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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Erin D. Dean, Special Referee

Case No.: 2019-CP-07-00818
Appellate Case No. 2021-00321

Mare Baracco…… Appellant-Respondent,

v.

Beaufort County…… Respondent-Appellant.

INITIAL REPLY BRIEF OF RESPONDENT-APPELLANT BEAUFORT COUNTY

October 15, 2021

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STATEMENT OF THE CASE

Appellant-Respondent Mare Baracco ("*Baracco*") filed this lawsuit on April 10, 2019, against Respondent-Appellant Beaufort County ("*County*"). On June 29, 2019, before service of a responsive pleading by the County, Baracco served and filed an Amended Complaint seeking an injunction against the County and attorneys' fees for the County's alleged violation of the Freedom of Information Act ("*FOIA*"). (R. pp. __; Am. Compl.). In particular, Baracco challenged the reasonableness of the County's estimated fee for the production of requested documents in response to a series of FOIA requests pertaining to years' worth of emails from/by/to various County Councilmembers and their personal email accounts, and the propriety of the redactions completed by the County in producing certain documents to Baracco pursuant to another FOIA request involving a real estate transaction. *Id.*

Although the relevant portion of the Freedom of Information Act does not require responsive pleadings, on August 14, 2019, the County answered the Amended Complaint and raised four defenses, including a general denial and Rule 12, SCRCP. (R. pp. __; Answer). On February 3, 2020, Baracco served her memorandum of law in support of the Amended Complaint. (R. pp. __; Pl. Mem. Of Law.).

On May 28, 2020, the Chief Administrative Judge *sua sponte* assigned the case to the Honorable Perry Buckner to conduct a hearing in accordance with S.C. Code Ann. § 30-4-100(A). (R. pp. __; Order.). On June 1, 2020, the County served its memorandum of law in opposition to the Amended Complaint and the memorandum of law served by Baracco. (R. pp. __; Def. Mem. Of Law.). In

On June 2, 2020, the matter came before Judge Buckner via WebEx hearing. By written order dated June 3, 2020, Judge Buckner (i) ordered Baracco to identify which documents she was

requesting under FOIA, which documents remained in dispute, and to provide a list of the same within fifteen days to the County; (ii) ordered the County, within thirty days of receipt of the document identification from Baracco, to provide the basis for any objections to the requested documents as well as the exact fee that County intended to charge for the production of the same; and, (iii) appointed Erin Dean as special referee to "determine the reasonableness of the fee, and whether or not any of the exceptions under the applicable FOIA statute apply." (R. pp. __; Buckner Order.).

On June 19, 2020, Baracco provided the County and the Special Referee with her list of requested documents. (R. pp. ___; Email of App., June 19, 2020). On June 29, 2020, the County responded. (R. pp. ___; Email of Resp., June 29, 2020). On July 6, 2020, and July 7, 2020, the County produced (i) redacted versions of the requested documents along with a privilege log asserting the basis of the FOIA exemption to Baracco and the Special Referee, and (ii) "clean" versions of the documents to the Special Referee for in camera review. (R. pp. ___; Privilege logs, letters of Respondent, July 6, 2021 and July 7, 2021). Given the sheer volume of documents, the parties agreed to accept receipt of the same via electronic transfer over Citrix ShareFile, an encrypted document sharing software program.

On July 28, 2020, after reviewing the pleadings, the memoranda of law and a letter from counsel for Baracco, the Special Referee posed a series of nine questions to the Parties. (R. pp. ___; Letter of Special Referee, July 28, 2020; Letter of App., July 13, 2020). On that same date, Baracco responded to the same. (R. pp. ___; Letter of App., July 28, 2020). On August 12, 2020, the County responded with its answers to the July 28, 2020, letters from the Special Referee and Baracco. (R. pp. ___; Ltr. of Resp., Aug. 12, 2020). On September 3, 2020, the County revised its

redacted production to remove redactions that covered the names of the senders/recipients of emails in accordance with the Special Referee's instructions.

The Parties appeared before the Special Referee on September 25, 2020, for a final hearing conducted via Lifesize streaming program supplied by the court reporter. After taking testimony and considering the briefing and arguments of counsel, the Special Referee issued an Order on November 13, 2020. (R. pp. ___; Order).

On November 19, 2020, the Appellant-Respondent filed and served her Motion for Reconsideration. (R. pp.___; App. Mot. Recon.). On November 23, 2020, the Respondent-Appellant filed and served its Motion for Reconsideration. (R. pp.___; Resp. Mot. Recon.). By Order dated March 2, 2021, the Special Referee denied both Motions for Reconsideration. (R. pp. ___; Recon. Order).

On March 22, 2021, the Appellant-Respondent filed her Notice of Appeal. (R. pp. ___; App. Notice of Appeal). On March 23, 2021, the Respondent-Appellant filed its Notice of Appeal. (R. pp. ___; App. Notice of Appeal). On May 18, 2021, the Special Referee billed $7,280.00 for her services in this case. In accordance with the Order from Judge Buckner, each party paid one-half of those costs.

