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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Judge

Appellate Case No. 2020-000050

South Carolina Lottery Commission,.....Respondent,

v.

George S. Glassmeyer,.....Petitioner.

REPLY BRIEF OF PETITIONER

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STATEMENT OF ISSUES/QUESTIONS PRESENTED

- I. Did the Court of Appeals err in granting the Respondent's motion for judgment on the pleadings as to its claim for a declaratory judgment?**
- II. Did the Court of Appeals err in granting the Respondent's motion for judgment on the pleadings as to its claim for an injunction?**
- III. Did the Court of Appeals err in failing to reverse the denial of the Petitioner's motion to dismiss the Respondent's claim for a declaratory judgment?**
- IV. Did the Court of Appeals err in failing to reverse the denial of the Petitioner's motion to dismiss the Respondent's claim for an injunction?**
- V. Did the Court of Appeals err in failing to reverse and remand as to the Petitioner's claim seeking relief under FOIA?**

ARGUMENT

The Respondent (hereinafter “the Lottery Commission”) continues to employ in its brief the cheat-to-win strategy that has, thus far, worked for it. This Court is the last stop. Either this Court condemns the Lottery Commission’s misdeeds – and those of the circuit court and Court of Appeals in abetting them – or it condones them. But this court cannot condone them consistently with law.

Much of what the Lottery Commission argues is already addressed in Petitioner (hereinafter “Glassmeyer”)’s petitioner’s brief. Accordingly, Glassmeyer has attempted to limit the repetition of argument made in his petitioner’s brief. See I’On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 418 n. 6, 526 S.E.2d 716 (2000) (appellant may address additional sustaining ground arguments in reply brief).

The Lottery Commission’s arguments are nothing more than an effort to perpetuate the errors of the courts below, and an examination of applicable law pokes holes in them that cannot be stitched.

I. The Lottery Commission devotes much of its brief to straw man argument.

The Lottery Commission, likely aware of the untenable qualities of its position, attempts to set up a defense against arguments that Glassmeyer has not made. “A straw man argument is where the arguer wishes to respond to an argument of his or her choosing and not one that is actually presented.” State v. Smith, 298 P.3d 1138 (Kan. App. 2013). The Lottery Commission argues against the idea that Glassmeyer’s appeal is about whether the exhibits to the Lottery Commission’s complaint were properly before the court. The exhibits to the Lottery Commission’s complaint were indeed properly before the court – for what they are, part of the

allegations of the complaint. Rule 10(c), SCRPC. The websites and their content alleged by the Lottery Commission were properly before the court – for what they are, part of the allegations of the complaint. (Appx. pp. 196-323.) They were *not* properly before the court for what the court treated them as being – admitted, established, proven, and proven to have the effect and import the Lottery Commission contended they did. (Appx. pp. 196-323); see Sapp v. Ford Motor Co., 386 S.C. 143, 687 S.E.2d 47, 49 (2009); Russell v. City of Columbia, 305 S.C. 86, 406 S.E.2d 338 (1991); Falk v. Sadler, 341 S.C. 281, 533 S.E.2d 350 (Ct. App. 2000); Fireman’s Ins. Co. v. Cincinnati Ins. Co., 302 S.C. 234, 394 S.E.2d 855 (Ct. App. 1990).

Arguing down a straw man is not very hard. See Smith, 298 P.3d at 1138. In doing so, though, the Lottery Commission betrays the weakness of its position. See id. Were its position strong, it would feel no need to respond to different arguments than those made by Glassmeyer and would truly answer the arguments Glassmeyer makes. See id. That it chose a straw man approach is telling. See id.

II. Nothing allowed the lower court to consider unadmitted allegations of the Lottery Commission’s complaint as being proven.

The Lottery Commission makes an implicit contention – as it must, in order to maintain its position that judgment on the pleadings was proper – that the circuit court was permitted to adjudge unadmitted factual allegations of the Lottery Commission’s complaint to be true. That contention is wrong.

