

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
DeAndrea G. Benjamin, Circuit Court Judge

Appellate Case No. 2019-001231
Civil Action No. 2017-CP-40-06976

RECEIVED
Sep 09 2020
SC Court of Appeals

Jefferson Davis, Jr. Appellant,

v.

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

FINAL BRIEF OF RESPONDENT
SOUTH CAROLINA EDUCATIONAL CREDIT FOR EXCEPTIONAL NEEDS CHILDREN FUND

Geoffrey K. Chambers, Esquire
CPerl Group
411 Walnut Street
Number 10646
Green Cove Springs, FL 32043
Phone: 864-508-0899
Geoffrey@CPerlgroup.com

*Attorney for Respondent South Carolina
Educational Credit for Exceptional Needs
Children Fund*

April 20, 2020

TABLE OF CONTENTS

Table of Authorities	ii
Counter-Statement of the Issues on Appeal	1
Statement of the Case	2
Standards of Review	4
Argument	5
I. The trial court properly dismissed Appellant’s claims against South Carolina Educational Credit for Exceptional Needs Children Fund because Respondent is not a Public Body pursuant to the South Carolina Freedom of Information Act.	5
II. Dismissal of Appellant’s claims against South Carolina Educational Credit for Exceptional Needs Children Fund without receipt of discovery is supported because the Appellant is not entitled to discovery where the subject of discovery is the subject of the FOIA action itself.	11
III. Dismissal of Appellant’s claims against South Carolina Educational Credit for Exceptional Needs Children Fund is proper because of specific statutory reporting requirements requiring a CPA to audit Respondent and Respondent’s activities, requiring the Department of Revenue to issue an extensive report, and requiring the Education Oversight Committee to report on the efficacy of Respondent’s program.	13
IV. Dismissal of Appellant’s claims against South Carolina Educational Credit for Exceptional Needs Children Fund is proper because of specific statutory reporting requirements are not required or expected to be as extensive as FOIA.	14
V. Dismissal of Appellant’s claims against South Carolina Educational Credit for Exceptional Needs Children Fund is proper pursuant to §12-6-3790 excluding Respondent from FOIA.	18
Conclusion	22

Table of Authorities

Cases

Capco of Summerville v. J.H. Gayle Const., 628 S.E.2d 38, 368 S.C. 137 (S.C. 2006).....	5
City of Columbia v. American Civil Liberties Union of South Carolina, Inc., 475 S.E.2d 747, 323 S.C. 384 (S.C. 1995).....	10
Disabato, v. S.C. Ass'n of Sch. Adm'rs, 404 S.C. 433, 442, 746 S.E.2d 329, 333 (2013).	5
DomainsNewMedia.com, LLC v. Hilton Head Island-Bluffton Chamber Commerce, 423 SC 295, 814 S.E.2d 513 (S.C. 2018)	5, 7, 8, 12
Gilstrap v. South Carolina Budget and Control Board, --- S.C. ----, 423 S.E.2d 101 (1992)	5, 15
Giza v. Secretary of Health, Education, and Welfare, 628 F.2d 748 (1st Cir.1980)	10
State v. Allen, --- S.C. ----, 431 S.E.2d 563 (1993)	6, 15
Stone v. State (City of Orangeburg), 443 S.E.2d 544, 313 S.C. 533 (S.C. 1994)	6, 15
Weston v. Carolina Research & Dev. Found. , 303 S.C. 398, 401 S.E.2d 161 (1991).....	7, 15
Wilder v. South Carolina Hwy. Dep't, 228 S.C. 448, 90 S.E.2d 635 (1955).....	5

Statutes

§ 6-4-25(D)	7, 12
§ 6-4-35;.....	7
§12-6-3790.....	8, 9, 12
2016 Budget Proviso 109.15 (Effective 7/1/2016)	13
2017 Budget Proviso 109.15.....	14
S.C. Code Ann. § 30-4- 20(a)	5, 15, 16
S.C. Code Ann. § 6-4-10(3).....	12
South Carolina Code Annotated 1976 §12-6-3790(B)(1).....	7
South Carolina Code Annotated 1976 §12-6-3790(B)(2).....	7, 16
South Carolina Code Annotated 1976 §12-6-3790(B)(4).....	7, 9, 10
South Carolina Code Annotated 1976 §12-6-3790(B)(5).....	6
South Carolina Code Annotated 1976 §12-6-3790(E)(3).....	6
South Carolina Code Annotated 1976 §12-6-3790(E)(6).....	6
South Carolina Code Annotated 1976. § 6-4-25(A).....	7, 12

