

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

Case No. 01-CP-40-2956

Edward D. Sloan, Jr., individually, and as a Citizen, Resident, Taxpayer and Registered Elector of the State of South Carolina, and on behalf of all others similarly situated,Appellant,

v.

Friends of the Hunley, Inc., and Warren F. Lasch, its Chairman, Respondents.

APPELLANT'S REPLY BRIEF

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ARGUMENT

Despite the length of the briefs, the condensed issues in this action are relatively simple and straightforward. On the first cause of action, FOIA, the issue is whether the claim for declaratory judgment is moot. On the second cause of action, alleging that FOTH is the *alter ego* or agent, the issues are whether Mr. Sloan possesses standing to sue, and whether the claim should have been dismissed under Rule 12(b)(6), for failure to state facts constituting a cause of action.

I. SLOAN'S REQUEST FOR DECLARATORY JUDGMENT UNDER FOIA IS PROPERLY BEFORE THE COURT.

Mr. Sloan's first claim, FOIA, requests relief beyond simple production of documents. It requests declaratory relief "that Defendants are subject to FOIA and that defendants have violated FOIA". *Id.* (R. pp. 21-22). No court has finally ruled on the merits of this request. Judge Kinard initially ruled that FOTH was subject to FOIA, but later withdrew this part of his ruling, at the objection of FOTH, and ordered, "The case will proceed."

Judge Kinard's ruling is the law of the case, only as to his finding that the request for injunctive relief was moot. Mr. Sloan does not contest this ruling. Judge Kinard's ruling on mootness could not have applied to the declaratory judgment part of the case, because in the same initial order he *granted* declaratory judgment that FOIA *does* apply to FOTH. For FOTH to argue that Judge Kinard was ruling blatantly inconsistently within the confines of one short order is untenable. Thus, the mootness ruling related only to the truly moot part of the case, the request for injunctive relief.

The law of the case doctrine does not prevent this Court's review of this issue. The law of the case doctrine applies to a final order of the court that has not been appealed. Respondents admit in their brief, "Thus when there is a final judgment—i.e., a disposition of all issues in an action, and a party timely files its notice of intent to appeal from that judgment, 'this court may review any intermediate order necessarily affecting the judgment not earlier appealed.' *South Carolina Dep't. of Transp. V. Faulkenberry*, 337 S.C. 140, 146, 522 S.E.2d 822, 825 (Ct. App. 1999). The rest of that paragraph from *Faulkenberry* contains the following:

Generally, only final judgments are appealable. *Culbertson v. Clemens*, 322 S.C. 20, 471 S.E.2d 163 (1996). If a judgment leaves some further act to be done by the court before the rights of the parties are determined, the judgment is not final. *Id.* "If a judgment determines the applicable law while leaving open questions of fact, it is not a final judgment." *Mid-State Distrib., Inc. v. Century Importers, Inc.*, 310 S.C. 330, 335, 426 S.E.2d 777, 780 (1993). When there is a final judgment, and a party timely files its notice of intent to appeal from that judgment, this court may review any intermediate order necessarily affecting the judgment not earlier appealed. *Lancaster v. Fielder*, 305 S.C. 418, 409 S.E.2d 375 (1991).

Id. Judge Kinard's order was not a "final judgment" under *Faulkenberry*. It left "some further act to be done." *Id.* In withdrawing his earlier order, Judge Kinard ruled, "The case will proceed."

Judge Hayes did not rule on the merits of the claim for declaratory judgment under FOIA, but instead ruled the claim moot. Judge Hayes's decision finding Mr. Sloan's request for declaratory judgment moot was the final order of the court, and Mr. Sloan has appealed this final order. As demonstrated in Appellant's Brief, the final order was error.

Sloan's request for declaratory judgment is authorized by statute.

(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 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.

S.C. Code Ann. § 30-4-100 (emphasis added).

FOTH is a “public body” under FOIA as demonstrated in Appellant’s Brief. When a “public body” violates FOIA, a plaintiff is entitled to litigate the nature and the fact of the violation (declaratory judgment) 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 attorneys fees and costs. *Cockrell by Cockrell v. Trustees of District 20 Constituent School District*, 299 S.C. 155, 382 S.E.2d 923 (1989).

No court has declared whether FOTH is a “public body” subject to FOIA or whether “defendants have violated FOIA.” There has been no final ruling on the request for declaratory judgment, and thus, it is not moot.

However, should the court consider the first cause of action moot, both declaratory and injunctive relief, the claim falls within both recognized exceptions to the mootness doctrine: capable of repetition but evading review, and the public interest exception.

