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SC Court of Appeals

In the State of South Carolina
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
• Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

Appellate Case No. 2020-000080

Herman Perry Holcomb,

Petitioner,

v.

City of North Augusta and
Mayor and City Council of
North Augusta,

Respondents.

PETITION FOR REHEARING

BY PETITIONER/RESPONDENT HERMAN PERRY HOLCOMB

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Comes now Petitioner, above named, by and through the undersigned counsel and pursuant to Rule 221(a), SCACR, and hereby respectfully petitions this Court to rehear this matter and allow oral argument, which was not previously permitted and might clarify the issues that gave rise to the Court's reversal of the court below.

In an action at law tried without a jury, such as this, the appellate court standard of review extends only to the correction of errors of law. *Crary v. Djebelli*, 329 S.C. 385, 496 S.E.2d 21 (1998); *Okatie River v. Southeastern Site Prep*, 353 S.C. 327, 577 S.E.2d 468 (Ct. App.2003); *Campbell v. Marion Cty. Hosp. Dist.*, 354 S.C. 274, 280, 580 S.E.2d 163, 165–66 (Ct. App. 2003). “[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 v. Marion Cty. Hosp. Dist.*, 354 S.C. 274, 280, 580 S.E.2d 163, 165–66 (Ct. App. 2003)(citations omitted); *see also Harkins v. Greenville County*, 340 S.C. 606, 533 S.E.2d 886 (2000); *Barnacle Broad., Inc. v. Baker Broad., Inc.*, 343 S.C. 140, 538 S.E.2d 672 (Ct. App. 2000); *Campbell v. Marion Cty. Hosp. Dist.*, 354 S.C. 274, 280, 580 S.E.2d 163, 165–66 (Ct. App. 2003). It is Petitioner's belief that this Court has overlooked or misunderstood certain matters that would justify rehearing, and given the law and findings of fact, the decision below should not be disturbed. Rehearing should be granted, and the findings of the trial court should not be disturbed and mandate reversal of this Court's decision.

First, Petitioner respectfully submits this Court overlooked or misunderstood the labeling of the agenda Petitioner contends was the agenda that was required to, but failed to, meet the procedural requirements of the South Carolina Freedom of Information Act (“FOIA”), S.C. Code Ann. § 30-4-10 *et seq.* In Reversing the Honorable Judge Clifton Newman's sound and well-reasoned opinion below, it appears the Court inadvertently overlooked that the actual name of the

agenda that did not comply with FOIA. There is no discussion of the actual name of the document in the Opinion. It is our contention that the document entitled Regular Agenda of May 7, 2018 was the agenda.

The doctrine of “plain meaning” means, absent ambiguity, the court will look to the plain meaning of the words used to determine their effect.

However plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention. If possible, the court will construe the statute so as to escape the absurdity and carry the intention into effect.

City of Rock Hill v. Harris, 391 S.C. 149, 152, 705 S.E.2d 53, 54 (2011).

It is Petitioner’s contention that the Court of Appeals overlooked or misunderstood the actual name of the document itself, which is plain on its face. The agenda, as alleged by Petitioner, is the “Regular Agenda of May 7, 2018.” On its face, it is plain that it should be treated as an agenda. That is what it is called. The lower court accepted and found that it was the agenda.

However, if this Court still finds that the Regular Agenda of May 7, 2018 is not plainly the agenda of the meeting, the Court should consider that determining the Regular Agenda of May 7, 2018 was not an agenda would lead to an absurd result. If it is not an agenda, the City of North Augusta and Mayor and City Council of North Augusta (hereinafter collectively the “City”) were allowed to add a \$500,000 project for the City’s consideration, without prior notice to the public by putting it on the Regular Agenda of May 7, 2018 without the process required by FOIA for an agenda.

The meeting related to substantial public funding, and the project was added to it for consideration without following the procedures required by FOIA as alleged in Petitioner's briefs in this case, which are adopted herein by reference. *See e.g.* S.C. Code Ann. § 30-4-80(A).

