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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Hon. DeAndrea Gist Benjamin, Circuit Court Judge

C.A. No.: 2017-CP-40-06976
Appellate Case No. 2019-001231

Jefferson Davis, Jr.Appellant,

v.

South Carolina Educational Credit for Exceptional Needs Children Fund,Respondent.

INITIAL REPLY BRIEF OF APPELLANT

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Appellant

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ARGUMENT

DOMAINSNEWMEDIA.COM GONE AWRY. This matter is frankly quite simple – in fact, it is elementary in its most basic respects– however it is far reaching in its potential result as a fallout of the *DomainsNewMedia.com, LLC, v. Hilton Head Island-Bluffton Chamber of Commerce*, 423 S.C. 295, 814 S.E.2D 513 (2018) case.

The *DomainsNewMedia.com* ruling reached the proper result. We all agree that “NO”, the operations of a local and independently run Chamber of Commerce should not be subject to the provisions of the S.C. Freedom of Information Act (hereinafter “**FOIA**”). However, the technical caselaw fallout of the *DomainsNewMedia.com* opinion is the unintended outcome we have today in this matter.

Today we have an outcome whereby Respondent (hereinafter the “**ECENC Fund**”) ... a legislatively created, single purpose, public non-profit, that is administered pursuant to statute by the South Carolina Department of Revenue (hereinafter the "SCDOR"), by SCDOR employees, at S.C. taxpayer expense, and governed pursuant to statute by a five person legislatively appointed board ... pursuant to the *DomainsNewMedia.com* ruling, is found to not be a "public body" for purposes of FOIA. Why? Simply because the legislature also asked the SCDOR for the most basic of a “report” about the organization ... not even a report from the ECENC Fund itself. It is an unintended result which Respondents cannot justify within the broader intent of FOIA.

Legislatively and based on the original legislative intent, for purposes of good and transparent government, for the purpose of public trust in our government, really for any purpose whatsoever, the outcome in this matter as it relates to the government administered body entitled

the ECENC Fund, is an overbroad outcome of the DomainsNewMedia.com ruling. If allowed to stand as is, FOIA as we have always known it, is meaningless.

We have a long and well documented history as it relates to the legislative intent of FOIA. The S.C. Code Ann. § 30-4-15, “Findings and purpose”, perhaps says it best:

“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.” (Emphasis added.)

Was it the intent of the S.C. Supreme Court to completely gut the bedrock of FOIA by its ruling in DomainsNewMedia.com? Gut something that our General Assembly said is “vital in a democratic society”? Is the General Assembly’s legislative intent completely overwritten because of the ruling in DomainsNewMedia.com? **Absolutely not and why the trial court must be reversed in this case.**

The DomainsNewMedia.com ruling was intended to reach a proper result, the result that an independent Chamber of Commerce was not subject to FOIA. Our Supreme Court reached this proper result by finding that an independent Chamber of Commerce was required to submit a “report” ... so the independent organization was therefore exempt from FOIA.

To now say that because a “report” SCDOR is required to make on an annual basis exempts a government administered entity completely from FOIA, is overbroad and frankly absurd in its result. FOIA has far reaching policy goals of government “oversight”. The required SCDOR report falls far short of meeting the “oversight” policy goals of FOIA. To apply DomainsNewMedia.com in this case, to a government administered entity, is exactly what Justice Few predicted when he wrote a scathing dissent in DomainsNewMedia.com.

PUBLIC FUNDS OR NOT – IT IS IRRELEVANT. Respondent also wants to rely upon its belief that the scholarship funds distributed are not public funds. That finding is not necessary as it is irrelevant. It is a fact that the ECENC Fund is a “public body” because it meets the clear FOIA definition of “supported in whole or in part by public funds” given its substantial government ties, the least of which is that Respondent is by statute administer by **SCDOR**, by SCDOR employees, at S.C. taxpayer expense. This cannot be denied by Respondent as it is a statutory requirement.

WHERE IS THE PROMISED TRANSPARENCY? The irony of this entire matter is the then current SCDOR Director who formed the ECENC Fund (while on government time and the government dime), as well as the legislatively appoint Board Chairman, both publicly promised “transparency” in a July 29, 2016 Op. Ed. in the Charleston Post & Courier. The leaders of the ECENC Fund itself stated the legislative intent for transparency:

“In its revised form, the ECENC, through Exceptional SC, will provide that support in an effective, ***transparent*** and fair manner, leaving independent schools free to focus their efforts on specialized instruction and services. To do so, best serves our most vulnerable children and their families.” (Emphasis added.)

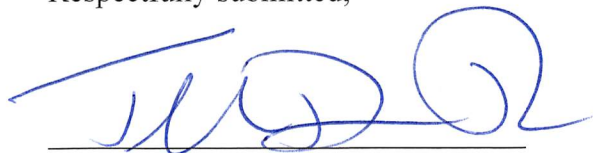
Our government leaders, including Respondent ECENC Fund’s government leadership, promised transparency for this organization. Now Appellants most basis of FOIA requests are being denied simply because the program has completely collapsed from mismanagement and the disclosure of the requested information would be embarrassing to these government officials and government appointees. That “oversight” is the purpose of FOIA and cannot be overwritten or erased by the *DomainsNewMedia.com* ruling.

ALTERNATIVELY, REMAND FOR LEGISLATIVE INTENT. Should the Court of Appeals not elect to REVERSE the trial court outright, at a minimum the dismissal of this case at the Summary Judgement level was premature given the inability to demonstrate the actual legislative intent through proper DISCOVERY, including but not limited to the reporting requirements and whether such was intended to exempt organizations such as Respondent ECENC Fund from FOIA.

CONCLUSION

For the foregoing reasons, as well as those in Appellants other filings, Respondent ECENC Fund is a “public body” and subject to the Freedom of Information Act. As such the trial court should be REVERSED. Alternatively, the matter should be remanded with further instructions to determine the actual legislative intent of Respondent governing statute.

Respectfully submitted,



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Date: August 3, 2020

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PROOF OF SERVICE

I, the undersigned Appellant does hereby certify that I have caused to be mailed and/or otherwise transmitted a copy of the below listed document(s) to the party shown below, postage prepaid, on the **3rd day of August, 2020**, as follows:

PLEADINGS: **INITIAL REPLY BRIEF OF APPELLANT**

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