It is puzzling that the Lottery Commission cites Wooten v. Standard Life & Cas. Ins. Co., 239 S.C. 243, 122 S.E.2d 637 (1961), as though it supports the idea that the circuit court and Court of Appeals were correct in their decisions. That case does not provide support for the Lottery Commission’s position. In Wooten, this Court affirmed the denial of a motion for judgment on

the pleadings. Id. at 247, 250. This Court observed that a judgment on the pleading “is appropriate, where the pleading is fatally deficient in substance, that is where the complaint fails to state a good cause of action in favor of the plaintiff and against the defendant.” Id. at 248. This Court further clarified the nature of a judgment on the pleadings, observing as follows:

In determining the right of a party to a judgment on the pleadings, the real question to be determined is the sufficiency of the admitted facts to warrant the judgment rendered, and the materiality of those upon which issue is joined. A motion for judgment on the pleadings should be sustained when, under the admitted facts, the moving party would be entitled to judgment on the merits, without regard to what the findings might be on the facts on which issue is joined. The motion, however, is not favored by the courts; pleadings alleged to state no cause of action or defense will be liberally construed in favor of the pleader. The motion cannot be sustained except where, under the conceded facts, a judgment different from that pronounced could not be rendered, notwithstanding any evidence which might be produced. In other words, it cannot be sustained unless under the admitted facts, the moving party is entitled to judgment, without regard to what the findings might be on the facts upon which issue is joined. A motion for judgment on the pleadings will not be sustained merely because the allegations are incomplete, indefinite, or state conclusions of law. If there is joined an issue of fact upon which, if supported by the evidence, a valid judgment may be based, a judgment on the pleadings is improper. The court cannot anticipate what the proof will show.

Id. at 248-49 (quoting 41 Am.Jur. Pleading § 336) (emphasis added).

That, not what the Lottery Commission argues or what the circuit court or Court of Appeals applied, is the standard. Id.; accord Sapp, 687 S.E.2d at 49; Russell, 305 S.C. at 86; Falk, 341 S.C. at 281; Fireman’s Ins., 302 S.C. at 234. The Lottery Commission also cites Rosenthal v. Unarco Indus., Inc., 278 S.C. 420, 297 S.E.2d 639 (1982), but Rosenthal states that a judgment on the pleadings may be had where “the pleadings disclose all facts necessary or where the pleadings present no issue of fact” and “[w]here the pleadings are fatally deficient in substance or fail to state

a good cause of action in favor of the plaintiff and against the defendant[.]” Id. at 422. In the instant case, the pleadings do not “disclose all facts necessary”; indeed, Glassmeyer denied material factual allegations the circuit court found to be true. Id.; (Appx. pp. 177-88, 196-338). The circuit court and the Court of Appeals were, to be sure, required to “consider the answer as well as the complaint[.]” Kozel v. Kozel, 299 F.Supp.3d 737, 746 (D.S.C. 2018), and, if they had, they would have seen that the issues joined by the pleadings presented issues of material fact for trial on an evidentiary record, not a case where Glassmeyer admitted everything needed for the Lottery Commission to win the case. (Appx. pp. 196-338.)

Lest we lose sight of the position taken by the Lottery Commission, the circuit court, and the Court of Appeals, let us remember that their position is premised upon the idea that it is proper for a court, on a motion for judgment on the pleadings, to convert unadmitted allegations of the moving party’s pleadings into findings of fact. Per the Lottery Commission, the circuit court, and the Court of Appeals, all a plaintiff has to do is throw a few URLs into a complaint and, magically, all the plaintiff’s allegations are established as matter of law. Our adversarial system of justice requires that, in order to prevail, the party bearing the burden of proof must prove, with evidence, each material allegation that the opposing party does not admit. See Wooten, 239 S.C. at 248-49; Baugh & Sons Co. v. Graham, 150 S.C. 398, 401, 148 S.E. 220 (1926) (plaintiff bears burden of proof in civil case); Williams v. Metro. Life Ins. Co., 202 S.C. 384, 25 S.E.2d 243, 246 (1943) (every essential fact must be pled and proven); Doe v. Doe, 324 S.C. 492, 478 S.E.2d 854, 857 (Ct. App. 1996) (“complaint is part of the pleadings of a case and is not evidence”). Period. No exceptions. Not for the Lottery Commission. Not for anybody. The fundamental premise of the

Lottery Commission's argument, the circuit court's decision, and the Court of Appeals' decision is wrong.