The Court of Appeals appropriately recognizes, in its opinion, that that on the website of the City, the document the City contends was the City's agenda, as defined by FOIA, was at a link on the City's website entitled "Agenda 050718" and that the document Petitioner contends was the City's agenda is at a link on the City's website entitled "Agenda 050718 Complete." Petitioner reasonably believed the "Complete" agenda was the one to review.

However, this honorable Court overlooks and does not discuss in its opinion the document itself. Petitioner contends the document called "Regular Agenda of May 7, 2018," which was Plaintiff's Merits Hearing Exhibit 6 (R. pp. at 292-323), constitutes the agenda for the May 7, 2018 City of North Augusta City Council meeting. *See* M.H. Tr. at 6 (R. p. at 173); M.H. Tr. at 49-52 (R. pp. at 216-219); Order dated October 8, 2019 at 2-3 (R. pp. at 11-12). What could be plainer as to the nature of a document than the title page of that document? *See* M.H. Tr. at 62:11-20 (R. p. at 229:11-20); *see also* Plaintiff's M.H. Exhibit 6 (R. pp. 292-323). What is a member of the public supposed to believe when he or she reads that a document is the "Regular Agenda of May 7, 2018" of the City Council Meeting?

The Court's Per Curium Opinion does not acknowledge that the title of the document is not just the link on the website. The Court's Opinion does not discuss that the document the City denies is its agenda is entitled "Regular Agenda of May 7, 2018," and it is Petitioner's contention that there is nothing plainer than the title of a document to indicate what it is and contends to be, in this case, an agenda. FOIA requires amendment of such a document to follow certain procedures in order to be amended. The publication of the Regular Agenda of May 7, 2018 fails to

follow those procedures, such as the failure to publish without twenty-four hours prior notice or a finding of emergency or exigent circumstances as required by FOIA. M.H. Tr. at 54-56 (R. pp. at 221-223); *see* Plaintiff's M.H. Exhibit 7 (R. pp. at 324-328); Order dated October 8, 2019 at 4 (R. p. at 13).

However, if this Court does not concur that the foregoing and other arguments made in Petitioner's briefs firmly establish the Regular Agenda of May 7, 2018 is plainly the "agenda" as that word is used in FOIA, the plain meaning rule may not be applied here. The plain meaning rule is only used in the absence of an ambiguity, and the substantial reasonable arguments set forth herein confirm Petitioner has demonstrated ambiguity.

"The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the legislature." *Whitner*, 399 S.C. at 552, 732 S.E.2d at 863-64 (citing *Sloan v. Hardee*, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007)). "Absent an ambiguity, the court will look to the plain meaning of the words used to determine their effect." *Whitner*, 399 S.C. at 552, 732 S.E.2d at 864 (citing *City of Rock Hill v. Harris*, 391 S.C. 149, 155, 705 S.E.2d 53, 55 (2011)).

State v. Alexander, 424 S.C. 270, 275, 818 S.E.2d 455, 458 (2018).

Instead, since there is a state of ambiguity in this case, the Court is required to hold in favor of the public. In addition to the ordinary rules of statutory construction applicable when interpreting a state statute, there are special considerations when interpreting the South Carolina Freedom of Information Act ("FOIA"), S.C. Code Ann. § 30-4-10 *et seq.* Specifically, the FOIA says:

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.

S.C. Code Ann. § 30-4-15.

“South Carolina's FOIA was designed to guarantee the public reasonable access to certain activities of the government.” *Burton v. York County Sheriff's Dept.*, 358 S.C. 339, 347, 594 S.E.2d 888, 892-93 (Ct. App. 2004), citing, *Fowler v. Beasley*, 322 S.C. 463, 468, 472 S.E.2d 630, 633 (1996). FOIA creates an affirmative duty on public bodies to disclose information. *Burton v. York County Sheriff's Dept.*, 358 S.C. at 347, citing, *Bellamy v. Brown*, 305 S.C. 291, 295, 408 S.E.2d 219, 221 (1991); *Campbell v. Marion County Hospital District*, 354 S.C. 274, 281, 580 S.E.2d 163, 166 (Ct. App. 2003).

