

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

William Jeffrey Young, Circuit Court Judge
Jocelyn Newman, Circuit Court Judge

Appellate Case No. 2019-001006

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

v.

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

APPELLANTS' FINAL BRIEF

October 1, 2019

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE CIRCUIT COURT ABUSE ITS DISCRETION IN DENYING ATTORNEYS FEES UNDER FOIA?**
- II. IS THE FREEDOM OF INFORMATION ACT COMPLEMENTARY TO THE RULES OF CIVIL PROCEDURE?**
- III. IS FOIA'S ATTORNEYS' FEES PROVISION MORE GENEROUS THAN THE DISCOVERY RULES?**
- IV. WERE APPELLANTS' ATTORNEYS' FEES AND COSTS REASONABLE?**

STATEMENT OF THE CASE

Appellants, the South Carolina Public Interest Foundation and Edward D. Sloan, Jr., appeal the Circuit Court's Order denying them attorneys' fees under the South Carolina Freedom of Information Act (FOIA).

Appellants served a FOIA request on the DOT Respondents (R. p. 45). The request asked for public records related to the rebuilding of a private driveway (owned by a DOT employee) using public funds, equipment, supplies, materials, and personnel, a violation of the South Carolina Constitution, Art. X, § 5 and 11. Appellants served the FOIA request on June 10, 2013 (R. p. 45).

Respondents responded on June 20, 2013 (R. p. 45) but failed to produce many of the requested public records. In those they did produce, Respondents redacted information. Respondents asserted that the requested public records were exempt from production under S.C. Code Ann. § 30-4-40(2) (sic) and § 30-4-40(7) (sic). (R. p. 45). Respondents probably meant § 30-4-40(a)(2) (personal information that would cause an unreasonable invasion of personal privacy) and § 30-4-40(a)(7) (records protected by the attorney-client and attorney work product privileges). Appellants filed suit July 1, 2013 (R. pp. 44-62).

Appellants had sought the same public records in Requests for Production of Documents in a related case, *South Carolina Public Interest Foundation, et al. v. South Carolina Department of Transportation and Jane Doe*, Civil Action No. 2013-CP-40-3677 ("the Driveway Case"). (R. pp. 149-150) Respondents, citing the attorney client relationship, refused to produce the requested public records either in response to discovery requests in the Driveway Case, or in response to the Freedom of Information Act. (R. pp. 162-63).

Appellants simultaneously moved to compel production of the same documents in a Motion to Compel under Rule 37, SCRPC, in the Driveway Case, and in this FOIA enforcement action. (R. pp. 144-145; 44-62).

The General Assembly delineated the rationale and purposes of FOIA:

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).

The purpose of FOIA is to protect the public from secret governmental activity.

Wiedman v. Town of Hilton Head Island, 330 S.C. 532, 500 S.E.2d 783 (1998). *See also Seago v. Horry County* 378 S.C. 414, 663 S.E.2d 38 (2008).

On October 24, 2013, the Circuit Court heard both motions simultaneously and later ordered the documents produced under Rule 37 in the Driveway Case, but did not rule in this case, the FOIA enforcement action. (R. pp. 20-31). The Circuit Court ruled that Respondents were not entitled to withhold the requested documents, even though they arose from an investigation (R. pp. 20-31). A public body may not insulate a matter from production simply by involving an attorney. The DOT Respondents had investigated the rebuilding of a private driveway (of a DOT employee) in the normal course of events, and the involvement of an in-house attorney was not necessary. Respondents' refusal to produce public records and Respondents' redaction the public records contravened these purposes. Respondents violated S.C. Code Ann. § 30-4-30(c).

The Circuit Court ordered the production of the unredacted documents in the Driveway Case, and the Respondents produced them. Respondents' production of the documents rendered moot Appellants' claim to require production under FOIA. However, because the Respondents produced the public records **after** Appellants had filed suit to enforce FOIA, and because Appellants were entitled to the documents under FOIA, Appellants are the prevailing parties under FOIA, and Appellants are entitled to an award of attorneys' fees under FOIA.

Appellants petitioned the Circuit Court for costs and attorneys' fees pursuant to S.C. Code Ann. § 30-4-100(b), the FOIA attorneys' fees provision (R. pp. 106-130).

(b) If a person or entity seeking such relief prevails, he or it may be awarded reasonable attorney fees and other costs of litigation. If such person or entity prevails in part, the court may in its discretion award him or it reasonable attorney fees or an appropriate portion thereof.