STATEMENT OF FACTS

On February 10, 2019, Mare Baracco, a resident of Port Royal, South Carolina, submitted a Freedom of Information Act ("*FOIA*") request to Beaufort County for communications related to the sale and purchase of two parcels of real estate commonly referred to as 1 Bostwick Circle and 429 Broad River Road ("*FOIA Request No. 1*"). (R. pp.___; Trial Ex. 2). On February 20, 2019, Beaufort County responded requesting an initial deposit of $124.66 as a condition of fulfilling the

request. After tendering the initial deposit, Ms. Baracco was provided with the responsive documents on March 21, 2019. At that time, the County refunded Ms. Baracco $53.66 due to the County's overestimating the initial costs of production. Portions of the production were redacted by the County prior to the delivery to Ms. Baracco.

On March 10, 2019, Ms. Baracco submitted an additional FOIA request to Beaufort County. In this request, Ms. Baracco requested all emails to/from/between two County Councilmembers with various County department heads, the County Administrator, the County Attorney, the County Sheriff, members of County Council, and/or other public and private individuals over an approximately six (6) years period ("*FOIA Request No. 2*"). (R. pp.___; Trial Ex. 4). There was no limit as to subject matter. The request implicated thousands of documents.

On March 18, 2019, the County responded to FOIA Request No. 2 by requesting a deposit of $3,019.75, which represented approximately 25% of the reasonably anticipated costs to be incurred by the County in responding to FOIA Request No. 2. (*Id.*). The County estimated that searching and retrieving the hundreds of records requested by FOIA Request No. 2 would take approximately 167 hours, based on an estimated time of one minute per document. (R. pp.___; Memo. of Law, p. 4).

On that same day, the Plaintiff requested a thorough explanation from the former County Administrator, who promptly responded that (i) SLED, as the primary law enforcement agency for the state, has recommended stronger internal controls on access to the County network, presumably to limit outside interference/hacking; (ii) the IT charge should range from $49.07/an hour to $30.74/an hour based upon which member of the County IT Department conducts the search; (iii) the County Attorney is required to review any disclosed emails from elected or appointed officials

to ensure that the attorney-client privilege is not waived; and, (iv) that the County Attorney's rate for review is $72.00/an hour. (R. pp____; Trial Ex. 1, 6).

Upon receipt of this explanation on March 18, 2019, Ms. Baracco revised FOIA Request No. 2, by reducing its scope to all e-mails over a 6-year period between the County Council Chairman, the former County Administrator, the former County Attorney/former Deputy County Administrator, and the County Attorney ("*FOIA Request No. 3*"). (R. pp____; Trial Ex. 4). On March 25, 2019, the County responded that an initial deposit of $152.82 – once again, 25% of the estimated cost of fulfillment - would be required prior to record compilation. (R. pp____; Trial Ex. 6).

Thereafter, on March 31, 2019, Ms. Baracco submitted her fourth FOIA request to the County specifically requesting emails from County Council member Alice Howard's personal e-mail address from January 1, 2015, to the "present" to/from/between Ms. Howard and multiple individuals ("*FOIA Request No. 4*"). (R. pp____; Trial Ex. 7). On April 2, 2019, the County responded that an initial deposit of $404.29 would be required prior to the County beginning the process of fulfilling this request. (R. pp____; Trial Ex. 8). This deposit represented 25% of the reasonably anticipated costs of producing the records, which the County determined was $1,617.14. (R. pp____; Trial Ex. 8).

The Appellant-Respondent commenced this lawsuit on April 10, 2019, amending her complaint once. Throughout the course of this litigation and into this appeal, the Appellant-Respondent has alleged that the County violated FOIA. In particular, the Appellant-Respondent has asserted the following claims, some of which are raised for the first time on appeal and others which have been abandoned:

1. Communications to and from an in-house governmental attorney are never afforded protections from FOIA disclosure as such communications can never be considered privileged.
2. Communications in which an attorney purportedly delivers inaccurate legal advice regarding whether the county's governing body must approve of the acquisition of real property is not subject to privilege per the crime-fraud exception (abandoned).
3. The consummation of a real estate transaction eliminates any ability to exempt privileged documents from FOIA disclosure (not raised below).
4. Upon being appointed as Interim County Administrator, the County Attorney was operating in a dual capacity and therefore no communications from the County Attorney during that time could be considered privileged, regardless of the content or context of the communications (abandoned).
5. The copying of the County's contractually retained third-party real estate agent on email communications between the County Attorney and County staff waives any claim of attorney-client privilege.
6. The County's inclusion of an estimated eight (8) hours billed at the rate of $72.00/an hour for the County's legal department to redact records in response to FOIA Request No. 3 violates the Freedom of Information Act.
7. The County's inclusion of an estimated twenty-two (22) hours billed at the rate of $72.00/an hour for the County's legal department to redact records in response to FOIA Request No. 4 violates the Freedom of Information Act.

Prior to the final hearing on the matter, the Special Referee received all of the documents pertaining to FOIA Request No. 1, both redacted and un-redacted, as well as all of the documents

implicated by the Appellant-Respondent's revised FOIA Request No. 4, both redacted and un-redacted.