Furthermore, the purpose of the FOIA is to protect the public by providing for the disclosure of information. *Id.* The Act is remedial in nature and should be *liberally construed* to carry out the purpose mandated by the legislature. *Burton v. York Cty. Sheriff's Dep't*, 358 S.C. 339, 347, 594 S.E.2d 888, 892-93 (Ct. App. 2004) (*emphasis supplied*), citing, *Campbell v. Marion County Hospital District.*, 354 S.C. at 281, 580 S.E.2d at 166. Any exception to FOIA's applicability must be narrowly construed. *Evening Post Publ'g Co. v. City of North Charleston*, 363 S.E. 452, 457, 611 S.E.2d 496, 499 (2005). Due to the foregoing, this Court should rehear the matter.

Last-minute agenda changes are inconsistent with the obligation imposed by FOIA to guarantee the public reasonable access. *See Fowler v. Beasley*, 322 S.C. 463, 468, 472 S.E.2d 630, 633 (1996); *see also* Order dated October 8, 2019 at 5. Order dated October 8, 2019 at 5. Pursuant to the FOIA, every meeting of all public bodies shall be open to the public unless closed pursuant to § 30-4-70 of the FOIA Chapter. S.C. Code Ann. § 30-4-60.

Furthermore, although FOIA did not always, FOIA now requires agendas for regularly scheduled meetings and sets forth a specific procedure for amending agendas once an agenda has

been posted. S.C. Code Ann. § 30-4-80(A); *see Brock v. Town of Mount Pleasant*, 415 S.C. 625, 629 n.4, 785 S.E.2d 198, 201 (2016); Order dated October 8, 2019 at 6.

South Carolina Code § 30-4-80(A) requires of a public body in part that, An agenda for regularly scheduled or special meetings must be posted on a bulletin board in a publicly accessible place at the office or meeting place of the public body and on a public website maintained by the body, if any, at least twenty-four hours prior to such meetings. . . . Once an agenda for a regular, called, special, or rescheduled meeting is posted pursuant to this subsection, no items may be added to the agenda without an additional twenty-four hours notice to the public, which must be made in the same manner as the original posting. After the meeting begins, an item upon which action can be taken only may be added to the agenda by a two-thirds vote of the members present and voting; however, if the item is one upon which final action can be taken at the meeting or if the item is one in which there has not been and will not be an opportunity for public comment with prior public notice given in accordance with this section, it only may be added to the agenda by a two-thirds vote of the members present and voting and upon a finding by the body that an emergency or an exigent circumstance exists if the item is not added to the agenda.

S.C. Code Ann. § 30-4-80(A)(emphasis supplied). FOIA was not followed in this case, and it should be reheard.

Second, this Court in its Opinion at 3 indicates, “As outlined above, we understand the term ‘agenda’ to describe a list of things to be done such as items to be considered at a meeting.” Petitioner contends the definition above suggests the Court has overlooked or misunderstood the nature and scope of the amendment of the agenda and associated problems that resulted due to insufficient process in this case.

The City clearly described and added to the list of things to be done and items to be considered on its May 7, 2018 agenda too close in time to the May 7, 2018 meeting without appropriate process. It described and added The New Savannah Bluff Lock and Dam project. It had never been considered on a City agenda for tax funding before. The City assigned a value of \$500,000 to the specific project for funding, which was added to the list of items the Capital Projects Sales Tax IV funds would fund. M.H. Tr. at 49:2– 2:23 (R. p. at 216:2-23). This addition

to things to be done, including items to be considered, occurred for the first time at and immediately before the May 7, 2018 meeting, thus leap frogging over the citizen rights protected by the Freedom of Information Act and violating Constitutional rights of the citizens protected by FOIA, such as the right to Due Process, First Amendment Freedom of Speech and Equal Protection. It was all done in a way that prevented Plaintiff from preparing and opposing the funding of the project. *See* M.H. Tr. 49-54 (R. pp. 216-221).