III. This was not a motion for summary judgment.

The Lottery Commission, in another straw man argument, contends that Glassmeyer did not make arguments about summary judgment being improper. A summary judgment motion, however, was not what was before the court. (Appx. p. 411 ln. 12-18.) No motion for summary judgment was ever made, no conversion of the Lottery Commission's motion for judgment on the pleadings was ever done, and summary judgment would not have been proper even if such a conversion had been made.

Like Rule 12(b)(6), Rule 12(c), SCRCF, provides that:

If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

This Court has spoken to how materially identical language in Rule 12(b)(6), SCRCF, is to be interpreted. In Brown v. Leverette, 291 S.C. 364, 367, 353 S.E.2d 697, 699 (1987), this Court ruled that the trial court erred in treating a motion to dismiss as one for summary judgment where “[t]he trial court gave no notice to the parties that it was going to consider the affidavits and hear the 12(b)(6) motion as a motion for summary judgment.” Twelve years later, this Court cited Brown in stating the following:

We have interpreted this language as meaning “the trial court may treat a 12(b)(6) motion as a motion for summary judgment and consider matters presented outside the pleadings if the parties are afforded a reasonable opportunity to respond to such matters in accordance with Rule 56(c) and (e) of the South Carolina Rules of

Civil Procedure. The notice provisions in Rule 56 are incorporated into Rule 12(b)(6).” Brown v. Leverette, 291 S.C. 364, 367, 353 S.E.2d 697, 698-99 (1987); see also Johnson v. Dailey, 318 S.C. 318, 457 S.E.2d 613 (1995). In Brown, we found the trial court had not given notice to the parties that it was going to consider the affidavits and hear the 12(b)(6) motion as a motion for summary judgment. Thus, the supporting affidavits in Brown were improperly considered by the trial court in ruling on the 12(b)(6) motion.

...

. . . We find that the trial court improperly converted County’s 12(b)(6) motions into summary judgment motions. . . .

. . . the trial court did not give notice to the parties prior to the hearing that it was going to consider affidavits and hear the 12(b)(6) motions as motions for summary judgment. The first indication that County’s 12(b)(6) motions would be converted to summary judgment motions was the trial court’s order of dismissal. Under these facts, the trial court erred in converting County’s 12(b)(6) motions into motions for summary judgment.

Baird v. Charleston Cnty., 333 S.C. 519, 527-28, 511 S.E.2d 69 (1999). This Court noted that “[p]roviding notice” – from the context, plainly meant to refer to notice that the motion would be treated as one for summary judgment – “prior to the hearing is essential under Rule 56(c). . . . However, there is no evidence in this case suggesting Doctors had any notice prior to the hearing, in compliance with Rule 56, SCRCF, that the trial court would look beyond the pleadings in considering County’s 12(b)(6) motions.” Id. at 528 n. 6.

This Court has adhered to this principle through time. The Court has “recognize[d] that a motion to dismiss may be converted into a motion for summary judgment when the court considers matters outside the pleadings[,]” but, “in order for the conversion to take place, the parties must be afforded a reasonable opportunity to introduce evidentiary matters of their own.” Charleston Cnty. Sch. Dist. v. Harrell, 393 S.C. 552, 559 n. 4, 713 S.E.2d 604, 608 n. 4 (2011) (internal

quotation marks omitted). In Brown, this Court rebuked the trial court for its improper procedure in implicitly converting the 12(b)(6) motion into one for summary judgment, stating that “[t]he first indication that the respondents’ affidavits would be used to support the 12(b)(6) motion was the trial court’s order of dismissal.” 291 S.C. at 367. In Baird, this Court issued a similar rebuke, as “[t]he first indication that County’s 12(b)(6) motions would be converted to summary judgment motions was the trial court’s order of dismissal.” 333 S.C. at 528. Here, nothing indicates that such a conversion occurred, much less that the required notice was given. The motion made and granted was one for judgment on the pleadings. (Appx. pp. 187-88, p. 411 ln. 12-18.) The Lottery Commission seeks to make a conversion for summary judgment only now, at the second level of appellate review.

