

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
Case No. 2016-CP-40-1651

RECEIVED
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SC Court of Appeals

Sisters of Charity Providence Hospitals,Respondent,

v.

Palmetto Health,Appellant.

INITIAL REPLY BRIEF OF APPELLANT

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REPLY ARGUMENT

The Initial Brief of Respondent contains 15 pages of argument. (Init. Resp. Br. at 4-18). Nine of those pages (~ 60%) are a virtually verbatim restatement of the appealed order with no response to Palmetto Health’s appellate arguments challenging the appealed order.¹ Three of the remaining pages (~ 20%) simply state undisputed principles of law, including extended quotations from statutes and Supreme Court opinions, with no related argument in response to Palmetto Health’s Brief of Appellant. (See Init. Resp. Br. at 4, top half of 6, bottom half of 7, and bottom half of 8 to top half of 9). Thus, approximately 80% of Providence’s brief, on its face, is the equivalent of not filing a respondent’s brief, which

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Initial Brief of Respondent	Appealed Order	Brief of Appellant
Arg. I(C) at 9-11, entitled: “[Providence] is Supported by Public Funds”	Part I at 2-4, entitled: “[Providence] is Supported by Public Funds”	Arg. III(A) at 11-13
Arg. I(D) at 11-12, entitled: “[Providence] Expends Public Funds and Manages Their Expenditures”	Part II at 4-5, entitled: “[Providence Expends Public Funds and Manages Their Expenditures”	Arg. I at 4-8 and Arg. III(B) at 13-14
Arg. I(E) at 13, entitled: “[Providence Has a History of Complying with FOIA”	Part III at 5-6, entitled: “[Providence Has a History of Complying with FOIA”	Arg. III(C) at 14
Arg. II(A) at 14-16, entitled: “The Grants Were Not Arm’s Length Transactions”	Part IV(a) at 6-8, entitled: “The Arm’s Length Transaction Exception Does Not Apply to [Providence]”	Arg. III(D) at 14
Arg. II(B) at 16-18, entitled: “Disabato Did Not Change the Law”	Part IV(C) at 10-11, entitled: “Disabato Did Not Change the Law”	Init. App. Br. at 19, n.4

TABLE OF AUTHORITIES

Cases

<i>Arkwright Mills v. Murph</i> , 65 S.E.2d 665 (S.C. 1951)	3
<i>City of Camden v. Brassell</i> , 486 S.E.2d 492 (S.C. App. 1997)	3
<i>Disabato v. South Carolina Ass'n of Sch. Adm'rs</i> , 746 S.E.2d 329 (S.C. 2013)	7
<i>Domainsnewmedia.com, LLC v. Hilton Head Island-Bluffton Chamber of Commerce</i> , 814 S.E.2d 513 (S.C. 2018)	7
<i>Floyd v. Nationwide Mut. Ins. Co.</i> , 626 S.E.2d 6 (S.C. 2005)	3
<i>New York Times Co. v. Spartanburg County Sch. Dist. No. 7</i> , 649 S.E.2d 28 (S.C. 2007)	9
<i>Pascoe v. Wilson</i> , 788 S.E.2d 686 (S.C. 2016)	3
<i>Robinson v. Hassiotis</i> , 610 S.E.2d 858 (S.C. App. 2005)	2
<i>South Carolina Dep't of Mental Health v. Hanna</i> , 241 S.E.2d 563 (S.C. 1978)	8
<i>State v. Brandenburg</i> , 797 S.E.2d 416 (S.C. App. 2017)	3
<i>Tempel v. South Carolina State Election Comm'n</i> , 735 S.E.2d 453 (S.C. 2012)	3

Other Authorities

S.C. Code Ann. § 30-4-20(a) (Rev. 2007)	4
Rule 208(a), SCACR	2

could warrant reversal under Rule 208(a), SCACR, and *Robinson, infra*. See Rule 208(a), SCACR (“Upon the failure of respondent to timely file a brief, the appellate court may take such action as it deems proper.”); see also *Robinson v. Hassiotis*, 610 S.E.2d 858, 859 n.2 (S.C. App. 2005) (same). No published opinion addresses the situation of a respondent’s brief that, albeit filed, does not respond to the appellant’s arguments, but failing to respond violates the spirit and purpose of Rule 208(a), SCACR, and *Robinson, supra*.²

I. Providence is using FOIA to advance its purely private business interests, which have absolutely nothing to do with the General Assembly’s purpose in enacting FOIA, and the appealed orders should therefore be reversed under the outcome determinative factor of legislative intent and purpose.

