IN 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 NUMBER 01-CP-40-2956

Edward D. Sloan, individually and as a citizen and taxpayer and registered elector of the State of South Carolina, and on behalf of all others similarly situated, ...Appellant,

vs.

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

FINAL BRIEF OF RESPONDENTS FRIENDS OF THE HUNLEY, INC., AND WARREN F. LASCH, ITS CHAIRMAN

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5. **As an additional sustaining ground, where the evidence establishes that Respondent Friends of the Hunley maintains an identity separate and apart from the Hunley Commission, and where Appellant can demonstrate no inequitable consequences, whether the evidence establishes that Friends of the Hunley is the *alter ego* of the Hunley Commission.**

6. **As an additional sustaining ground, where the evidence establishes that Warren Lasch is being sued only in his capacity as Chairman of Friends, whether Warren Lasch may be held personally liable for an alleged Freedom of Information Act violation.**

STATEMENT OF THE CASE

On July 12, 2001, Appellant Edward D. Sloan, Jr., ("Sloan") individually and as a citizen, resident and taxpayer of the State of South Carolina, commenced this action with the filing of a complaint for injunctive relief and declaratory judgment against Friends of the Hunley, Inc. ("Friends") and its Chairman, Warren F. Lasch ("Lasch"). (R. pp. 18-22). Friends is a non-profit organization incorporated under the provisions of sections 33-31-10 – 450 of the South Carolina Code of Laws (Law Co-op. 1990 & Supp. 2003) and dedicated to the recovery and conservation of the Confederate Submarine, *H.L. Hunley*. (R. pp. 271 ¶ 2).

In his first cause of action, Sloan alleges that Friends received more than 13 million dollars of public money and, as such, is a "public body" as defined in section 30-4-20(a) of the South Carolina Code of Laws (Law Co-op. 1991). (R. p. 20 ¶ 9). In his Complaint, Sloan contends that although he sent a Freedom of Information Act ("FOIA") request to Friends on July 2, 2001, Friends refused to provide the documents requested. (R. p. 20 ¶¶ 10, 11). As such, according to Sloan, Friends violated the FOIA. (R. p. 20 ¶ 12). In his second cause of action, Sloan seeks a declaratory judgment alleging that given the corporate structure of Friends and the relationship between Friends and the Hunley Commission, "Friends is the *alter ego* of the Hunley Commission," and is therefore "equally subject to all the laws of the State of South Carolina that apply to the Commission," including the FOIA. (R. p. 20-21 ¶¶ 13-21).

On August 16, 2001, Friends and Lasch answered the Complaint and asserted various factual and legal defenses (Supp. R. pp. 2-6), and on August 24, 2001, Friends and Lasch filed an Amended Answer. (R. pp. 23-27).

On January 18, 2002, Friends and Lasch filed their first Motion for Summary Judgment on the grounds that Friends fully complied with Sloan's FOIA request and, therefore, Sloan's first cause of action was moot and did not present a justiciable controversy. (R. pp. 28-29). Friends and Lasch maintained further that because the case was moot, a determination by the trial court on Sloan's second cause of action would amount to no more than an advisory opinion and, as such, must be dismissed. On March 21, 2002, Sloan filed a motion for partial summary judgment on the grounds that the FOIA applies to Friends. (R. p. 56).

By Order dated April 10, 2002, the Honorable Ernest J. Kinard granted Friends' motion as to Sloan's first cause of action, finding that no justiciable controversy existed and the first cause of action was now moot. (R. pp. 1-6). Judge Kinard also granted Sloan's motion to declare the FOIA applies to Friends. (R. pp. 1-6). However, by Order dated May 21, 2002, Judge Kinard, upon a motion to alter or amend judgment filed by Friends and Lasch, withdrew the granting of Sloan's motion to declare that the FOIA applies to Friends, finding that this determination was premature. (*See* R. pp. 171-176; R. pp. 7-8).

On September 6, 2002, Friends and Lasch filed a second motion for summary judgment contending, *inter alia*, that the case no longer presented a justiciable controversy, and even if it did, the evidence conclusively establishes

that Friends is not the *alter ego* of the Hunley Commission. (R. pp. 258-259). On January 20, 2004, based on an unpublished opinion issued by this Court, Friends and Lasch filed a supplemental memorandum in support of their Motion for Summary Judgment on the grounds that Sloan did not have standing to maintain this action individually or as a taxpayer and that therefore, Friends and Lasch were entitled to judgment as a matter of law. (Supp. R. pp. 24-31). On February 6, 2004, the Honorable John C. Hayes, III issued an Order granting summary judgment in favor of Friends and Lasch on the grounds that no case or controversy existed, and Sloan lacked standing to maintain this action. (R. pp. 9-16).

On February 25, 2004, Sloan filed a Notice of Appeal (Supp. R. p. 41), and an Amended Notice of Appeal. (R. p. 277).[1] It is only Judge Hayes' February 6, 2004 Order from which Sloan now appeals.

FACTS

The crux of the matters in this appeal is legal in nature and thus, the majority of this brief focuses on legal principles and arguments. Very few facts are disputed in this case, and Respondents address only the facts pertinent to the issues on appeal. The Court should note however that Sloan has not adopted this approach in his recitation of the facts.

While there are facts cited by Sloan that are supported by evidence, a large portion of the fourteen pages of "facts" in Sloan's brief, apparently designed to distract the Court's attention from the pertinent facts and legal issues at bar, is

[1] It appears that the only substantive difference between the Notice of Appeal and Amended Notice of Appeal is the date Appellant states that he received written notice of Judge Hayes' Order granting summary judgment.

irrelevant and inflammatory, and in many instances unsupported by sound evidence.[2] Those "facts" will not be addressed here because to do so would only lend credence to what is otherwise purely immaterial propaganda.

As noted above, because this appeal can and should be decided on primarily legal points, the first several arguments found herein do not rely on facts, but rather the legal machinations of the case's progression. To the extent the Court reaches a consideration of issues beyond the legal bars against Sloan, the facts to be analyzed pivot on the same fulcrum: the nature and relationship of the parties.

Sloan accuses Friends of being an *alter ego* State agency (and thus subject to certain State laws) and Friends and Lasch contend Sloan lacks sufficient standing to bring such allegations. The legal arguments *infra* concerning *alter ego* and standing will include specific reference to certain facts important to each of these issues; however, the following recitation should provide an overview of the material facts relevant to this appeal.

Facts concerning Respondents:

The Hunley Commission was created by the State of South Carolina "to negotiate with appropriate representatives of the United States government concerning the recovery, curation, siting and exhibition of the H.L. Hunley." S.C.

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[2] For instance, Sloan repeatedly refers to his Plaintiff's Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment and in Support of Plaintiff's Motion for Partial Summary Judgment, filed March 25, 2002, and certain of the exhibits attached thereto. A memorandum of law and its exhibits are not competent, authenticated evidence, and therefore, references to the memorandum of law should be ignored in considering this appeal. Furthermore, Sloan states "facts" not supported by the record. For instance, no one testified that "Lasch paid nothing for use of the terminals." *See* Appellant's Initial Brief at 6. Instead, Mr. Hazzard plainly testified that he did not know if "Mr. Lasch paid anything for his terminals." (Supp. R. p. 501).

Code Ann. § 54-7-100 (Supp. 2004). The Commission is composed of nine members, three of whom are appointed by the Governor, three of whom are appointed by the speaker of the House, and three of whom are appointed by the President *Pro Tempore* of the Senate. The Hunley Commission created Friends to aid in raising funds for the recovery, conservation, and ultimate exhibition of this historic vessel. Members of Friends are appointed by the Hunley Commission, and the Board of Directors of Friends includes Respondent Lasch as its Chairman.

Friends is a non-profit organization that was incorporated on October 20, 1997 under the provisions of section 33-31-10 - 450 of the South Carolina Code of Laws (1991 & Supp. 2004). Friends is dedicated to raising and preserving the *H.L. Hunley*. The purposes of Friends are defined as follows:

> a. to procure charitable donations for the raising, restoration, and preservation of the H.L. Hunley submarine;
>
> b. to manage and expend the procured funds as needed to advance the raising, restoration, and preservation of the H.L. Hunley submarine and related artifacts; and
>
> c. to perform all necessary or desirable actions, incident to the above stated purposes.

See Bylaws of Friends of the Hunley, Inc.