Even if a conversion to a summary judgment motion had occurred, though, there was no record on which the Lottery Commission would have been entitled to summary judgment. “The burden of proving that an exemption [from mandatory FOIA disclosure] exists lies with the government.” Evening Post Publ’g Co. v. Berkeley Cnty. Sch. Dist., 392 S.C. 76, 83, 708 S.E.2d 745, 748 (2011); accord Evening Post Publ’g Co. v. City of N. Charleston, 363 S.C. 452, 457, 611 S.E.2d 496, 499 (2005) (to advance purpose of FOIA, “government has the burden of proving that an exemption applies”); Fowler v. Beasley, 322 S.C. 463, 468, 472 S.E.2d 630, 633 (1996) (same). No evidentiary record was ever made at all, which means that no evidentiary record was ever made to the effect that the information Glassmeyer sought was that of which disclosure would constitute an unreasonable invasion of personal privacy. S.C. Code Ann. § 30-4-40(a)(2). The Lottery Commission would not have been entitled to summary judgment had it moved for it. Indeed, since the Lottery Commission bore the burden of proving the applicability of an exemption and adduced

no such proof, Glassmeyer would have been entitled to summary judgment had he made such a motion.

The Lottery Commission does not articulate any contention that this Court's precedent does *not* require that the "determination of whether documents or portions thereof are exempt from FOIA must be made on a case-by-case basis." Evening Post v. Berkeley Cnty. Sch. Dist., 392 S.C. at 82; accord City of Columbia v. Am. Civil Liberties Union of S.C., Inc., 323 S.C. 384, 475 S.E.2d 747 (1996) (rejecting categorical approach to unreasonable invasion of personal privacy exemption under S.C. Code Ann. § 30-4-40(a)(2)). The Lottery Commission does not argue to the effect that it did not have the burden to prove the applicability of a FOIA exemption, nor does it point to some evidence it adduced tending to prove that S.C. Code Ann. § 30-4-40(a)(2) applied to the information requested by Glassmeyer. See Evening Post v. Berkeley Cnty. Sch. Dist., 392 S.C. at 83; Evening Post v. City of N. Charleston, 363 S.C. at 457; Fowler, 322 S.C. at 468. It just argues that, despite never having put up any evidence of something on which it bore the burden of proof, it would still, somehow, have been entitled to summary judgment.

IV. The Lottery Commission has the gall to cite its own collusive conduct as evidence that it was entitled to the judgment it got.

The Lottery Commission's brief repeatedly states that Glassmeyer's FOIA request put it in danger of having to litigate cases brought by million-dollar lottery claimants about whether it could release their identities. Poppycock. The Lottery Commission was sued by such claimants because it asked the lottery claimants to sue it, and it did so in an effort to collusively create court orders to the effect that it had to withhold the requested information. (Appx. pp. 221-323, 326-27, 331, 333-34.)

All of Glassmeyer's allegations must be taken as true for the purposes of evaluating whether judgment against him on the pleadings was proper. See Sapp, 687 S.E.2d at 49; Russell, 305 S.C. 86; Falk, 341 S.C. 281; Fireman's Ins., 302 S.C. 234. Glassmeyer alleged the following with regard to the lawsuits the Lottery Commission invited:

Answering the allegations of paragraph 16 of the Complaint, the Defendant admits that the referenced order states what it states but denies that the order has any effect on the Defendant's rights to receive the information he has requested from the Plaintiff under FOIA. The Defendant further denies that the existence of the order in any way provides or contributes to the Plaintiff having grounds to bring the instant suit. The order is apparently the product of collusive conduct or what is tantamount to collusion. As shown by attachments to the Plaintiff's own Complaint, the Plaintiff invited the lawsuit that resulted in the order, as well other lawsuits, including those reflected by pleadings attached to the complaint, by asking the plaintiffs in those suits to sue the Plaintiff and seek the relief sought in those cases. The Plaintiff wanted and wants the plaintiffs in those lawsuits to win those suits. The Plaintiff did not and does not plan to substantively oppose the relief sought by the plaintiffs in those lawsuits. Those lawsuits do not and did not represent actual live controversies; rather, the Plaintiff (the defendant in those suits) desired and desires the same outcome sought in those suits by the plaintiffs therein. To the extent the order purports to adjudicate the Defendant's right to receive the information he has requested from the Plaintiff under FOIA, the order is void and of no effect; the Defendant was not a party to the suit that produced the order, and no one in that suit advocated for the Defendant's rights or position as to the matters involved in that suit. The same is true for all the other suits invited by the Plaintiff in this regard. Further, the order reaches an incorrect conclusion and makes incorrect findings, likely as a result of the Plaintiff's failure to actually defend the suit that created the order.