Rules

Rule 220(a), SCACR 14
Rule 268(d)(2), SCACR..... 14

Counter-Statement of the Issues on Appeal

1. Whether the trial court correctly found Respondent to be a 501(c)3 corporation that is not a public body and correctly dismissed Appellant's claims against South Carolina Educational Credit for Exceptional Needs Children Fund where Appellant sent a Freedom of Information Act (hereinafter "FOIA") Request to an entity that is not a Public Body for the purposes of FOIA.
2. Whether dismissal of Appellant's claims against South Carolina Educational Credit for Exceptional Needs Children Fund is proper without discovery in the context of a declaratory judgment action under the FOIA statute, where discovery requests were the subject matter of the action.
3. Whether the trial court correctly dismissed Appellant's claims against South Carolina Educational Credit for Exceptional Needs Children Fund where legislative reporting statutes asked for reports on Appellant's activities from SCDOR, SCEOC, and an audit by a licensed CPA.
4. Whether the trial court correctly dismissed Appellant's claims because specific statutory requirements for reporting are not required to be as far reaching as FOIA.
5. Whether the trial court correctly dismissed Appellant's claims where a legislative clarification of law renders Appellant's claims and this appeal moot.
6. Whether the trial court correctly dismissed Appellant's claims where *South Carolina Code Annotated 1976* §12-6-3790(B)(4) exempts from FOIA "information contained in or produced from a tax return, document, or magnetically or electronically stored data utilized by the Department of Revenue or the public charity in the exercise of its duties as provided in this section..."

Statement of the Case

Respondent South Carolina Educational Credit for Exceptional Needs Children Fund (“ECENCF”) is a domestic nonprofit entity created by legislative budget proviso and incorporated in South Carolina on Jun 16, 2016 as a 501(c)(3) charity. The legislature passed a permanent law to replace the budget proviso which was signed by the Governor on May 18, 2018. The permanent law was modeled after earlier budget provisos and contains some clarifications in the statutory language. Respondent ECENCF manages a scholarship fund made up of private charitable donations and uses moneys in this fund to award scholarships to special needs students who may be better assisted by the services of private institutions.

Pursuant to statutory definition, the scholarship fund managed by Respondent ECENCF may not receive appropriations of public funds, does not contain public funds, and is not the property of the State. *South Carolina Code Annotated 1976* §12-6-3790(B)(4) provides both the Department of Revenue and the charity (Respondent ECENCF) the authority to manage the scholarship fund. Neither the Department of Revenue nor Respondent ECENCF are permitted to expend public funds for the management of the scholarship fund.

On July 31, 2017, Appellant filed a Summons and Complaint for FOIA Enforcement in the Court of Common Pleas for the County of Greenville, Civil Action No. 2017-CP-23-04748, (“FOIA Action”) through which Appellant sought certain remedies and damages for ECENCF’s failure to respond to Appellant’s requests for documents and information pursuant to the South Carolina Freedom of Information Act (“FOIA”). After venue for the action was transferred to the Court of Common Pleas for Richland County, Appellant filed a Motion for Summary Judgment which was heard and denied by order dated May 16th, 2018. Respondent ECENCF filed motions judgment on the pleadings and summary judgment on August 17, 2018. Appellant filed a renewed

motion for summary judgment on September 10, 2018. These motions were heard on October 9th 2018 and taken under advisement. On December 21, 2018, the Honorable DeAndrea Benjamin dismissed the action by granting ECENCF's motions for judgment on the pleadings and for summary judgment. The trial court determined that FOIA does not apply to ECENCF because ECENCF is not a public body as defined by FOIA, the specific reporting requirements of *South Carolina Code Annotated 1976* §12-6-3790(B)(5), §12-6-3790(E)(3), and §12-6-3790(E)(6) are what the legislature intended as reporting requirements in lieu of FOIA, and legislative clarification to law codified in *South Carolina Code Annotated 1976* §12-6-3790(B)(4) exempts the information sought by Appellant from disclosure under the FOIA. .

On January 7, 2019, Appellant filed a motion for reconsideration of the order dismissing the action. After the Honorable DeAndrea Benjamin denied Appellant's Motion for Reconsideration, this appeal followed.

