THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
DeAndrea Gist Benjamin, Circuit Court Judge

Appellate Case No. 2020-001135
Case No. 2015-CP-40-01805

Wendy Brawley .....Respondent-Appellant,

v.

Richland County, South Carolina, ...Appellant-Respondent.

FINAL RESPONDENT'S BRIEF OF RESPONDENT-APPELLANT WENDY BRAWLEY

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STATEMENT OF THE CASE

Respondent-Appellant Wendy Brawley ("Mrs. Brawley") filed suit on March 25, 2015, seeking declaratory judgment and injunctive relief under then-current S.C. Code Ann. § 30-4-100 against Appellant-Respondent Richland County, South Carolina ("Richland County") due to its failure to comply with the South Carolina Freedom of Information Act ("FOIA"). R. pp. 103-112. Specifically, Mrs. Brawley sought the following declarations:

a. As a result of Richland County's conduct, including its belated response, Mrs. Brawley's FOIA requests are considered approved;

b. Richland County has failed to properly and fully reply to Mrs. Brawley's FOIA requests dated September 9, 2014;

c. Mrs. Brawley is entitled to immediately receive full and complete responses; and

d. Mrs. Brawley is entitled to recover costs and reasonable attorneys' fees associated with compelling the Defendants complete responses in an amount approved by this court upon a finding that Plaintiffs are entitled to prevail under S.C. Code Ann. 30-4-100(b).

(the "Declaratory Relief"). R. pp. 110-111.

Additionally, Mrs. Brawley sought an injunction that would prohibit Richland County from: sending surveys to residents that make any representation that Richland County will provide all residents that reside within 200 feet of the proposed Phase I sewer line a full waiver of tap or connection fees; entering into negotiations with residents of Hopkins and Lower Richland for the acquisition of easements; or providing a third public reading to the Lower Richland Sewer Project being debated in Richland County at that time (the "Injunctive Relief"). R. pp. 111-112.

On August 11, 2015, the Hon. Clifton Newman signed a Form 4 dismissing Mrs. Brawley's request for Injunctive Relief. R. p. 1. On August 27, 2015, Mrs. Brawley filed a Motion to Compel responses to her requests for production seeking access to Richland County's records that were the

subject of her FOIA requests. R. pp. 141-48.

The matter was ultimately tried before the Hon. DeAndrea Gist Benjamin on September 5, 2019. R. pp. 266-714. Judge Benjamin signed and filed a Final Order on the Merits on February 13, 2020, finding for Mrs. Brawley, concluding Richland County had violated FOIA, and awarding Mrs. Brawley the production of public records under FOIA constituting the supporting documentation that Richland County submitted to the United States Department of Agriculture (USDA) Rural Development for grant and loan funding for the Lower Richland Sewer Project (the "Loan Records"). R. pp. 12-25. On February 24, 2020, Richland County filed a Motion to Amend this Final Order. R. pp. 208-19.

After consideration of Richland County's Motion to Amend, Judge Benjamin issued an amended Order on July 16, 2020. Therein, Judge Benjamin modified her Final Order regarding Mrs. Brawley's entitlement to receive the Loan Records under FOIA. In her July 16, 2020 Order, Judge Benjamin maintained Mrs. Brawley's entitlement to recover reasonable attorneys' fees and costs under FOIA. R. pp. 29-38. Therefore, on July 27, 2020, Mrs. Brawley filed an Affidavit of Attorneys' Fees and Costs. R. pp. 220-23.

On August 11, 2020, Richland County filed a Memorandum Opposing Award of Attorneys' Fees and Costs. R. pp. 249-59. Then, on August 17, 2020, prior to the Circuit Court issuing an order regarding the amount of attorneys' fees to be awarded to Mrs. Brawley, Richland County filed this appeal. Upon receipt and in response, Mrs. Brawley filed her notice of cross-appeal, and she pursued an opposed Motion to Hold Appeal in Abeyance in this Court so that Judge Benjamin would have an opportunity to set the amount of Mrs. Brawley's attorneys' fees and costs awarded in the post-trial orders. This Court granted Mrs. Brawley's Motion to Hold Appeal in Abeyance over Richland County's objection on October 2, 2020.

