

STATE OF SOUTH CAROLINA  
In the Court of Appeals

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Appeal from Richland County  
Court of Common Pleas

The Honorable Doyet A. Early, III, Circuit Judge

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Appellate Case No. 2016-001708

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Adele J. Pope,

Appellant,

v.

Alan Wilson, in his capacity as  
Attorney General of South Carolina,

Respondent.

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SC Court of Appeals

REPLY TO RETURN OF RESPONDENT TO APPELLANT'S MOTION FOR COSTS

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By return of December 12, 2019, Respondent Attorney General of South Carolina ("Respondent") opposes Appellant's motion for costs under Rule 222 SCACR after the this Court reversed her appeal of a 2016 circuit court order dismissing her 2011 FOIA complaint, and remanding the matter for a determination of Appellant's FOIA rights. Respondent's asserted reasons for the denial of Rule 222 costs are not consistent with Rule 222 or the record in this appeal. For each reason stated herein, and in her motion for costs of November 18, 2019, Appellant asks this Honorable Court to grant Appellant Rule 222

costs of \$4,195.55, to be awarded without prejudice to Appellant's right to seek recovery of attorneys' fees and costs as provided under FOIA.

### **Background**

This appeal involves a long-running FOIA suit brought after Respondent declined to comply with a July 19, 2011 request for a copy of several public documents, including the State/Attorney General's 2010 contract with a private law firm to sue Respondent and Robert Buchanan, Jr. in Richland County Case 2010-CP-40-4900 (Richland 4900).

In March 2013, after being admonished by the South Carolina Supreme Court to conclude the matter in the first instance, Respondent advised the Supreme Court of plans to end this and another 2011 FOIA case promptly. Today, more than 8 years after the FOIA request was made, Respondent has not produced the State/Attorney General's public contract under FOIA. Further, Respondent's private counsel and Respondent's co-Plaintiffs in Richland 4900, have been deeply involved in the disruption and delay associated with Respondent's FOIA noncompliance.

In 2016 the circuit court dismissed the FOIA complaint which, at Respondent's request, had been consolidated with Richland 4900 for four years. The dismissal, at Respondent's request, was under Rule 12(b), SCRCR.

On June 19, 2019 this Court issued its decision reversing the circuit court's 2016 dismissal of the FOIA case and remanding the case for a determination of Appellant's FOIA rights. Respondent petitioned this Court for rehearing, which was denied.

Respondent, while still failing to produce the public contract and related documents under FOIA, now seeks to deny Appellant costs under Rule 222 SCACR.

### **Appellant Prevailed in the Reversal of the Lower Court's Orders in this Appeal**

Respondent correctly quotes the language of Rule 222, which provides that “[w]hen a judgment is reversed, costs shall be taxed against the respondent unless the court orders otherwise.” Respondent then argues that Appellant should not receive costs under Rule 222 because she has not prevailed in “the entire case.” Appellant, however, undisputedly prevailed in reversal of *the judgment from which she appealed*.

The circuit court orders from which Appellant appealed dismissed this FOIA case in its entirety, preventing Appellant from being able to litigate any of her claims. This Court's judgment reverses that dismissal and allows Appellant to proceed to final disposition of her claims. Appellant is unaware of any precedent supporting a denial of costs under Rule 222 where an appellant has not prevailed on all ultimate issues in the *underlying* case, and Respondent cites none.

### **Respondent, Not Appellant, Has Caused Unnecessary Work in this FOIA Case**

On page 2 of the return, Respondent asserts that “Appellant has caused much unnecessary work on appeal by including in her brief irrelevant background and issues that were not reached by the Court of Appeals.” The response to this assertion is simple. *All* of the work of Respondent, and that of Appellant, could have ended before, or at any stage during, this appeal. The only thing necessary to prevent the proliferation of issues and extensive background for this appeal was for the State's official charged with the enforcement of the FOIA to have produced the public contract authorizing him to bring a tort suit against two South Carolina citizens, one being Appellant.

The background and issues are indeed extensive. The reason for their inclusion in the record, however, is the unprecedented resistance to FOIA compliance by Respondent

coupled with the extensive involvement of Respondent's private attorney and Respondent's Richland 4900 co-Plaintiffs in FOIA disruption and noncompliance. Respondent took the position that Appellant's status as a litigant in Richland 4900 subordinated her FOIA rights to discovery in that case. Appellant was therefore required to present additional information to show that in addition to being unsupported by any portion of FOIA, Respondent's argument would submit (and indeed has submitted) Appellant to undue complication and delay in exercising her FOIA rights.

