

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Robert E. Hood, Circuit Court Judge

Appellate Case No. 2019-001624

RECEIVED
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SC Court of Appeals
Respondent,

Nancy Miramonti,

v.

Richland County School District One, a body politic and corporate; and the
Board of Commissioners of Richland County School District One,

Appellants,

INITIAL BRIEF OF RESPONDENT, NANCY MIRAMONTI

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STATEMENT OF ISSUES ON APPEAL

- I. The Circuit Court correctly held Appellants violated FOIA by improperly entering executive session and taking improper action during executive session.
 - a. Appellants violated FOIA by discussing the Complaint Letter in executive session as (i) the legal advice exemption does not apply; (ii) discussions in executive session extended beyond legal advice; and (iii) the Board failed to properly vote to enter executive session and announce intent to discuss the Complaint Letter.
 - b. Appellants violated FOIA by taking illegal action in executive session.
- II. The Circuit Court correctly declared the Board should consider the Complaint Letter in public.
- III. The Circuit Court properly resolved factual issues.

STATEMENT OF THE CASE

On September 4, 2019, Nancy Miramonti (hereinafter, “**Miramonti**”, or, “**Respondent**”) brought this action against Richland County School District One (hereinafter, the “**District**”) and the Richland County School District One Board of Commissioners (hereinafter, the “**Board**”) (collectively, the District and the Board may hereinafter be referred to as the “**Appellants**”), asserting the Appellants violated the South Carolina Freedom of Information Act (hereinafter, “**FOIA**”) by (1) holding a closed meeting to discuss a letter complaint about a District policy; and (2) taking improper action during executive session to discuss and respond to the letter complaint. The Circuit Court granted declaratory relief and held the Defendants’ violated FOIA by improperly going into executive session to discuss the letter complaint and improperly taking action in executive session. The Circuit Court also declared that the Board must properly consider the letter complaint at its next regular or special meeting and enjoined the Defendants from further similar FOIA violations. In addition, the Circuit Court awarded Miramonti attorneys’ fees and costs.

Appellants subsequently filed a Motion to Alter and/or Amend the Circuit Court's Order, which the Circuit Court denied. Appellants appealed.

For the reasons set forth below, the Court should affirm the Circuit Court's order.

STATEMENT OF THE FACTS

In May 2019, the District announced expansion of the English for Speakers of Other Languages (hereinafter, "ESOL") Program beginning in the 2019-2020 school year where ESOL services would be offered at additional schools throughout the District. (*See generally*, Transcript of Hearing, p. 5-7). Historically, the District limited ESOL services to a few select ESOL Center Schools; as a result of the expansion, any ESOL students zoned for one of the new ESOL schools were to have his/her enrollment changed to the new ESOL school for the 2019-2020 school year. Id. Miramonti and other parents raised concerns about the impact the expansion may have on schools and students in the District and made efforts to work with the District to address such concerns. Id.

On August 7, 2019, a complaint letter (hereinafter, "**Complaint Letter**") was registered to the Board to address an unsatisfactory response from the District pertaining to the ESOL expansion and the District's Transfer Request Policy. Id. The Complaint Letter asked the Board to take action to instruct the District to revise the Transfer Request Policy to allow ESOL students impacted by the District's expansion of the ESOL Program to request transfers. Id. Specifically, the Complaint Letter requested that the Board/District:

1. Create a one-time Transfer Option for affected ESOL students and their siblings, allowing Transfer applications to be submitted by such students and their siblings through September 21, 2019 to request approval to remain at the school they (or their sibling) attended in 2018-2019.
2. Such Transfer Applications shall be approved pursuant to Board Policy, (i.e.: contingent on space, faculty, staff, and curriculum availability adequate to accommodate such transfer). See Policy JFABC Student Assignments And Transfers, attached here as Attachment 3.

Id. The Complaint Letter was registered per District Policy KE Public Concerns and Complaints, which provides in relevant part that upon receipt of a complaint, “The board, at its next regular meeting or at a special meeting, will then consider the complaint and dispose of the matter according to its best judgment.” (Attachment to Summons and Complaint).

On August 13, 2019, the Board held a meeting that consisted of an executive session beginning at 5:30 PM and a public session beginning at 7:00 PM. (Meeting Minutes; *see also*, Hearing Transcript p. 14). The Agenda for the August 13, 2019 meeting did not specifically list the Complaint Letter or subject thereof in items to be considered in executive session or public session. (Attachment to Summons and Complaint). Nevertheless, during Agenda Item 7.01 (Board Report presented by Chairman Devine), Commissioner Jamie Devine referred to the Complaint Letter. (Meeting Minutes, p. 14). Commissioner Devine “acknowledged receipt of [the Complaint Letter],” and that the complainant “will get something in writing from the Board”.