As set forth in the Affidavit of Warren Lasch, Friends has always maintained a separate corporate existence from the Hunley Commission notwithstanding the two organizations' shared interest in preserving the submarine. Specifically, the undisputed evidence demonstrates that (1) Friends is a 501(c)(3) corporation created to aid in the recovery and conservation of the

Confederate submarine *H.L. Hunley* and is recognized by the Internal Revenue Service as a distinct non-profit corporate entity; (2) Friends is governed by its own Board of Directors and maintains its own corporate records and formalities, including by-laws, annual meetings, and minutes of annual meetings; (3) Friends retains an independent contractor, whom it has entitled "Project Manager," to implement and supervise the restoration of the *H.L. Hunley* submarine. The Project Manager also manages Friends' day-to-day operations; (4) Friends executes and enters into contracts with third parties on its own behalf and binds itself and no other entity to said contracts; (5) Friends obtains and pays for its own insurance and other services, such as utilities, phone service, office products, computers and computer service; (6) Friends files its own tax returns and maintains financial statements separate from any other entity; (7) Friends maintains its own bank accounts and utilizes the services of its own accountants, auditors and lawyers, who do not work for the Hunley Commission; (8) Friends has applied for and received protection for the intellectual property it owns in its own name; (9) Friends owns additional property and equipment in its own name including a replica of the *H.L. Hunley* submarine, office furniture and equipment, and conservation laboratory equipment; and (10) Friends sells merchandise from its own gift shop and memberships to join the charitable organization. It also conducts other fundraising efforts on its own, all of which provide substantial revenue to support the Hunley Restoration Project. (R. pp. 271-273)

The above facts are uncontroverted and should form the basis for this Court's affirmation of the lower court's rulings pertaining to the *alter ego* issue.

Facts concerning Appellant:

Just as there is no dispute as to the nature of Friends as an entity separate and apart from the Hunley Commission, there is also no question that Sloan lacks sufficient standing to bring this lawsuit. Sloan is suing Friends and Lasch as a "citizen, taxpayer and registered elector of the State of South Carolina." However, none of these roles convey upon Sloan the authority to file the allegations against Respondents. As Sloan's deposition testimony demonstrates, Sloan has never had any type of personal or individual relationship with Friends:

> Q: Mr. Sloan, other than your role as Plaintiff in this case, do you have any or have you ever had any relationship with Friends of the Hunley?
>
> A: No.
>
> Q: Well, have you ever had any contacts with Friends of the Hunley?
>
> A: No.
>
> Q: Have you ever made any contributions to Friends of the Hunley?
>
> A: No.
>
> Q: So your sole relationship with Friends of the Hunley is Plaintiff in this lawsuit?
>
> A: Yes.

(R. p. 364, ll. 10-22). Rather, by his own admission, Sloan's interest in this lawsuit is purely academic:

> Q: Do you have some specific reason or motivation beyond just the general academic application of these personnel laws to Friends of the Hunley for wanting the employees of Friends of the Hunley subjected to these laws?

A: No. And they would also have certain benefits, other than being subjected to things.

Q: Right. They would be subjected to benefits as well as restrictions.

A: The answer is no.

* * * *

Q: . . . I mean, do you have a specific interest in having these particular laws, rules and regulations applied to Friends of the Hunley, or is it, again, just this generally academic need to have Friends of the Hunley subjected to State laws, rules and regulations, if it is an alter ego of the state?

A: The latter.

* * * *

(R. p. 360, ll. 3-11; R. p. 361, ll. 2-8).

As unhappy as Sloan may be about Friends of the Hunley, he simply is not in a position to evoke this Court's power to affect whatever changes he may desire as a result of his academic interests.

STANDARD OF REVIEW

The purpose of summary judgment is "to expedite disposition of cases which do not require the services of a factfinder." *Ellis v. Davidson*, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004), *reh'ing denied* (May 20, 2004) (citing *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003)); *George v. Fabri*, 345 S.C. 440, 548 S.E.2d 868 (2001)). When reviewing the grant of a summary judgment motion, an appellate court applies the same standard that governs the trial court under Rule 56(c), SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to

judgment as a matter of law. *Ellis*, 358 S.C. at 517, 595 S.E.2d at 821 (citing cases); *Rumpf v. Massachusetts Mut. Life Ins. Co.*, 357 S.C. 386, 392, 593 S.E.2d 183, 186 (Ct. App. 2004) (citing cases).

"In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the non-moving party." *Ellis*, *supra* (citing cases); *Rumpf*, *supra* (citing cases). Summary judgment is appropriate "where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Ellis*, 358 S.C. at 517-18, 595 S.E.2d at 821 (citing cases); *Rumpf*, *supra* (citing cases). All ambiguities, conclusions, and inferences arising from the evidence "must be construed most strongly against the moving party." *Id.* However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. *Ellis*, 358 S.C. at 518, 595 S.E.2d at 822 (citing cases); *Rumpf*, 357 S.C. at 393, 593 S.E.2d at 186 (citing cases).

When this standard is applied to the present case, it is apparent that the Order of Judge Hayes granting summary judgment in favor of Friends and Lasch must be affirmed.

ARGUMENTS

I. THE TRIAL COURT PROPERLY DECLINED TO CONSIDER WHETHER FRIENDS WAS A PUBLIC BODY UNDER FOIA.

A. The Soundness of Judge Kinard's Orders Finding the First Cause of Action Moot is Not Subject to Review by This Court.

Sloan's first case of action brought pursuant to the FOIA alleges that because Friends failed to provide Sloan with certain requested documents, "Defendants have violated FOIA." (R. p. 20 ¶ 12). Sloan's second cause of action for declaratory judgment alleges that Friends is the *alter ego* of the Hunley Commission and, therefore, "it is equally subject to all the laws of the State of South Carolina that apply to the commission." (R. p. 21 ¶ 21). In its prayer for relief, Sloan requested that the trial court issue an order that, among other things, (a) declares Friends and Lasch are subject to the FOIA and that they have violated the FOIA; (b) enjoins Friends and Lash "to approve plaintiff's FOIA request and forthwith to provide [Sloan] a copy of all requested documents pursuant to Section 30-4-100(a)"; and (c) declares Friends "is an alter ego 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).

Judge Kinard's Order dated April 10, 2002 found that Friends and Lasch fully complied with Sloan's FOIA request, rendering Sloan's cause of action for declaratory relief moot. (R. p. 3). Because Judge Kinard was satisfied that no justiciable controversy existed, he concluded that "[a]ny judgment by this Court would have no legal effect on the parties on the Plaintiffs' First Cause of Action." (R. pp. 5-6). Furthermore, with respect to Sloan's cross motion for partial

declaratory judgment that the FOIA applies to Friends, Judge Kinard initially concluded that there was no genuine issue of material fact on that issue, and therefore Judge Kinard granted Sloan's motion for partial declaratory judgment. [3] (R. p. 6). Sloan does not appeal from Judge Kinard's April 10, 2002 Order.

After considering the motions for reconsideration filed by both parties, Judge Kinard concluded as follows:

> Upon review of the motions for reconsideration by both parties, the court concludes that this action obviously should not be dismissed *because all issues herein have not been adjudicated* and further concludes that, although the motion to declare FOIA applied to Friends was furnished to the Court and briefed by Plaintiffs, the Court prematurely considered that motion as the Defendants were not properly noticed. *Defendants' motion for reconsideration of the order to alter or amend judgment and/or for relief from judgment pursuant to Rules 59(e) and 60(b) is granted, such that the Court hereby withdraws the granting of Plaintiffs' motion to declare that FOIA applies to Friends, and the Order of April 11, 2002 is hereby amended and the case will proceed.*

(R. p. 8) (emphasis added). Thus, it is clear that following the issuance of Judge Kinard's May 21, 2002 Order, the case was to proceed, but only on Sloan's second cause of action – the question of whether the FOIA applies to Friends based upon a claim of *alter ego*. The question of whether Friends complied with Sloan's FOIA request or violated the FOIA was no longer an issue in the case and Sloan does not appeal from Judge Kinard's May 21, 2002 Order.

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[3] Following the issuance of Judge Kinard's April 10, 2002 Order, the Clerk of Court mistakenly issued a Form 4 Order dismissing the entire action. (R. p. 17). Appellant objected only "to the dismissal of the second claim and move[d] the Court pursuant to SCRCP 59(e) to alter or amend the judgment, to show that plaintiff's second claim is not dismissed." (R. p. 168). Curiously, Appellant now suggests that "[n]o court has declared whether . . . 'defendants have violated FOIA.'" Initial Brief of Appellant at p. 19.