The undisputed facts and law of this case demonstrate that the trial court erred in granting Providence’s FOIA request. Here are the undisputed facts and law:

1. The General Assembly’s purpose in enacting FOIA was to prevent secret government activity, promote an informed electorate, and prevent/detect government corruption, including corruption in the expenditure of public funds. (See Init. App. Br. at 8-9, and authorities cited therein).
2. Providence did not request any information on the public funds at issue in this case or any other information having anything to do with the purpose of FOIA. Moreover, Providence has never challenged and does not now challenge anything regarding the public funds at issue in this case. (See Init. App. Br. at 2, 10; see also FOIA Requests at Cmplnt., Exhs. A and B.).
3. As admitted by Providence, its sole purpose in bringing this FOIA action was to acquire Palmetto Health’s private business information so that Providence could use that information in its then pending and ongoing private litigation against Palmetto, which is a matter for discovery in that litigation rather than FOIA litigation having nothing to do with the purposes of FOIA. (See 8/31/17 Email Letter at p.2).

Providence has never denied any of the foregoing undisputed facts and law, nor does it does deny them in its Brief of Respondent. (See Init. Resp. Br., *passim*).

² Providence makes some arguments dispersed among the same remaining pages. (See Init. Resp. Br. at 5, bottom half of 6, top half of 7, top half of 8, and bottom half of 18). Those arguments are addressed in Argument IV, *infra*.

Accordingly, the appealed orders should be reversed and the case remanded for the entry of judgment in favor of Palmetto Health. Reversal on this grounds moots all other questions.

IV. Providence’s appellate arguments have no merit.

A. Providence’s “*Domains* is Distinguishable” Argument

In its Argument II(C), Providence summarily argues that the Supreme Court’s decision in the recent *Domains* case is distinguishable, because the present case “contains no subsequent statute that would modify FOIA for these circumstances.” (Init. Resp. Br. at 18, citing *Domainsnewmedia.com, LLC v. Hilton Head Island-Bluffton Chamber of Commerce*, 814 S.E.2d 513 (S.C. 2018)). This argument is based on the majority’s principal holding that the General Assembly did not intend the recipient of public funds under the provisions of the A-Tax statute would thereby be made subject to FOIA. Providence, however, simply ignores Palmetto Health’s arguments under *Domains*, which arise from the majority’s refutation of the dissent in *Domains*. (See Init. App. Br. at 3-5, 7, 9, 11-12).³

B. Providence’s “Statutory Definitions are Binding” Argument

In its Argument I(A), Providence argues generally that the statutory definition of “public body” in FOIA is “binding,” and it is not “incoherent or inconsistent.” (See generally Init. Resp. Br. 4-5). Palmetto Health has never argued the statutory definition is not binding, nor has it argued the definition is incoherent or inconsistent. (See, e.g., Init. App. Br., *passim*).

³ It may be that Providence views the majority’s response to the dissent as mere dicta, which is how the trial court viewed the majority’s response to the dissent in *Disabato v. South Carolina Ass’n of Sch. Adm’rs*, 746 S.E.2d 329 (S.C. 2013). See Init. App. Br. at 19, n.2. If so, it fails for the same reasons as the trial court’s view, including the fact one cannot ignore the Supreme Court’s explanation of its own case. See *Id.*

Within this argument, Providence appears to make an argument about the Supreme Court's consistent ruling that providing "goods and services" does not satisfy the statutory definition of being supported by public funds or expending public funds. (Id. at 5, first full ¶ to end of section). Providence's point is unclear, and it never responds to Palmetto Health's appellate arguments on this point. (See, e.g., Arg. II, *supra*, and sections of Init. App. Br. cited therein).