S.C. Code Ann. § 30-4-100(b) (emphasis added).

Respondents argued that the Circuit Court should not award attorneys' fees and costs under FOIA because they withheld the documents under Rule 37(a)(4) in the Driveway Case. Respondents argued that Appellants might win the Driveway Case and might be awarded attorneys' fees in the Driveway Case, and this claim for fees was not ripe for review (R. pp. 131-134). (Later, on January 29, 2018, the Circuit Court ruled for the Plaintiffs in the Driveway case.) (R. pp.32-43).

On July 15, 2015, the Honorable William Jeffrey Young denied Appellants' Motion for Attorneys' Fees under FOIA (R. pp. 7-9), reasoning that Appellants had an opportunity to ask for fees under Rule 37.

Having considered the arguments and submissions of the parties herein, I determined 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.

(R. p. 9). Accordingly, the Circuit Court refused to consider the Appellants' request for fees under FOIA.

Both parties believed the FOIA case was concluded. Appellants gave Notice of Appeal.

The Court of Appeals dismissed the appeal, ruling that the Circuit Court had not issued a final order and remanded the case to the Circuit Court. (R. pp. 13-15).

After remand, the Circuit Court issued a final Order on May 22, 2019. (R. pp. 16-18). The Circuit Court ruled that because the Appellants had sought and received the same documents in the Driveway case under the Rules of Discovery, and that the prior ruling of the Circuit Court had denied Appellants' motion for attorneys' fees under FOIA, the FOIA case was moot. Accordingly, the Circuit Court issued final order of dismissal.

Having received a final order from the Circuit Court, Appellants appeal again, requesting attorneys' fees under FOIA.

STANDARD OF REVIEW

Appellants petitioned the Circuit Court for costs and attorneys' fees pursuant to S.C. Code Ann. § 30-4-100(b) (R. pp. 106-113). The award of attorney's fees under FOIA is discretionary. Appeal is based upon the standard of abuse of discretion.

An abuse of discretion occurs when the judge's ruling is based upon **an error of law** or, when based upon factual conclusions, is **without evidentiary support**. *Renney v. Dobbs House, Inc.*, 275 S.C. 562, 274 S.E.2d 290 (1981). When the trial judge is vested with discretion, but his ruling reveals **no discretion was, in fact, exercised**, an error of law has occurred. *Mark, Inn, Inc. v. Department of Transportation*, 174 Ga.App. 420, 330 S.E.2d 134 (1985); *Calloway v. Ford Motor Co.*, 281 N.C. 496, 189 S.E.2d 484 (1972). *See also, Sumner v. Pruitt*, 281 S.C. 63, 314 S.E.2d 150 (Ct.App.1984); *Wright v. Charleston & Western Railway*, 59 S.C. 268, 37 S.E. 832 (1901).

Fontaine v. Peitz, 291 S.C. 536, 538-39, 354 S.E.2d 565, 566-67 (1987).

Appellants will demonstrate that the denial of fees was an error of law, without evidentiary support, and no discretion was exercised.

ARGUMENT

I. THE REFUSAL TO GRANT ATTORNEY'S FEES UNDER FOIA WAS AN ABUSE OF DISCRETION.

Respondents' production of public records did not moot the claim for an award of attorneys' fees. The Circuit Court's refusal to award attorney's fees under FOIA was in error of law and a failure to exercise its discretion.

The Supreme Court of South Carolina addressed this issue in *Sloan v. South Carolina Department of Revenue*.

"[T]he information Sloan sought has been disclosed, [and] there is no continuing violation of FOIA upon which the trial court could have issued a declaratory judgment." *Friends I*, [*Sloan v. Friends of the Hunley, Inc.*] 369 S.C. [20,] 26, 630 S.E.2d [474,] 478 [(2006)]. This, however, does not end the case, for Sloan further sought to recover his attorney's fees and costs as provided in section 30-4-100(b).