Subsequently, on September 6, 2002, Friends and Lasch filed a second motion for summary judgment contending, *inter alia*, that the case no longer presented a justiciable controversy, and even if it did, the evidence conclusively establishes that Friends is not the *alter ego* of the Hunley Commission. (R. pp. 258-259). On February 6, 2004, Judge Hayes issued an Order granting summary judgment to Friends and Lasch, finding and concluding as follows:

> In light of the fact that Friends has complied with plaintiff's FOIA request and that plaintiff's first cause of action alleging a violation of FOIA is moot, the question of whether Friends is subject to FOIA, or for that matter any of the laws of South Carolina that apply to the Hunley Commission, is purely academic, and therefore this Court cannot render judgment on plaintiff's second cause of action.
>
> Any judgment rendered by this Court on plaintiff's second cause of action would be merely advisory, given that plaintiff's first cause of action is now moot, and therefore any such judgment would not change the obligations of the parties or grant meaningful relief. This conclusion is supported by the plaintiff's testimony on pages 18 and 19 of his deposition which makes it clear that he has no specific interest in having particular laws, rules and regulations applied to Friends, but instead only has a general academic need to have Friends subjected to these laws, rules and regulations if it is found to be an alter ego of the State.

(R. p. 11) (citations omitted). Judge Hayes further concluded that Sloan lacked standing to maintain this action. (R. pp. 12-16). It is only Judge Hayes' February 6, 2003 Order from which Sloan appeals.

The Orders issued by Judge Kinard are not subject to review by this Court. Friends and Lasch acknowledge that it is permissible for a party to wait to appeal

the grant of partial summary judgment in a multi-claim action until final judgments have been rendered on all other claims. *See Link v. Sch. Dist. of Pickens County*, 302 S.C. 1, 6, 393 S.E.2d 176, 179 (1990). 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). However, if Sloan did not wish Judge Hayes or any other circuit court to be bound by Judge Kinard's findings with respect to the first cause of action, Sloan could have, and should have, immediately appealed Judge Kinard's grant of partial summary judgment, which plainly and correctly dispenses with the first cause of action as moot. At the very least, it was incumbent upon Sloan to appeal from Judge Kinard's Orders as part of this appeal in order for this Court to intimate any opinion on the soundness of Judge Kinard's Orders. *Compare Watkins v. Hodge*, 232 S.C. 245, ____, 101 S.E.2d 657, 658 (1958) (concluding that unappealed order overruling demurrer became the law of the case and, therefore, "[t]he soundness of the decision is not before us, for lack of timely appeal, and we intimate no opinion thereabout."); *Schreiberg v. S. Coatings & Chem. Co.*, 231 S.C. 67, ___, 97 S.E.2d 214, 215 (1957) (holding that plaintiffs did not appeal from order denying demurrer "whereby it became the law of the case, whether right or wrong."); and *Miller v. Gertz*, 288 S.C. 119, 121, 341 S.E.2d 620, 621 (1986) (holding the doctrine of sovereign immunity became the law of the case where "appellant took no appeal, either initially or after final

judgment, from the order sustaining the demurrer on the ground of sovereign immunity."), *with Foothills Mall v. Farrell*, 288 S.C. 371, 373, 342 S.E.2d 624, 626, n.1 (Ct. App. 1986) (rejecting respondents' argument that construction of lease by trial court in intermediate order overruling demurrer was the law of the case because it was not appealed until after final order of trial court since appeal was taken from the order overruling demurrer). *See also Belton v. State of South Carolina*, 313 S.C. 549, 554, 443 S.E.2d 554, 557 (1994) (finding that State Budget and Control Board's failure to appeal one circuit court's ruling that board had jurisdiction to hear employee's appeal resulted in order becoming law of the case); *Resolution Trust Corp. v. Eagle Lake & Golf Condominiums*, 310 S.C. 473, 427 S.E.2d 646 (1993) (finding that "[t]he trial judge's procedural ruling is the law of the case since it has not been appealed.").

Accordingly, Sloan's arguments purporting to establish that Friends is a public body within the meaning of the FOIA, *see* Initial Brief of Appellant at 22-30, are inconsequential to the present appeal and should not be entertained by this Court.

B. Assuming that Judge Kinard's Orders are Subject to Review by This Court, Judge Hayes Correctly Concluded Sloan's First Cause of Action is Moot Based on Judge Kinard's Prior Orders.

Sloan contends that Judge Hayes erred in assuming that Sloan's first cause of action is moot. Initial Brief of Appellant at 18-19. According to Sloan, "No court has declared whether [Friends] is '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." Initial Brief of Appellant at 19. This argument fails for several reasons.

First, Judge Hayes made no such assumption. There *has* in fact been a final ruling on Sloan's first cause of action. Judge Kinard's Order dated April 10, 2002 plainly finds that Sloan's first cause of action is moot. (R. p. 3). Judge Kinard's Order dated May 21, 2002 merely withdraws that part of his April 10, 2002 Order declaring that FOIA applies to Friends, and instructs that the case will proceed only on the question of whether FOIA applies to Friends. *See* R. p. 8 ("Defendants' motion for reconsideration . . . is granted, *such that the Court hereby withdraws the granting of Plaintiffs' motion to declare that FOIA applies to Friends, and the Order of April 11, 2002 is hereby amended and the case will proceed.*" (Emphasis added)). Judge Kinard's initial ruling that Sloan's first cause of action was moot remained in effect.[4]

It is well established that one circuit court judge "does not have the authority to set aside the order of another." *Enoree Baptist Church v. Fletcher*, 287 S.C. 602, 604, 340 S.E.2d 546, 547 (1986) (citing *Cook v. Taylor*, 272 S.C. 536, 252 S.E.2d 923 (1979)); *Nix v. Columbia Staffing, Inc.*, 322 S.C. 277, 280, 471 S.E.2d 718, 719 (1996). Thus, Judge Hayes correctly concluded, as he had to, that Sloan's first cause of action was moot. (*See* R. p. 10-11). It is clear that

[4] Any suggestion by Sloan that Judge Kinard's Order dated May 21, 2002 "undid his whole [April 10, 2002] ruling", (*see* Supp. R. p. 455), is misplaced. Judge Kinard's Order explicitly states that the Court "hereby withdraws the granting of Plaintiffs' motion to declare that FOIA applies to Friends," (R. p. 8), and the Court therefore *amended* – i.e., "change[d] for the better by removing defects or faults," *Black's Law Dictionary* 80 (6th ed. 1990), the Order. Had Judge Kinard intended to undo the whole ruling, he would have expressly withdrawn the April 10, 2002 Order in its entirety and ordered the case to proceed.

Judge Hayes had no choice but to abide by Judge Kinard's ruling, and as established above, there was no assumption made on the part of Judge Hayes in doing so.

Moreover, pursuant to section 30-4-100 of the South Carolina Code of Laws (Rev. 1991), before a declaratory judgment may issue, a court must find an existing violation of the FOIA. *Piedmont Pub. Serv. Dist. v. Cowart*, 319 S.C. 124, 130, 459 S.E.2d 876, 879 (Ct. App. 1995) ("*Upon finding a violation of the Act*, the trial court may order equitable relief as it considers appropriate, and a violation of the statute must be considered to be an irreparable injury for which no adequate remedy at law exists.") (Emphasis added) (citing S.C. Code Ann. § 30-4-100(a)). Judge Kinard concluded in his April 10, 2002 Order that "all documents requested by Plaintiffs were forwarded to Plaintiffs' attorney" and, therefore, "no justiciable controversy exists and the case is now moot." (R. p. 5). In other words, Judge Kinard did not, and, given the factual circumstances, could not, find an existing violation of the FOIA. Nothing in Judge Kinard's Order dated May 21, 2002 alters that finding. (*See* R. pp. 7-8). Judge Hayes was therefore bound by Judge Kinard's finding of no existing violation of the FOIA. Accordingly, Sloan's contention that Judge Hayes failed to act on Sloan's request for declaratory judgment is without merit, and the Order of Judge Hayes must therefore be affirmed.

C. Assuming that Judge Kinard's Orders are Subject to Review by This Court, Judge Kinard Correctly Determined that Appellant's First Cause of Action is Moot.