Third, this Court opines that it is “concerned that after-the-fact evaluations such as the one conducted here would discourage public bodies from providing supplemental information.” *See* Per Curium Opinion at 3. This statement of the Court and the associated discussion suggest that the Court has overlooked and/or misunderstood one other significant factor in this case. It is evident, the City was using FOIA as a sword, not a shield, in its conduct of the May 7, 2018 meeting. It only provided the supplemental information it wanted to provide. The City was in a superior position to be clear for the benefit of the public. If it did, or does, not provide clearly labeled supplemental information to the public, it does so to punish or evade review. The City is not transparent. The Opinion does not discuss the significance of this failure.

The City had already failed to provide supplemental information on the project when it decided to announce it at the 11th hour amendment in this case. It declined to announce properly in advance of the meeting that there would be consideration of this major project, evidently so as not to draw substantial public scrutiny.

FOIA's essential purpose is to protect the public from secret government activity. *Belamy v. Brown*, 305 S.C. 291, 295, 408 S.E.2d 219, 221 (1991). Because FOIA is remedial in nature, it should be liberally construed to carry out the purpose mandated by the legislature. *Campbell*, 354 S.C. at 281, 580 S.E.2d at 166; *see Brock v. Town of Mount Pleasant*, 411 S.C. 106,

117, 767 S.E.2d 203, 208 (Ct. App. 2014). Reversal of the decision below leaves the City free to continue to conduct secret government activity, thwarting FOIA's essential purpose of protecting the public from such secret activity.

Respondent Holcomb contends in this case that, "Regular Agenda of May 7, 2018," which was Plaintiff's Merits Hearing Exhibit 6 (R. pp. at 292-323), constitutes the complete agenda for the May 7, 2018 City of North Augusta City Council meeting. *See* M.H. Tr. at 6 (R. p. at 173); M.H. Tr. at 49-52 (R. pp. at 216-219); Order dated October 8, 2019 at 2-3 (R. pp. at 11-12). If the Court had been aware of and understood the foregoing, Petitioner is confident there would have been a different outcome, rather than reversal, and Petition moves this honorable Court for the opportunity to have the matter reheard, have the Order below restored, have a finding for the Petitioner/Respondent and have restored the award of his attorney's fees and costs.

The matter is not casually pursued by Petitioner, it is a matter of principal. As an individual seeking to enforce the laws of the State of South Carolina and, indeed, the United States of America, the last three (3) years pending before the Court of Appeals resulting in reversal has been very disappointing, especially given his confidence in the opinion below. Petitioner now requests, therefore, if this honorable Court believes it may have overlooked or misunderstood any aspect of this case, that it rehear the matter.

WHEREFORE, premises considered, for the reasons stated above, the Petitioner would respectfully request this Court rehear argument, including oral argument, in this appeal.

Respectfully submitted,

May 4, 2023



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CERTIFICATE OF SERVICE

I, Dionè C. Carroll, do hereby certify that I have caused the **PETITION FOR REHEARING** in the above-referenced matter to be served on all known counsel of record as required by the Rule this May 4th, 2023 to:

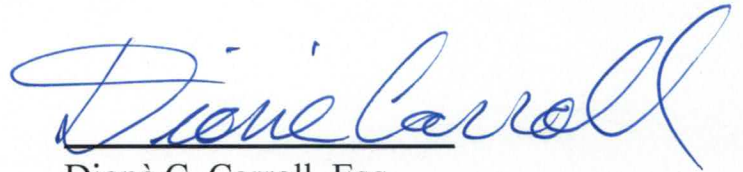
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