Standards of Review

The trial court granted summary judgment and dismissed Appellant's claims against ECENCF pursuant to Judge Benjamin's December 21, 2018 decision.

The grant or denial of summary judgment is reviewed *de novo*. *B&G Enters., Ltd. v. United States*, 220 F.3d 1318, 1322 (11th Cir. 2000); *Thornton v. E.I. Du Pont de Numours & Co.*, 22 F.3d 284, 288 (11th Cir. 1994). Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), *SCRCP*; *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999); *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999); *Young v. South Carolina Dep't of Corrections*, 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999); see also *Wells v. City of Lynchburg*, 331 S.C. 296, 501 S.E.2d 746 (Ct. App. 1998) (a trial court should grant motion for summary judgment when pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact and moving party is entitled to judgment as matter of law). In determining whether any triable issue of fact exists so as to preclude summary judgment, the evidence and all inferences reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. *Strother v. Lexington County Recreation Comm'n*, 332 S.C. 54, 504 S.E.2d 117 (1998); *Pye v. Aycock*, 325 S.C. 426, 480 S.E.2d 455 (Ct. App. 1997). If triable issues exist, those issues must go to the jury for consideration. *Rothrock v. Copeland*, 305 S.C. 402, 409 S.E.2d 366 (1991); *Joubert v. South Carolina Dep't of Soc. Servs.*, 341 S.C. 176, 534 S.E.2d 1 (Ct. App. 2000).

Argument

I. The trial court properly dismissed Appellant's claims against South Carolina Educational Credit for Exceptional Needs Children Fund because Respondent is not a Public Body pursuant to the South Carolina Freedom of Information Act.

Specific reporting requirements enacted by the Legislature render Respondent not a Public Body and Respondent is not engaging in activities that would make it a public body.

"FOIA subjects a 'public body' to record disclosure." *Disabato, v. S.C. Ass'n of Sch. Adm'rs*, 404 S.C. 433, 442, 746 S.E.2d 329, 333 (2013). "Among those entities defined as a public body subject to the statute are 'any organization, corporation, or agency supported in whole or in part by public funds or expending public funds . . .'" *Id.* at 442, 746 S.E.2d at 333 (quoting *S.C. Code Ann.* § 30-4- 20(a)).

FOIA is a general statute. *DomainsNewMedia.com, LLC v. Hilton Head Island-Bluffton Chamber Commerce*, 423 SC 295, 814 S.E.2d 513 (S.C. 2018). Where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect. *Capco of Summerville v. J.H. Gayle Const.*, 628 S.E.2d 38, 368 S.C. 137 (S.C. 2006) (quoting *Wilder v. South Carolina Hwy. Dep't*, 228 S.C. 448, 90 S.E.2d 635 (1955).) See also *DomainsNewMedia.com, LLC v. Hilton Head Island-Bluffton Chamber Commerce*, 423 SC 295 at 299 (a local government must fulfill specific reporting requirements on the Chamber of Commerce's spending of accommodations tax dollars, thus fulfilling a specific reporting requirement and creating an exception to FOIA.) The primary rule of statutory construction is to ascertain and effectuate the intent of the Legislature. *Gilstrap v. South Carolina Budget and Control Board*, --- S.C. ----, 423 S.E.2d 101 (1992). This Court must

avoid construing a statute so as to lead to an absurd result. *State v. Allen*, --- S.C. ----, 431 S.E.2d 563 (1993). *Stone v. State (City of Orangeburg)*, 443 S.E.2d 544, 313 S.C. 533 (S.C. 1994).

South Carolina Code Annotated 1976 §12-6-3790(B)(5) requires an annual report from Respondent ECENCF with the following items:

- (a) the number and total amount of grants issued to eligible schools in each year;
- (b) the identity of the school and the amount of the grant for each grant issued to an eligible school in each year;
- (c) an itemized and detailed explanation of fees or other revenues obtained from or on behalf of an eligible school;
- (d) a copy of a compilation, review, or audit of the fund's financial statements, conducted by a certified public accounting firm; and
- (e) the criteria and eligibility requirements for scholarship awards.

South Carolina Code Annotated 1976 §12-6-3790(E)(3) requires a web posting by ECENCF with the following items:

- (a) A list of eligible schools participating in the scholarship program.
- (b) Test scores for each school participating in the program.