In light of Sloan's failure to appeal Judge Kinard's grant of partial summary judgment in favor of Friends and Lasch, Sloan now seeks a declaration from this Court that Friends and Lasch, as its Chairman, violated the FOIA. Assuming this Court may properly make such a determination, Judge Kinard correctly concluded that Sloan's first cause of action is moot, and no exception applies.

The South Carolina Declaratory Judgments Act provides, in relevant part, as follows:

> Any person . . . whose rights, status or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status or other legal relations thereunder.

S.C. Code Ann. § 15-53-30 (Law Co-op. 1977). "The existence of an actual controversy is essential to jurisdiction to render a declaratory judgment." *South Carolina Elec. & Gas Co. v. South Carolina Pub. Serv. Auth.*, 215 S.C. 193, 215, 54 S.E.2d 777, 787 (1949); *Brown v. Wingard*, 285 S.C. 478, 479, 330 S.E.2d 301, 302 (1985) (observing that under the Declaratory Judgment Act, "[a]ll that is required is that the respondents demonstrate a justiciable controversy."). Before a court may render a declaratory judgment, an actual, justiciable controversy must exist. "A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute." *Carolina Alliance for Fair*

Employment v. South Carolina Dep't. of Labor, Licensing and Regulation, 337 S.C. 476, 488, 523 S.E.2d 795, 801 (citing *Orr v. Clyburn*, 277 S.C. 536, 290 S.E.2d 804 (1982)).

When judgment on an issue "can have no practical effect upon an existing controversy, the issue is moot." *State v. Green*, 337 S.C. 67, 71, 522 S.E.2d 602, 605 (Ct. App. 1999) (citing *Dodge v. Dodge*, 332 S.C. 401, 505 S.E.2d 344 (Ct. App. 1998)); *Byrd v. Irmo High Sch.*, 321 S.C. 426, 431, 468 S.E.2d 861, 864 (1996) ("A case becomes moot when judgment, if rendered, will have no practical legal effect upon an existing controversy."). Moot appeals differ from unripe appeals in that "moot appeals result when intervening events render a case nonjusticiable." *Curtis v. State*, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001).

In the present case, as is evidenced by the affidavit of Richard L. Tapp (R. pp. 49-50) and a letter dated August 16, 2001 from Richard L. Tapp (R. p. 52), Friends fully complied with Sloan's FOIA request. As such, it is inescapable that no justiciable controversy exists, and as Judge Kinard correctly concluded, Sloan's first cause of action is now moot. *See Trueblood v. U.S. Dept. of Treasury, I.R.S.*, 943 F.Supp. 64, 67 (D.D.C. 1996) (observing that "[I]t is well established that under the FOIA, 'once the records are produced [,] the substance of the controversy disappears and becomes moot, since disclosure which the suit seeks has already been made.'"); *Mells v. Internal Revenue Serv.*, 2001 WL 260061 (D.D.C.) (granting defendant's motion for summary judgment on the ground that the FOIA action was moot because defendant processed plaintiff's FOIA request and notified plaintiff of the result).

"The function of appellate courts is not to give opinions on merely abstract or theoretical matters, but only to decide actual controversies injuriously affecting the rights of some party to the litigation." *Sloan v. Greenville County*, 356 S.C. 531, 552, 590 S.E.2d 338, 349 (Ct. App. 2003) (hereinafter "*Sloan II*"). Accordingly, "cases or issues which have become moot or academic in nature are not a proper subject of review." *Id.* (citing *Wallace v. City of York*, 276 S.C. 693, 694, 281 S.E.2d 487, 488 (1981)). Any judgment by this Court would have no legal effect on the parties. Accordingly, this issue is not a proper subject of review and the Order of Judge Hayes concluding that Sloan's first cause of action alleging violation of the FOIA is moot must be affirmed.[5]

1. The Trial Court Correctly Determined That No Exception to the Mootness Doctrine Applies.

a. The factual scenario in this case may well be capable of repetition, but does not evade review.

According to Sloan, the trial court erred by failing to recognize the mootness exception for matters capable of repetition yet evading review and the exception for matters of public importance. *See* Initial Brief of Appellant at 20-22. "'A case becomes moot when judgment, if rendered, will have no practical effect upon existing controversy.'" *Seabrook v. City of Folly Beach*, 337 S.C.

[5] If not moot, Appellant's FOIA claim fails because FOIA does not apply to business enterprises that receive payment from public bodies in return for supplying specific goods or services on an arms length basis. *Weston v. Carolina Research & Dev. Found.*, 303 S.C. 398, 404, 401 S.E.2d 161, 165 (1991). As set forth in the Affidavit of Glen F. McConnell, the Hunley Commission consistently and systematically reviews and approves invoices submitted by Friends. Therefore, the Hunley Commission manages the expenditure of any public funds, and the public can determine how these funds are spent throught access to the records and affairs of the Hunley Commission. (R. p. 179 ¶ 8). *See also* Affidavit of Warren F. Lasch where he states: "Public funds are not diverted *en masse* to Friends. Instead, payments are made in return for the supply and invoicing of specific goods or services on an arms length basis." (R. p. 222, ¶ 8).

304, 305, 523 S.E.2d 462, 463 (1999) (quoting *Mathis v. South Carolina State Hwy. Dep't*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973)). "'This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief.'" *Curtis*, *supra* (quoting *Mathis*, *supra*).

As our Supreme Court elucidated, there are three general exceptions to the mootness doctrine:

> First, an appellate court can take jurisdiction, despite mootness, if the issue raised is capable of repetition but evading review. 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. Finally, if a decision by the trial court may effect 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.

Curtis, 345 S.C. at 568, 549 S.E.2d at 596 (internal citations omitted).

In *Seabrook*, plaintiffs applied with the city to subdivide an undeveloped tract of land into nine parcels for residential development. The city preliminarily approved the plat, subject to certain conditions. The issue before the trial court was whether the city had the authority to impose conditions upon the development of the land. The trial court found that it did not, and thereafter the city voluntarily removed the conditions and approved the plat. On appeal, the South Carolina Supreme Court concluded that the appeal was moot despite the fact that the factual scenario was capable of repetition:

> [The City] voluntarily removed the conditions and approved Respondent's plat and Respondents have abandoned their taking claim. Accordingly, a ruling on the pending issues will have no practical effect

> on the parties to this appeal. Moreover, while the factual scenario presented by this appeal is certainly capable of repetition, it does not evade review, and would have been clearly reviewable had [the City] not voluntarily removed the conditions and Respondents abandoned their taking claim.

Seabrook, 337 S.C. at 307, 523 S.E.2d at 463.

As was the case in *Seabrook*, admittedly the factual scenario in the present case is capable of repetition, but the factual scenario does not evade review because it would clearly be reviewable at any point in time in which Friends fails to comply with a FOIA request and a party files suit enforce compliance. The capable of repetition, yet evading review exception to the mootness doctrine does not operate to afford Sloan relief.

b. The public importance exception does not apply.

It has been recognized that "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 Dist.*, 211 S.C. 77, 96, 44 S.E.2d 88, 97 (1947); *Berry v. Zahler*, 220 S.C. 86, 89, 66 S.E.2d 459, 461 (1951) (reaffirming the exception to the rule of rejection without decision of academic questions articulated in *Ashmore*). Recently, our Supreme Court held that the essence of the public importance exception to the mootness doctrine, which must be decided in an individual basis, is "whether a particular suit raises 'questions of imperative and manifest urgency' . . ." *Sloan v. Greenville County*, ___ S.C. ___, 606 S.E.2d 464, 465-66 (2004).

Since Sloan commenced this action, the Attorney General of South Carolina has determined that revenues derived from the Hunley's exhibition and

display are not legally required by any provision of State law to be returned to the general funds of the State, but rather are private funds that may remain with Friends for the operation of the project. *See* Op. Att'y Gen., 2004 WL 2451471 (S.C.A.G.). Sloan cannot establish a question of imperative and manifest urgency sufficient to invoke the public importance exception to the mootness doctrine.

Moreover, for the same reasons that the issues in this case fail to rise to a level of significant public importance to warrant a finding that Sloan has standing, *see* § II D, *infra*, the public importance exception to the mootness doctrine does not operate to afford Sloan relief. There are no real controversies between the parties, and by Sloan's own admission, he has not suffered an injury in fact, but rather has merely an academic interest in this case. The Order of the trial court should therefore be affirmed.

II. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT TO FRIENDS ON THE BASIS THAT APPELLANT LACKS STANDING TO MAINTAIN THIS ACTION.

