THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Robert E. Hood, Circuit Court Judge

C.A. No.: 2019-CP-40-04931
Appellate Case No. 2019 - 001624

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.

FINAL REPLY BRIEF OF APPELLANTS

Eugene H. Matthews, S.C. Bar No. 10193
RICHARDSON PLOWDEN & ROBINSON, P.A.
Post Office Drawer 7788
Columbia, South Carolina 29202
T: (803) 771-4400
F: (803) 779-0016
E-mail: gmatthews@RichardsonPlowden.com

Kenneth A. Davis, S.C. Bar No. 66416
Charles J. Boykin, S.C. Bar No. 65149
BOYKIN & DAVIS, LLC
220 Stoneridge Drive, Suite 100
Columbia, South Carolina 29210
T: (803) 254-0707
E-mail: cjboykin@boykinlawsc.com
E-mail: kdavis@boykinlawsc.com

COUNSEL FOR APPELLANTS

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I. RESPONDENT URGES THE COURT TO IGNORE THE APPELLANT'S RIGHT TO SEEK LEGAL COUNSEL IN EXECUTIVE SESSION BY ARGUING ERRONEOUSLY THAT THE APPELLANT DID NOT HAVE "JUSTIFIABLE REASONS" TO SEEK LEGAL ADVICE.

The crux of Respondent's argument is that it is proper for him, or for the trial court, to second-guess the Appellant – or any other public body – as to its decision to seek legal counsel in executive session. Further, the Respondent demands that this Court allow it to use FOIA to substitute its after-the-fact judgment for the public body's decision to seek legal counsel. This is not the proper function of FOIA.

Generally, entities are permitted to seek legal advice from their lawyers. Indeed, because those who seek legal advice are rarely experts in the law, entities should be permitted to seek legal counsel, and the attorney-client privilege functions to "encourage attorneys and their clients to communicate fully and frankly and thereby to promote broader public interests in the observance of law and administration of justice." *Am. Civil Liberties Union v. Nat'l Sec. Agency*, 925 F.3d 576, 589 (2d Cir. 2019). As explained by the court:

> In the context of legal advice to government officials, "the privilege furthers a culture in which consultation with government lawyers is accepted as a normal, desirable, and even indispensable part of conducting public business. Abrogating the privilege undermines that culture and thereby impairs the public interest."

Id. (quoting *In re Grand Jury Investigation*, 399 F.3d 527, 534 (2d Cir. 2005)).

The argument advanced by the Respondent, and adopted by the trial court, seriously undermines this principal. Should this Court uphold the decision, public entities would be correspondingly reluctant to seek legal advice due to the prospect of being sued, and held liable for attorney's fees and costs, whenever a disappointed suitor convinces a trial court to second-guess their decisions to confer with counsel.

Here, the record is instructive. At the hearing on the matter, the Appellants articulated the legal justification for receiving legal advice regarding the complaint letter, and the Court agreed that there was a justifiable need for legal advice. (Rec. on App., pp 147-148, 156-157). Nevertheless, the trial court's Order concluded that Appellants' rational for using the FOIA legal advice exception was "manufactured," despite the trial court's acknowledgement in the hearing on the matter that there was a legal basis and justification for the Board to receive legal advice regarding the complaint letter.[1]

Indeed, the record reflects that, because the complaint letter explicitly requested changes to the District's existing policy on transfers, the Board received legal counsel from its General Counsel, Ms. Susan Williams, in executive session concerning potential legal issues implicated by the request. Specifically, the Board sought legal advice from Ms. Williams on the following matters:

- The Board received legal advice concerning the legality of a District employee requesting that ESOL students waive their rights to ESOL services in order to remain at A.C. Moore Elementary School, and how these actions relate legally to the complaint letter and the transfer policy.
- The Board received legal advice regarding the ways in which a response to the complaint letter would implicate student privacy, including how the requirements of state and federal statutory protections would impact the response.

