THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

Case No. 12-CP-40-08469

South Carolina Public Interest Foundation and Edward D. Sloan, Jr., individually, and on behalf of all others similarly situated, ... Appellant,

v.

South Carolina Department of Revenue, and James F. Etter, its Director,..... Respondents.

APPELLANTS' INITIAL BRIEF

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Statement of the Case

Appellant Edward D. Sloan, Jr, ("Sloan") is a citizen, resident, taxpayer, and registered elector of Greenville County, South Carolina. Appellant South Carolina Public Interest Foundation is a corporation not for profit, organized and existing under the laws of the State of South Carolina and dedicated to the public interest, including the proper enforcement of the South Carolina Freedom of Information Act, S.C. Code Ann. § 30-4-10 *et seq.* ("FOIA").

Respondent South Carolina Department of Revenue is an agency of the State of South Carolina and a "public body" under FOIA. Respondent James F. Etter is the Director of the South Carolina Department of Revenue and is named in his official capacity.

Appellants served a FOIA request on the Respondents, which they received November 23, 2012 (Complaint, Exhibit A). In response to a request, FOIA requires a "public body" to "notify" the Appellants "of its ***determination*** and the ***reasons*** therefor" within 15 business days. S.C. Code Ann. § 30-4-30(c) (emphasis added). Respondents made a written response to the Appellants on December 10, 2012, but failed to "notify" the Appellants "of [their] determination and the reasons therefor" (Complaint, Exhibit B). S.C. Code Ann. § 30-4-30(c). Furthermore, Respondents' December 10, 2004 letter states, "if we are unable to . . . release the requested file(s) you ***will be notified*** of the ***decision*** and the ***reasons*** therefor" (Complaint, Exhibit B) (emphasis added).

Appellants filed this action on December 21, 2012 seeking declaratory judgment that the Respondents' response failed to comply with S.C. Code Ann. § 30-4-30(c), and seeking injunctive relief for enforcement of FOIA. Appellants also filed a Motion for

Preliminary Injunction.

Defendants then produced the requested public records, which made moot the Plaintiffs' request for injunctive relief. However, Plaintiffs had also requested declaratory judgment that the public body's response was unlawful.

Respondents filed their Answer February 5, 2013. Respondents submitted their Memorandum in Opposition to the Motion at the hearing on February 6, 2013, arguing that the case was moot. By consent of the parties, the Court heard argument on the Preliminary Injunction and on the merits of the case on February 6, 2013.

On February 8, 2013, the Court issued only a Form 4 Judgment that states, "Plaintiff's complaint for FOIA enforcement is DENIED. Issue is moot." Judgment entered February 8, 2013. This ruling ended the entire case, including Plaintiffs' request for declaratory judgment.

Appellants appeal the failure to grant declaratory judgment that the public body's response was unlawful, and the failure to award attorneys' fees

Statement of Issues on Appeal

I. WHEN A PUBLIC BODY'S RESPONSE TO A FOIA REQUEST STATES, "IF WE ARE UNABLE TO . . . RELEASE THE REQUESTED FILE(S) YOU WILL BE NOTIFIED OF THE DECISION AND THE REASONS THEREFOR," DID THE RESPONSE VIOLATE FOIA?

II. WHEN A PUBLIC BODY FAILED TO NOTIFY THE APPELLANTS "OF ITS DETERMINATION AND THE REASONS THEREFOR" WITHIN 15 BUSINESS DAYS, DID THE CIRCUIT COURT ERR IN RULING THAT APPELLANTS' REQUEST FOR DECLARATORY JUDGMENT WAS MOOT?

III. DID THE CIRCUIT COURT ERR IN FAILING TO APPLY AN EXCEPTION TO THE DOCTRINE OF MOOTNESS?

ARGUMENT

I. WHEN A PUBLIC BODY'S RESPONSE TO A FOIA REQUEST STATES, "IF WE ARE UNABLE TO . . . RELEASE THE REQUESTED FILE(S) YOU WILL BE NOTIFIED OF THE DECISION AND THE REASONS THEREFOR," THE RESPONSE VIOLATES FOIA.

The South Carolina General Assembly has set out the purposes of the Freedom of Information Act and how it must be construed in S.C. Code Ann. § 30-4-15:

> The General Assembly finds that it is ***vital in a democratic society*** that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy. Toward this end, provisions of ***this chapter must be construed*** so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their public officials ***at a minimum cost or delay*** to the persons seeking access to public documents or meetings.

