

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

Case No.: 2013-CP-40-3908

South Carolina Public Interest Foundation and
Edward D. Sloan, individually, and on behalf
of all others similarly situated,

Plaintiffs,

v.

South Carolina Department of Transportation,
and Robert J. St. Onge, Jr., Secretary of
Transportation,

Defendants.

RECEIVED Order

JUN 20 2019

SC Court of Appeals

JEANNETTE W. MCBRIDE
C.C.P. & G.S.

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RICHLAND COUNTY
FILED

This matter came before me in open Court in Columbia on March 19, 2015, on Plaintiffs' motion for attorneys' fees and costs. Plaintiffs filed a memorandum and an affidavit in support of their motion and Defendants filed a return opposing the award of fees. In addition, the Court had the benefit of oral argument by James C. Carpenter, Esquire, for Plaintiffs and Beacham O. Brooker, Jr., Esquire, for Defendants.

Plaintiffs claim entitlement to fees under the Freedom of Information Act's fee shifting provisions, S.C. Code Ann. §34-4-100(b), by virtue of prevailing on a motion to compel production of a certain internal investigation report in possession of the Department of Transportation in a separate case pending before this Court, South Carolina Public Interest Foundation and Edward D. Sloan, individually, and on behalf of all others similarly situated, v. South Carolina Department of Transportation, and Jane Doe, a DOT employee, No. 2013-CP-40-3677. Neither that case nor this one have yet proceeded to judgment. Plaintiffs cite the recent decision of our Supreme Court, Sloan and South Carolina Public Interest Foundation v. S.C.

Department of Revenue, 409 S.C. 551, 762 S.E.2d 687 (2014), as supporting their argument that final judgment in a suit to enforce FOIA is not necessary for a finding that a party has substantially prevailed, and they succeeded in obtaining a copy of the investigation report they sought in their parallel lawsuit for a declaratory judgment against the Department and its employee. Thus, they are entitled to costs

Defendants argue that Sloan v. Department of Revenue, *supra*, is distinguishable since that suit was brought solely under the FOIA statute whereas, here, two separate suits pertaining to the same underlying facts were brought—the first for declaratory judgment regarding the constitutionality of certain activities of employees of its Chester Maintenance section, and the second under FOIA for disclosure of the investigation report of that incident. According to Defendants, the reason this distinction is important is that the provisions for attorneys' fees under Rule 37 (a)(4), SCRPC, and under Code section 34-4-100(b) differ in their language--the former containing certain protections to the losing party on a fee petition that are not included in the latter. Specifically, Rule 37 (a)(4) permits the trial judge to award fees unless he finds that the opposition to the motion was substantially justified or that other circumstances make an award unjust.¹ Defendants argue that being prohibited from making the arguments on those grounds deprives them of a substantial right available to all litigants. If a party to a lawsuit against the government were able to submit a FOIA request for every document or thing requested in request for production in civil litigation then be permitted to recover fees under the more liberal FOIA provisions, State government parties in court would never be able avail themselves of the protections in the Civil Rules to argue justification to avoid an unwarranted award against them.

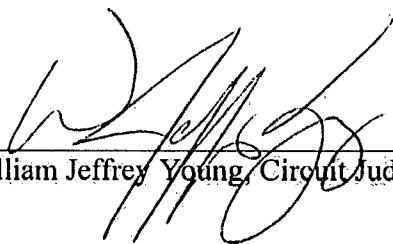
¹ The Department argues that it was substantially justified in withholding the names of its employees in that they had already been disciplined for their actions and public disclosure would constitute an additional penalty. South Carolina has recognized the Constitutional right of privacy as being the right to be left alone; the right of a person to be free of unwarranted publicity. Sloan v. S.C. Department of Public Safety, 355 S.C. 321, 327, 586 S.E.2d 108, 110 (2003) (quoting Holloman v. Life Ins. Co. of Virginia, 192 S.C. 454, 458, 7 S.E.2d 169, 171 (1940)).

Finally, as Defendants note, the main case involving the constitutional issue has not concluded. The defense in that suit involves the lack of standing of Plaintiffs as strangers to the underlying activities. If the defense prevails on the standing issue, the Plaintiffs would not have had standing to bring their suit or conduct discovery. This would be a circumstance that would make an award of fees unjust under the provisions of Rule 37 (a)(4), SCRPC.

Having considered the arguments and submissions of the parties herein, I determine that the motion for fees should be denied. This result is fair to the Defendants in that it preserves their opportunity to make their arguments against an award under the Rules of Civil Procedure. Moreover, it is not unjust to Plaintiffs in that they have the opportunity to pursue their claim for costs and fees under the remedy they elected--an order compelling production under Rule 37 in case number 2013-CP-40-3677.

For the foregoing reasons, I find that Plaintiffs' motion should be and hereby is DENIED.

AND IT IS SO ORDERED.



William Jeffrey Young, Circuit Judge

Sumter, S.C.

19 June, 2015