On October 19, 2020, Mrs. Brawley submitted a memorandum in reply to Richland County's August 11, 2020 opposition to Mrs. Brawley's affidavit of attorneys' fees and costs. R. pp. 224-40. On November 9, 2020, Judge Benjamin conducted her first hearing on the amount of attorneys' fees and costs to award Mrs. Brawley. During this hearing, Judge Benjamin asked to review Mrs. Brawley's counsels' detailed billing records. Following her timely receipt of these records, Richland County filed its Objections to Plaintiff's Billing Records on November 23, 2020. R. pp. 260-65.

After consideration, Judge Benjamin issued an Order Awarding Plaintiff Attorneys' Fees and Costs on November 30, 2020, and she made Mrs. Brawley's counsels' billing records an Exhibit to that Order. R. pp. 39-93.

Richland County filed another Motion to Alter or Amend on December 10, 2020. Therefore, on January 8, 2021, Judge Benjamin held another hearing on Richland County's Motion to Alter and Amend and on the amount to award Mrs. Brawley in attorneys' fees and costs. R. pp. 758-801. Judge Benjamin issued her Amended Order Awarding Plaintiff Attorneys' Fees and Costs on January 19, 2021. R. pp. 94-101

On February 18, 2021, Mrs. Brawley filed an amended notice of her cross-appeal of the July 16, 2020 Amended Order and the January 19, 2021 Amended Order.

STATEMENT OF FACTS

Prior to February 2013, Richland County applied for a loan and grant from the USDA Rural Development office to fund the majority of what is known as "Phase I" of the Lower Richland Sewer Project (hereinafter, the "Grant"), which includes planning, acquiring easements, and installing the infrastructure to provide Richland County sewer service to Lower Richland. R. p. 362, lines 1-11. Richland County's utilities department, grants coordinator, and general

administration had roles in applying for the Grant. R. p. 362, lines 1-11; R. p. 379, lines 2-5.

On September 9, 2014, at a Richland County Council Meeting, Mrs. Brawley submitted four (4) separate written South Carolina Freedom of Information Act ("FOIA") requests to the Defendant Richland County. R. pp. 288-92 and p. 346, lines 17-24. Of the four requests, only one remains at issue; specifically, Mrs. Brawley sought "a copy of the application and supporting documentation Richland County submitted to the United States Department of Agriculture (USDA) Rural Development for grant and loan funding for the Lower Richland Sewer Project" (hereinafter "Loan Documentation FOIA Request"). R. p. 293, lines 5-25 cont. p. 294, lines 1-3.

Richland County informed Mrs. Brawley by letter dated October 1, 2014 that they were researching her Loan Documentation FOIA Request and expected to have data available within the next few weeks. R. pp. 294-96. The October 1, 2014 letter provided, in part, "The information requested will be released." R. p. 348, lines 11-14.

a) The County's Response to Mrs. Brawley's Loan Documentation FOIA Request

By letter dated October 8, 2014, Richland County informed Mrs. Brawley that her request was forwarded to the Richland County Clerk of Council, Procurement Department, Utility Department, and Finance Department for review and provided documents as a response to the Loan Documentation FOIA Request. R. p. 297, lines 1-21. The October 8, 2014 letter also informed Mrs. Brawley that "*Richland County has no further information regarding this matter*". R. p. 574 (emphasis added). The October 8, 2014 letter included only six (6) pages of documents consisting of the following:

a) A one (1) page Application for Federal Assistance on Form 424, as signed by County Administrator J. Milton Pope;
b) Two (2) pages of instructions for the SF-424 and SF-424c;
c) Two (2) pages of "assurances" dated March 16, 2010; and
d) A one (1) page budget.

(Hereinafter "Original Response Documents"). R. pp. 298-99. The Application included with the Original Response Documents specifies the type of submission is "Non-Construction," the type of application is marked as a "Continuation," and the estimated federal funding requested was $20,961,360. R. pp. 575-82. Further, the documents provide that "Continuation" is defined as "an extension for an additional funding/budget period for a project with a projected completion date." R. p. 358, lines 16-25.