Sloan contends that the trial court erred in concluding he lacked standing to maintain this action because the trial court relied on an unpublished opinion issued by this Court, *Sloan v. Dep't of Transp.*, 2003-UP-416 (S.C. App. 2003) (*cert. granted* May 26, 2004) (hereinafter "*Sloan III*"), which, according to Sloan, "applied new rules of taxpayer standing, in conflict with the prior decisions of the South Carolina Supreme Court." Initial Brief of Appellant at 31. In fact, there is nothing new about the rules of taxpayer standing applied in *Sloan III*. Sloan overlooks critical distinctions between the present case and cases on which he relies in support of his imperfect contention.

In the present case, Sloan maintains this action as a citizen, taxpayer and registered elector of the State of South Carolina. A fundamental prerequisite to institute an action is the requirement that the plaintiff have standing. *Sloan v. Sch. Dist. of Greenville County*, 342 S.C. 515, 518, 537 S.E.2d 299, 301 (Ct. App. 2000) (hereinafter "*Sloan I*") (citing *Blandon v. Coleman*, 285 S.C. 472, 330 S.E.2d 298 (1985)). Standing is a personal stake in the subject matter of a lawsuit. *Sloan I, supra* (citing *Newman v. Richland County Hist. Preserv. Com'n*, 325 S.C. 79, 82, 480 S.E.2d 72, 74 (1997)); *Sea Pines Ass'n for the Protection of Wildlife v. South Carolina Dep't. of Natural Res. & Cmty. Servs. Assocs., Inc.*, 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001). "[S]uch imminent prejudice must be of a personal nature to the party laying claim to standing and not merely of general interest common to all members of the public." *Citizens for Lee County, Inc. v. Lee County*, 308 S.C. 23, 29, 416 S.E.2d 641, 645 (1992).

To have standing, "[a] plaintiff must allege an actual controversy in which he has a personal stake." *Beaufort Realty Co., Inc. v. Beaufort County*, 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct. App. 2001). "A mere interest in a problem is not enough." *Id.* Moreover, a party must demonstrate standing for each form of relief sought. *Friends of the Earth v. Laidlaw Envt'l Serv's*, 528 U.S. 167, 185 (2000); *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996) ("[S]tanding is not dispensed in gross.").

In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the United States Supreme Court articulated the "irreducible constitutional minimum" that standing requires:

> First, the plaintiff must have suffered an injury in fact – an invasion of a legally-protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical[.] Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Id. at 560-61 (citations and internal quotation marks omitted) (alterations in original). The party seeking to establish standing "carries the burden of demonstrating each of the three elements." *Sea Pines*, 345 S.C. at 600, 550 S.E.2d at 291.

A. Sloan Fails to Meet the Irreducible Constitutional Minimum that Standing Requires Because He Has Not Suffered a Particularized Harm.[6]

The first element of standing requires that a plaintiff suffer an injury in fact, or a particularized harm. In order for the injury to be "particularized," it must affect the plaintiff in a personal and individualized way." *Sea Pines*, 345

[6] Appellant begins his standing analysis contending that he has standing to bring his second cause of action because as a citizen of the State, he was challenging an *ultra vires* act of the State. Initial Brief of Appellant at 31-32. This inventive argument certainly does not form the basis of Appellant's second cause of action for a declaration that the FOIA applies to Friends. Moreover, the trial court did not rule on this argument in the appealed order, and Appellant failed to raise the issue in any post-trial motions. Therefore, this issue is not properly preserved for appellate review and should not be addressed by this Court. *See I'On, L.L.C. v. Town of Mount Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) ("If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review."); *Noisette v. Ismail*, 304 S.C. 56, 403 S.E.2d 122 (1991) (same). Finally, this argument deviates from the real issue of whether Appellant has standing to maintain this action as a general taxpayer which, as will be established below, he plainly does not.

S.C. at 602. 550 S.E.2d at 292 (citing *Lujan*, 504 U.S. at 651). The allegations contained in Sloan's Complaint fail to establish this first element.

In *Sloan III*,[7] Sloan brought three actions as a state taxpayer against the South Carolina Department of Transportation ("DOT") and the Commissioners of the DOT alleging that the DOT violated sections 57-5-1620 and 1660 (Supp. 2002) when it awarded construction contracts on three highway projects. Affirming the trial court's findings that Sloan did not have taxpayer standing in the litigation, this Court stated as follows:

> The general rule is that a taxpayer may not maintain a suit to enjoin the action of State officers when he has no special interest and his only standing is the exceedingly small interest of a general taxpayer . . .
>
> The cases cited by Sloan as authority for the proposition that he has taxpayer standing to bring this action all involve standing for a municipal or county taxpayer. Here, however, Sloan bases his standing on his status as a state taxpayer. He does not allege the statutes in question . . . are unconstitutional. Rather, he alleges only statutory violations in the methods employed by DOT in awarding the contracts for the various projects.
>
> As this court observed in Sloan v. School District of Greenville County, *there is a difference between a municipal or county taxpayer and a state taxpayer in terms of what must be demonstrated in order to have standing*. . . . The taxpayers of the State of South Carolina, on whose behalf Sloan has filed the present action, comprise a class that represents a very large portion of the general public. We therefore hold Sloan's interest in this case is not specific or distinct from that of the general public;

[7] Respondents are aware that under South Carolina law, unpublished opinions have no precedential value. *Lanham v. Blue Cross and Blue Shield of South Carolina, Inc.*, 338 S.C. 343, 349, 526 S.E.2d 253, 256 (Ct. App. 2001); Rule 220(a), SCACR. However, Respondents rely on *Sloan III, supra*, as persuasive, instructive authority and note the cogent reasoning in this Court's opinion.

> therefore his status as a taxpayer of the State of South Carolina would be insufficient to confer standing in this instance.

Sloan III, 2003-UP-416 at *5, 6 (emphasis added) (internal citations and footnotes omitted). This Court further found that as a state taxpayer, any harm to Sloan's interest "would be *de minimis* at best." *Id.* at *6.

Reversing the trial court's determination that Sloan had standing based on the public importance of the lawsuit, this Court found that "although the issue in this case is unquestionably important to the public, as any public works project would be, there are potential plaintiffs who were directly affected by DOT's actions in awarding the three contracts" who did not bring suit alleging the procedures were improper. *Id.* at *7; *see also Crews v. Beattie*, 197 S.C. 32, 49, 14 S.E.2d 351, 358 (1941) ("The mere fact that the issue is one of public importance does not confer upon any citizen or taxpayer the right to invoke per se a judicial determination of the issue."). Accordingly, this Court found that Sloan did not have standing to maintain the action.

In the present action, Sloan is suing as a citizen, taxpayer and registered elector of the State of South Carolina, a class that comprises a very large portion of the general public. As Sloan's deposition testimony demonstrates, Sloan has never had any type of personal or individual relationship with Friends:

> Q: Mr. Sloan, other than your role as Plaintiff in this case, do you have any or have you ever had any relationship with Friends of the Hunley?
>
> A: No.
>
> Q: Well, have you ever had any contacts with Friends of the Hunley?

A: No.

Q: Have you ever made any contributions to Friends of the Hunley?

A: No.

Q: So your sole relationship with Friends of the Hunley is Plaintiff in this lawsuit?

A: Yes.

(R. p. 364, ll. 10-22). Rather, by his own admission, Sloan's interest in this lawsuit is purely academic:

Q: Do you have some specific reason or motivation beyond just the general academic application of these personnel laws to Friends of the Hunley for wanting the employees of Friends of the Hunley subjected to these laws?

A: No. And they would also have certain benefits, other than being subjected to things.

Q: Right. They would be subjected to benefits as well as restrictions.

A: The answer is no.

* * * *

Q: . . . I mean, do you have a specific interest in having these particular laws, rules and regulations applied to Friends of the Hunley, or is it, again, just this generally academic need to have Friends of the Hunley subjected to State laws, rules and regulations, if it is an alter ego of the state?

A: The latter.

* * * *

(R. p. 360, ll. 3-11; R. p. 361, ll. 2-8).