[1] The court's assertion that "none of the statutes which could potentially be impacted by a change in the transfer policy were cited in the response letter which undermines the presented argument of the [Appellants]" is, respectfully, not materially probative. FOIA does not require that a governmental body subsequently disclose the legal advice it received in any subsequent communications. It seems, therefore, of little probative value that the District did not disclose the legal advice it received to the letter's author (who is not the Respondent).

(Rec. on App., p 31). None of this is "extraordinary" or "manufactured." It is ordinary legal advice, sought in the manner permitted by FOIA, and for reasons reflecting common concerns of many public bodies.

Furthermore, the Respondent's attempt to distinguish *Herald Pub. Co. v. Barnwell*, 291 S.C. 4, 10, 351 S.E.2d 878, 882 (S.C. App. 1986), is unavailing. The Respondent inaccurately argues that the holding in *Barnwell* is distinguishable because the ruling noted that "litigation was a very real possibility." *Id.* However, nothing in the ruling detracts or compromises the material holding of *Barnwell*, which is that "[t]he exemption does not require that a public body actually be engaged in litigation, only that legal advice be rendered." *Id.* (emphasis added). The law of our state simply does not require that litigation be threatened, a "real" possibility, or mentioned in correspondence to permit the public body to seek legal counsel on pending matters in executive session.

For this reason alone, the judgment of the trial court should be reversed.

II. THE COURT ERRED IN CONCLUDING THAT APPELLANTS TOOK ACTION IN EXECUTIVE SESSION BECAUSE THERE IS NO EVIDENCE IN THE RECORD TO SUPPORT THIS CONCLUSION.

The Respondent again relies on circumstantial evidence to argue that the Appellants took "action" during executive session. However, the evidence that the Respondent cites – open discussion by board members on the record and following executive session – reflects the opposite. The record reflects that the Board engaged in a discussion during open session in a manner that supports the conclusion that it did not take any action, formal or otherwise, during executive session, other than voting to come out of executive session.

Nothing in the underlying Order, or the record before this Court, detracts from the showing in the minutes of the Board meeting that (1) the letter was discussed in executive session, and (2)

there was no action taken on the letter in executive session. As to the discussion and action taken in open session, Mr. Devine and Ms. King may have disagreed over whether the Board must formally vote on how to respond to the complaint letter, but the Board Chairman's decision to dispose of the matter by responding with a letter under his signature without any vote on the matter by the full Board is simply not a matter subject to review under FOIA.[2]

For this reason alone, the judgment of the trial court should be reversed.

III. THE COURT'S DECISION TO AWARD EQUITABLE RELIEF SHOULD BE REVERSED BECAUSE IT IS EFFECTIVELY A "WRIT OF MANDAMUS."

In its decision, the Court ordered equitable relief based on its finding that the Appellants violated FOIA. Specifically, the Court ordered the Appellants to "consider the Letter complaint at their next regular meeting or special meeting and dispose of the matter according to their best judgment, in a public setting." Because the underlying finding that the Appellants violated FOIA should be reversed, the equitable relief ordered by the Court is inappropriate.[3]

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[2] In her appellate brief, the Respondent raises – for the first time – the argument that the Board did not properly vote to enter executive session. *Pye v. Estate of Fox*, 369 S.C. 555, 564-65, 633 S.E.2d 505, 510 (2006) ("It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved."). For this reason, it should be rejected by this Court.

[3] The Respondent suggests that the Court should ignore the Appellants' argument that the equitable relief ordered by the trial court should be ignored because the issue was not addressed at the hearing. With respect, the law of our state holds that a party may not raise an issue for the first time in a motion to reconsider, alter, or amend a judgment that could have been presented prior to judgment. *Kan Enterprises, Inc. v. S.C. Dep't of Revenue*, 420 S.C. 596, 608, 803 S.E.2d 882, 888 (S.C. App. 2017). Because the equitable remedies were only issued by the trial court after the required "initial" hearing under S.C. Code Ann. § 30-4-100(A) on September 13, 2019, this issue could only be addressed after the hearing and the issuance of the trial court's Order.