Id. (emphasis added). In the case before the Court, the Respondents failed to meet this standard.

The statute requires:

> (c) Each public body, upon written request for records made under this chapter, shall within fifteen days (excepting Saturdays, Sundays, and legal public holidays) of the receipt of any such request ***notify the person*** making such request ***of its determination and the reasons therefor***. Such a determination shall constitute the ***final opinion*** of the public body as to the public availability of the requested public record and, if the request is granted, the record must be furnished or made available for inspection or copying. If written notification of the determination of the public body as to the availability of the requested public record is neither mailed nor personally delivered to the person requesting the document within the fifteen days allowed herein, the request must be considered approved.

S.C. Code Ann. § 30-4-30(c) (emphasis added).

In a response fairly typical of the responses of public bodies, Respondents responded within fifteen business days, but their response did not meet the letter or the spirit of the statute. The response stated:

Dear Mr. Sloan:

> The South Carolina Department of Revenue has received your Freedom of Information request dated November 19, 2012. Your request is currently being researched and reviewed. As soon as the information has been compiled, ***you will be contacted again*** and the requested information will be sent to you.
>
> ***If we are unable*** to locate, obtain or ***release the requested file(s) you will be notified of the decision and the reasons for it.***

Complaint, Exhibit B (emphasis added).

The Respondents' promise that, "if we are unable to . . . release the requested file(s) you will be notified of the decision and the reasons for it," does not satisfy the statutory standard, which requires a public body to "***notify the person*** making such request ***of its determination and the reasons therefor***" within 15 business days. S.C. Code Ann. § 30-4-30(c) (emphasis added). The letter should have provided "its determination and the reasons therefor," but instead the public body unilaterally granted itself an unlimited extension of time to "notify the person . . . of its determination and the reasons therefor." *Id.*

The statute requires a substantive response within 15 business days. The statute does not authorize public body to grant itself an extension of time. Instead, the statute requires: "Such a determination shall constitute the ***final opinion*** of the public body as to the public availability of the requested public record." *Id.* The public body must give the "determination and the reasons therefor" the first time, within 15 business days; it is not entitled to a second or third bite at the apple.

The purpose of FOIA is to protect the public from secret governmental activity. *Wiedman v. Town of Hilton Head Island*, 330 S.C. 532, 500 S.E.2d 783 (1998) *See also Seago v. Horry County*, 378 S.C. 414, 663 S.E.2d 38 (2008). Furthermore, a willful

violation of FOIA is a criminal offense. S.C. Code Ann. § 30-4-110.

The Appellants' case is a fairly straight-forward proposition. The Respondents failed to meet the standards of FOIA. Appellants should be entitled to declaratory judgment of this failure, and an award of attorneys' fees.

II. WHEN A PUBLIC BODY FAILED TO NOTIFY THE APPELLANTS OF ITS DETERMINATION AND THE REASONS THEREFOR WITHIN 15 BUSINESS DAYS, THE CIRCUIT COURT ERRED IN RULING THAT APPELLANTS' REQUEST FOR DECLARATORY JUDGMENT WAS MOOT.

The South Carolina Freedom of Information Act provides for declaratory ***and*** injunctive relief.

> (a) Any citizen of the State may apply to the circuit court for ***either or both a declaratory judgment and injunctive relief*** to enforce the provisions of this chapter in appropriate cases as long as such application is made no later than one year following the date on which the alleged violation occurs or one year after a public vote in public session, whichever comes later. The court may order equitable relief as it considers appropriate, and a ***violation of this chapter must be considered to be an irreparable injury*** for which no adequate remedy at law exists.
>
> (b) If a person or entity seeking such relief prevails, he or it may be awarded reasonable attorney fees and other costs of litigation. If such person or entity prevails in part, the court may in its discretion award him or it reasonable attorney fees or an appropriate portion thereof.

S.C. Code Ann. § 30-4-100 (emphasis added). Accordingly, FOIA establishes an independent claim for declaratory judgment ("either ***or*** both declaratory judgment and injunctive relief") and the fee provision following refers to "such relief."

Appellants are compelled to agree that after the Respondents produced the documents in question, Appellants' claim for ***injunctive*** relief was effectively moot.

Not only does FOIA itself rebut Appellant's argument, but the S.C. declaratory judgment statute also states that declaratory relief may be awarded independently.

> Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect. Such declarations shall have the force and effect of a final judgment or decree.

