designed to promote an informed electorate in a democratic society. In short, Providence’s “FOIA action” has nothing to do with FOIA or the General Assembly’s intent and purpose in enacting FOIA. Rather, Providence’s only goal is to acquire Palmetto Health’s wholly private business information for the sole purpose of pursuing Providence’s private business dispute with Palmetto Health. This perversion of FOIA for private gain should not be countenanced by any court and, for this reason alone, the appealed orders should be reversed.

Moreover, the undisputed evidence demonstrates that all grant money paid to Palmetto Health was for a specific purpose and in exchange for Palmetto Health delivering specific goods and services that the granting authority specified in the grant documents. Thus, Palmetto Health is not a “public body” for the reasons pronounced by the Supreme

Court in *Domains*, *Disabato*, and *Weston*. For these reasons, and for all of the reasons set forth in this brief, it is respectfully submitted that this Court should reverse both appealed orders and remand this case to the circuit court for the entry of judgment in favor of Palmetto Health.

Respectfully Submitted,



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Columbia, SC
July 5, 2018

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Thomas A. Russo, Circuit Court Judge

Appellate Case No. 2017-001726

RECEIVED
JUL 05 2018
SC Court of Appeals

Sisters of Charity Providence Hospitals, Respondents,

v.

Palmetto Health, Appellant.

CERTIFICATE OF SERVICE

I, Ann Shuler, an employee of McNair Law Firm, P.A., hereby certify that true and correct copies of the foregoing *Initial Brief of Appellant* and *Designation of Matter to Be Included On Appeal* were served upon counsel for the Respondents in the above-captioned matter, by causing copies of same to be deposited in the United States Mail, first class postage prepaid, this 5th day of July, 2018, addressed as follows:

James G. Carpenter, Esq.
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RECEIVED
JUL 05 2018
SC Court of Appeals

Re: Sisters of Charity Providence Hospitals -v- Palmetto Health
Appellate Case No. 2017-001726

Dear Ms. Kitchings:

Please find enclosed for filing the original and one copy of the Initial Brief of Appellant, and the original and one copy of the Designation of Matter to Be Included On Appeal. Please file both in your office, and return the file stamped copies to me via our courier.

By copy of this letter, we are serving counsel for the Respondents with a copy of the Initial Brief and Designation of Matter.

Thank you for your assistance in this matter.

Respectfully yours,

McNAIR LAW FIRM, P.A.



Robert L. Widener

RLW/as
Enclosures

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