Sloan does not make any allegation that a particular statute is unconstitutional. Rather, his second cause of action simply seeks a declaratory judgment, for purely academic reasons, that Friends is the *alter ego* of the Hunley Commission and therefore subject to the FOIA. As was the case in *Sloan III, supra*, Sloan's interest in this case as a citizen and taxpayer is not distinct from that of the general public. Therefore, "his status as a taxpayer of the State of South Carolina would be insufficient to confer standing in this instance." *Sloan III, supra* at *6.[8]

B. The Trial Court Did Not Err in Requiring a Constitutional Challenge.

1. Sloan Misconstrues the Relevant Case Law Conferring Standing.

According to Sloan, the trial court relied on *Sloan III, supra* for the proposition that "without a constitutional challenge, Sloan did not possess standing." Initial Brief of Appellant at 33. This assertion is incorrect. In *Sloan III*, this Court observed that "'[a] citizen and taxpayer has standing as such to contest the expenditure of public funds under an alleged unconstitutional statute.'" *Sloan III*, 2003-UP-416 at * 5 (footnote omitted). Conferring taxpayer standing where there is an allegation of the existence of an unconstitutional statute is an exception to the general rule "that a taxpayer may not maintain a suit to

[8] Again, Appellant has the burden of demonstrating each of the *Lujan* elements. *Sea Pines*, 345 S.C. at 600, 550 S.E.2d at 291. Appellant's deposition testimony conclusively establishes that Appellant has not established the first element of standing. Thus, even if it may be said that Appellant can demonstrate the remaining elements, this Court must conclude that Appellant lacks standing.

enjoin the action of State officers when he has no special interest and his only standing is the exceedingly small interest of a general taxpayer . . .". *Id.*

In *Sloan III*, Sloan "base[d] his standing on his status as a state taxpayer. He does not allege the statutes in question . . . are unconstitutional." *Id.* "Rather," this Court continued, "he alleges only statutory violations in the methods employed by DOT in awarding the contracts for the various projects." *Id.* Because Sloan brought suit as a state taxpayer on behalf of all taxpayers throughout the State, rather than a county taxpayer on behalf of his fellow county taxpayers concerning an issue affecting only them, this Court correctly concluded that Sloan's interest was not distinct from that of the general public. Moreover, because his complaint did not allege anything that would otherwise confer standing on Sloan, such as the unconstitutionality of a statute, this Court concluded that Sloan's "status as a taxpayer of the State of South Carolina would be insufficient to confer standing in this instance." *Id.* at * 6.

Thus, contrary to Sloan's contention, *see* Appellant's Initial Brief at 33, this Court did not wrongfully interpret *Shillito v. Spartanburg*, 214 S.C. 11, 51 S.E.2d 95 (1948) to require a taxpayer plaintiff to assert a constitutional violation to possess standing. Rather, this Court referenced *Shillito* in support of the well established proposition that where a taxpayer has no special interest other than the exceedingly small interest of a general taxpayer, a taxpayer may have standing to contest the expenditure of public funds under an alleged unconstitutional statute. However, the key is that the unconstitutionality of a statute must be alleged. No such allegation has been made in the present case.

In the present case, the only point in the trial court's reference to the fact that Sloan "does not make any allegation that a particular statute is unconstitutional" (R. p. 15) is to buttress its conclusion that Sloan's status as a general taxpayer is insufficient to confer standing in this case, and Sloan has not alleged any other fact or circumstance, such as the unconstitutionality of a statute, that would confer standing on him to maintain this action. The Order of the trial court finding Sloan does not have standing to maintain this action should be affirmed.

2. Sloan's Argument is Beyond this Court's Scope of Review.

Sloan now contends that he has standing because he "challenges the illegal governmental acts of Respondents." Initial Brief of Appellant at 34. Specifically, it appears that Sloan contends he has standing because the act he seeks to enjoin is the alleged unlawful diversion of public funds, and to ensure "that state funded agencies do not evade their statutory limitations by creating alter ego corporations to violate statutes governing the agency." Initial Brief of Appellant at 33-34.

Assuming that Sloan's interpretation of the case law on which he relies is correct (which is denied),[9] Sloan bases his argument on an expanded version of

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[9] Appellant's representation of the holding of *Shillito* is incorrect. According to Appellant, "*Shillito* holds that if standing should be granted to enjoin these unlawful diversions of public funds, a citizen should also be granted standing 'to contest the expenditure of public funds under an alleged unconstitutional statute.'" Initial Brief of Appellant at 34. In *Shillito*, plaintiff brought suit challenging the validity of a statute providing for the annual tax levy in the City of Spartanburg for the benefit of the Spartanburg City Firemen's Pension Fund. The Supreme Court noted that as a general rule "private citizens may not restrain official acts when they fail to allege and prove damage to themselves different in character from that sustained by the public generally. An apparent exception to this rule exists when the Act sought to be enjoined in [sic] an unlawful diversion of public funds." *Shillito*, 214 S.C. at ___, 51 S.E.2d at 99. The court went on to hold that "[a] citizen and taxpayer has standing to contest the expenditure of public funds

the relief he seeks in his Complaint. Sloan's Complaint alleges two causes of action: a violation of FOIA and a declaration that FOIA applies to Friends. (Complaint). Nowhere does Sloan's Complaint allege that the Hunley Commission evaded its statutory limitations by creating Friends, or that the act he seeks to enjoin is an alleged unlawful diversion of public funds.[10] Accordingly, Sloan's attempt to confer standing premised on allegations not set forth in his Complaint should be disregarded by this Court.

C. The Trial Court Correctly Concluded Sloan's Interest is *De Minimus*.

Sloan asserts that the trial court, relying on this Court's opinion in *Sloan III*, *supra* in reaching its decision that Sloan lacked standing, "erred in adopting a *de minimis* test to determine standing." Initial Brief of Appellant at 39. According to Sloan, "[n]either a '*de minimis* rule' nor a distinction between the level of standing required for State and local taxpayers exists anywhere in published South Carolina case law." Initial Brief of Appellant at 36. This assertion is mistaken, and once again is based on Sloan's failure to appreciate the distinction between suits brought by state taxpayers on behalf of themselves and others, and county or municipal taxpayers.

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under an alleged unconstitutional statute. . . . [W]e are satisfied that the action as brought can be maintained to *challenge the validity of this special law* and the alleged unlawful diversion of public funds to the designated beneficiary." *Id.* (Emphasis added) (internal citations omitted). Thus in *Shillito*, an alleged unlawful – i.e., unconstitutional, statute was the basis for an alleged unlawful diversion of funds. The alleged unconstitutionality of the statute conferred standing on the plaintiffs. Similar allegations led the court to confer standing on the plaintiffs in *Meyers v. Patterson*, 315 S.C. 248, 433 S.E.2d 841 (1993).

[10] In fact, Sloan cannot cite any specific reasons or specific instances in which he believes Friends has misapplied funds. (*See* R. p. 361, ll. 22-25 ("Q: . . . Do you have specific reasons or specific instances in which you believe Friends of the Hunley has misapplied funds? A: Not yet.")).

Initially it should be noted that neither the trial court nor this Court in *Sloan III*, *supra* "adopted" a *de minimis* test to determine standing. Rather, our appellate courts have consistently held that the injury complained of "must be of a personal nature to the party bringing the action, not merely of a general nature which is common to all members of the public." *Joytime Distribs. & Amusement Co., Inc. v. State*, 338 S.C. 634, 639-40, 528 S.E.2d 647, 650 (1999). "The general rule is that a taxpayer may *not* maintain a suit to enjoin the action of State officers when he has no special interest and his only standing is the *exceedingly small interest* of a general taxpayer." *Crews*, 197 S.C. at ___, 14 S.E.2d at 357-58 (emphasis added); *Duncan v. Heyward*, 74 S.C. 560, 54 S.E. 760 (1906) (holding that individual taxpayers cannot maintain an action to enjoin state board of education from providing for a central depository for text books as illegal because "the personal interest of the petitioners is exceedingly small; it being impossible that it could amount to more than $5 or $6 each year."). As this Court observed in *Sloan III*, "there is a difference between a municipal or county taxpayer and a state taxpayer in terms of what must be demonstrated in order to have standing." *Sloan III*, 2003-UP-416 at *5-6.

In the usual case, by definition a state taxpayer's interest, in a lawsuit in which the taxpayer is suing on behalf of all his or her fellow state taxpayers, is going to be "exceedingly small" – i.e., *de minimis*. For that reason, our Courts have required taxpayers to demonstrate something more in order to have standing – e.g., the existence of a justiciable controversy, *see e.g.*, *Brown*, *supra* at 479, 330 S.E.2d at 302; or the existence of an alleged unconstitutional statute, *see e.g.*,

Shillito, 214 S.C. at ___, 51 S.E.2d at 99. As demonstrated above, in the present case there is no justiciable controversy. Moreover, the existence of an alleged unconstitutional statute has not been alleged by Sloan who is suing not as a county taxpayer on behalf of his fellow county taxpayers, but rather is suing as a state taxpayer on behalf of taxpayers throughout the State of South Carolina.