...

The collateral objective of bolstering its position so as to attempt a better outcome in the instant case and to be in a better position to

coerce the Defendant into making no more FOIA requests for information about lottery winners from the Plaintiff was the Plaintiff's objective in inviting the other lawsuits discussed above to be brought against it and in its conduct in those suits.

(Appx. pp. 326-27, 331, 333-34.)

And it is plain from the exhibits the Lottery Commission attached to its own complaint that it was facing lawsuits by lottery claimants because it asked lottery claimants to bring suit against it. (Appx. pp. 221-323.)

Viewed in the light most favorable to Glassmeyer, as they are required to be, the pleadings indicate that the Lottery Commission both invited the claimants' lawsuits and brought the instant one with the aim of avoiding its responsibilities under FOIA and suppressing Glassmeyer's rights under FOIA. (Appx. pp. 221-323, 326-27, 331, 333-34.) The Lottery Commission's conduct in the Doe lawsuit certainly indicates that it was not trying to win the suit; rather, it rolled over and allowed the "relief" sought by Doe and invited by the Lottery Commission, despite numerous and rather good arguments it could have raised against it. (Appx. pp. 221-323, 326-27, 331, 333-34.) The Lottery Commission's attempt to find evidence to support its position in the collusive, sham lawsuits it helped create would be laughable if this were not such a serious matter. (Appx. pp. 221-323, 326-27, 331, 333-34.) Since it cannot find real support for its position, the Lottery Commission turns to the "evidence" it ginned up. This Court should not brook such chicanery.

V. The Lottery Commission's cheat-to-win strategy is on naked display.

The Lottery Commission has employed a cheat-to-win strategy, and the circuit court and Court of Appeals thought that was just fine. Not only has the Lottery Commission engaged in naked collusion, as cited above, it cheats now before the highest court in this state. A respondent

is not required to put a statement of the case in its brief, but, if it does, it must comply with the requirement that a statement of the case “shall not contain contested matters[.]” Rule 208(b)(1)(C)&(b)(2), SCACR. The Lottery Commission’s ostensible “Statement of the Case” is chockablock with statements of contested facts. It is loaded up with the unadmitted allegations of the Lottery Commission’s complaint, much as was the circuit court’s order that the Court of Appeals affirmed. (Appx. pp. 177-88, 196-204, 324-338.)

The Lottery Commission could have written a statement of facts, and, in such a section in its brief, it would have been allowed to make contentions of contested fact. Rule 208(b)(1)(E), SCACR. It chose, however, to put contested factual statements in its statement of the case, attempting to masquerade them as being uncontested or established by the record. See Rule 208(b)(1)(C). This Court ought to be angry at such unabashed cheating. The Lottery Commission has no shame.

Perhaps moreover, that the Lottery Commission feels compelled to cheat only underscores that even it believes that it cannot win this case if the rules are followed. With no real argument, the Lottery Commission is desperate enough to cheat blatantly. Far from helping the Lottery Commission, its pervasive misconduct cries out for this Court’s rebuke.

VI. The Lottery Commission fails to address that the injunction it obtained was not aimed at the conduct that would cause the “harm” it envisioned.

The Lottery Commission argues that it was necessary and proper for the circuit court to issue the injunction it did in order to carry its declaratory relief into effect. Just as did the circuit court and the Court of Appeals, the Lottery Commission equates a perceived harm flowing from *disclosure* of the information at issue with the very different activity of *asking for* the information

– yet the circuit court enjoined Glassmeyer from asking for the information, not the Lottery Commission from disclosing it. (Appx. p. 188.)