In regard to FOIA Request No. 1, the Special Referee determined that all of the redactions completed by the County fell within a recognized FOIA exemption except for those redactions on communication in which Debra Regecz, a third-party real estate agent retained by the County to assist with the location and acquisition of real property, was copied. (R. pp. ___; Order, p. 11, 12-14). The Special Referee recognized that the question of whether a third party realtor was an "agent of the client" to qualify as a "privileged person" to avoid waiver was a novel question in South Carolina. The Special Referee further acknowledged that had the County not redacted this information, any privilege would have been waived upon disclosure; nevertheless, the Special Referee found that the County's RFP for brokerage services included an explicit disclaimer that any contractor retained for such services "shall not act as an agent or employee of the County." (R. pp. ___; Order, p. 11, 12-14). For this reason, the Special Referee declined to extend "privileged persons" status to Ms. Regecz.

In regard to revised FOIA Request No. 3, "[a] thorough review by this Court of the 167 pages of documents produced … revealed that the majority of redactions did pertain to legal advice received from Keaveny." (R. pp. ___; Order, p. 10). Three exceptions were found and the Special Referee ordered that those three documents be provided to the Appellant-Respondent. On December 15, 2020, those three documents were provided to Appellant-Respondent through her counsel.

As the Statement of the Case outlines, the Special Referee reviewed extensive pleadings on all of these issues, received the testimony of the Appellant-Respondent, and on November 13,

2020, issued her final Order. (R. pp. ___; Order); *see* discussion *supra* in the Statement of the Case.

STANDARD OF REVIEW

Declaratory judgments in and of themselves are neither legal nor equitable. *See Felts v. Richland Cty.*, 303 S.C. 354, 400 S.E.2d 781 (1991); *Campbell v. Marion Cty. Hosp. Dist.*, 354 S.C. 274, 580 S.E.2d 163 (Ct. App. 2003); *Wiedemann v. Town of Hilton Head Island*, 344 S.C. 233, 542 S.E.2d 752 (Ct. App. 2001). The standard of review for a declaratory judgment action is therefore determined by the nature of the underlying issue. *Campbell*, 354 S.C. at 279, 580 S.E.2d at 165; *Travelers Indem. Co. v. Auto World*, 334 S.C. 137, 511 S.E.2d 692 (Ct. App. 1999) (suit for declaratory judgment is neither legal nor equitable, but is determined by nature of underlying issue).

"The determination of whether or not a communication is privileged and confidential is a matter for the trial judge to decide after a preliminary inquiry into all the facts and circumstances." *Tobaccoville USA, Inc. v. McMaster*, 387 S.C. 287, 692 S.E.2d 526 (2010). "The trial judge's decision will not be overturned absent an abuse of discretion." *Id.* "An abuse of discretion occurs when the trial court's decision is based on an error of law or upon factual findings that are without evidentiary support." *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 555, 658 S.E.2d 80, 85-86 (2008), quoted in *Lambries v. Saluda County Council*, 409 S.C. 1, 7, 760 S.E.2d 785, 788 (2014).

"The decision to award or deny attorneys' fees under a state statute will not be disturbed on appeal absent an abuse of discretion." *Kiriakides v. Sch. Dist. of Greenville County*, 382 S.C. 8, 20, 675 S.E.2d 439, 445 (2009) (*citing Layman v. State*, 376 S.C. 434, 444, 658 S.E.2d 320, 325

(2008)). "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." *Id.*, 675 S.E.2d at 445 (*quoting Layman*, 376 S.C. at 444, 658 S.E.2d at 325); *Sloan v. Friends of The Hunley Inc.*, 393 S.C. 152, 711 S.E.2d 895 (S.C. 2011). "[T]he trial court's factual findings will not be disturbed on appeal unless a review of the record discloses that there is no evidence which reasonably supports the judge's findings." *Campbell*, 354 S.C. 274,280, 580 S.E.2d 163, 165-66 (citations omitted); *see also Harkins v. Greenville County*, 340 S.C. 606,533 S.E.2d 886 (2000).

ARGUMENT IN REPLY

I. THE SPECIAL REFEREE WAS CORRECT AS A MATTER OF LAW IN DETERMINING THAT THE COUNTY ACTED PROPERLY IN REDACTING VARIOUS EMAILS PRODUCED TO THE APPELLANT-RESPONDENT.

The heart of the Appellant-Respondent's first issue on appeal is whether the Special Referee erred in finding that the majority of documents produced by the County in response to FOIA Request No. 1 and FOIA Request No. 3 were properly redacted as exempt material under the Freedom of Information Act. The Appellant-Respondent offers multiple different positions as to why the County's redactions were improper. As discussed herein, the Special Referee's conclusions to the contrary were based on a complete and exhaustive review of each redaction, grounded in established law, and the result of a proper analysis of the facts.

A. Public Officials' Use of Private Email Does Not Eliminate the Attorney-Client Privilege.

The Special Referee correctly refused to accept Appellant-Respondent's assertion that a public body may never exempt from disclosure a communication between legal counsel for a public body and a member of that public body if such communication originated from or was

received through the public official's private email address. The Special Referee reasoned that "[w]hile 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." (R. pp. ___; Recon. Order, p. 2).