Id. Commissioner Devine also stated that after Board discussion in executive session, “the best judgment of the Board is to send a letter to respond to this complaint. So we’re going to send a letter out tomorrow . . . based off the discussion we had in executive session.” Id. at p. 16; *see also*, Video of Board Meeting, 26:23 to 26:32. Similarly, Commissioner Devine provided, “Our best judgment is to respond to [the complainant] in writing.” Id. at 17. The Board sent a letter to the complainant dated August 14, 2019 that provides, in part:

We are in receipt of your letter dated June 13, 2019 regarding a potential complaint. Please be aware that we cannot share information regarding student transfer requests as it pertains to ESOL participants or their families which is protected by the Family Education and Privacy Act.

(Attachment to Summons and Complaint). The response letter was signed by Commissioner Devine, and on the letterhead of the Board, listing all Board Commissioners. Id.

Standard of Review

Declaratory judgments in and of themselves are neither legal nor equitable. Campbell v. Marion County Hosp. Dist., 354 S.C. 274, 279, 580 S.E.2d 163, 165 (Ct. App. 2003) (citations omitted). The standard of review for a declaratory judgment action is therefore determined by the nature of the underlying issue. Id. (see also Burton v. York County Sheriff's Dept., 358 S.C. 339, 346, 594 S.E.2d 888, 892 (Ct. App. 2004)).

Determining the proper interpretation of a statute is a question of law. Lambries v. Saluda County Council, 409 S.C. 1, 7, 760 S.E.2d 785, 788 (2014). For a question of law, the reviewing court need not give deference to the trial court's interpretation of a statute. See generally, Id. at 8. However, "In an action at law tried without a jury, [the reviewing court] reviews the lower court only to correct errors of law." Seago v. Horry County, 378 S.C. 414, 422, 663 S.E.2d 38, 42 (2008). The trial court's factual findings will not be disturbed on appeal unless there is no evidence in the record that would reasonably support the findings. Id.

Arguments

I. The Circuit Court correctly held Appellants violated FOIA by improperly entering executive session and taking improper action during executive session.

The plain reading of FOIA supports the finding that the Board's discussions of the Compliant Letter were improper and the Board's sending a response letter based on discussions in executive session was improper.

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (citations omitted). The court's place under the plain meaning rule is not to change the meaning of a clear and unambiguous statute. Id. The rules of statutory interpretation are not needed and the court has no right to impose another meaning where the statute's language is plain and unambiguous, and conveys a clear and definite meaning. In re Vincent J., 333 S.C. 233, 235, 509 S.E.2d 261, 262 (1998) (citing Paschal v. State Election Comm'n, 317 S.C. 434, 454 S.E.2d 890 (1995)). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." Hodges v. Rainey, 341 S.C. at 85, 533 S.E.2d at 581-582 (quoting Norman J. Singer, *Sutherland Statutory Construction* § 46.03 at 94 (5th ed. 1992)).

FOIA is codified as sections 30-4-10 to -165 in the South Carolina Code. *See* S.C. Code Ann. §§ 30-4-10 to -165 (2019). The purpose of FOIA is to protect our democratic society by ensuring 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." S.C. Code Ann. § 30-4-15. As such, provisions of FOIA "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.” Id.

FOIA should be liberally construed to carry out the legislative purpose of guaranteeing the public reasonable access to certain activities of the government. Pope v. Wilson, 427 S.C. 377, 384-385, 831 S.E.2d 442, 446 (Ct. App. 2019). The essential purpose of FOIA is to protect the public from secret government activity. Burton, 358 S.C. at 347, 594 S.E.2d at 892. Any exemptions from the mandates of FOIA should be narrowly construed. Id., 358 S.C. at 348, 594 S.E.2d at 893.

a. Appellants violated FOIA by discussing the Complaint Letter in executive session as (i) the legal advice exemption did not apply; (ii) discussions in executive session extended beyond legal advice; and (iii) the Board failed to properly vote to enter executive session and announce intent to discuss the Complaint Letter.

(i) The “legal advice” exemption does not apply.