Though nothing in the record establishes that any harm would befall any million-dollar lottery claimant were someone to learn his name, the learning of his name would flow from the Lottery Commission’s release of that information, not from Glassmeyer asking for it. Were this Court to accept the Lottery Commission’s unfounded premise that harm would flow from the release of the requested information, it was certainly not necessary or proper for the circuit court to have issued the injunction it did in this case, which was pointed at the wrong person and the wrong conduct to prevent this so-called “harm.” (Appx. p. 188.) If the Lottery Commission were correct about being able to withhold the requested information in response to Glassmeyer’s FOIA requests, all it would have to do to prevent this “harm” would be to write him a letter and invoke the appropriate FOIA exemption. No injunction would be necessary. The Lottery Commission has failed to address this, and it cannot do so in a way that justifies its position.

VII. The Lottery Commission had no rights at issue, and no authority gave it standing to bring this case.

The Lottery Commission argues that it had standing to sue Glassmeyer for making FOIA requests. As discussed in Glassmeyer’s petitioner’s brief, the Lottery Commission is wrong. The Lottery Commission is wrong about the fundamentals of its contentions in this regard.

The Lottery Commission is in no position to complain about having been sued by million-dollar lottery claimants, since it invited them to bring those suits in a collusive effort. (Appx. pp. 221-323, 326-27, 331, 333-34.) Glassmeyer did not cause those lawsuits, but the Lottery Commission certainly had a hand in bringing them about. (Appx. pp. 221-323, 326-27, 331, 333-34.)

But the Lottery Commission also advances no authority to the effect that being sued by someone constitutes an injury in fact – its argument just assumes that. It cites no authority to the effect that being sued is an injury. Without citing authority for that proposition, it does not properly place that argument before the Court. Jones v. S.C. Dep’t of Health & Env’tl. Control, 384 S.C. 295, 317, 682 S.E.2d 282, 294 (Ct. App. 2009) (argument abandoned where argument was conclusory and unsupported by authority). In any event, there is no reason to think that simply being sued constitutes an injury. Anyone with \$150 and a civil action cover sheet can file a lawsuit. Were the Court to accept the Lottery Commission’s position on this, that would establish wrongheaded precedent to the effect that simply being a defendant in a lawsuit, without more, constitutes an injury.

The Lottery Commission is also not right when it contends that existing law permitted the circuit court to conclude that a non-citizen, such as a part of the government, had standing to bring suit about a controversy under FOIA. City of Columbia v. American Civil Liberties Union of South Carolina, Inc., 323 S.C. 384, 475 S.E.2d 747 (1996), and South Carolina Tax Commission v. Gaston Copper Recycling Corporation, 316 S.C. 163, 447 S.E.2d 843 (1994), do not stand for the proposition that a government body, which by definition cannot be a citizen, has standing to bring an action under FOIA. That question was not posed in either of those cases, and it is well established that “[a]ppellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.” State v. Austin, 306 S.C. 9, 19, 409 S.E.2d 811, 817 (Ct. App. 1991). A review of both these cases reveals that no one’s standing was made an issue; thus, neither case held nor stands for the proposition that a government body has standing to sue under FOIA. See id.

Contrary to the Lottery Commission’s suggestion, under South Carolina law, standing is not a matter of subject matter jurisdiction of which this Court would have been required to take notice in the City of Columbia v. ACLU and Tax Commission v. Gaston Copper cases; rather, standing goes instead to the question of a party’s right to bring the lawsuit. Baird v., 333 S.C. at 530 & 530 n. 7 (citing Bardoon Properties, infra, and noting standing requires party to be real party in interest); Bardoon Properties, NV v. Eidolon Corp., 326 S.C. 166, 170-71 & 171 n. 4, 485 S.E.2d 371, 373-74 & 374 n. 4 (1997) (holding unequivocally that whether party is real party in interest is not jurisdictional and overruling prior case law to the contrary). Neither City of Columbia v. ACLU nor Tax Commission v. Gaston Copper were federal court cases, in which standing would have been a part of subject matter jurisdiction. In neither case was this court asked questions about whether government entities could sue for relief under FOIA; thus, this court did not answer those unasked questions. Austin, 306 S.C. at 19.

After the circuit court ruled in this case, the legislature changed S.C. Code Ann. § 30-4-110 to allow for government entities to bring suit under FOIA in limited circumstances. Before that, at the time applicable to this case, the law about who could seek a declaratory judgment for a question arising under FOIA was that such relief could be sought by a “citizen of the State[,]” not by anyone else. S.C. Code Ann. § 30-4-100(a). That was the law in effect during all material times in this case.