The Freedom of Information Act's basic premise is to give "any person [the] right to inspect or copy any public record of a public body." *See* S.C. Code Ann. § 30–4–30(a). In defining "public record" for FOIA purposes, the General Assembly deliberately chose a broad definition – one that focuses on the content of the record and the manner in which the record was created, not on its location or current custodian. *See* S.C. Code Ann. § 30-4-20(c) (defining public records as "books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body").

At no point relevant to this action has Beaufort County challenged the proposition that a public official's private emails are subject to the Freedom of Information Act when such emails are used to conduct public business. FOIA's definition of "public record" is designed to encompass all records that relate to public business, not just those records that are created and/or stored on publically-owned communication systems. Moreover, as discussed infra, the County agrees with the Appellant-Respondent that there is no distinction between private emails and public emails when such emails are being used to conduct public business. (App. Initial Brief, p. 25-27). Rather, the issue presented to the Special Referee was whether the County erred in exempting portions of these public records.

FOIA's judicially enforceable right to access public records is subject to certain well-recognized exceptions, including the right of the public body to exempt from disclosure "[c]orrespondence or work products of legal counsel for a public body and any other material that would violate attorney-client relationships." *See* S.C. Code Ann. § 30–4–40(a)(7). Initially, Ms. Baracco contended that no communication with in-house governmental counsel can be considered privileged: "The assertion that the email communications of government officials are 'privileged' is nonsense…." (R. pp___; Pl. Memo of Law, p. 6). Although not directly raised as an "issue" in this Appeal, this contention appears to have been resurrected: "[T]here is no such thing as 'privileged information' when government officials communicate with third parties or one another." (R. pp___; App. Initial Brief, p. 29).

The South Carolina Supreme Court has already dismissed the notion that the status of the attorney can eliminate the protections provided by the attorney-client privilege. *Evening Post Publ'g Co. v. Berkeley County Sch. Dist.*, 392 S.C. 76, 82, 708 S.E.2d 745 (2011)(recognizing the existence of the attorney-client privilege for governmental clients but questioning whether inclusion of outside counsel on employee questionnaires was done solely to avoid disclosure); *see also, In re Grand Jury Investigation (John Doe)*, 399 F.3d 527 (2nd Cir. 2005) (finding, "if anything, the traditional rationale for the [attorney-client] privilege applies with special force in the government context"); *In re Sealed Case*, 737 F.2d 94, 99 (D.C. Cir. 2004). ("The lawyer whose testimony the government seeks in this case served as in-house attorney. That status alone does not dilute the privilege."); *Ross v. City of Memphis*, 423 F.3d 596, 601-603 (6th Cir. 2005)(noting that the privilege in the civil context for government employees should be even more robust so that the government can investigate wrongdoing more thoroughly and pursue remedial options). Thus, the Special Referee correctly rejected the contention that the attorney-client

privilege is somehow not applicable to any communications between a governmental official or employee and its in-house counsel.

Given that the attorney-client privilege is recognized in the governmental client context, the issue presented on appeal is whether the use of personal email by a public official constitutes an automatic waiver of the attorney-client privilege. Neither the text of the applicable statute nor South Carolina law supports such a position. Much like FOIA's definition of "public record" hinges on the context of the communication to determine whether it is subject to disclosure, the applicability of the exemptions set forth in S.C. Code Ann. § 30-4-40 are based on the content of the communication, not the medium used. If the public record contains "[c]orrespondence or work products of legal counsel for a public body and any other material that would violate attorney-client relationships" then such material may be exempted from disclosure. *See* S.C. Code Ann. § 30–4–40(a)(7).

At its core, the attorney-client privilege protects communications between attorneys and clients in which legal advice was sought or rendered, and which was intended to be and was in fact kept confidential, unless otherwise waived. "In order to establish the privilege, it must be shown that the relationship between the parties was that of attorney and client and that the communications were of a confidential nature." *Marshall v. Marshall*, 282 S.C. 534, 320 S.E.2d 44, 46-47 (S.C. Ct. App. 1984). Like lawyers working within the private sector, governmental attorneys' communications should be protected by the attorney-client privilege so long as they relate to some legal strategy, or to the meaning, requirements, allowances, or prohibitions of the law.

As to FOIA Request No. 1, the County's attorneys were brought into these communications due to their legal knowledge and the existence of potential legal issues regarding the acquisition

of real estate and the potential development of a Department of Special Needs home in a residential subdivision. (R. pp. ___; Resp. Mem. Of Law, p. 15-16). The communications were predominantly centered on the process by which a local government could acquire this real estate and the various title issues revealed by the title work, in particular various restrictive covenants. *See Matrix Financial Services Corporation v. Frazer*, 394 S.C. 134, 714 S.E.2d 532 (2011)(recognizing certain aspects of real estate acquisition constitute the practice of law). The Special Referee agreed. "After careful review of the un-redacted documents produced to the Court…with the exception of the documents that include Debra Regecz [the County's real estate agent] … I find the remaining redactions appropriate and subject to exemption pursuant to S.C. Code Ann. § 30-4-40(a)(7)." (R. pp. ___; Order, p. 11). The Special Referee's finding that copying a third party real estate agent on communications between an attorney and a client constitutes a waiver of privilege is an issue raised and addressed in the County's cross-appeal.