Pursuant to section 30–4–60 of the South Carolina Code, every meeting of a public body shall be open to the public unless closed pursuant to the limited exceptions enumerated in section 30-4-70 of FOIA. S.C. Code Ann. §30–4–60. Section 30-4-70(a)(2) provides that a closed meeting may be held for “the receipt of legal advice where the legal advice relates to a pending, threatened, or potential claim or other matters covered by the attorney-client privilege, settlement of legal claims, or the position of the public agency in other adversary situations involving the assertion against the agency of a claim.”

In this case, the Complaint Letter merely asks the Board to amend the District policy regarding student transfers to allow transfer applications to be submitted for students impacted by the ESOL program expansion.¹ The Complaint Letter was not part of any pending litigation, did

¹ Please note, Appellants assert the Complaint Letter sought a waiver of ESOL services in order to remain at A.C. Moore (Appellants’ Brief, P.8). There is nothing in the Complaint Letter that supports this assertion. Further, as

not threaten a claim against the District, did not give rise to any potential claim against the District, and was not related to any legal settlement or the position of the Board or District related to a claim. Accordingly, in narrowly construing the exemptions of FOIA, the Circuit Court correctly held that the Board violated FOIA by discussing the Complaint Letter in executive session as no closed meeting exemption applied.

Appellants contend that the Board is allowed to obtain legal advice based on the Court of Appeal's finding in Herald Pub. Co. v. Barnwell, 291 S.C. 4, 10, 351 S.E.2d 878, 882 (Ct. App. 1986) that the exemption of Section 30-4-70(a)(2) "does not require that a public body actually be engaged in litigation, only that legal advice be rendered." However, Herald Pub. Co. is distinguishable as the public body in question there was discussing an issue where "litigation was a very real possibility" and gave rise to a potential claim. Id. There is nothing in the record that suggests the issues raised in the Complaint Letter triggered any "very real possibility" of litigation.

Based on the above, in narrowly construing the legal advice exemption, the Court should affirm the Circuit Court's finding that the Board violated FOIA by discussing the Complaint Letter during executive session.

(ii) The "legal advice" exemption does not apply to all discussions undertaken in executive session.

As noted above, the legal advice exemption must be narrowly construed. Burton, 358 S.C. at 348, 594 S.E.2d at 893. The "Public Official's Guide to Compliance with South Carolina's Freedom of Information Act", issued May 2017 and endorsed by Governor Henry McMaster and Attorney General Alan Wilson, aptly provides that the legal advice exemption in FOIA is not intended to give rise to a "carte blanche excuse for secrecy". (S.C. Press Association, Public

indicated by websites referenced in the Complaint Letter, A.C. Moore is listed as an ESOL Center School and still provides ESOL services.

Official's Guide to Compliance with South Carolina's Freedom of Information Act, May 2017, available at <https://spress.org/public-officials-guide-to-the-foia/>, P.16, comments regarding Section 30-4-70(a)(2)).

As such, even if legal advice is deemed an acceptable exemption in this case, the record shows that discussions during executive session extended beyond legal advice and violated FOIA. The meeting minutes show that during executive session there was a discussion about the Complaint Letter and "the best judgment of the Board is to send a letter to respond." (Meeting Minutes, p. 16). Such discussions among Board members during executive session extend beyond receipt of legal advice, are not exempted by the legal advice exemption and are in violation of FOIA. To comply with FOIA, after legal advice is rendered, the Board should adjourn from executive session and continue any discussions about the disposition of the matter in public session.

Further, in order to protect the public from secret activity, FOIA cannot be read to allow executive session discussions by a public body under the guise of a public body receiving "any" legal advice, where such legal advice is not on point, warranted or valid. Appellants allege FOIA merely requires that a public body demonstrate legal advice was sought/obtained in order to properly discuss an issue in executive session. (Appellants Brief, p. 8). However, in construing the legal advice exemption narrowly, a public body should be, at a minimum, required to seek relevant and valid legal advice for any executive session discussions. In this case, the response letter sent to the complainant refers to the Family Education Rights and Privacy Act (FERPA)² as a legal reason preventing any further response from the Board or District. However, the Complaint

² FERPA is a federal law that affords parents the right to have access to their children's education records, the right to seek to have the records amended, and the right to have some control over the disclosure of personally identifiable information from the education records. 20 U.S.C. § 1232g. The Complaint Letter request the Board's consideration of a change to the District transfer policy and in no way seeks any personal information regarding students.

Letter does not seek any personal information, or impact FERPA. As the Circuit Court noted, the Board's response letter citing FERPA "makes absolutely zero sense in any way, shape, or form . . . it might as well say, 'The elephant is purple'," or "the sky is yellow". (Hearing Transcript, p. 32-33). As such, the Circuit Court properly held a public body must have justifiable reasons for seeking legal advice to qualify for the legal exemption, which did not exist here.