Sloan contends that South Carolina appellate courts "have consistently granted taxpayers standing to contest illegal government expenditures." Initial Brief of Appellant at 39. While this generally may be true, nowhere in his Complaint does Sloan contest illegal government expenditures. Moreover, Sloan continues to ignore the distinction between a municipal or county taxpayer and a state taxpayer in terms of what must be demonstrated in order to have standing. Thus, the long line of opinions cited by Sloan is inapposite because those opinions involve local taxpayers suing on behalf of fellow local taxpayers to enjoin statutes affecting local individuals or entities, or bringing suit alleging that a statute is unconstitutional. *See Shillito*, *supra* (taxpayer of Spartanburg County sued challenging the validity of a statute providing for the annual tax levy in the City of Spartanburg for the benefit of the Spartanburg City Firemen's Pension Fund); *Mauldin v. City Council of Greenville*, 33 S.C. 1, 11 S.E. 434 (1890) (taxpayers of Greenville County sued to enjoin city council from purchasing and operating electric light plant)[11]; *Sligh v. Bowers*, 62 S.C. 409, 40 S.E. 885 (1902) (taxpayers of Newberry school district sue to enjoin Newberry county board of education);

[11] As the Court in *Mauldin* observed in conferring standing, "Here the tax-paying citizens of Greenville are not the whole public, but comparatively a small part of it. They are not strangers to the municipality. They, and they alone, are affected by their acts. As to them this is more in the nature of 'a private' than 'public' matter." *Id.* at ___, 11 S.E. at 435.

Kirk v. Clark, 191 S.C. 205, 4 S.E.2d 13 (1939) (bondholders of Chesterfield County sue to enjoin Chesterfield County officials from diverting tax funds levied and collected for payment of interest on bonds); *Brown*, *supra* (Greenwood County taxpayers sue to enjoin mayor of Greenwood and members of city counsel challenging city's payment of expenses for spouses of mayor and counsel members to attend convention); *Sloan II*, *supra* (Greenville County taxpayer brings declaratory judgment action alleging Greenville County failed to comply with ordinances governing procurement of construction services on public works projects). Sloan does *not* include such a claim in the present action.

Pursuant to well established South Carolina law, the trial court correctly found that as a taxpayer suing on behalf of all taxpayers in the State, any harm to Sloan is *de minimis* – i.e., "exceedingly small," at best. Friends has used approximately 4.1 million dollars in state taxpayer funds. (*See* R. p. 346-358). This amount, divided by the number of taxpayers in the State,[12] would be approximately $1.04 per taxpayer. In the present case, as to Sloan this is a "public" and not a "private" matter. Sloan has not alleged that Friends has committed a wrong pursuant to an alleged unconstitutional statute. It cannot be said, therefore, that Sloan has a special interest in the lawsuit that would afford him taxpayer standing to bring and maintain this lawsuit. The Order of the trial court should be affirmed.

[12] It appears that in *Sloan III*, *supra*, the number of taxpayers was estimated to be 3,952,375. Respondents rely on this estimation in reaching the above conclusion.

D. The Issues Fail to Rise to a Level of Significant Public Importance.

Finally, the issues presented in this lawsuit fail to rise to a level of "significant public importance" to warrant a finding that Sloan has standing on this ground. As this Court observed in *Sloan III*:

> Regarding the right of an individual to obtain injunctive relief against an action by the State, the supreme court has held that '[t]he mere fact that the issue is one of public importance does not confer upon any citizen or taxpayer the right to invoke per se a judicial determination of the issue.' In so holding, the court explained that the basis for this rule is the 'salutary public policy of *limiting the judicial process to real controversies between the parties* to the proceeding.'

Sloan III, *supra* at * 7 (quoting *Crews*, 197 S.C. at 49, 14 S.E.2d at 358) (emphasis added).

Sloan contends that he should have been granted public interest standing pursuant to *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999) and *Evins v. Richland County Historic Pres. Dist.*, 341 S.C. 15, 532 S.E.2d 876 (2000) because in those cases "the Supreme Court ruled that standing had been granted because of the public importance of the issues and for future guidance." Initial Brief of Appellant at 33. However, unlike the factual situation in *Baird* and *Evins*, this case does not present a real controversy between the parties. Rather, all that remains in this case is a purely abstract, academic question, the resolution of which would amount to no more than an advisory opinion which this Court lacks jurisdiction to consider. *See Booth v. Grissom*, 265 S.C. 190, 194, 217 S.E.2d 223, 224 (1975) (observing that it is "elementary that the courts of this

State have no jurisdiction to issue advisory opinions."); *City of Greenville v. South Carolina Second Injury Fund*, 339 S.C. 141, 148, 528 S.E.2d 91, 94 (Ct. App. 2000) (same). *See also Sangamo Weston, Inc. v. Nat'l Surety Corp.*, 301 S.C. 143, 146, 414 S.E.2d 127, 130 (1992) ("This court will not issue advisory opinions and cannot alter precedent based on questions presented in the abstract."); *Jones v. Dillon-Marion Human Res. Dev. Comm'n*, 277 S.C. 533, 291 S.E.2d 195 (1992) (observing that the court will not issue advisory opinions on which no meaningful relief can be granted); *Byrd*, 321 S.C. at 431, 468 S.E.2d at 864 (observing that the mootness doctrine requires an appellate court to render a decision on an existing, justiciable controversy, not an issue that is moot or academic). Moreover, as this Court correctly observed in *Sloan III*, in *Baird*, "there were additional factors that would confer standing." *Sloan III, supra* at * 8, n.12.[13] Finally, Sloan has not suffered an injury in fact, and therefore there is no injury to be redressed. (R. p. 365, ll. 3-8; ll. 23-25). Accordingly, the decision of the trial court finding that Sloan lacks standing to maintain this action should be affirmed.

[13] Had the Supreme Court in *Baird* and *Evins* concluded, as Appellant ostensibly contends, that the plaintiffs in those cases had standing *solely* because of the public importance of the issues and for future guidance, the Court would have conferred standing without regard to the irreducible constitutional minimum that standing requires under *Lujan, supra*. Plainly that is not the case. In *Baird*, the court concluded that the plaintiff doctors, as a group, had a real and material interest as citizens "in ensuring that their county acts within the legal parameters established by the legislature for funding hospital development." *Baird*, 333 S.C. at 531, 511 S.E.2d at 75. This interest was significant enough to impact "a profound public interest – the public health and welfare" of the county. *Id.* By his own admission, Appellant's interest is not real, material, or distinct from the general public. (R. p. 364, ll. 10-22). Rather, Appellant's interest is merely academic.

III. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT AS TO THE *ALTER EGO* CLAIM.

A. Judge Hayes Correctly Determined That a Justiciable Controversy No Longer Exists and, Therefore, a Judgment on Appellant's Second Cause of Action Would Amount to No More Than an Advisory Opinion.

Sloan contends that he has "raised serious issues in his second cause of action, which have received no judicial consideration whatsoever." Initial Brief of Appellant at 43. Judge Hayes provided valid and ample reason for this lack of consideration when he reached the inescapable conclusion that "[a]ny judgment rendered by this Court on plaintiff's second cause of action would be merely advisory, given that plaintiff's first cause of action is now moot, and therefore any such judgment would not change the obligations of the parties or grant meaningful relief. This conclusion is supported by the plaintiff's testimony . . . which makes it clear that he . . . has only a general academic need to have friends subjected to these laws, rules and regulations if [Friends] is found to be an alter ego of the State." (R. p. 11). Thus, the purported seriousness of Sloan's issues does not overcome the fact that the trial court was without jurisdiction to render an opinion on Sloan's second cause of action. Accordingly, the Order of Judge Hayes should be affirmed.

