

STATE OF SOUTH CAROLINA )  
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COUNTY OF BEAUFORT )  
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MARE BARACCO, )  
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Plaintiff, )  
 )  
-versus- )  
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COUNTY OF BEAUFORT )  
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 )  
Defendant. )  
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IN THE COURT OF COMMON PLEAS  
FOURTEENTH JUDICIAL CIRCUIT  
CASE NO.: 2019-CP-07-0818

ORDER DENYING MOTIONS FOR  
RECONSIDERATION

**RECEIVED**  
MAR 22 2021  
SC Court of Appeals

This matter came before me as appointed Special Referee pursuant to Rule 53, SCRCPP and by Order of this Court issued by the Honorable Perry M. Buckner, III dated June 3, 2020. On November 13, 2020, I issued my Order ruling on the matters that were before the Court pursuant to the Order of Reference. Thereafter, Plaintiff Mare Baracco filed a Motion for Reconsideration on November 19, 2020 pursuant to Rules 59(e) and 60, of the SCRCPP on several grounds. The Defendant County of Beaufort also filed a Motion to Reconsider on November 23, 2020 pursuant to Rule 59(e), of the SCRCPP on two grounds as well.

After inquiry by the Court, the parties agreed that no hearing on either Motion to Reconsider was needed and that they would each respond to the other's Motions via brief. Accordingly, the Defendant Beaufort County filed its Brief in Opposition to Plaintiff's Motion to Reconsider on January 8, 2021. Plaintiff then filed her Reply to the County's Memorandum on January 18, 2021. With regard to the Defendant's Motion to Reconsider, Plaintiff filed its Memorandum in Opposition to the Defendant's Motion to Reconsider on December 17, 2021. Defendant Beaufort County's Reply to Plaintiff's Memorandum of Law in Opposition to County's Motion for Reconsideration was filed on January 15, 2021. Thereafter, Plaintiff filed a Reply to

County's Memorandum on January 19, 2021. For the reasons set forth herein, both Motions to Reconsider are denied.

**I. Plaintiff's Motion to Reconsider:**

**A. The use of private e-mail communications is a waiver of attorney-client privilege.**

Plaintiff asserts that the use of certain County Council member's personal email addresses to communicate with the County Attorney is in violation of SC Code 30-4-70 (c) of the Freedom of Information Act and therefore any such attorney-client privilege associated with the communication is waived. The Court finds neither statutory nor common law support for this contention. While use of private email to conduct governmental business is not best practices, I can find no statutory authority or South Carolina case that indicates 1) such manner of communication is prohibited, or 2) that such manner of communication operates to waive attorney-client privilege. Accordingly, I do not find sufficient evidence to grant Plaintiff's Motion to Reconsider on this ground.

**B. The record contains no evidence of "harassment" by the Plaintiff.**

During the merits hearing, counsel for Defendant County did question Plaintiff regarding the number of FOIA requests she had filed with the County, and Joint Exhibit 22 contained numerous checks from Plaintiff to Defendant for FOIA inquiries not at issue in the instant case. Regardless, the Court found neither party acted with improper motivation in requesting or responding to the subject FOIA requests before the Court. Therefore, I do not find sufficient evidence to grant Plaintiff's Motion to Reconsider on this ground.

**C. The Court overlooks how Tom Keaveny's dual capacity waives the attorney-client privilege.**

There was one document (County FOIA#1\_000273) that was not produced by the County during the July 20, 2018 - October 15, 2018 time period, when Keaveny served as both the County Attorney and the Interim County Administrator. The Court has been unable to locate any case law or statutory prohibition from an employee serving in this dual capacity. The document at issue did contain a legal analysis by Keaveny and as such was protected by the attorney-client privilege. However, because the recipient list included a third party vendor (subject of Defendant's Motion to Reconsider), the Court determined that the privilege had been waived and ordered that the document be produced. Therefore, there is no need to grant the Plaintiff's Motion to Reconsider on this ground.

**D. The refusal to award fees is an abuse of discretion.**

S.C. Code Ann. 30-4-100 provides:

[i]f a person or entity seeking relief under this section prevails, he may be awarded attorney's fees and other costs of litigation specific to the request. If the person or entity prevails in part, the court may **in its discretion** (emphasis added) award him reasonable attorney's fees or an appropriate portion of those attorney's fees.

Here, the Plaintiff prevailed in part and therefore, the statute indicates that there is a permissive ability to award fees to the Plaintiff in the Court's discretion. "The decision to award or deny attorney's fees under a state statute will not be disturbed absent an abuse of discretion. . . . An abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions." *Sloan v. Friends of the Hunley, Inc.* 393 S.C.152, 156, 711 S.E.2d 895, 897 (2011) (internal citations omitted). Plaintiff relies on the *Sloan* case cited above to infer that because the Plaintiff prevailed, in part, the failure to award fees was an abuse of discretion. In *Sloan*, the Court determined that Sloan was the prevailing party (not the partially prevailing party) and that, but for filing the suit, the documents would not

have been received. Here the Defendant produced responses to FOIA No. 1 even prior to suit being filed. Additionally, she amended her request relative to FOIA No. 2 (which became FOIA No. 3) prior to suit being filed. Accordingly, the facts of the instant case are vastly different than those set forth in *Sloan* such that the Plaintiff's reliance on the *Sloan* case to show an abuse of discretion by this Court in failing to award her attorney's fees is respectfully misplaced. Therefore, the Plaintiff's Motion to Reconsider the failure to award her attorney's fees is denied as well.