S.C. Code Ann. § 15-53-20. Furthermore, the declaratory judgment statute is to be construed broadly to effectuate its remedial purposes.

> This chapter is declared to be remedial. Its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations. It is to be liberally construed and administered.

S.C. Code Ann. § 15-53-130.

Appellants asserted two independent FOIA claims, which Respondents attempted to moot. First, Respondents attempted to moot Appellants claim for injunctive relief by producing the documents only after Appellants filed this action. Second, Respondents argued that Appellants' claim for declaratory judgment was mooted by the production of the documents. However, the production of those documents did not moot the claim for ***declaratory*** judgment, which the statute also specifically authorizes. The claim for declaratory judgment was not moot. Appellants brought this case to clarify the requirements for FOIA responses to benefit the citizens of this state. The Respondents' response was unlawful.

The General Assembly does not want courts ignoring or belittling cases brought to enforce a citizen's rights under the Freedom of Information Act. Hence, it authorized both declaratory and injunctive relief. The General Assembly also authorized an award of attorneys' fees. The General Assembly intended that the courts enforce the Freedom of Information Act, and do so with diligence.

When a "public body" violates FOIA, a plaintiff is entitled to litigate the nature and the fact of the violation and the appropriate relief to be awarded. *Business License Opposition Committee v. Sumter County*, 304 S.C. 232, 403 S.E.2d 638 (1991). A plaintiff who prevails on a request for declaratory relief under FOIA is entitled to receive attorney fees and costs. *Cockrell by Cockrell v. Trustees of District 20 Constituent School District*, 299 S.C. 155, 382 S.E.2d 923 (1989).

The Circuit Court should have ruled that Appellants' claim for declaratory judgment was not moot; it should have granted Appellants declaratory judgment that the public body's "final opinion" was unlawful, and the Circuit Court should have awarded Appellants their attorneys' fees for prevailing under FOIA. S.C. Code Ann. § 30-4-30(c).

III. THE CIRCUIT COURT ERRED IN FAILING TO APPLY AN EXCEPTION TO THE DOCTRINE OF MOOTNESS.

The Circuit Court ruled that because the documents had been produced, the action was moot (Order, pp. 4-5). As demonstrated in section II above, the Appellants contend that the issue of declaratory judgment is not moot. However, should this Court disagree and find that the issue is technically moot; nevertheless, the Circuit Court should have applied—and likewise this Court should apply—one or more of the three main exceptions to the doctrine of mootness, and reach the merits of the controversy.

South Carolina courts have recognized three exceptions to the doctrine of mootness.

> First, if the issue raised is capable of repetition but generally will evade review, the appellate court can take jurisdiction. *E.g., id.; Sloan v. Department of Transp.,* 365 S.C. 299, 303, 618 S.E.2d 876, 878 (2005); *Byrd v. Irmo High Sch.,* 321 S.C. 426, 468 S.E.2d 861 (1996). "Second, an appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest." *Curtis v. State,* 345 S.C. at 568, 549 S.E.2d at 596.

> Third, "if a decision by the trial court may affect future events, or have collateral consequences for the parties, an appeal from that decision is not moot, even though the appellate court cannot give effective relief in the present case." *Id.; accord Sloan v. Department of Transp.*, 365 S.C. at 303, 618 S.E.2d at 878.

Sloan v. Dept. of Transportation, 379 S.C. 160, 168, 666 S.E.2d 236, 240 (2008) ("Ladson Road").

A. This Matter Is Capable of Repetition, Yet Evading Review.

This matter falls within the first exception to the doctrine of mootness: it is capable of repetition, but evades review. The basic unlawful element was a State agency's refusing to comply with the plain language of the Freedom of Information Act. This scenario is capable of repetition.

The South Carolina Supreme Court applied this standard in *Sloan v. Dept. of Transportation* (the "*Ravenel Bridge*" case), which held that the manner of selection of source of procurement of the Arthur Ravenel Bridge was unlawful, being by Requests for Proposals instead of by competitive sealed bids.

> The DOT contends this case should be dismissed as moot because the construction contracts have been awarded and fully performed. We disagree.
>
> "[A]n appellate court can take jurisdiction, despite mootness, if the issue raised is capable of repetition but evading review." *Curtis v. State,* 345 S.C. 557, 568, 549 S.E.2d 591, 596 (2001).