VIII. The Lottery Commission makes no argument about why disclosure of million-dollar lottery payees’ identities would constitute an unreasonable invasion of personal privacy.

Like the circuit court and the Court of Appeals, the Lottery Commission fails to articulate how the information Glassmeyer sought is “[i]nformation of a personal nature where the public

disclosure thereof would constitute unreasonable invasion of personal privacy.” S.C. Code Ann. § 30-4-40(a)(2). The Lottery Commission, like the courts below, employs a circular logic, its argument assuming that the disclosure of lottery payees’ names and addresses would constitute an unreasonable invasion of their personal privacy without ever stating why that would be so.

The Lottery Commission engages in the logical fallacy of *petitio principii*, assuming the initial thing, often called *begging the question* or *circular reasoning*. As support for its factual contentions, the Lottery Commission simply cites the making of those very contentions in its complaint – but it does not and cannot cite to factual material in the record that actually supports its factual contentions, because *no evidentiary record was ever made*. (Appx. p. 411 ln. 12-18.) The Lottery Commission’s argument in this regard can be summed up as being that there is of course factual support for the findings of the circuit court and the Court of Appeals, because the Lottery Commission alleged that those things are true. But “[a] complaint is part of the pleadings of a case and is not evidence.” Doe, 478 S.E.2d at 857 (internal quotation marks omitted). “It is a truism that allegation without proof is as unavailing as proof without allegation. Not only is it essential that every fact necessary to constitute a cause of action or defense be pleaded, but every such fact, if in issue, must be proved.” Williams, 25 S.E.2d at 246. A record of proof to support the applicability of S.C. Code Ann. § 30-4-40(a)(2) is absent.

The Lottery Commission has done no more than show that disclosure of the information at issue in this case would identify the people to whom the state paid a million dollars or more in claimed lottery winnings. That does not mean that any private matter would be divulged, much less a very private matter of the character subject of the exemption at issue. S.C. Code Ann. § 30-4-40(a)(2). The information sought is about how the Lottery Commission spent the money of

which it was given charge. “South Carolina FOIA mandates that the public be provided with information regarding the expenditure of public funds.” Weston v. Carolina Research and Development Foundation, 303 S.C. 398, 402, 401 S.E.2d 161, 164 (1990). “The law does not recognize a right of privacy in connection with that which is inherently a public matter.” Meetze v. Associated Press, 230 S.C. 330, 337, 95 S.E.2d 606, 609 (1956). The information sought is inherently a public matter. Weston, 303 S.C. at 402.

The Lottery Commission argues, without evidence, that disclosure of this information would put these lottery payees at risk of harm. That contention has certainly never been put to the evidentiary test to suss out its validity; however, just as importantly, *safety is not privacy*. See Society of Prof’l Journalists v. Sexton, 283 S.C. 563, 566, 324 S.E.2d 313, 315 (1984). Safety is important, but it does not have anything to do with whether something is private. They are different things. Glassmeyer certainly has no desire to put anyone’s safety at risk; however, whether disclosure of the information would put anyone’s safety at risk has nothing to do with the exemption at issue, which is not about safety. S.C. Code Ann. § 30-4-40(a)(2).

IX. Glassmeyer’s brief more than adequately argues why his motion to dismiss should have been granted.

The Lottery Commission thumps its chest about the brevity of the section of Glassmeyer’s petitioner’s brief devoted to reversal of the denial of his motion to dismiss. The Lottery Commission seems to ignore that preceding sections of Glassmeyer’s brief lay out quite plainly why the Lottery Commission’s complaint failed to state facts sufficient to constitute a cause of action. Rule 12(b)(6), SCRCF. There was no reason for Glassmeyer to repeat all of that in a separate section of his brief, as that argument was already there. There was no reason simply to make the brief longer to state what had already been stated. They are called *briefs* for a reason.

CONCLUSION

The Lottery Commission offers this Court nothing of substance that would support affirming the Court of Appeals. Its circular arguments do not make sense. This Court has the opportunity to check the Lottery Commission's naked abuse of the judicial system. This Court ought to do so. The integrity of this branch of government depends on it.

This Court should reverse the Court of Appeals and remand both of Glassmeyer's counterclaims for trial.

Respectfully submitted,

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