The Respondent argues that, should the trial court's Order be regarded as a Writ of Mandamus, it is an appropriate one. However, the Respondent fails to address the major points in the Appellants' argument:

- Trial courts may issue writs of mandamus to legislative bodies[4] only "in those extremely limited circumstances in which there is a clear constitutional or statutory mandate that the legislative body take some specified action." *See, e.g., McMehan v. York County Council*, 281 S.C. 249, 315 S.E.2d 127 (1984); *Buchanan v. State Treasurer*, 68 S.C. 411, 47 S.E. 683 (1903); *Culbertson v. Blatt*, 194 S.C. 105 S.E.2d 218 (1940); *Attorney General Op.*, 1988 WL 485355, at *4 (S.C.A.G. Dec. 30, 1988). A School Board sits in a legislative capacity with respect to the making and changing of Board Policy. *See Cole v. Buchanan Cty. Sch. Bd.*, 504 F. Supp. 2d 81, 84 (W.D. Va. 2007), *rev'd on other grounds*, 328 F. App'x 204 (4th Cir. 2009).

- The issue before the Board concerned policy questions over which the Board was permitted to address "according to its best judgment." The judicial branch should not disturb these types of decisions unless there is clear evidence of corruption, bad faith, or a clear abuse of power. *Davis v. Greenwood Sch. Dist. 50*, 365 S.C. 629, 635, 620 S.E.2d 65, 68 (2005). Review of school board decisions by the Court is limited to allow the Board the discretion necessary to carry out the duties imposed upon them. *Id.*

For these reasons alone, the trial court should not have issued a Writ of Mandamus, and this portion of the trial court's Order should be reversed.

IV. IN THE ALTERNATIVE, TO THE EXTENT THE COURT MADE FACTUAL DETERMINATIONS, THE CASE SHOULD BE REMANDED AS THE ACTION IS AT "LAW," AND FACTUAL DISPUTES SHOULD BE DETERMINED BY A JURY.

[4] A School Board sits in a legislative capacity with respect to the making and changing of Board Policy. *Cole v. Buchanan Cty. Sch. Bd.*, 504 F. Supp. 2d 81, 84 (W.D. Va. 2007), *rev'd on other grounds*, 328 F. App'x 204 (4th Cir. 2009).

In her brief, the Respondent appears to acknowledge that a declaratory judgment action under the FOIA to determine whether certain information should be disclosed is an action at law. *Campbell v. Marion Cty. Hosp. Dist.*, 354 S.C. 274, 280, 580 S.E.2d 163, 165 (S.C. App. 2003). If so, because the trial court's Order resolved genuine issues of material fact in favor of the Respondent, the Appellants are entitled to a jury trial to resolve disputed material facts, and under S.C. Code Ann. § 30-4-100, the matter must be remanded to the trial court for issuance of a scheduling order.

CONCLUSION

For the forgoing reasons, this Court should reverse the lower court's decision, or in the alternative, remand the case for further proceedings consistent with this Court's directives.

Respectfully Submitted,

Eugene Matthews, Esq. (SC Bar #10193)
RICHARDSON PLOWDEN & ROBINSON, P.A.
Post Office Box Drawer 7788
Columbia, South Carolina 29202
(803) 771-4400
gmatthews@richardsonplowden.com

Kenneth A. Davis, Esq. (SC Bar #66416)
Charles J. Boykin, Esq. (SC Bar #65149)
BOYKIN & DAVIS, LLC
220 Stoneridge Drive, Suite 100
Columbia, South Carolina 29210
(803) 254-0707
cjboykin@boykinlawsc.com
kdavis@boykinlawsc.com

Attorneys for Appellants

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Columbia, South Carolina

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief and Final Reply Brief comply with Rule 211(b), SCACR.

Dated this 5th day of February, 2020.

RICHARDSON PLOWDEN & ROBINSON, P.A.

Eugene H. Matthews
Post Office Drawer 7788
Columbia, South Carolina 29202
T: (803) 771-4400
F: (803) 779-0016
Email: gmatthews@RichardsonPlowden.com

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