Sloan is the prevailing party. See *Sloan v. Friends of the Hunley, Inc. (Friends II)*, 393 S.C. 152, 157, 711 S.E.2d 895, 897 (2011) ("When a public body frustrates a citizen's FOIA request to the extent that the citizen must seek relief in the courts and incur litigation costs, **the public body should not be able to preclude prevailing party status to the citizen by producing the documents after litigation is filed.**" (citations omitted)). As the prevailing party under these circumstances, **the trial court erred in not awarding Sloan his reasonable attorney's fees and costs.** Sloan is entitled to recover his reasonable attorney's fees and costs in this action. See *Litchfield Plantation Co. v. Georgetown Cnty. Water & Sewer Dist.*, 314 S.C. 30, 34, 443 S.E.2d 574, 576 (1994) (Toal, J., concurring in part, dissenting in part) ("**A governmental agency should not be allowed to stonewall an FOIA request without some penalty for its actions.**") We reverse the trial court and remand to the trial court for an award of reasonable attorney's fees and costs to Sloan.

Id. 409 S.C. 551, 555-56, 762 S.E.2d 687, 689 (2014) (footnotes omitted, emphasis added).

Likewise, in the case at bar, "the trial court erred in not awarding Sloan his reasonable attorney's fees and costs." *Id.* The Circuit Court's failure to award attorney's fees under FOIA in this case was an error of law, and an abuse of discretion.

II. THE FREEDOM OF INFORMATION ACT IS COMPLEMENTARY TO THE RULES OF CIVIL PROCEDURE.

Respondents argued that the Circuit Court should not make an award of attorneys' fees and costs in this case because Respondents made a good faith argument about the withholding of documents under Rule 37(a)(4) in the Driveway Case. Respondents argue that public bodies should enjoy the same status and treatment under FOIA in shielding their activities and public records as private litigants under the Rules of Civil Procedure. The Circuit Court seemed to agree.

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. 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 the request for production and civil litigation and be permitted to recover fees under the more liberal FOIA provisions, State government parties in court would never be able to avail themselves of the protections in the Civil Rules to argue justification to avoid an unwarranted award against them.

(Order entered June 19, 2014, p. 2)

The Circuit Court recognized that FOIA has "more liberal . . . provisions" for a plaintiff to "be permitted to recover fees." *Id.* However, this ruling fails to acknowledge the purpose and functioning of the "more liberal" rules under FOIA. This failure was an abuse of discretion. The Freedom of Information Act distinguishes public bodies from ordinary litigants by demanding openness from public bodies, and the production of public records "at a minimum cost or delay." S.C. Code Ann. § 30-4-15.

(a) Any citizen of the State may apply to the circuit court for either or both a declaratory judgment and injunctive relief to enforce the provisions of this chapter in appropriate cases as long as such application is made no later than one year following the date on which the alleged violation occurs or one year after a public vote in public session, whichever comes later. The court may order equitable relief as it considers appropriate, and **a violation of this**

chapter must be considered to be an irreparable injury for which no adequate remedy at law exists.

(b) If a person or entity seeking such relief prevails, he or it may be awarded reasonable attorney fees and other costs of litigation. If such person or entity prevails in part, the court may in its discretion award him or it reasonable attorney fees or an appropriate portion thereof.

S.C. Code Ann. 30-4-100 (emphasis added).

FOIA opens government to the sunlight and requires the courts to enforce this openness by construing enforcement actions “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.**” S.C. Code Ann. § 30-4-15 (emphasis added). SCRCP 37 does not recognize or provide for a similar public purpose. As a public body under FOIA, the Respondents are not “all litigants,” (R. p. 8), nor are they entitled to “avail themselves of the protections of the Civil Rules to argue justification” in response to a FOIA request. *Id.*

FOIA is broader and more inclusive than Rule 37. Under Rule 37, the requested document must meet standards of Rule 26: “any matter, not privileged, which is **relevant to the subject matter involved in the pending action.**” Accordingly, production under Rule 37 is limited to the issues in the litigation.

FOIA requires production of a “public record,” which includes “**all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body.**” S.C. Code Ann. 30-4-20(c) (emphasis added). Under FOIA, the “public records” need not relate to any particular litigation. Accordingly, FOIA is far more comprehensive than the Rules of Civil Procedure.

Furthermore, a person need not be a litigant against a “public body” in order to obtain “public records.” “**Any person** has a right to inspect or copy **any public record** of a public body.” S.C. Code Ann. 30-4-30(a) (emphasis added).

The Respondents would have this Court limit the Freedom of Information Act so that when a public body litigates, the Freedom of Information Act is no longer applicable to a request for a “public record,” but rather that the Rules of Civil Procedure control the production of “public records.” A “public record” must be disclosed under the Freedom of Information Act regardless of whether the “public body” is in litigation with the person requesting that “public record.”