As to FOIA Request No. 3, following a "thorough" *in camera* review of the "167 pages" of redacted and un-redacted documents produced by Beaufort County, the Special Referee similarly found "that the majority of the redactions did pertain to legal advice received from Keaveny [the County Attorney]." (R. pp. ___; Order, p. 10). The Special Referee ultimately found that there were three (3) documents improperly redacted as to FOIA Request No. 3, at least one of which she inferred was an "oversight." (R. pp. ___; Order, p. 10-11).

While the County recognizes that whether a particular communication is privileged can become cloudier given the recognized public benefit of transparency in government actions and the complex and varied roles expected of a county attorney on a daily basis, the redactions made by the County in this case were proper, legal, and necessary to avoid an inadvertent waiver of privileged material through disclosure to a third party. Upon a thorough review of all of the public

records produced by the County in this action, the Special Referee agreed, correctly finding that the vast majority of them – with two notable exceptions – were privileged and properly redacted in accordance with FOIA. (R. pp. ___; Order). For these reasons, the Special Referee's order as to these issues should be affirmed.

B. There Was No Justiciable Controversy as to the Estimated Deposits.

In further support of her primary claim that the "Special Referee err[ed] in finding government officials conducting government business on private e-mail accounts, can claim 'privilege' from disclosure under the *Freedom of Information Act*," the Appellant-Respondent alleges that the Special Referee erred in finding there was no violation of the Act related to the calculation of the estimated deposits for costs of production. Although the Amended Complaint alleged violations related to the amount of fees charged by the County, no fees were ever charged by the County; rather, the County requested from Baracco a twenty-five (25%) percent deposit based on the reasonably anticipated costs to be incurred by the County in responding to the substantial requests. (R. pp. ___; Resp. Memo. of Law). This particular distinction is addressed more thoroughly in the Respondent's cross-appeal.

The Special Referee correctly found that there was no violation of the Freedom of Information Act relative to the deposits because the Appellant-Respondent never paid the deposits. (R. pp. ___; Order, p. 7-8). Since no deposits were paid, the Appellant-Respondent's questions were merely academic. *See Sloan v. Friends of the Hunley, Inc.*, 369 S.C. 20, 630 S.E.2d 474, 478 (2006)(finding that even in FOIA cases appellate courts will not decide academic questions). "Generally, this Court only considers cases presenting a justiciable controversy." *Id.* (citing *Byrd v. Irmo High School,* 321 S.C. 426, 430, 468 S.E.2d 861, 864 (1996)). "A justiciable controversy

exists when there is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute that is contingent, hypothetical, or abstract." *Id.*

The Appellant-Respondent has not alleged any exception as to why this particular matter meets any of the recognized exceptions to the aforementioned rule; thus, the Special Referee correctly found that there was a cognizable violation of the Freedom of Information Act. Further, even to the extent a justiciable controversy may have existed, the Appellant-Respondent mooted any claims related thereto by **voluntarily** amending FOIA Request No. 3 and FOIA Request No. 4, to which amended FOIA requests the County provided revised estimated deposits. (R. pp. ___; Email of App., June 19, 2020). At no point during this action has the Appellant-Respondent challenged the revised estimated deposits.

C. The Use of Private Email by a Public Official Is Not a Violation of the Freedom of Information Act.

The Appellant-Respondent alleges the County violated S.C. Code Ann. § 30-4-70(c) for the first time on appeal. Although couched by the Appellant-Respondent as the County advancing "a straw man argument that the plaintiff was attempting to bring an action under § 30-4-70(c)" and an attempt to "sow confusion where there is none," the Appellant-Respondent nevertheless asserts that the "Special Referee erred in failing to recognize that conducting government business on private e-mail communications is a violation of the prohibition of § 30-4-70, S.C. Code, Ann., and are not communications shielded from public inspection." (App. Initial Brief, p. 23-25).

As an initial matter, this issue is not properly before the Court. In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal. *Linda Mc Co., Inc. v.*

Shore, 390 S.C. 543, 556-57, 703 S.E.2d 499, 506 (2010). "Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after is has considered all relevant facts, law, and arguments." *Home Med. Sys., Inc. v. South Carolina Dep't of Rev.*, 382 S.C. 556, 562, 677 S.E.2d 582, 586 (2009). "It prevents a party from keeping an ace card up his sleeve intentionally or by chance in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to provide his case." *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000). As a result, Ms. Baracco should not be permitted to appeal the Special Referee's finding that FOIA was not violated on this basis, nor present a novel argument for an alleged FOIA violation on appeal.