Sloan v. Dept. of Transportation, 365 S.C. 299, 303, 618 S.E.2d 876, 878 (2005). In *Ravenel Bridge*, the Supreme Court ruled that use of the Requests for Proposal process was designed to accelerate the procurement process. The Court ruled, "Clearly, this issue is capable of repetition, yet will usually evade review. Accordingly, despite mootness, we will address the merits." *Id.*

The standard is *capable* of repetition, not *likelihood* of repetition.

> The party bringing the action need only show the issue raised is *capable* of repetition and **is not required to prove there is a "reasonable expectation" the issue will arise again**. *Byrd [v. Irmo High School],* 321 S.C. at 431-32, 468 S.E.2d at 864 (finding South Carolina has adopted the "lenient" approach to evading review analysis).

Sloan v. Greenville County, 356 S.C. 531, 554-555, 590 S.E.2d 338, 351 (2003) (italics in original; bold and underline added). The SCDOR and other State agencies are capable of continuing to refuse to comply with FOIA in the same manner: to grant themselves an unauthorized and unlimited extension of time to comply with FOIA, to keep the public uninformed until after a lawsuit is filed, and then to produce the documents, to moot the case and thereby evade review.

In the *Ladson Road* case, the Supreme Court explained its reasoning on the standard of capable of repetition, yet evading review.

> We find the issue of whether the DOT properly authorized the emergency procurement is one that is capable of repetition, yet will usually evade review.[FN6] For example, here an emergency procurement came four years into the construction project, which was then ***completed within about six months.*** The project was completed only a few months after Sloan filed suit and well before the parties filed motions for summary judgment. Therefore, the "capable of repetition but evading review" exception to mootness applies here.

Sloan v. Dept. of Transportation, 379 S.C. 160, 168, 666 S.E.2d 236, 240 (2008). If the manner of selection of source for the Ravenel Bridge was an issue capable of repetition, yet evading review, because the project was completed within six months, then certainly a FOIA response, which can moot a FOIA case in a much shorter time, meets the standard of capable of repetition, yet evading review. This exception to the mootness doctrine should apply here.

In footnote 6 in *Ladson Road*, the Supreme Court explained the standard "capable of repetition."

> Although the DOT maintains this case is not capable of repetition because of its unique facts, ***we do not agree that this situation***—a construction project which experiences substantial delays and then requires a replacement contractor—***is particularly unique***.

Id. at n. 6 (emphasis added). Likewise, any state agency's temptation to grant itself an unauthorized and unlawful extension of time to respond properly to a FOIA request is not "particularly unique." It is capable of repetition, yet evading review.

B. This Matter is of Great Public Importance.

This case also falls within the second exception, public importance. The General Assembly has ruled that the violation of FOIA is "an irreparable injury for which no adequate remedy at law exists." S.C. Code Ann. § 30-4-100. Appellants respectfully suggest that the circumstances in the case at bar are the very circumstances that prompted the General Assembly to include such language in the statute.

The Supreme Court has repeatedly recognized, developed, and expanded jurisprudence of public importance standing and the standing of a South Carolinian to challenge unconstitutional actions by State officers. *South Carolina Public Interest Foundation v. Harrell*, 378 S.C. 441, 663 S.E.2d 52 (2008); *Sloan v. Department of Transportation*, 379 S.C. 160, 666 S.E.2d 236 (2008); *Sloan v. Hardee*, 357 S.C. 495, 640 S.E.2d 457 (2007); *Cornelius v Oconee County*, 369 S.C. 531, 633 S.E.2d 492 (2006); *Sloan v. Department of Transportation*, 365 S.C. 299, 618 S.E.2d 876 (2005), *Sloan v. Wilkins*, 362 S.C. 430, 608 S.E.2d 579 (2005); *Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004); *Sloan v. Greenville County*, 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003); *Sloan v. School District of Greenville County*, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000); *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999); *Newman v. Richland County Historic Preservation Commission*, 325 S.C. 79, 480 S.E.2d

72 (1997).

The analysis that supports public importance ***standing*** also supports a public importance ***exception*** to the doctrine of ***mootness***.

> In our discussion of Sloan's ***standing*** to bring this action, this court has already found in an analogous case that the "expenditure of public funds pursuant to a competitive bidding statute is of ***immense public importance***." *Sloan [v. School District],* 342 S.C. at 524, 537 S.E.2d at 303. ***The same rationale applies with respect to mootness***.

Sloan v. Greenville County, 356 S.C. 531, 554, 590 S.E.2d 338, 350 (2003) (emphasis added).