The Circuit Court stated, “Defendants argue that being prohibited from making the arguments [of substantial justification] deprives them of a substantial right available to all litigants.” (R. p. 8). The Circuit Court’s focus on the “rights” of a government litigant (or “public body”) would amount to a judicial amendment of the Freedom of Information Act and would go far beyond the proper authority of this Court.

This Court recently addressed the differences between the Freedom of Information Act and the Discovery Rules in *Pope v. Wilson*, 832 S.E.2d 442 (Ct. App. 2019). Pope had requested documents from the Attorney General both in discovery and under FOIA. The Attorney General failed to respond properly and timely. Pope filed suit to enforce FOIA. The Attorney General moved for judgment on the pleadings “asserting that the items sought by Pope were exempt from FOIA because they were subject to discovery in the [related] litigation.” The Circuit Court granted the motion for judgment on the pleadings and dismissed the action.

The circuit court also concluded that the requested documents were exempt under FOIA because the South Carolina Rules of Civil Procedure constitute

“law” for purposes of the exemption in section 30-4-40(a)(4) of the South Carolina Code (2007), which allows a public body to exempt from disclosure “[m]atters specifically exempted from disclosure by statute or law.”

Id. 831 S.E.2d 442, 445. Pope appealed.

The Court of Appeals reversed.

[W]e conclude that when a citizen in litigation with a governmental agency directs a FOIA request to that agency, **the agency must show the applicability of a specific FOIA exemption to each requested public record.** If the government invokes the exemption in section 30-4-40(a)(4), “[m]atters *specifically* exempted from disclosure by statute or law,” to seek protection under discovery rules, it must point to the **specific language** of a discovery rule that **expressly prohibits** disclosure of a particular type of record rather than vaguely referencing “discovery rules” or the “South Carolina Rules of Civil Procedure” and lumping all of the requested documents together into one category to justify nondisclosure. *See City of N. Charleston*, 363 S.C. at 457, 611 S.E.2d at 499 (“[T]he exemptions in section 30-4-40 are to be **narrowly construed** so as to fulfill the purpose of FOIA ... ‘to guarantee the public reasonable access to certain activities of the government.’ To further advance this purpose, the government has the burden of proving that an exemption applies.” (citations omitted) (quoting *Fowler*, 322 S.C. at 468, 472 S.E.2d at 633)); *see also Berkeley Cty. Sch. Dist.*, 392 S.C. at 83, 708 S.E.2d at 748 (“[T]he exemptions should be narrowly construed *to not provide a blanket prohibition of disclosure* in order to ‘guarantee the public reasonable access to certain activities of the government.’” (emphasis added) (quoting *Fowler*, 322 S.C. at 468, 472 S.E.2d at 633)). In sum, **we decline** to depart from precedent by imposing a blanket prohibition on disclosure whenever the person seeking public records is simultaneously being sued by the public body in possession of those records.

Id. 831 S.E.2d 442, 448. (*footnotes omitted, italics in Court of Appeals opinion; bold and underlining added*). The Court of Appeals remanded the case to the Circuit Court for a consideration of Pope’s motion for attorneys’ fees under FOIA.

The Circuit Court’s ruling in the case at bar that Respondents are entitled to the general rules and protections of rules of discovery, instead of utilizing a strict application of the Freedom of Information Act, is contrary to the reasoning and analysis of the Court of Appeals in *Pope v. Wilson*. The Circuit Court’s failure to consider awarding attorney’s

fees under FOIA, contrary to the analysis in *Pope v. Wilson*, amounts to an error of law, and therefore, the failure is an abuse of discretion.

III. FOIA'S ATTORNEYS' FEES PROVISION IS MORE GENEROUS THAN THE RULES OF CIVIL PROCEDURE.

Respondents posit a rule of "substantial justification" for their refusal to produce "public records" under the Freedom of Information Act. They argue, "The Department was substantially justified in attempting to protect the information sought in this matter even though it ultimately lost the issue." (R. p. 133). From that proposition, they argue that they should not be ordered to pay attorneys' fees under the Freedom of Information Act.

The Freedom of Information Act does not contain a "substantially justified" standard for denying attorney's fees. The standard is whether the person or entity requesting the public records "prevails" in litigation.

(b) **If a person** or entity seeking such relief **prevails**, he or it may be **awarded reasonable attorney fees** and other costs of litigation. If such person or entity prevails in part, the court may in its discretion award him or it reasonable attorney fees or an appropriate portion thereof.