Moreover, as noted herein, nothing within the Freedom of Information Act explicitly prohibits the use of private email by a public official. The relevant portion of the Act states that "[n]o chance meeting, social meeting, or electronic communication may be used in circumvention of the spirits of this chapter to act upon a matter over which the public body has supervision, control, jurisdiction, or advisory power." S.C. Code Ann. § 30-4-70(c). This section addresses meetings of public bodies. Meeting is defined by the Code as "the convening of ***a quorum*** of the constituent membership of a public body, whether corporal or by means of electronic equipment, to discuss or act upon a matter over which the public body has supervision, control, jurisdiction or advisory power." S.C. Code Ann. § 30-4-20(d) (double emphasis added).

In order for a meeting to occur, there must be a quorum. *Id.* For there to be a quorum, "a simple majority of the constituent membership of a public body" must be present. S.C. Code Ann. § 30-4-20(e). The email offered by the Appellant-Respondent is between four (4) of nine (9) County councilmembers and the Interim County Administrator/County Attorney. (R. ____; App. Initial Brief, p. 23 & 25). Without a majority of the councilmembers present, there could be no

quorum. S.C. Code Ann. § 30-4-20(e). Without a quorum, there can be no meeting. S.C. Code Ann. § 30-4-20(d). Without a meeting, there can be no violation of S.C. Code Ann. § 30-4-70(c). For these reasons, the expansive argument presented by the Appellant-Respondent – that the use of any private equipment to conduct public business by a public official automatically constitutes a violation of the Freedom of Information Act – is simply not supported by the text of the Act.

D. The Consummation of a Real Estate Transaction Does Not Eliminate Privilege.

The Appellant-Respondent, for the first time on appeal, contends that S.C. Code Ann. § 30-4-40(a)(5) operates to eliminate attorney-client privilege. For an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal. *Linda Mc Co., Inc. v. Shore*, 390 S.C. 543, 556-57, 703 S.E.2d 499, 506 (2010). As a result, Ms. Baracco should not be permitted to appeal the Special Referee's finding that FOIA was not violated on this basis, nor present a novel argument for an alleged FOIA violation on appeal.

Additionally, the exemption for privileged and confidential documents granted to public bodies by S.C. Code Ann. § 30-4-40(7) are not limited, much less extinguished, by S.C. Code Ann. § 30-4-40(a)(5). S.C. Code Ann. § 30-4-40(a)(5) generally permits public bodies to exempt from disclosure certain documents incidental to contractual arrangements and/or the sale or purchase of property. *See* S.C. Code Ann. § 30-4-40(a)(5). The basis for this exemption is clear and apparent: Not permitting certain information to remain confidential is likely to harm the public body's bargaining position in contractual negotiations. *See* S.C. Code Ann. §§ 40-57-350(C)(1)(f) & (E)(1)(f) (recognizing a real estate agent's obligation to preserve confidential information provided

by parties that could harm the party's respective bargaining power). Once the transaction is consummated, however, the purpose behind this particular exemption is eliminated. For this reason, FOIA's exemption for prospective or pending contractual arrangements related to real property terminate once "the deed is executed," provided "the execution of the deed occurs within twelve months from the date of sale or purchase." S.C. Code Ann. § 30-4-40(a)(5)(b).

Contrary to the Appellant-Respondent's assertion, attorney-client privileged documents pertaining to a real estate transaction nonetheless retain their privilege and remain exempt from disclosure after the consummation of the underlying real estate transaction. The attorney-client privilege exemption is a separate and independent exemption within the Freedom of Information Act. When interpreting statutes, courts must apply the terms of a statute according to its literal meaning, without resort to subtle or forced construction in an attempt to limit or expand the scope of the statute. *Holley v. Mount Vernon Mills, Inc.*, 312 S.C. 320, 440 S.E.2d 373 (1994). Where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it which are not in the legislature's language. *Timmons v. Tricentennial Commission*, 254 S.C. 378, 175 S.E.2d 805 (1970). Further, the purpose behind preserving confidential legal communications is not eliminated by the completion of the transaction. Many legal issues addressed by a purchaser of real property may remain after acquiring title, including but not limited to development issues or the existence of potential title defects.

II. THE SPECIAL REFEREE ACTED WITHIN HER DISCRETION IN DECLINING TO AWARD ATTORNEYS' FEES.

The Freedom of Information Act provides for a discretionary, not mandatory and automatic, award of attorney's fees: "If a person or entity seeking relief under this section prevails,

he may be awarded reasonable 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*** award him reasonable attorney's fees or an appropriate portion of those attorney's fees." S.C. Code Ann. § 30-4-100(B)(double emphasis added). The Special Referee found that the Appellant-Petitioner had only prevailed in part, specifically on the claim that the County's copying of a third-party real estate agent constituted a waiver of the attorney-client privilege as to certain documents. (R. pp. ___; Order, p. 15-16).