South Carolina Code Annotated 1976 §12-6-3790(E)(6) requires the Education Oversight Committee issue a report to the General Assembly documenting the impact of the Educational Credit for Exceptional Needs Children Program on student achievement.

Similarly, the accommodations tax statute provides three layers of oversight:

“—a local advisory committee, a statewide oversight committee, and an expenditure review committee. First, it requires a local government receiving over \$50,000 in revenue from A-Tax funds to appoint an advisory committee "to make recommendations on the expenditure of revenue generated from the accommodations tax." *South Carolina Code Annotated 1976* § 6-4-25(A).6 Second, the local government must submit certain information to the South Carolina

Accommodations Tax Oversight Committee, to include a "list of how funds from the accommodations tax are spent," which is due "before October first and must include funds received and dispersed during the previous fiscal year." *Id.* § 6-4-25(D). Finally, these reports are provided to the Tourism Expenditure Review Committee (TERC) for review to ensure that the local government complies with the basic requirements for expenditures set forth in the statute. *Id.* § 6-4-35; *Id.* § 6-4-25(D)."

DomainsNewMedia.com, LLC v. Hilton Head Island-Bluffton Chamber Commerce, 814 S.E.2d 513, at 517 (S.C. 2018).

South Carolina Code Annotated 1976 §12-6-3790(B)(1) states that the scholarship fund must consist only of contributions and cannot receive appropriations of public funds.

The scholarship fund amounts on deposit do not constitute public funds and are not the property of the State. The State does not have a claim or interest in the amount on deposit. *South Carolina Code Annotated 1976* §12-6-3790(B)(2). The debts and obligations of the fund do not constitute debts or obligations of the State. *Id.*

The Department of Revenue and the Public Charity (Respondent ECENCF) cannot expend public funds to administer the scholarship program. *South Carolina Code Annotated 1976* §12-6-3790(B)(4).

The Affidavits of Thomas Persons, Sr. that were presented to the trial court provide a summary of the background of Respondent, the legislative history of Respondent and the practices of Respondent. In summary, Respondent is a charity set up by Legislative act in such a way that its operations and corporate format would not make it a Public Body. *See* Affidavit of Thomas Persons, (R. 339-341) The trial court was provided the statutory scheme of Respondent's creation with an explanation of why Respondent is not a Public Body by definition. *See* Respondent's Memo in Support of Judgment on the Pleadings filed September 29, 2018 (R. 151-153). *See also*

Trascript of October 3, 2018 hearing on Motion for Judgment on the Pleadings and Motion for Summary Judgment, R. 248-252)

Appellant argues that the Public Charity (Respondent ECENCF) administering the fund was created by legislative act, its board members were appointed by the legislature, and the Department of Revenue filed paperwork to incorporate the Respondent charity. Thus, the Respondent is a public body subject to FOIA. Respondent cites a litany of FOIA cases that do not apply to the statutory reporting requirements at hand and numerous Attorney General Opinions to support his position.

Appellant also alleges that the Department of Revenue has spent public funds and continues to spend public funds in support of the Respondent Charity. Respondent compares the expenditure of public funds to the holding in *Weston v. Carolina Research & Dev. Found.*, 303 S.C. 398, 401 S.E.2d 161 (1991). The public charity in *Weston* was not governed by a specific reporting statute and such a charity would be subject to FOIA if supported in whole or in part by public funds. Especially so with the massive amount of public funding supplied to the charity in *Weston*. *Id.* However, *Weston* illustrates that there are exceptions to FOIA for a public charity that is part of a program with a specific legislatively determined reporting requirement and supports a finding that specific reporting requirements override the more general FOIA reporting requirements. *DomainsNewMedia.com, LLC v. Hilton Head Island-Bluffton Chamber Commerce*, 814 S.E.2d 513 at 518 and 519 (S.C. 2018).

Appellant further argues the reporting requirements of §12-6-3790 do not come from Respondent, but rather State Agencies. If Respondent is operating the scholarship program, the audit of the scholarship program would necessarily cover the financials of Respondent. Likewise, the information and data on scholarships granted by respondent would also have to be provided by

the Respondent who selected and funded the grants. As illustrated in *DomainsNewMedia.com*, apart from a spending budget and audit submitted by the Chamber of Commerce, the reporting requirements cited by the Supreme Court were the responsibility of the city / county / local government body allowing a private entity to manage Accommodations Tax expenditures. *DomainsNewMedia.com, LLC v. Hilton Head Island-Bluffton Chamber Commerce*, 814 S.E.2d 513, at 517 (S.C. 2018).