S.C. Code Ann. § 30-4-100(b) (emphasis added). Appellants prevailed. The Circuit Court ordered production of the requested public records.

Respondents may not rely on other statutes with different standards for the award of attorneys' fees such as S.C. Code. Ann. § 15-77-300, because that statute contains an explicit "substantial justification" standard:

(A) In any civil action brought by the State, any political subdivision of the State or any party who is contesting state action, unless the prevailing party is the State or any political subdivision of the State, the court may allow the prevailing party to recover reasonable attorney's fees to be taxed as court costs against the appropriate agency if:

- (1) the court finds that **the agency acted without substantial justification** in pressing its claim against the party; and
- (2) the court finds that there are no special circumstances that would make the award of attorney's fees unjust.

The agency is presumed to be **substantially justified** in pressing its claim against the party if the agency follows a statutory or constitutional mandate that has not been invalidated by a court of competent jurisdiction.

S.C. Code Ann. § 15-77-300 (emphasis added). The standard from section 15-77-300 is different from that under the Freedom of Information Act.

Similarly, the federal Equal Access to Justice Act, 28 U.S.C.A. § 2412, like § 15-77-300 contains an explicit rule of substantial justification. Accordingly, neither the Equal Access to Justice Act, nor § 15-77-300, nor any case law interpreting either of those acts, is applicable to the standard under the Freedom of Information Act.

When a plaintiff is forced to resort to the courts in order to enforce to a request for a "public record" from a "public body," the Supreme Court has ruled that the payment of attorneys' fees is entirely appropriate and supported by the public purpose of the Freedom of Information Act. *Sloan v. Friends of the Hunley, Inc.*, 393 S.C. 152, 157, 711 S.E.2d 895, 897 (2011); *Sloan v. South Carolina Department of Revenue*, 409 S.C. 551, 555-56, 762 S.E.2d 687, 689 (2014). Accordingly, in this case, Appellants are prevailing parties, and are entitled to recover attorneys' fees and costs under S.C. Code Ann. § 30-4-100(b). The Circuit Court's failure to consider awarding attorney's fees under FOIA in the case at bar amounts to a failure to exercise discretion, and therefore, an abuse of discretion.

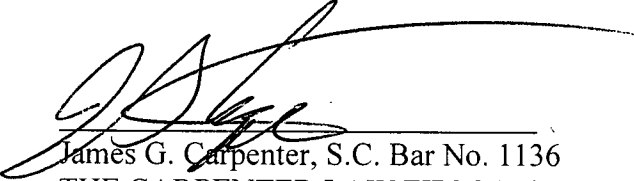
IV. APPELLANTS' ACTUAL ATTORNEYS' FEES AND COSTS ARE REASONABLE.

Appellants' counsel attached an affidavit and statements documenting attorneys' fees and costs (R. pp. 125-129). Through December 31, 2013, Appellants had incurred \$6,137.50 in attorneys' fees and \$200.00 in costs pursuing this matter, for a total of \$6,337.50. They have incurred additional fees since they submitted the affidavit. Respondents did not object to any individual entry, the hourly rate, or the total amount of fees requested. Accordingly, Appellants' actual attorneys' fees and costs were reasonable, and the Court should award Appellants their attorneys' fees and costs, including those incurred subsequent to the filing of the attorney's fees affidavit.

CONCLUSION

WHEREFORE, Appellants pray the Court to reverse the judgment of the Circuit Court, rule that the Appellants are entitled to attorneys' fees and costs of litigation pursuant to S.C. Code Ann. § 30-4-100(b), and grant Appellants such other and further relief as the Court deems just and proper.

Respectfully submitted,



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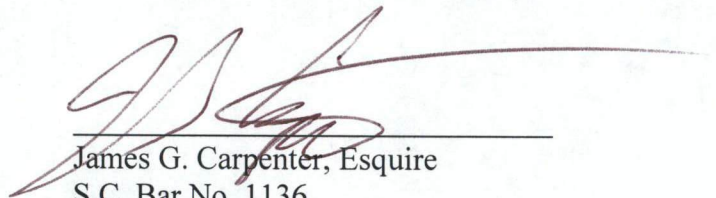
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CERTIFICATE OF COUNSEL

Pursuant to Appellate Rule 211(a), the undersigned hereby certifies that his Final Brief and Final Reply Brief for Appellants complies with Rule 211(b).

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