Recognizing that the County's six-page response was not complete[1], on March 25, 2015, Mrs. Brawley was forced to file the underlying lawsuit pursuant to the South Carolina Freedom of Information Act (FOIA), S.C. Code Ann. § 30-4-10, et seq seeking, inter alia, the production of all responsive documents to the Loan Documentation FOIA Request. On June 3, 2015, after suit was filed, Defendant produced 55 pages of additional documents[2]. The documents provided were:

a) Application for Assistance dated July 18, 2012;
b) Instructions for the SF-424
c) Budget Information – Construction Programs;
d) Instructions for HUD-424C;
e) Richland County Utilities Department - Lower Richland Sewer System - Preliminary Engineering Report - July 2012 – Cost Estimate – Phase I;
f) SC WEP Guide 1 – Processing the Initial Application;
g) Certification of Outstanding Debts dated July 18, 2012;
    - Richland County – Ratios of Outstanding Debt by Type – Last Ten Fiscal Years;
    - Richland County – Direct and Overlapping Governmental Activities Debt– As of June 30, 2011;
    - Richland County – Legal Debt Margin – Last Ten Fiscal Years;
    - Richland County – Ratios of General Bonded Debt Outstanding – Last Ten Fiscal Years;
h) Lower Richland Sewer Revenue/Expenditure Projections;
i) Balance Sheet (Governmental Funds; Capital Projects Fund; Water/Sewer Enterprise

[1] The fact that the County's response was incomplete was evident to Mrs. Brawley by both the sparsity of the documents produced and by the very language used in those few documents, including that the Application specified that it was a Continuation.

[2] At trial, Richland County sought to enter into evidence the transmittal letter that its attorney wrote at the time of providing the June 2015 Discovery Documents to counsel for the Plaintiff Mrs. Brawley. In that transmittal letter, counsel for the Defendant maintains that the June 2015 Discovery Documents were obtained *from* the USDA after the instant suit was brought. The trial court rejected any notion that the were obtained from the USDA after suit was filed as there was no evidence before the court establishing such – "Defendant's reliance on its own counsel's transmittal letter for the June 2015 Discovery Documents is not evidence establishing the origin of these documents." R. p. 21.

Fund) and related documents;
j) Lower Richland Water/Sewer – Statement of Net Assets;
k) Hopkins Utility System Enterprise Fund – Statement of Net Assets;
l) Letter dated October 20, 2010 to the United States Department of Agriculture Rural Development from Richland County;
m) Memorandum entitled "Richland County for Richland County/Utilities Department" dated February 23, 2007;
n) Memorandum entitled "Information Needed for Organizational Review"
o) Minutes of a Meeting Hopkins Community Water Project – Hopkins Park – Monday 28 August 2006;
p) Letter dated April 12, 2010 to the United States Department of Agriculture Rural Development from South Carolina Budget and Control Board;
q) Memorandum entitled "Lower Richland Community Sewer System Project";
r) Memorandum entitled "Development of a Richland County Owned and Operated Sewer System to Serve Lower Richland County";
s) Lower Richland Sewer – Monthly User Fee and New Customer Connection Rate Comparison;
t) Three (3) USDA Memoranda with Subject referring to "Richland County Utilities Department – Lower Richland County Sewer Project";

R. pp. 307-22. (Hereinafter "June 2015 Discovery Documents").

Believing Richland County's production to still be incomplete, in February 2016, nearly a year and a half after the Loan Documentation FOIA Request was originally submitted, Mrs. Brawley was allowed inspection of Richland County's Lower Richland Sewer Project file at Richland County's attorney's office as part of discovery in the action. R. pp. 322-23 and p. 353. In reviewing Richland County's files, Mrs. Brawley identified more than 120 pages of additional, entirely unique and relevant documents *which were not produced originally in response to the Loan Documentation FOIA Request*, **nor were they produced as part of the June 2015 Discovery Documents**. R. pp. 322-23. The newly discovered documents Mrs. Brawley found included the following:

a) "New" Application for Federal Assistance SF-424 for Sewer System Improvements, Hopkins Service Area (R. pp. 632-36);
b) "New" Application for Federal Assistance for Sewer System Improvements, Hopkins Service Area dated July 18, 2012 (R. p. 665);
c) "Continuation" Application for Federal Assistance SF-424 for project affecting "Hopkins Community, Lower Richland Community, Town of Eastover" (R. pp. 637-42);