Accordingly, the legal advice exemption is not applicable in this case and the Circuit Court's finding that the Board violated FOIA by discussing the Complaint Letter in executive session should be upheld.

(iii) The Board failed to properly vote to enter executive session and announce intent to discuss the Complaint Letter in executive session.

Section 30-4-70(b) of the South Carolina Code provides, in relevant part:

Before going into executive session the public agency shall vote in public on the question and when the vote is favorable, the presiding officer shall announce the specific purpose of the executive session. As used in this subsection, 'specific purpose' means a description of the matter to be discussed as identified in items (1) through (5) of subsection (a) of this section.

The Court of Appeals held in Herald Pub. Co., 291 S.C. at 12, 351 S.E.2d at 883, that FOIA provides that an executive session can only follow an open session, where the public body must vote in public to meet in executive session. Further, prior to going into executive session the presiding officer of a public body shall announce the purpose of the executive session. Id., 291 S.C. at 11, 351 S.E.2d at 883.

In this case, as shown in the Agenda, the executive session preceded the public session. *See also*, Meeting Minutes. Accordingly, the Board did not vote in public prior to entering executive session. Moreover, the Board failed to announce that the specific purpose of the executive session included discussing the Complaint Letter; there is no such announcement

evidenced by the Meeting Minutes or set forth on the Agenda. As the Board failed to publicly vote to enter executive session and failed to properly announce intent to discuss the Complaint Letter, the Board violated FOIA in discussing the Complaint Letter during executive session.

Based on the foregoing, the Circuit Court's ruling the Board violated FOIA in discussing the Complaint Letter during executive session should be affirmed as the Board failed to properly vote, in public, to go into executive session, and failed to properly specify that discussions in executive session would include the Complaint Letter.

b. **Appellants violated FOIA by taking illegal action in executive session.**

Per section 30-4-70(b) of the South Carolina Code: "No action may be taken in executive session except to (a) adjourn or (b) return to public session." Moreover, "The members of a public body may not commit the public body to a course of action by a polling of members in executive session." *Id.* Per Merriam-Webster Dictionary (2019), available at <https://www.merriam-webster.com/dictionary/act?src=search-dict-box>, "act" is defined as "the doing of a thing", and also, "the formal product of a legislative body".

The Board violated FOIA by taking action to decide to send a response letter in executive session and to send such response letter. The record shows that during the executive session the Board discussed the Complaint Letter and decided to send a response letter to the complainant based on those discussions. Chairman Devine admitted during the Board Meeting, that the response letter was in "the best judgment of the **Board**". (Meeting Minutes, p. 16) (emphasis added). Chairman Devine also noted that "**We** are going to send a letter out tomorrow . . . based on discussion **we** had in executive session." *Id.* (emphasis added). Finally, at the end of the Board's debate about the process for handling the Complaint Letter, Chairman Devine reiterated that, "**Our** best judgment is to respond to [the complainant] in writing." (Meeting Minutes, p. 17)

(emphasis added). The response letter received by the complainant is on the Board letterhead listing all Board Commissioners and signed by the Chairman of the Board. The response letter also states, “*We* are in receipt of your letter . . .”, and “*we* cannot share information . . .”. (Board Response Letter) (emphasis added).

Based on the above, the record shows that during executive session the Board improperly determined, via vote, poll or some other manner, that a response letter should be sent to the complainant, and then took action to effectuate the sending of the response letter during executive session. Accordingly, the Circuit Court correctly held that the Board took action in executive session other than adjourning or returning to public session and violated FOIA.

II. The Circuit Court correctly declared the Board should consider the Complaint Letter in public.

The Appellants’ assertion that the equitable relief ordered equates to a Writ of Mandamus was not raised at trial and is not properly preserved for appeal. When a trial court does not explicitly rule on an argument raised, and the appellant makes no motion to obtain a ruling, the appellate court may not address the issue. Smith v. NCCI, Inc. 369 S.C. 236,247-248, 631 S.E.2d 268, 274 (Ct. App. 2006) (rehearing denied). “It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.” Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). The record must show that an issue has been properly raised to the lower court. *See* York v. Conway Ford, Inc., 325 S.C. 170, 480 S.E.2d 726 (1997) (an objection made during an off-the record conference which is not made part of the record does not preserve the question for review). If the party is not reasonably clear in his objection to the perceived error, the party waives their right to challenge the erroneous ruling on appeal. Buist v. Buist, 410 S.C. 569,

575, 766 S.E.2d 381, 384 (2014) (citing S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007)). “It is well settled that an issue may not be raised for the first time in a post-trial motion.” S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007).