B. As an Additional Sustaining Ground, the Evidence Establishes that Friends is Not the *Alter Ego* of the Hunley Commission.[14]

In *Peoples Fed. Sav. & Loan Ass'n. v. Myrtle Beach Golf & Yacht Club*, 310 S.C. 132, 425 S.E.2d 764 (Ct. App. 1992), this Court recognized and applied the *alter ego* test set forth in *Krivi Indus. Supply Co. v. Nat'l Distillers & Chem. Corp.*, 483 F.2d 1098 (5th Cir. 1973):

> In the *Krivo* case, the Fifth Circuit Court of Appeals gave expression to the elements of an instrumentality or alter-ego theory. The Court stated that the control required for liability under the 'instrumentality' doctrine amounted to total domination of the subservient corporation to the extent the subservient corporation manifested no separate corporate interest of its own and functioned solely to achieve the purpose of the dominant corporation. *The Court noted that the instrumentality theory would not apply even in the presence of 'total domination' without some misuse of control by the dominant corporation resulting in injustices or inequitable consequences.*

Peoples Federal, 310 S.C. at 148, 425 S.E.2d at 774 (internal citations omitted) (emphasis added) (citing *Krivi*, *supra*). Thus, the *alter ego* doctrine test is two-fold. First, a court must determine that there is a requisite amount of control by the dominant corporation to the extent the subservient corporation has no separate

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[14] "'[A] respondent . . . may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or relied on by the lower court.'" *Angus v. Burroughs & Chapin Co.*, 358 S.C. 498, 509, 596 S.E.2d 67, 73, n.7 (Ct. App. 2004), *reh'ing denied* (May 12, 2004) (quoting *I'On, L.L.C. v. Town of Mount Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000)). However, "'[i]t is within the appellate court's discretion whether to address and additional sustaining grounds.'" *Id.* Respondents submit that the issue of whether Friends is the *alter ego* of the Hunley Commission is not before this Court given that Appellant's first cause of action is moot, and all that remains is an abstract, academic issue. As observed above, "[t]he function of appellate courts is not to give opinions on merely abstract or theoretical matters, but only to decide actual controversies injuriously affecting the rights of some party to the litigation." *Sloan II*, 356 S.C. at 552, 590 S.E.2d at 349. However, Respondents present the following as an additional sustaining ground should the Court elect to consider this issue.

identity. Second, there must be a determination of injustice or inequitable consequences. *See also Tucker Land Co. v. State*, 114 Cal.Rptr.2d 891, 898 (Cal.App. 2001) (recognizing in the government contracting context that in order for the *alter ego* doctrine to be invoked, "there must be such a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not in reality exist" and "there must be an inequitable result if the acts in question are treated as those of the corporation alone."). Neither prong of the test is present in this case.

The undisputed facts establish that Friends is governed by its own Board of Directors and maintains its own corporate records and formalities. (R. p. 271 ¶ 3). Further, Friends retains an independent contractor who, among other things, manages the day-to-day operations of Friends. (R. p. 271 ¶ 4). The independence of Friends as an entity is further demonstrated by the fact that it executes and enters into contracts with third parties on its own behalf, obtains and pays for its own insurance and other business services, files its own tax returns and maintains its own financial statements, maintains its own bank accounts, utilizes the services of its own accountants and lawyers, has applied for and received in its own name intellectual property protection, and owns a variety of property and equipment in its own name. (R. p. 272 ¶¶ 5-10).[15] This level of independence conclusively establishes as a matter of law that the first prong is not met in this case. Plainly

[15] The powers enjoyed by Friends are in keeping with powers generally bestowed on non-profit corporations in South Carolina. *See* S.C. Code Ann. § 33-31-100 (Law Co-op. 1990). The Attorney General recently concluded that Friends was legally created for the purpose of raising sufficient funds to defray the costs of curating, displaying and exhibiting the Hunley and that the revenues derived from the exhibition and display of the Hunley are legally treated as funds retained by the nonprofit corporation – Friends of the Hunley. *See* Op. Atty. Gen., 2004 WL 2451471 (S.C.A.G.).

Friends has an identity and is free to act separate and apart from the Hunley Commission. There is no evidence of control that rises to the level required to find *alter ego*.

Additionally, as Sloan's own deposition testimony establishes, aside from Sloan's personal disappointment, no inequitable results or injustices exist:

> Q: Are you aware of any unfairness or inequity imposed by Friends of the Hunley upon any persons, specifically aware of any unfairness or inequity imposed by Friends of the Hunley upon any persons?
>
> A: No. They wouldn't respond to my FOIA request. I think that was an inequity.
>
> * * * *
>
> Q: Okay. But beyond that inequity, you are not aware of any other inequities or unfairness?
>
> A: That's correct.

(R. p. 365, ll. 3-8; ll. 23-25).

Sloan has failed to present any evidence to establish that Friends is the *alter ego* of the Hunley Commission. There is no evidence of total domination or control of Friends by the Hunley Commission. To the contrary, the evidence conclusively establishes that Friends is a separate entity with its own corporate purpose, and it acts with a large degree of independence in achieving its purpose. Moreover, other than personal disappointment on the part of Sloan, there is no evidence of any injustice or inequitable consequences. Friends is not the *alter ego* of the Hunley Commission. As such, should this Court reach this issue, this Court

should find, as an additional sustaining ground, that Friends is not the *alter ego* of the Hunley Commission.

IV. AS AN ADDITIONAL SUSTAINING GROUND, LASCH IS ENTITLED TO SUMMARY JUDGMENT BECAUSE HE IS BEING SUED ONLY IN HIS CAPACITY AS CHAIRMAN OF FRIENDS.

Lasch is the Chairman of Friends. (R. p. 271 ¶ 1). According to Sloan, Lasch was named as a defendant to this action solely as a "warm body" a judge could "lay his hand on":

> Q: Now, this lawsuit against Friends of the Hunley and Warren F. Lasch as Chairman was filed on July the 16th, 2001. Question, why did you sue Mr. Lasch?
>
> A: Just to have an individual to be a Defendant.
>
> Q: I mean, you have not sought to make him the alter ego of the Hunley Commission; have you?
>
> A: No.
>
> Q: You have sought to make Friends of the Hunley the alter ego?
>
> A: Yes.
>
> * * * *
>
> Q: I mean, am I correct that you don't seek any specific relief against Mr. Lasch?
>
> A: That's correct.
>
> Q: So he's been denominated what you would call I guess a nominal party?
>
> A: He's named as an individual so there would be an individual defendant.
>
> Q: For what purpose?

> A: So if it got into a contempt situation, the judge would have a warm body he could lay his hand on.

(R. p. 362, ll. 18-25; R. p. 363, ll. 1-14). Sloan has not alleged any claims against Lasch individually; rather, Lasch's presence in this action is tangential to the relief sought in the Complaint. It is well established that officers of agencies are not proper parties to a FOIA action. *See Petrus v. Bowen*, 833 F.2d 581, 583 (5th Cir. 1987) (observing that the plain language of FOIA authorizes actions against agencies, not individual officers of agencies); *Parenti v. Internal Revenue Serv.*, 2003 WL 1548550 at * 2 (W.D. Wash. 2003) (dismissing action against individual agency employees finding, "[t]he district court has jurisdiction over the agency that allegedly violated the FOIA, but individual agency employees are not proper party defendants."); *Youngblood v. Commissioner*, 2000 WL 852449 (C.D. Cal.) at * 5 ("Only Federal departments and agencies are proper party defendants in FOIA litigation. This rule is derived from the plain language of the Act . . ."); *Johnson v Comm'r Internal Revenue*, 239 F.Supp.2d 11251139 (W.D. Wash. 2002) ("Individual agency employees are not proper party defendants in FOIA action."); *Smilde v. Rossotti*, 2000 WL 960738 (N.D. Ill.); *Laughlin v. Comm'r of Internal Revenue*, 117 F.Supp.2d 997 (S.D. Cal. 2000). Because he is sued only in his capacity as Chairman of Friends, Lasch is entitled to summary judgment.

CONCLUSION

For the reasons stated above, the trial court's Order granting summary judgment should be affirmed.

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Columbia, South Carolina

January 28, 2005

IN 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 NUMBER 01-CP-40-2956

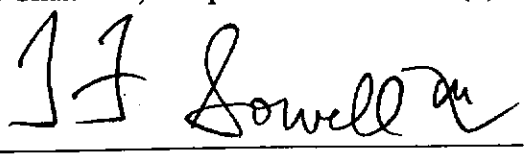
Edward D. Sloan, individually and as a citizen and taxpayer and registered elector of the State of South Carolina, and on behalf of all others similarly situated, ...Appellant,

vs.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of Respondents Friends of the Hunley, Inc., and Warren F. Lasch, its Chairman, complies with Rule 211(b), SCACR.



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