d) "New" Construction Application for Federal Assistance for Lower Richland County Sewer System, that included (i) Budget Information – Construction Programs, (ii) Certification Regarding Debarment, Suspension, and Other Responsibility Matters, and (iii) Certification of Outstanding Debts (R. pp. 643-49);
e) "Continuation" Non-Construction Application for Federal Assistance for Sewer System Improvements for Hopkins Community, that included Budget Information – Construction Programs dated March 16, 2010 (R. pp. 650-52);
f) Letter of Transmittal dated June 7, 2010 from Wilbur Smith indicating sending (i) Environmental Assessment for USDA (client copy); (ii) HUD Modified Environmental Assessment (client copy), among other items (R. p. 653);
g) South Carolina Rural Infrastructure Authority Grant Checklist (R. pp. 666-68);
h) Letter from the USDA to Richland County dated January 5, 2011 providing comments to the revised "PER dated July 2012" (R. pp. 655-56);
i) Letter from the USDA to Richland County dated August 2, 2012 providing comments to the revised "PER dated July 10" (R. pp. 669-670);
j) Letter from the USDA to Richland County dated January 30, 2013, 21 pages in total, providing conditions which Richland County "must understand and agree to before further consideration may be given to [Richland County's] application." (R. pp. 678-698);
k) Letter from Richland County to the USDA dated February 4, 2014 confirming Richland County is moving forward with the sewer project and is working to meet all "items contained in the Letter of Conditions dated January 30, 2013" (R. pp. 707-09);

R. pp. 324-46. (Hereinafter collectively "February 2016 Located Documents").

b) Richland County's Efforts in Responding to Loan Application FOIA

At trial, Sara Salley, the former grants coordinator for Richland County, testified that she accumulated and provided the documents that were given to Mrs. Brawley in the Original Response Documents. R. p. 366. Salley admitted that the documents she provided were solely from a search of what was in her office and further testified that she only had some files in her office, but her office did not have the "full application file" and that additional files should be kept by each department involved with the Grant. R. p. 363 and p. 366. Salley's office was not in the same building as the Utilities Department and Salley did not search files in the Utilities Department or Finance Department. R. pp. 364-65.

Andy Metts, Director of Utilities for Richland County in 2014, testified that files on the

Grant "could have been" in the finance department office, procurement department office, and administration. R. p. 373, lines 14-16. Metts is listed on both applications as point of contact for Richland County. R pp. 442-43. Mr. Metts' testimony made it abundantly clear that he knew or should have known that Richland County was in possession of more than *six pages* of documents at the time they responded to the Loan Documentation FOIA. Specifically, Mr. Metts testified that he was aware of the following:

a) A Grant application and supporting documentation were given to the USDA prior to August 18, 2010. R. p. 398.
b) The County submitted a USDA Application in July 2012 related to the Grant. R. pp. 407-410; R. p. 665.
c) In August 2012, USDA requested additional information and explanations, which were likely provided by Richland County. R. pp. 407-410.
d) Richland County obtained and submitted preliminary engineering reports and revised preliminary engineering reports as part of the Grant. R. pp. 415-17.
e) In July 2012, Richland County received and Metts reviewed a 21-page letter from the USDA with requirements and conditions that must be met prior to the USDA further considering the Grant request. R. pp. 423-27; R. p. 678-98.
f) Likely correspondence between Richland County and the USDA regarding the USDA's need for proof that Richland County held public meetings about the project. R. p. 440.
g) The County's full application included numerous documents provided as part of the June 2015 Discovery Documents. R. p. 462.

In regard to Richland County record keeping practices, Metts further testified as follows:

a) Documents and correspondence created as early as June 7, 2010 as part of the Grant were likely kept as part of Richland County's file. R. p. 394.
b) Metts' general mode of operation involved printing off important emails and keeping them in his files. R. p. 406.
c) Metts likely did not destroy preliminary engineering reports obtained by Richland County for the Grant and submitted to the USDA, and such is "sure" to be somewhere in the Utilities Department's files. R. pp. 415-16.
d) Mr. Metts further admitted that he possessed miscellaneous documents associated with the Grant and submitted to the USDA as part of the application on his computer that he never deleted, which were not part of the Original Response Documents. R. pp. 476-77.

However, despite Mrs. Brawley's clear request for the application "*and supporting documentation*," Metts testified that he inexplicably interpreted the Loan Documentation FOIA

Request to be seeking just "the USDA application that was signed and submitted." R. p. 521, line 8 and lines 22-23. Accordingly, in response to the Loan Documentation FOIA Request, after Metts and his staff could not locate a USDA application in records within the Utilities Department, Metts contacted Salley. R. p. 377 and p. 431. After obtaining "***a*** USDA loan application" from Salley, despite Metts' admittedly knowing the Grant application was more involved than six pages, Metts and Richland County provided the Original Response Documents to Mrs. Brawley as their complete and final response. R. p. 378, lines 7-12 (emphasis added). Perhaps more troublingly, Metts later testified that in his search he found numerous documents related to the application which were not produced to Mrs. Brawley as part of the Original Response Documents. R. pp. 471-73, pp. 476-80, pp. 491-92, pp. 496-99, p. 531, and p. 537.