Appellant's argument is inconsistent with South Carolina law. Specifically, there are extensive reporting requirements on this program, including a CPA audit of the Respondent and the fund. The choices, actions, and performance of the Respondent are evaluated and reported in both a Department of Revenue Report and an Educational Oversight Committee report. The reporting requirements of Respondent are clearly outlined in the law. Furthermore, the performance of schools receiving scholarship money from Respondent are evaluated by the EOC to determine effectiveness of the program.

These reports are sent to the Legislature and published on government agency websites. These materials have been disclosed to Appellant in past Freedom of Information Act Requests to the Department of Revenue and the Governor's Office.

As in the holding of *DomainsNewMedia.com*, these specific reporting requirements are the way the legislature intended information from this program to be evaluated and tracked. The specific reporting requirements replace the more general reporting requirements under FOIA pursuant to the *DomainsNewMedia.com* holding on specific reporting requirements.

The only significant difference between Respondent's position and the holding in *DomainsNewMedia.com* is Respondent does not have access to public funds and is not spending

public funds pursuant to §12-6-3790. This fact would further distance Respondent from being a Public Body pursuant to FOIA.

Finally, if there is any doubt in the legislature's intent of FOIA applying to Respondent or to the operation of this program, there was a legislative clarification resulting from the legislature's awareness of this litigation. The legislative intent of §12-6-3790(B)(4) is abundantly clear in stating that FOIA does not apply to information used by Respondent in its duties under the Act.

Because of the presence of the above specific statutory reporting requirements, the more general requirements of FOIA do not apply. Allegations of legislative control, a joint venture with the Department of Revenue, expenditures of public funds and provision of supporting resources by the Department of Revenue are not relevant under the Legislature's specific reporting requirements as held in *DomainsNewMedia.com*. Lastly the legislative intent that this program be subject to the statutory reporting requirements and not FOIA was made crystal clear by the legislative clarification in the governing statutes that specifically exempts information from FOIA.

The trial court correctly dismissed Appellant's causes of action.

II. Dismissal of Appellant's claims against South Carolina Educational Credit for Exceptional Needs Children Fund without receipt of discovery is supported because the Appellant is not entitled to discovery where the subject of discovery is the subject of the FOIA action itself.

As the subject of the FOIA request and FOIA suit, information sought through discovery is not discoverable. *Giza v. Secretary of Health, Education, and Welfare*, 628 F.2d 748 (1st Cir.1980). *City of Columbia v. American Civil Liberties Union of South Carolina, Inc.*, 475 S.E.2d 747, 323 S.C. 384 (S.C. 1995).

In concert with the public charity directors, the Department of Revenue shall administer the public charity including, but not limited to, the keeping of records, the management of accounts, and disbursement of the grants awarded pursuant to this section. *South Carolina Code Annotated 1976* §12-6-3790(B)(4).

Appellant sought financial information which was the subject matter of his FOIA request leading to this litigation through discovery from Respondent. As such, this information is not discoverable.

The reporting requirements of §12-6-3790 outlined in the previous section make financial information irrelevant to disposition of this case pursuant to *DomainsNewMedia.com*. The Respondent is not a Public Body pursuant to FOIA.

Furthermore, financial information is not relevant for a 501(c)(3) entity that does not expend public funds or have access to public funds. The Department of Revenue can operate the scholarship program pursuant to §12-6-3790(B)(4). The alleged support by the Department of Revenue is within the Department of Revenue's statutory authority to operate the scholarship program. Operation of the scholarship program was clearly contemplated by the Legislature, who also stated that public funds could not be utilized in operation of the scholarship program. And specifically clarified that such operation was not subject to FOIA. The Department of Revenue is

not a party to this case and the Department of Revenue's compliance or non-compliance with the law is not within the control or choice of the Respondent.

There are no allegations made that Respondent itself has engaged in activity that would jeopardize its compliance with the law as the Legislature intended. Respondent does not have access to state resources, is not part of the State, is not property of the State, and cannot receive State appropriations.

III. Dismissal of Appellant’s claims against South Carolina Educational Credit for Exceptional Needs Children Fund is proper because of specific statutory reporting requirements requiring a CPA to audit Respondent and Respondent’s activities, requiring the Department of Revenue to issue an extensive report, and requiring the Education Oversight Committee to report on the efficacy of Respondent’s program.