C. Providence's "Statutory Definitions are Deliberately Broad" Argument

In its Argument I(B), Providence argues that the statutory definitions of "public body" and "public record" are intended to be broadly inclusive. (See generally Init. Resp. Br. at 5-9). As to "public body," Providence argues that the "supported by / expending" definition must be interpreted expansively under the Supreme Court's decision in *Hanna* that "FOIA is remedial in nature and should be liberally construed to carry out the purpose mandated by the legislature." (Init. Resp. Br. at 6, *citing South Carolina Dep't of Mental Health v. Hanna*, 241 S.E.2d 563 (S.C. 1978)). However, even an intentionally broad construction cannot defeat the undisputed facts, which demonstrate that Palmetto Health is not supported by public funds and is not expending public funds. (See Arg. II, *supra*, and sections of Init. App. Br. cited therein). Moreover, Providence never explains how an "expansive" reading of the "supported by / expending" definition captures the undisputed facts in this case. (See Init. Resp. Br., *passim*). Finally, as shown herein, construing and applying FOIA to carry out its purpose demonstrates that the appealed orders should be reversed. (See Args. I-II, *supra*, and sections of Init. App. Br. cited therein).

The bulk of Providence's "broad definitions" argument relates to the definition of "public records," and it appears to be a response to Palmetto Health's argument on the

scope of FOIA's reach into Palmetto Health if its receipt of public funds somehow makes it subject to FOIA. (See Arg. III, *supra*, and sections of Init. App. Br. cited therein). Rather than respond to Palmetto Health's actual argument (*compare id. with* Init. Resp. Br., *passim*), Providence redefines it as a simplistic argument that the statutory definition of "public records" is too broad and should be rewritten by this Court. (See Init. Resp. Br. at last full ¶ on 6 to middle of 8). That simply is not Palmetto Health's argument. Rather, the question is the following: if Palmetto Health's receipt of public funds makes it subject to FOIA, what is the scope of FOIA's reach into Palmetto Health? Answering this question requires an examination of and limitation to the purpose of FOIA. See *New York Times Co. v. Spartanburg County Sch. Dist. No. 7*, 649 S.E.2d 28, 30 (S.C. 2007) (application of a statute hinges on "a *practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers.*") (all emphasis added).

As shown earlier, the purposes of FOIA establish that application of FOIA to a private corporation is limited to the scope necessary to serve the purposes of FOIA and, in the present case, the trial court erred when it ordered the production of wholly private information that has no bearing on any FOIA purpose and was sought by Providence for its wholly private business competition purposes. (See Arg. III, *supra* and sections of Init. App. Br. cited therein). Moreover, as also shown earlier, the controlling inquiry is legislative purpose, and nothing in FOIA indicates any legislative purpose and intent that FOIA can reach into a private corporation and extract its private information, when access to that private information bears no relationship to and does not serve the purpose of FOIA in any manner whatsoever. Accordingly, this Court should reverse the appealed orders and remand for the entry of judgment in favor of Appellant Palmetto Health.

CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in Palmetto Health's Brief of Appellant, it is respectfully submitted that this Court should reverse the trial court and remand for the entry of judgment in favor of Palmetto Health.

Respectfully Submitted,

Robert L. Widener,
by Jane W. Trinkley
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August 10, 2018

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CERTIFICATE OF SERVICE

I, Ann Shuler, an employee of McNair Law Firm, P.A., hereby certify that a true and correct copy of the foregoing *Appellant's Initial Reply Brief* was 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 10th day of August, 2018, addressed as follows:

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Appellate Case No. 2017-001726

Dear Ms. Kitchings:

Please find enclosed for filing the original and one copy of the Initial Reply Brief of Appellant. Please file the brief in your office, and return the file stamped copy to me in the return envelope provided.

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

Thank you for your assistance in this matter.

Respectfully yours,

McNAIR LAW FIRM, P.A.



Robert L. Widener

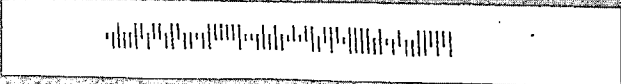
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