## **II. Defendant Beaufort County's Motion to Reconsider:**

### **A. Whether Public Body may charge for Redactions.**

Defendant asserts that the Court erred in determining that the Defendant's legal department cannot charge for "redacting" the records. SC Code Ann. Section 30-4-30(B) does state that a "public body may establish and collect reasonable fees not to exceed the actual cost of the search, retrieval, and redaction of records." This section also clearly states "[f]ees may not be charged for examination and review to determine if documents are subject to disclosure." Therefore, there can be no charge to determine what portions of the documents are exempt from disclosure. The act of redaction requires no special skill necessary to charge the full \$72.00 per hour fee (the same charged for legal review) nor has any such evidence been placed into the record of the instant case. The FOIA is clear to instruct that "the fee for the search, retrieval, or redaction of records shall not exceed the prorated hourly salary of the lowest paid employee who, in the reasonable discretion of the custodian of records, has the necessary skill and training to perform the request." These tasks (search, retrieval and redaction) are administrative not analytical in nature. The Defendant argues that the 2017 amendment to the FOIA permits compensation for

the time spent reviewing documents as part of the redaction process. Unfortunately, that is not how the language of the statute reads. To charge the public for the physical act of redaction by the legal department at the highest hourly fee charged by the County appears to be an attempt to recoup the legal fees incurred for reviewing the records for exemption status in violation of the direct mandates of the Statute. Accordingly, the Defendant's Motion to Reconsider on this ground is denied.

**B. Whether Debra Regecz was an Agent of the County for Purposes of the Attorney-Client Privilege.**

Defendant County argues that Ms. Regecz was, in essence, the functional equivalent of an employee of the County such that her inclusion in various emails did not waive the attorney-client privilege. Defendant relies on the "functional equivalent doctrine," as found in the case of *United States v. Koval*, 296 F.2d 918 (2d. Cir.1961), for the position " that where a non-employee is someone whose involvement is needed to enable effective communication between the lawyer and the client or plays a role as the necessary agent of the attorney or the client, the privilege is not waived merely due to their inclusion in the communication (Defendant Reply Memorandum to Plaintiff's Memorandum in Opposition to County's Motion for Reconsideration, p. 3)."

Defendant County goes on to suggest that derivative attorney-client privilege should become an accepted manifestation of the attorney-client privilege in South Carolina as it is in courts throughout the United States. The fact that Ms. Regecz acted as the Real Estate Agent for the Defendant County with regard to the purchase of 1 Bostick Circle, Beaufort, South Carolina is not disputed. What is disputed is whether that representation elevates Ms. Regecz to a "functional employee" or to agency status necessary to invoke the protections under the attorney-client privilege exemption under FOIA. Neither Defendant nor Plaintiff addressed S.C. Code

Ann. 40-57-370 (E) in their respective Memorandums on this issue which states in pertinent part:

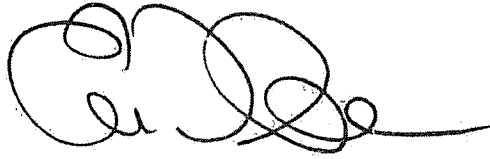
For all real estate transactions, no agency relationship between a buyer, seller, landlord or tenant and a real estate brokerage firm and its associated licensees exists unless the buyer, seller, landlord, or tenant and the brokerage company and its associated licenses agree, **in writing**, to the agency relationship. No type of agency relationship may be assumed by a buyer, seller, landlord, tenant or licensee or created orally or by implication (emphasis added). . . .

Clearly under South Carolina statutory authority, in order for an agency relationship to exist between the County and Ms. Regecz, a written contract must exist. Furthermore, as addressed in Plaintiff's Memorandum in Opposition to Defendant's Motion to Reconsider, while the subject documents would have been protected prior to the closing of the real estate transaction, SC Code Ann. Section 30-4-30(5)(a) provides that documents of and documents incidental to proposed contractual arrangements including proposed sales or purchases of property are not exempt from disclosure once the contract is entered into or the property is sold or purchased. To date, Defendant has not been able to produce a contract between it and Ballenger Realty for the property that is the subject of the email exchange. As a result, the Court is unable to conclude that Ms. Regecz was an agent/functional employee of Defendant County. Therefore, since the property sale has concluded and there is no attorney-client privilege between the Defendant County and Ms. Regecz, the documents must be produced in response to Plaintiff's FOIA requests. The Defendant's Motion to Reconsider is denied as to that ground as well.

### **Conclusion**

For the reasons set forth above, the Plaintiff's Motion to Reconsider is denied as to all four grounds. The Defendant's Motion to Reconsider is also denied as to both grounds asserted.

**AND IT IS SO ORDERED.**



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***Special Referee Pursuant to The Order signed by Judge  
Buckner dated June 2, 2020***

March 2, 2021  
Beaufort, South Carolina