In the interest of brevity, Respondent defers to its argument in Section 1 that references Appellant’s allegations that reporting requirements do not exempt Respondent pursuant to *DomainsNewMedia.com*. In summary, the Respondent’s reporting requirements by a licensed CPA audit and government entity reports are similar to the CPA audit and local government reporting requirements listed in the accommodations tax statute and referenced by *DomainsNewMedia.com*. Nothing in *DomainsNewMedia.com* requires Respondent issue a report. It only requires a specific statutory reporting scheme on the program or activity. As such, Respondent is not required to issue the reports to categorize as a non-Public Body. It is sufficient to be the subject of such reports.

IV. Dismissal of Appellant's claims against South Carolina Educational Credit for Exceptional Needs Children Fund is proper because of specific statutory reporting requirements are not required or expected to be as extensive as FOIA.

Specific statutory reporting requirements are usually not as far reaching as FOIA and do not need to be far reaching to make an entity not a public body for FOIA purposes. *DomainsNewMedia.com, LLC v. Hilton Head Island-Bluffton Chamber Commerce*, 814 S.E.2d 513, at 517 (S.C. 2018).

At the end of each fiscal year, an organization receiving funds under the accommodations tax statute shall render an accounting of the expenditure to the municipality or county which distributed them. S.C. Code Ann. § 6-4-10(3). The accommodations tax statute requires a local government receiving over \$50,000 in revenue from A-Tax funds to appoint an advisory committee "to make recommendations on the expenditure of revenue generated from the accommodations tax." *Id.* § 6-4-25(A).6. The local government must submit certain information to the South Carolina Accommodations Tax Oversight Committee, to include a "list of how funds from the accommodations tax are spent," which is due "before October first and must include funds received and dispersed during the previous fiscal year." *Id.* § 6-4-25(D). These reports are provided to the Tourism Expenditure Review Committee (TERC) for review to ensure that the local government complies with the basic requirements for expenditures set forth in the statute. *Id.* § 6-4-35; *Id.* § 6-4-25(D).

In the case of this appeal, the current law as codified in §12-6-3790 requires a reports from a licensed CPA, the Department of Revenue, and the Education Oversight Committee with the following items: (1) the number and total amount of grants issued to eligible schools in each year; (2) the identity of the school and the amount of the grant for each grant issued to an eligible school in each year; (3) an itemized and detailed explanation of fees or other revenues obtained from or

on behalf of an eligible school; (4) a copy of a compilation, review, or audit of the fund's financial statements, conducted by a certified public accounting firm; (5) the criteria and eligibility requirements for scholarship awards. The law also requires a web posting by EOC with a list of eligible schools participating in the scholarship program and test scores for each school participating in the program. The Education Oversight Committee issues a report to the General Assembly documenting the impact of the Educational Credit for Exceptional Needs Children Program on student achievement. §12-6-3790

2016 Budget Proviso 109.15 (Effective 7/1/2016) required a reports from a licensed CPA, the Department of Revenue and Education oversight committee with the following items: (1) the number and total amount of grants issued to eligible schools in each year; (2) the identity of the school and the amount of the grant for each grant issued to an eligible school in each year; (3) an itemized and detailed explanation of fees or other revenues obtained from or on behalf of an eligible school; (4) a copy of a compilation, review, or audit of the fund's financial statements, conducted by a certified public accounting firm; (5) the criteria and eligibility requirements for scholarship awards; and (6) requires a web posting by EOC with a list of eligible schools participating in the scholarship program and test scores for each school participating in the program. 2016 Budget Proviso 109.15

Budget Proviso 109.11 (Effective 7/1/2017) required a reports from a licensed CPA, the Department of Revenue and Education oversight committee with the following items: (1) the number and total amount of grants issued to eligible schools in each year; (2) the identity of the school and the amount of the grant for each grant issued to an eligible school in each year; (3) an itemized and detailed explanation of fees or other revenues obtained from or on behalf of an eligible school; (4) a copy of a compilation, review, or audit of the fund's financial statements,

conducted by a certified public accounting firm; (5) the criteria and eligibility requirements for scholarship awards; and (6) requires a web posting by EOC with a list of eligible schools participating in the scholarship program and test scores for each school participating in the program.2017 Budget Proviso 109.15

In the interest of brevity, Respondent targets their argument towards Appellant's argument that the reporting requirements of Proviso 109.11, Proviso 109.15, and §12-6-3790 are not sufficient to exclude Respondent from being a Public Body subject to FOIA.