As demonstrated in the Appellant’s brief, other citizens have sought to secure documents from FOTH under FOIA, and FOTH has responded that that FOIA does not apply to FOTH and that no documents will be produced (R, pp. 71, 73, 75, 77-79). Thus, the issue is not only capable of repetition, because it has been repeated. Furthermore, as in the case at bar, it is evading review.

Another exception to the general rule of mootness is the exception for issues of public importance. Issues of public importance in the current litigation should be decided for future guidance despite their mootness. "Questions of public interest originally encompassed in an action should be decided for future guidance, however abstract or moot they may have become in the immediate contest." *Ashmore v. Greater Greenville Sewer District*, 211 S.C. 77, 44 S.E.2d 88, 96-97 173 A.L.R. 397 (1947).

The Supreme Court has recently restated this rule in *Sloan v. Greenville County, Sloan v. Greenville County, et al.*, Opinion No. 25899 (November 22, 2004), ("Roads 99-Family Court"). The Supreme Court recognized anew the "'public importance' exception to mootness holding that 'an appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest.'" The Court ruled that this issue "must be decided on an individual basis." The Court found that the Court of Appeals had adopted a "categorical exception" without a consideration of the facts "on an individual basis," which would indicate an "imperative and manifest urgency." The Supreme Court based on its ruling two factors: (1) the Court of Appeals had subsequently issued two opinions addressing the sufficiency of a written determination to avoid competitive sealed bidding (the issue in the cases) and (2) the violated ordinance had been amended. The factors on which the Supreme Court relied are not found in the case at bar: there is no appellate decision on point and the statute has not been amended.

The applicability of FOIA to this organization supported by public funds is an issue of great public importance. The General Assembly stated that FOIA addresses an issue "vital in a democratic society." S.C. Code Ann. § 30-4-15. FOIA protects the

public from secret governmental activity. *Wiedman v. Town of Hilton Head Island*, 330 S.C. 532, 500 S.E.2d 783 (1998). Furthermore, a willful violation of FOIA is a criminal offense. S.C. Code Ann. § 30-4-110. As demonstrated in the Appellant's Brief, Respondents willfully refused to comply with FOIA until after service of a summons and complaint for the enforcement of FOIA. Sloan is entitled to declaratory judgment in this case. The trial court's ruling that the issue is moot should be reversed.

II. THE TRIAL COURT SHOULD NOT HAVE GRANTED DEFENDANTS SUMMARY JUDGMENT ON THE ALTER EGO/AGENCY CLAIM.

The Complaint's Second Cause of Action prays for an order "declaring that FOTH is an *alter ego* or agent of the Hunley Commission and therefore is equally subject to all the laws of the State of South Carolina that apply to the Commission" (R. pp. 21-22).

A. Sloan Presented Evidence of Domination or Control and of the Instrumentality Theory.

1. The Commission Created FOTH.

The State created the Commission to oversee the salvage and curation of the *H.L. Hunley*. S.C. Code Ann. § 54-7-100. The Commission founded FOTH. The Commission chairman appoints the members of the Board of Directors of FOTH (Supp. R. p. 508). As demonstrated above, FOTH has acted as an arm of the Commission, and the Commission has operated as merely a financial conduit for FOTH. The Commission possesses few detailed records to substantiate how millions of State and Federal taxpayer dollars have been spent (R. pp. 178-180, Supp. R. pp. 45-434). FOTH, meanwhile, contends that as a "private" charitable organization, it is beyond the reach of FOIA. Non-profit corporations are subject to FOIA if they receive or expend public funds. FOTH does not comply with the Consolidated Procurement Code (Supp. R. p. 482, l. 19 - p. 483, l. 1). Neither the Commission nor the public is receiving detailed accounting reports. With this lack of accountability and oversight, and with millions of dollars being poured into this politically popular project, the potential for unmonitored misuse, fraud, and irresponsible behavior is enormous.

2. The Commission Cannot Grant FOTH More Authority Than It Possesses.

The Commission, as a governmental body, is limited in its powers to those enumerated in S.C. Code Ann. §§ 54-7-100 and 54-7-110. It possesses only the powers granted to it by law. The Commission, through its Chairman, vice-chairman, and general counsel, established FOTH to do the business of the Commission. Nonetheless, FOTH takes the implied position that FOTH is free to operate outside the strictures and limitations that govern the Commission. This position is fundamentally wrong, and respondents do not attempt to defend it in the Respondents' brief.