In *Ladson Road*, analyzed the great public importance exception to the doctrine of mootness this way:

> This Court has noted "the limited nature of the exception for questions of 'imperative and manifest urgency.'" *Sloan v. Greenville County,* 361 S.C. 568, 571, 606 S.E.2d 464, 466 (2004) (*Greenville County II*). In *Greenville County II,* we held that ***where judicial guidance exists*** on the legal issue presented, ***there is no imperative and manifest urgency*** for an advisory opinion.
>
> ***In the instant case, however, there is no case law*** specifically addressing the DOT's authorization of an emergency procurement. Because this is a matter of public importance which ***could occur*** at any time (given the inherent unpredictability of emergencies), we find there is an urgent nature to this issue.
>
> Accordingly, even though the Ladson Road Project was completed in 2005, we will address the other issues raised in the case.

Sloan v. Dept. of Transportation, 379 S.C. 160, 169, 666 S.E.2d 236, 240 (2008).

The Court made a similar ruling in the *Ravenel Bridge* case. "None of these cases required the plaintiff to show the absence of any other potential plaintiffs with a greater interest or any other nexus. Accordingly, ***despite the mootness in the present case,*** we find Sloan has standing ***to raise this issue.***" *Id.,* 365 S.C. 299, 304-5, 618 S.E.2d 876, 879 (2005).

The research of the undersigned counsel disclosed no South Carolina case interpreting or applying the particular provision at issue here. Accordingly, this Court should rule, like the *Ladson Road* Court, and the *Ravenel Bridge* Court, that it should address the issue to provide guidance on this important issue, even though the Court may find that the issue is technically moot.

C. This Matter May "Affect Future Events or Have Collateral Consequences."

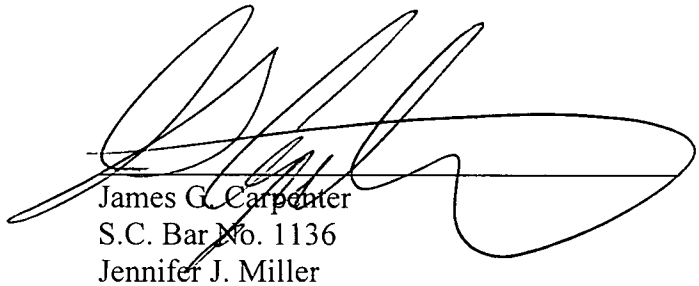
Finally, the third exception to mootness applies. This ruling may "affect future events or have collateral consequences." The Supreme Court in *Ladson Road* also found this third exception to the doctrine of mootness. "Moreover, a decision on the merits of this case certainly will affect future events, *to wit,* how the DOT decides to authorize emergency procurements in the future." *Id.* Likewise, the Supreme Court in the *Ravenel Bridge* case ruled that its decision would affect future events: other procurements by the DOT.

The statutory provisions at issue in this case apply not only to the SCDOR, but also to all agencies and branches of State government. No South Carolina cases interpret and apply this particular statutory provision, and a ruling would provide guidance to all agencies and departments of State government. Like the decisions in *Ladson Road* and *Ravenel Bridge*, a decision in this case will affect how the DOR and other South Carolina State agencies decide questions involving the use of public funds for private purposes.

Conclusion

WHEREFORE, Appellants respectfully request that this Court reverse the judgment of the Circuit Court, declare that Respondents violated the FOIA, and order that Appellants be awarded their costs and attorneys' fees pursuant to S.C. Code Ann. § 30-4-100(b).

THE CARPENTER LAW FIRM, P.C.



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PROOF OF SERVICE

The undersigned attorney hereby certifies that he served a copy of the Appellants' Initial Brief and Appellants' Designation of Matter to be Included in the Record on Appeal upon counsel for the Respondents by US Mail, postage prepaid this Friday, April 26, 2013, addressed as follows:

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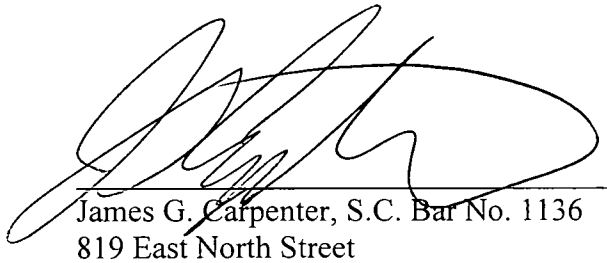

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