The scope and depth of the reporting requirements in both Budget Provisos and §12-6-3790 are similar in nature to the reporting requirements of the accommodations tax reporting requirements contemplated in *DomainsNewMedia.com*. As such, they should qualify as a specific reporting statute making Respondent not a Public Body subject to FOIA.

Appellant argues that *DomainsNewMedia.com* was an anomaly and should not apply. Appellant's reasoning is the Supreme Court did not intend to set precedent, but rather intended the sole purpose of correcting an unfair outcome in a trial court.

Unpublished opinions have no precedential value. Rule 220(a), SCACR. "Memorandum opinions and unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved. Rule 268(d)(2), SCACR. The unpublished opinion is the common tool used by Appellate Courts when precedent is not intended. The Supreme Court chose to publish the opinion in *DomainsNewMedia.com*, thus setting precedent.

Because *DomainsNewMedia.com* sets precedent and the reporting requirements of the Accommodations Tax statute and §12-6-3790 are similar, Respondent is not a Public Body pursuant to FOIA. The trial court did not err in dismissing Appellant's claims.

V. Dismissal of Appellant's claims against South Carolina Educational Credit for Exceptional Needs Children Fund is proper pursuant to §12-6-3790 excluding Respondent from FOIA.

Respondent was created by the Legislature in such a way that it shows intent it not be a Public Body.

Public Bodies for purposes of application of the FOIA are defined in South Carolina Code § 30-4-20(a):

"Public body" means any department of the State, a majority of directors or their representatives of departments within the executive branch of state government as outlined in § 1-30-10, any state board, commission, agency, and authority, any public or governmental body or political subdivision of the State, including counties, municipalities, townships, school districts, and special purpose districts, or any organization, corporation, or agency supported in whole or in part by public funds or expending public funds, including committees, subcommittees, advisory committees, and the like of any such body by whatever name known, and includes any quasi-governmental body of the State and its political subdivisions, including, without limitation, bodies such as the South Carolina Public Service Authority and the South Carolina State Ports Authority. Committees of health care facilities, which are subject to this chapter, for medical staff disciplinary proceedings, quality assurance, peer review, including the medical staff credentialing process, specific medical case review, and self-evaluation, are not public bodies for the purpose of this chapter.
South Carolina Code Annotated 1976 § 30-4-20(a)

ECENCF is statutorily defined as a corporation that does not receive, have or spend public funds. This statutory definition of ECENCF has remained unchanged since the creation of the Public Charity by proviso 109.15 of the 2016-2017 Appropriations Act.

§ 12-6-3790(B)1 specifies that ECENCF is a Public Charity pursuant to IRC §509(a)1-4. All public charities are 501(C)3 corporations. This is defined by IRC §509.

An organization is a "public body" under the FOIA if it is supported in whole or in part by public funds and has expended public funds. *Weston v. Carolina Research and Development*

Foundation, 401 S.E.2d 161, 303 S.C. 398 (S.C. 1990) An organization related to a public body also becomes a public body if a block of public funds is diverted *en masse* from a public body to the related organization, or when the related organization undertakes the management of the expenditure of public funds. *Weston v. Carolina Research and Development Foundation*, 401 S.E.2d 161, 303 S.C. 398 (S.C. 1990).

Subdivisions of the State, Boards, Commissions, and quasi-governmental agencies are public bodies, as is any corporation or entity supported in whole or in part by public funds. *S.C. Code Ann.* § 30-4-20(a), See also *Weston v. Carolina Research and Development Foundation*, 401 S.E.2d 161, 303 S.C. 398 (S.C. 1990).

The primary rule of statutory construction is to ascertain and effectuate the intent of the Legislature. *Gilstrap v. South Carolina Budget and Control Board*, --- S.C. ----, 423 S.E.2d 101 (1992). This Court must avoid construing a statute so as to lead to an absurd result. *State v. Allen*, --- S.C. ----, 431 S.E.2d 563 (1993). *Stone v. State (City of Orangeburg)*, 443 S.E.2d 544, 313 S.C. 533 (S.C. 1994).