STANDARD OF REVIEW

As to questions of law, this court's standard of review is de novo. Citizens for Quality Rural Living, Inc. v. Greenville Cty. Plan. Comm'n, 426 S.C. 97, 102, 825 S.E.2d 721, 724 (Ct. App. 2019) (further citations omitted). As this Court is aware, "[a] declaratory judgment action under the FOIA to determine whether certain information should be disclosed is an action at law." Campbell v. Marion Cty. Hosp. Dist., 354 S.C. 274, 280, 580 S.E.2d 163, 165 (Ct. App. 2003). In an action at law tried without a jury, the appellate court's standard of review *extends only to the correction of errors of law*. Crary v. Djebelli, 329 S.C. 385, 388, 496 S.E.2d 21, 23 (1998). "Thus, the trial court's factual findings will not be disturbed on appeal unless a review of the record discloses that there is no evidence which reasonably supports the judge's findings." Barnacle Broad., Inc. v. Baker Broad., Inc., 343 S.C. 140, 146, 538 S.E.2d 672, 675 (Ct. App. 2000). Finally, "[t]he award of fees and costs to the prevailing person or entity in a suit brought pursuant to section 30-4-100(a) is entrusted to the discretion of the trial court." Sloan v. S.C. Dep't of Revenue, 409

S.C.551, 556, 762 S.E.2d 687, 690 (2014) (J. Pleicones, concurring in part and dissenting in part) (citing S.C. Code Ann. §30-4-100(b) (2007)). As such, this Court will not alter a trial court's award of attorney's fees absent an abuse of that discretion. See EFCO Corp. v. Renaissance on Charleston Harbor, LLC, 370 S.C. 612, 621, 635 S.E.2d 922, 926 (Ct. App. 2006) (concerning award of attorney fees under the mechanic's lien statute).

ARGUMENT

I. The Trial Court did not Err in Finding that Richland County Plainly and Repeatedly Violated FOIA

In its Initial Appellant's Brief, Richland County asserts that Judge Benjamin erred in finding that Richland County had violated FOIA and in awarding declaratory relief to Mrs. Brawley. In support of this position, Richland County argues that the trial court:

a) improperly allocated the burden of proof to Richland County. Richland County's Brief, pp. 14-15.

b) refused to consider and evaluate the scope of the request and whether the request was "reasonably described such that the responding public body could understand it." Richland County's Brief, pp. 15-20.

c) erred in adjudicating a failure to conduct a reasonable investigation claim that was "never pled." Richland County's Brief, pp. 20-22.

d) erred in failing to recognize that Richland County has no duty to retain documents, recreate documents that were not retained, produce documents in its possession, or obtain documents from a third-party source. Richland County's Brief, pp. 22-5.

All of these assertions are simply incorrect.

a. The Trial Court Properly Allocated the Burden of Proof and Concluded that Richland County had Responsive Documents in its Possession which it Failed to Produce in Response to the Loan Documentation FOIA that Plainly Described Documents Richland County Should Have Produced

Each of these issues, despite being couched as a question of law by Richland County, is instead Richland County simply asking this Court to reverse a determination of fact made by the trial court based on the evidence before it. As stated above, "[a] declaratory judgment action under the FOIA to determine whether certain information should be disclosed is an action at law." Campbell v. Marion Cty. Hosp. Dist., 354 S.C. 274, 280, 580 S.E.2d 163, 165. In an action at law tried without a jury, the appellate court's standard of review *extends only to the correction of errors of law*. Crary v. Djebelli, 329 S.C. 385, 388, 496 S.E.2d 21, 23. "Thus, the trial court's factual findings will not be disturbed on appeal unless a review of the record discloses that there is no evidence which reasonably supports the judge's findings." Barnacle Broad., Inc. v. Baker Broad., Inc., 343 S.C. 140, 146, 538 S.E.2d 672, 675.

i. The Trial Court Correctly Allocated the Burden of Proof and Found Unequivocally that Richland County had Responsive Documents in its Possession that it failed to Produce