At any point in the last 8 years and 5 months, Respondent's work, and that of Appellant, could have ended with the production of the State/Attorney General's public contract and the related documents requested under FOIA.

In February 2013, the Supreme Court of South Carolina directed Respondent to conclude this FOIA suit, and a second FOIA suit, "in the first instance." In May 2013 the Supreme Court in *Wilson v. Dallas*, 746 S.E.2d 743 (2013), noted Respondent's assertions that he planned to do so. Respondent's private Richland 4900 counsel then began a 6-year relentless effort to delay release of the State/Attorney General's public contract and other public documents under FOIA.

More than six years after *Wilson v. Dallas*, Respondent has still not complied with the 2011 FOIA request for public documents.

#### **The Record of this Appeal is Relevant to Respondent's FOIA Noncompliance**

Respondent asserts that Appellant is not entitled to Rule 222 costs because much of the record contains documents "completely irrelevant to the appeal," and because Respondent was required to "waste time responding to" Appellant's arguments. Respondent asserts that "... Appellant's unnecessary designations total 245 pages which is well more than half

of the record.” The response to these assertions is twofold. First, every document cited by Appellant was relevant. Next, no motion was made by Respondent to restrict or strike from the record on appeal in this case. Nor did this Court or the circuit court find that any of the documents was irrelevant to this extraordinary FOIA case.

The undisputed record shows that it is Respondent who has complicated and delayed this matter. Just a few examples of that complication and delay follow:

1. In the fall of 2011 Respondents’ private counsel moved to intervene to stop release of the public contract to file Richland 4900, as did more than a dozen of Respondent’s Co-Plaintiffs in Richland 4900. [R. 121-2]
2. In the fall of 2011 the AG moved to transfer this FOIA case from Newberry County to Richland County, and to consolidate it with Richland 4900, where Respondent’s counsel claimed that State/AG’s public contract was the epitome of a private document. [R. 9-15]
3. In 2013 Respondent Attorney General told the Supreme Court he hoped to conclude this, and another, FOIA case promptly. But two days after the *Wilson v. Dallas* decision Respondent asked the Richland 4900 Court to stay both FOIA matters indefinitely. [R. 407]
4. Respondent and his Richland 4900 co-Plaintiffs obtained, a delay until 2016 of any action in this FOIA case except the mediation described below. [R. 172-3]
5. In 2015 Respondent allowed his private counsel to seek a second mediation in Richland 4900, and insisted that the FOIA cases be part of that mediation.
6. In 2016 Respondent’s counsel moved to consolidate Richland 4900 with yet another case, this time a 2013 Aiken County Case.
7. From 2016 to 2019 Respondent simply refused to comply with the long-overdue FOIA request as this appeal moved forward.

In addition to being the source of the numerous motions and delays which make up this FOIA record, Respondent did not move at any time to strike a matter from the designations or briefs in this appeal, and neither the circuit court nor the Court of Appeals has made any

finding to support Respondent's untimely assertion that the record contains irrelevant matters.

Respondent's assertions about delays, like those about the record, could have all been resolved at any time if Respondent had complied with FOIA and delivered the public documents which have remain undelivered since Appellant's July 2011 FOIA request.

**The Fees Sought Under Rule 222 are Appropriate**

Finally, as set forth in Appellant's motion for costs, the fees requested under Rule 222 are vastly less than those actually incurred in this appeal, and counsel asserts that the fees incurred in this case would have substantially exceeded \$2,500 even if the record had been shorter. Appellant notes that all briefs filed in this case (including Respondent's) were less than half of the maximum page length allowed under Rule 208(b)(5).

**Conclusion**

For the foregoing reasons, Appellant respectfully requests that the Court tax the costs of this appeal in the amount of \$4,191.55 against Respondent Alan Wilson, as Attorney General of South Carolina.

Respectfully submitted,



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December 17, 2019

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**PROOF OF SERVICE**

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I certify that I have served a copy of the Appellant's Reply to Respondent's Return to Motion for Costs on Respondent by mailing a copy of same on December 17, 2019, addressed to his attorney of record as follows:

J. Emory Smith, Jr., Esquire  
Office of the Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211

*Counsel for Respondent Attorney General*



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Adam T. Silvernail