The scholarship fund must consist only of contributions and cannot receive appropriations of public funds. §12-6-3790(B)(1). See also 2017 Budget Proviso 109.11(B)(1), see also 2016 Budget Proviso 109.15(B)(1).

The scholarship fund amounts on deposit do not constitute public funds and are not the property of the State. The State does not have a claim or interest in the amount on deposit. *South Carolina Code Annotated 1976* §12-6-3790(B)(2). See also 2017 Budget Proviso 109.11(B)(2), see also 2016 Budget Proviso 109.15(B)(2). The debts and obligations of the fund do not constitute debts or obligations of the State. *Id.*

The Department of Revenue and the Public Charity (Respondent ECENCF) cannot expend public funds to administer the scholarship program. *South Carolina Code Annotated 1976* §12-6-3790(B)(4), See also 2017 Budget Proviso 109.11(B)(4), see also 2016 Budget Proviso 109.15(B)(4).

The scheme used by the legislature to set up Respondent Public Charity was clearly one intended to avoid becoming a Public Body according to the definition of a Public Body in S.C. Code Ann. § 30-4-20(a). Respondent was set up by the legislature in the Budget Provisos and §12-6-3790 as a 501(c)(3) corporation, independent of the State., The Public Charity cannot be supported by, spend, or manage any public funds.

It was presented to the trial court that the Legislature has never listed Respondent as a board or commission in any Legislative Manual where all boards and commissions of the State are listed. This includes the 2017 Legislative Manual presented to the trial court and all subsequent Legislative Manuals. *See 2017 Legislative Manual* pp 483-489, (R. 327-334) *See also* Transcript of Hearing October 3, 2018, (R. 272-274) By statutory definition, the money managed by Respondent are not public funds, not the property of the State, and the State has no claim to or interest in these funds. By statutory definition, a public body as an organization that is either a subdivision of the state or supported in whole or in part by public funds.

The legislature made its intent explicit when codifying the Provisos into §12-6-3790(B)(4) which reads:

In concert with the public charity directors, the department [of Revenue] shall administer the public charity including, but not limited to, the keeping of records, the management of accounts, and disbursement of the grants awarded pursuant to this section. The public charity may expend up to two percent of the fund for administration and related costs. The department and the public charity may not expend public funds to administer the program. **Information contained in or produced from a tax return, document, or magnetically or electronically stored data utilized by the Department of Revenue or the public charity in the exercise of its duties as provided in this section must remain**

confidential and is exempt from disclosure pursuant to the Freedom of Information Act. Personally identifiable information, as described in the Family Educational Rights and Privacy Act and individual health records, or the medical or wellness needs of children applying for or receiving grants must remain confidential and is not subject to disclosure pursuant to the Freedom of Information Act. [emphasis added]

The plain meaning of the statutory language is any information used by Respondent in carrying out its many duties prescribed by the entirety of §12-6-3790 is not subject to FOIA.

For the above listed reasons, the trial court correctly inferred from §12-6-3790 the legislature never intended Respondent to be a Public Body subject to FOIA and the language of §12-6-3790(B)(4) offers clarification to the legislature's intent. As such, Appellant never had a right to information from Respondent from FOIA. The trial court correctly dismissed Appellants causes of action because Respondent is not a Public Body and FOIA does not apply.

Conclusion

For the foregoing reasons, this Court should affirm the Trial Court's Order dismissing Appellant's claims against South Carolina ECENCF.

Respectfully submitted,



Geoffrey K. Chambers, Esquire
CPerl Group
411 Walnut Street
Number 10646
Green Cove Springs, FL 32043
Phone: 864-508-0899
Geoffrey@CPerlgroup.com

*Attorney for Defendant South Carolina
Educational Credit for Exceptional Needs
Children Fund*

September 8, 2020
Greenville, SC

Rule 211(b) Certification

The undersigned counsel for ECENCF hereby certifies that the Respondent's brief complies with the requirements of Rule 211(b), SCACR.



Geoffrey K. Chambers, Esquire
CPerl Group
411 Walnut Street
Number 10646
Green Cove Springs, FL 32043
Phone: 864-508-0899
Geoffrey@CPerlgroup.com

RECEIVED
Sep 09 2020
SC Court of Appeals

*Attorney for Defendant South Carolina
Educational Credit for Exceptional Needs
Children Fund*

September 8, 2020
Greenville, SC