The Special Referee recognized that the question of whether a third party realtor was an "agent of the client" to qualify as a "privileged person" to avoid waiver was a novel question in South Carolina. The Special Referee further acknowledged that had the County not redacted this information, any privilege would have been waived upon disclosure; nevertheless, the Special Referee found that the County's RFP for brokerage services included an explicit disclaimer that any contractor retained for such services "shall not act as an agent or employee of the County." (R. pp. ___; Order, p. 11, 12-14). Thus, while the Special Referee declined to extend "privileged persons" status to Ms. Regecz, the Special Referee similarly declined to penalize the County for these redactions as the decision to redact was made under the good faith belief that the redactions were necessary to prevent waiver of privilege.

In this particular set of circumstances, it should not be deemed an abuse of the Special Referee's statutory discretion to decline to award any attorneys' fees to the Appellant-Respondent. The Special Referee recognized that these redactions were the result of the extremely difficult and unique challenges posed by the interplay between the Freedom of Information Act and the attorney-client privilege. Limited and strict timelines coupled with vague and often overwhelming requests create an environment ripe for mistake. Given the limited timeframe in which to respond

to a valid FOIA request, a thorough analysis of every communication (including but not limited to an analysis of contracts and RFPs for all parties copied on any communication) to determine whether the attorney-client privilege will apply is simply not feasible in certain scenarios.

The Appellant-Respondent did not prevail on the primary or main issues in this litigation. Rather, after reviewing all documents and thorough briefing by both parties and conducting a hearing on the matters, the Special Referee analyzed the facts and the law as presented to her and found in favor of both Parties. In particular, the Special Referee's ruling in favor of the Appellant-Respondent impacted only a small subset of the documents at issue and constitutes a far cry from "prevailing on the main issue," which, as alleged by the Appellant-Respondent, is the trigger that requires an award of attorneys' fees. (App. Initial Brief, p. 42).

The unambiguous language of FOIA empowered the Special Referee with the discretion to award or deny any attorneys' fees to a prevailing party. *See* S.C. Code Ann. § 30-4-100(B). FOIA is not a punitive statute designed to punish public bodies for all manner of transgressions, no matter how slight, provided that the prosecuting party is capable of prevailing on just one of many different claims. *See Litchfield Plantation Co., Inc. v. Georgetown County Water & Sewer Dist.*, 314 S.C. 30, 443 S.E.2d 574 (1994) (finding that Special Referee did not err in refusing to award attorneys' fees to prevailing party); *but see Sloan v. Dep't of Revenue*, 409 S.C. 551, 762 S.E.2d 687, 689 (2014)("As the prevailing party under these circumstances, the trial court erred in not awarding Sloan his reasonable attorney's fees and costs."). The explicit and codified purpose of FOIA is public disclosure, not discipline. *See* S.C. Code Ann. § 30-4-15. Interpreting the Act to require the award of attorneys' fees not only runs counter to the purpose of FOIA, but also rejects established South Carolina case law.

The Appellant-Respondent's reliance on *Sloan v. Friends of the Hunley* ("*Hunley II*"), 393 S.C. 152, 711 S.E.2d 895 (2011) is misplaced as inapplicable to the present case, as determined by the Special Referee. For one, the holding therein was dependent upon the plaintiff prevailing on the main issue. *Id.* The Special Referee clearly and unmistakably found that the Appellant-Respondent did not prevail on the main issue in this matter. (R. pp. ___; Recon. Order, p. 4-5). "[T]he specific amount of attorneys' fees awarded pursuant to a statute authorizing reasonable attorneys' fees is left to the discretion of the trial judge and will not be disturbed absent an abuse of discretion." *Kiriakides v. Sch. Dist. of Greenville Cty.*, 382 S.C. 8, 20, 675 S.E.2d 439, 445 (2009) (quoting *Layman v. State*, 376 S.C. 434, 444, 658 S.E.2d 320, 325 (2008)); *see Hunley II*, 393 S.C. at 156, 711 S.E.2d at 897 (applying the abuse of discretion standard to an award of attorneys' fees under the FOIA).

Additionally, in *Hunley II*, the Supreme Court determined that while **the public body's voluntary production** of records after the initiation of litigation may moot the case, the individual litigant may still be considered the prevailing party for the purposes of attorneys' fees. *Hunley II*, 393 S.C. at 156, 711 S.E.2d at 897. In this case, however, the claims were not mooted due to action of the public body; rather, it was Ms. Baracco's own voluntary actions that mooted the claims. (R. pp.___; Order, p. 7-8). The estimate provided in response to FOIA Request No. 1 was never challenged and FOIA Request No. 2 was abandoned by the Plaintiff's voluntary amendment thereof prior to the initiation of litigation. (R. pp.___; Order, p. 5). Similarly, after the initiation of litigation, FOIA Request No. 3 and FOIA Request No. 4 were dramatically reduced by voluntary action of Ms. Baracco. (R. pp.___; Recons. Order, p. 4). Unlike the facts set forth in *Hunley II*, the public body's actions were not responsible for mooting the case. Instead, the intervening act that mooted the case was the voluntarily action of the party claiming it should be entitled to prevailing

party status. For these reasons, the Special Referee did not abuse her discretion in declining to award any attorneys' fees.