In this case, the Appellants did not raise the Writ of Mandamus argument at the hearing before the Circuit Court. Rather, Appellants first asserted such argument in their Rule 59(e) Motion and as such, this argument is not preserved.

In the event the Court finds this issue properly preserved, the Circuit Court’s declaration was proper under FOIA. Per section 30-4-100 of the South Carolina Code, “The court may order equitable relief as it considers appropriate.” Further, a violation of FOIA “must be considered to be an irreparable injury for which no adequate remedy at law exists.” Id. In determining Appellants violated FOIA, the Circuit Court found that relief for the Plaintiff included having the Board properly consider and discuss the Complaint Letter in public. The Circuit Court is within its right to determine such an equitable remedy.

Further, the Circuit’s Court’s equitable relief should be upheld as such would qualify as a valid Writ of Mandamus. The primary purpose of the Writ of Mandamus is to enforce an established legal right and corresponding imperative duty imposed by law. Willimon v. City of Greenville, 243 S.C. 82, 86, 132 S.E.2d 169, 170-171 (1963) (citing 55 C.J.S. Mandamus § 51, p. 85). It is not the purpose of the Writ of Mandamus to establish a legal right, but to enforce one which has already been established. Id. 243 S.C at 87. In this case, the Circuit Court was enforcing the open meeting requirements in FOIA and as such, if the Circuit Court’s ruling is deemed a Writ of Mandamus, the Writ of Mandamus should be upheld.

III. **The Circuit Court properly resolved factual issues.**

As with the above, this issue is not properly preserved. The issue was first raised in Appellants' Rule 59(e) Motion and not raised at the hearing.

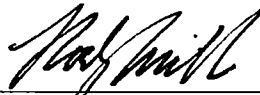
Nevertheless, section 30-4-100 of the South Carolina Code provides the hearing court shall establish a scheduling order to conclude actions brought pursuant to FOIA only in the event the court is unable to make a final ruling at the initial hearing. Further, in actions at law, on appeal of a case tried without a jury, the lower court must be affirmed where there is any evidence which reasonably supports the judge's findings. Sloan v. Greenville County, 356 S.C. 531, 544, 590 S.E.2d 338, 345 (Ct. App. 2003).

In this matter, the record supports the findings of the Circuit Court as discussed more specifically herein. Accordingly, the Circuit Court should be affirmed.

CONCLUSION

For the reasons stated above, this Court should deny Appellants' request to reverse the Circuit Court's Order, should not remand this action for further proceeding, and should affirm the Circuit Court's Order. In addition, this Court should award Respondent additional attorney's fees and costs related to this appeal.

Respectfully Submitted,



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November 18, 2019

THE STATE OF SOUTH CAROLINA
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**RESPONDENT NANCY MIRAMONTI'S PROOF OF SERVICE OF INITIAL BRIEF,
DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL,
AND CERTIFICATE OF COUNSEL**

I certify that I have served Respondent Nancy Miramonti's Initial Brief, Designation Of Matter To Be Included In The Record On Appeal, And Certificate Of Counsel by depositing a copy of it in the United States Mail, postage prepaid, on **November 18, 2019** addressed to their attorneys of record, listed as follows:

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November 18, 2019

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings, Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RECEIVED
NOV 18 2019
SC Court of Appeals

Re: Nancy Miramonti, Respondent, v. Richland County School District One, a body politic and corporate; and the Board of Commissioners of Richland County School District One, Appellants / Appellate Case No. 2019-001624

Dear Ms. Kitchings:

Enclosed for filing please find an original and a copy of each of the following for filing:

1. Initial Brief of Respondent Nancy Miramonti;
2. Respondent Nancy Miramonti's Designation of Matter to be Included in the Record on Appeal; and
3. Respondent Nancy Miramonti's Certificate of Counsel.

Please file the originals and return file-stamped copies to me via the courier from my office. By copy hereof, all counsel of record are being served with the above.

Thank you for your assistance, and should you have any questions, please do not hesitate to contact me.

Very truly yours,

ROGERS LEWIS JACKSON MANN & QUINN, LLC



Anne B. Allison, Paralegal

Enclosures

cc: Eugene Matthews, Esq. (via U.S. Mail)
Kenneth A. Davis, Esq. (via U.S. Mail)
Charles J. Boykin, Esq. (via U.S. Mail)