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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2011-198146

Rocky Disabato d/b/a/ "Rocky D," Appellant,

v.

South Carolina Association of School Administrators, Respondent.

State Ex Rel Alan Wilson, Attorney General, Intervenor.

REPLY BRIEF OF
STATE EX REL ALAN WILSON, ATTORNEY GENERAL
TO BRIEF OF AMICI SOUTH CAROLINA SCHOOL BOARDS ASSOCIATION,
AND THE AMERICAN SOCIETY OF ASSOCIATION EXECUTIVES

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ARGUMENT

AMICI'S FUNCTIONAL EQUIVALENCY ARGUMENT IS INAPPLICABLE BECAUSE THE GENERAL ASSEMBLY HAS ALREADY DEFINED PUBLIC BODY FOR PURPOSES OF FOIA AND ITS APPLICATION HAS BEEN CONCEDED FOR PURPOSES OF THIS APPEAL

The brief of Amici largely covers general First Amendment law which has already been addressed in the briefs of the parties. Amici do advocate a “functional equivalency” test for whether an association is covered by a state public information statute, but the cases they cite are statutory construction cases rather than First Amendment cases. Those cases and the “functional equivalency argument” are irrelevant because Respondent SCASA has already conceded that it is a public body “for purposes of this appeal,” and for the purposes of considering the Motion to Dismiss of Appellant Disabato, the Circuit “Court assume[d] that SCASA is supported in part by public funds and that SCASA would fall within the FOIA’s definition of “public body” as alleged in the Complaint.” R. p. 23; Respondent’s Brief at p. 14, note 4.

Further, the “functional equivalency” test cases cited by Amici at pages 18 and 19 address statutes that do not define whether a private entity is a public agency unlike our own FOIA, or as in the following cases, contain definitions that are different from the “public body” definition in South Carolina’s FOIA: *Mem'l Hosp.-W. Volusia, Inc. v. News-Journal Corp.*, 927 So. 2d 961, 965 (Fla. Dist. Ct. App. 2006), (“any private business entity ‘acting on behalf of any public agency.’”); *United HealthCare of Georgia, Inc. v. Georgia Dept. of Cmty. Health*, 293 Ga. App. 84, 87, 666 S.E.2d 472, 476 (2008) (“the Act requires the

disclosure of documents possessed by a private entity performing a service or function for or on behalf of a public agency”); *Rumore v. Bd. of Educ. of City Sch. Dist. of Buffalo*, 35 A.D.3d 1178, 1179, 826 N.Y.S.2d 545, 546 (2006)(“other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature”); *Times of Trenton Public Corp. v. Lafayette Yard Cmty Dev. Co.*, 874 A.2d 1064 (NJ 2005)(did not apply a functional equivalency test and instead applied a statutory definition under New Jersey’s Open Meetings Law¹ and a statutory definition under the State’s Open Records law²).

Amici essentially contend that associations not receive sufficient public support for the purposes of the definition of public body under S.C. Code Ann. §30-4-20(a)(“agency supported in whole or in part by public funds or expending public funds”), but the degree of public support cannot undermine the concession for this appeal that SCASA is a S.C. Code Ann. §30-4-20 public agency. Moreover, even Amici appear to acknowledge that public funds may pay the dues of members of some associations and pay for some of their activities and that dues funded at least in part by the public may be used for the participation

1 “[A]ny other group of two or more persons organized under the laws of this State, and collectively empowered as a voting body to perform a public governmental function affecting the rights, duties, obligations, privileges, benefits, or other legal relations of any person, or collectively authorized to spend public funds.” 874 A.2d at 1071.

2 “[A]ny political subdivision of the State or combination of political subdivisions, and any division, board, bureau, office, commission or other instrumentality within or created by a political subdivision of the State.” 874 A.2d 1064, 1074.

of associations in the State Health Plan. Brief of Amici at pp. 20 – 24.³

Amici seek to downplay the governmental functions of associations such as SCASA, characterizing them as “public service” rather than a “governmental function”, but the instant case does not involve a “*quid pro quo*” situation in which a corporation receives funds because it is providing services. Such issues were addressed regarding the identical “public body” definition under the State’s Whistleblower statute, S.C. Code Ann. § 8–27–10(1). *Woods v. Boeing, Inc.*, 841 F. Supp. 2d 925 (D.S.C. 2012);⁴ *Sutler v. Palmetto Elec. Co-op., Inc.*, 325 S.C. 465, 469, 481 S.E.2d 179, 181 (Ct. App. 1997)⁵ (whistleblower statute). Those cases do not apply here because but the instant case does not involve “business enterprises that receive payment from public bodies in return for supplying specific goods or services on an arm’s length basis” which *Weston v. Carolina Research & Dev. Found.*, 303 S.C. 398, 404, 401 S.E.2d 161, 165 (1991) said would be beyond the scope of FOIA.

Moreover, none of these arguments avoid the concession that SCASA is a public body for purposes of this appeal and that a solution of disengagement from public funds and

³ This brief takes no position on which organizations other than SCASA are subject to FOIA.

⁴ Addressing an “identical” definition of “public body” under the Whistleblower statute, the Court noted that “Boeing has provided, and continues to provide, jobs to an area within the State that would otherwise not have jobs. In exchange for this service, under a negotiated agreement governed by the Bond Act, Boeing has received and will continue to receive payments from the State.” *Woods*.

⁵ “Just as the FOIA does not apply to enterprises that accept payment from public bodies in exchange for services, the Whistleblower Act does not apply to Respondent, who provides electricity to rural areas in exchange for loans with beneficial interest rates.” *Sutler*.

governmental functions exists for any covered association such as SCASA that does not want to be subject to FOIA's requirements. An association subject to FOIA may also seek legislative change if it wants the definition of public body modified. These options of disengagement and legislative change are matters for, respectively, associations and the General Assembly to determine rather than the Courts.

CONCLUSION

For the foregoing reasons, the State ex rel Wilson, respectfully requests that this Court reverse the Circuit Court and uphold application of FOIA to SCASA.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served one copy of the Reply Brief to Amici of the State ex rel Wilson upon counsel for the other parties by mailing copies to each of them at the addresses below via the United States Mail this July 16, 2012:

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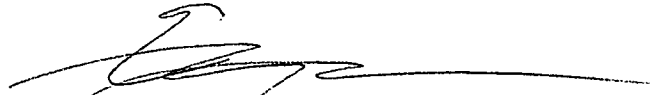
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A handwritten signature in black ink, appearing to read "J. Emory Smith, Jr.", written over a horizontal line.

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ALAN WILSON
ATTORNEY GENERAL

July 16, 2012

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The Honorable Daniel E. Shearouse
Clerk, Supreme Court of
South Carolina
HAND DELIVERY

S.C. Supreme Court

Re: Disabato v. S.C. Association of School Administrators
Appellate Case No. 2011-198146

Dear Mr. Shearouse:

Enclosed for filing with your Office is the original and fourteen copies of the Brief of the Attorney General in Reply to Brief of Amici School Boards Association, et al in this case together with a Certificate of Service. I assume that a Rule 211 Certificate is not needed but, if it is, please let me know and I will produce it. Thank you for your assistance.

Sincerely,

J. Emory Smith, Jr.
Assistant Deputy Attorney General

cc : Kevin A. Hall, Esquire
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