The Appellant-Respondent also leans heavily on allegations of the County's animus against her in support of her argument for attorneys' fees, a factor which is wholly irrelevant. Even assuming, arguendo, that there is a shred of relevant connection, communications made by long-gone former County employees from 2012-2015 have no bearing on a Freedom of Information Act request filed years later in 2019. For example, the Appellant-Respondent devotes substantial portions of her Initial Brief to two email exchanges that are completely irrelevant to this matter.

The first email is dated June 11, 2014, and allegedly "gives away the game" of the County. (R. p. ___, Ex. 17). This email from an Assistant County Attorney purportedly urges other local governments "to get on board with a 'similar approach' of the County requiring a 50% deposit for plaintiff's requests." The Appellant-Respondent goes to great lengths to imply how such action was criminal under the former iteration of the Act. This position is completely without merit. Prior to the 2017 revisions to the Freedom of Information Act, the Act granted the public body with the right to charge a "reasonable deposit of these costs." S.C. Code Ann. § 30-4-30(b) (2016). While reasonable minds could differ regarding the imposition of a fifty (50%) percent deposit requirement, arguing that the mere consideration of it was criminal borders on the absurd. In 2017, the Act was amended to permit a "deposit not to exceed twenty-five percent of the total reasonably anticipated cost for reproduction of the records." See S.C. Code Ann. § 30-4-30(b) (2018). The County has used this percentage since the revisions to FOIA became effective. Moreover, "the County Attorney" referenced in the email has been employed elsewhere since 2017.

The second email is dated June 10, 2014, and purportedly establishes "the County's willfulness in harassing her" despite it being between the former Town Manager of Bluffton and

the former Bluffton Police Chief, with a copy to the Bluffton Town Attorney. Although located in Beaufort County, the Town of Bluffton is a separate and independent municipality that has absolutely zero involvement in this litigation.

The Special Referee analyzed all of the evidence and facts available to her and recognized that the redactions made in this case – despite the claims of the Appellant-Respondent – were not made with animus, but rather, in a diligent effort by County attorneys attempting to comply with their legal responsibilities. Even though the application of the laws of privilege in the context of governmental attorneys may result in different attorneys reaching different conclusions regarding the appropriateness of any redactions, the Special Referee appropriately exercised her discretion and declined to award attorneys' fees.

CONCLUSION

As compellingly argued by the Appellant-Respondent, the recognition of the governmental attorney-client privilege seemingly stands in conflict with the public's interest in open and honest government. Transparency is an important contributor to ensuring that governments function fairly and efficiently. At the same time, the litany of different statutes, ordinances, and regulations that apply to public officials and public employees require full and competent representation to minimize risk to the public and the individual.

When a client requests legal advice, the client expects candor, confidentiality, and competence. If a client knows that legal advice is to be made public, the client may choose to not seek legal advice that could be politically unpopular or could hurt his/her reputation. As such, the privacy and protections afforded by the attorney-client privilege are essential to allowing unpopular truths to be spoken. Zealously defended for centuries, the attorney-client privilege

remains a cornerstone of American jurisprudence for this reason. Like lawyers working within the private sector, governmental attorneys' communications should be protected by the attorney-client privilege so long as they relate to some legal strategy, or to the meaning, requirements, allowances, or prohibitions of the law. In this case, the County's attorneys were brought into these communications due to their legal knowledge and the existence of potential legal issues, and they remained engaged in the planning and completion of the real property acquisition. In recognizing the appropriateness of the County's redactions and declining to award either party any attorneys' fees, the Special Referee carefully and adeptly balanced these competing concerns.

For all of the foregoing reasons and those so well stated by the Special Referee, this honorable Court should affirm the Special Referee's decisions as to the matters stated herein. Pursuant to Rule 220(c), SCACR, this honorable Court may affirm for any ground appearing in the record.

Respectfully submitted,

October 15, 2021

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Oct 15 2021
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Erin D. Dean, Special Referee

Case No.: 2019-CP-07-00818

Mare Baracco, Appellant-Respondent,

v.

Beaufort County, Respondent-Appellant.

PROOF OF SERVICE

I certify that I have served the Designation of Record on Appeal and Initial Reply Brief, by emailing a copy of it to Thomas R. Goldstein, Attorney for Appellant, at email tgoldstein@cobblaw.net on October 15, 2021.

October 15, 2021

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October 15, 2021

Hon. Jenny A. Kitchings,
Clerk of Court
S.C. Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Mare Baracco v. Beaufort County; 2019-CP-07-00818
Appellate Tracking No.: 2021-00321
Our File No. 6868.002 – Beaufort County

Dear Ms. Kitchings,

I am filing an electronic version of the appellant's initial brief and designation of contents of record on appeal along with a proof of service. I understand that I am not required to file a paper copy of the Initial Brief. I am, however, sending a paper copy to opposing counsel (unless he tells me he does not want me to do that). Please let me know if I need to do anything other than electronic filing on the Initial Brief. I thank you in advance for your attention.

With best regards, I am

Sincerely yours,

/s/ E. Richardson LaBruce
E. Richardson LaBruce
FINGER, MELNICK & BROOKS, P.A.

ERL/
Enclosure: Initial Brief (digital copy)

cc: T. Goldstein

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