An agent (FOTH) can have no more power or authority than the principal (Commission). This principle is as old as the common law. Almost 200 years ago, the Court asked the rhetorical question: "How then could the defendants convey to their agent a power which they themselves did not possess?" *Moodie and Black v. Penman, Shaw and Co.*, 3 S.C. Eq. 482 (3 Des. 482) (1812). Again 130 years ago, the Supreme Court stated that in "the relation of principal and agent, . . . the agent acts solely as the hand of the principal." *Welsh v. Davis*, 3 S. C. (3 Richardson) 110 (1871). Again, over 100 years ago this Court approved a jury instruction that restated this fundamental principle: "The agent's right and authority to do any act . . . must be derived from [his] principal." *Stickley v. Mobile Ins. Co.*, 37 S.C. 56, 16 S.E. 280 (1892).

The potential range of authority, within which power can validly be conferred to act as agent for another as principal, has been broadly and comprehensively summarized by the statement that what one may do himself he may do by another. A somewhat more exact statement is that authority can be vested in an agent to do for his principal any lawful act performable by the principal Authority cannot be effectively conferred upon an agent to do an unlawful act, which by reason of its illegality, the principal has no right to do personally, or, as otherwise stated, that regardless of the scope of his authority, an agent cannot do what the principal himself could not honestly or lawfully have done.

B. The Alter Ego or Instrumentality Relationship Produced Adverse Consequences.

FOTH contends that in addition to an identity with the Commission and overreaching relationship with the Commission, the appropriate standard to support a finding of *alter ego* includes an element of "injustice or inequitable consequences" flowing from the close relationship (R. p. 263). Sloan denies that it is an essential element to create an *alter ego*, but contends that the excesses listed in the Appellant's brief demonstrate such injustice or inequitable consequences.

Appellant submits that without the overreaching control and *alter ego* relationship between the Commission and FOTH, in which the Commission did not act at arms length, but merely as a conduit for public funds, spent largely unsupervised, this unethical conduct would not have happened. Furthermore, without this *alter ego* relationship the young attorney's conflict of interest would not have arisen. The alter ego relationship allowed the conflicts in Hazzard's multiple offices and compensation, 2) his co-signing FOTH's checks totaling millions of dollars with Lasch; 3) his serving as hired consultant to FOTH at \$2,000 per month, receiving a \$16,000 signing bonus, \$5,000 "comp time," vacation; and 4) a luxury sports car that at least resembles a bribe or payoff. The injustice and unfairness arising from and permitted by the *alter ego* relationship demonstrate the error of the trial court's ruling.

Sloan has raised serious issues in his second cause of action, which have received no judicial consideration whatsoever. The Circuit Court erred in granting Respondents' dispositive motion on this claim.

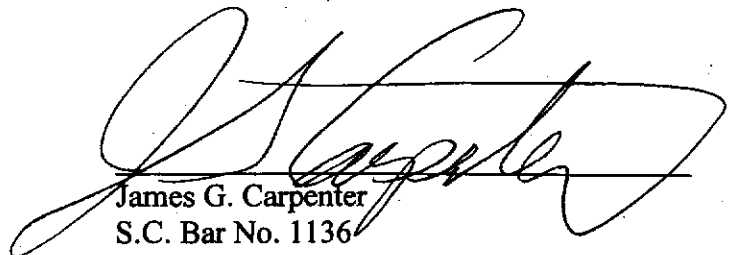
CONCLUSION

Sloan possesses statutory standing under FOIA. The claim for declaratory judgment regarding whether FOTH is a public body has never been ruled upon. Furthermore, Sloan's FOIA claim falls within both exceptions to the mootness doctrine.

Sloan also possesses citizen, taxpayer, and public interest standing on his second claim. Sloan has presented extensive evidence to support his *alter ego* claim. FOTH possessed no more authority than the Commission that created it, and should, as the *alter ego* of the Commission, be subject to all the legal restrictions of the Commission.

Sloan therefore prays the Court for an order reversing the Trial Court's finding that the first claim was moot; reversing the Trial Court's finding that Sloan did not possess standing on his second claim; reversing the grant of Summary Judgment on his second claim; remanding the case for trial; and granting such other and further relief as the Court deems just and proper.

Respectfully submitted,
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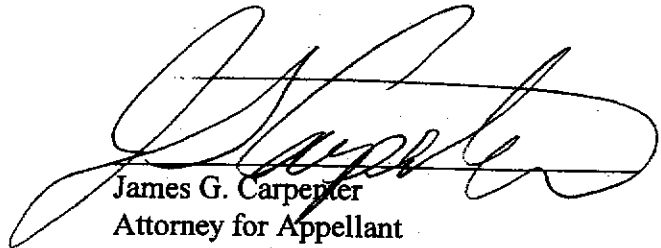
v.

Friends of the Hunley, Inc., and Warren F. Lasch, its Chairman,
..... Respondents.

PROOF OF SERVICE

I certify that I have caused to be served Appellant's Brief and Appellant's Reply
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