In its Initial Appellant's Brief, Richland County argues "the trial court failed to recognize that the burden of proof rests with a Plaintiff to prove a FOIA violation" and further argues that the trial court erred in failing to recognize Richland County has no duty to obtain and/or produce documents not in its possession. These assertions are simply unfounded obfuscations of what the trial court actually found. While noting that it had every right to flip the burden "since the requesting party (Plaintiff) did not have the documents, 'placing the burden of proof upon the agency puts the task of justifying the withholding of the records on the only party able to explain the withholding'" (citing 37A Am. Jur. 2d Freedom of Information Acts § 514), the trial court ultimately did not shift the burden at all, nor did it fail to recognize that Richland County has no

duty to produce documents it does not have. R. pp. 30-31. Instead it correctly concluded, based on the evidence before it, that Mrs. Brawley *met* the burden of proof in demonstrating Richland County neglected to provide all applicable reasonably responsive documents to her FOIA Request that were in Richland County's possession. R. pp. 19-22.

Specifically, the trial court found, based on the evidence presented at trial, that "*The record demonstrates Richland County failed to provide* the application and supporting documents *in their possession* in response to the Loan Documentation FOIA Request." R. p. 20. (emphasis added). The trial court went on to find:

> Richland County contends that it did not violate FOIA, arguing that it is only required to produce those documents it created or retained, and is not required to obtain documents from a third-party or duplicate or re-create documents. In support of this argument, Defendant cites Trask v. South Carolina Dept. of Public Safety, 2012 WL 10864175 (S. C. Ct. App. 2012) (unpublished), which references, Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 152 (1980)(indicating FOIA "does not obligate agencies to create or retain documents; it only obligates them to provide access to those which is in fact has created and retained"). Defendant's reliance on *Trask* and *Kissinger* concerning the recreation of documents inapplicable to the facts before this Court.
>
> First, Defendant has attempted to argue that the June 2015 Discovery Documents were obtained from the USDA after the instant suit was brought. **There is no testimony or evidence before this Court establishing any such origin for June 2015 Discovery Documents. Defendant's reliance on its own counsel's transmittal letter for the June 2015 Discovery Documents is not evidence establishing the origin of these documents. Furthermore, neither Defendant's counsel, nor any witness, testified that the June 2015 Discovery Documents originated from the USDA.**
>
> Second, the February 2016 Located Documents which were not produced to Ms. Brawley prior to filing suit, but are unique from the June 2015 Discovery Documents, and are responsive to the Loan Documentation FOIA Request. Defendant contends that the Plaintiff cannot establish that the February 2016 Located Documents were in the Defendant's possession at the exact moment that it responded to her FOIA request. However, the law places no such burden on the

Plaintiff.

> In a civil case, proof of circumstances warranting a given inference is sufficient to prove a fact. *See generally*, Eickhoff v. Beard-Laney, 20 S.E.2d 153, 155 (S.C. 1942). (*citing* Leek v. New South Exp. Lines, 192 S.C. 527, 7 S.E.2d 459). "In the absence of a statute or a valid contractual provision to the contrary, circumstantial evidence is regarded by law as competent to prove any given fact in issue in a civil case *and is sometimes as cogent and irresistible as direct and positive testimony.*" Id. (*quoting* Am. Jur, Volume 20 at 259-260) (emphasis included in original) (*see also*, Graves v. CAS Med. Sys., Inc.,401 S.C.63, 80, 735 S.E.2d 650, 658 (2012) (providing "the general rule is any fact can be shown through circumstantial evidence, and it is up to the trier of fact to determine whether it alone is worth as much merit as direct evidence."). **The testimony in the present case provides that the loan application documentation involved numerous submittals and documents, that Richland County Utilities Department generally kept copies of important documents, that supporting documentation was likely within Richland County's files and that these very same documents were present in the Defendant's files when Ms. Brawley was allowed to search it in February 2016. No evidence or testimony was presented by Richland County to the contrary.**

R. pp. 21-22. (emphasis added).

Indeed, Richland County raised these same issues of burden flipping and documents not in Richland County's possession in its Feb. 24, 2020 Motion to Alter, at which time the trial court again clarified that Mrs. Brawley had met her burden in eliciting testimony that established Richland County had failed to produce documents in its possession at the time it responded to her Loan Documentation FOIA Request:

> The Defendant contends that with respect to the Application for Federal Assistance dated July 18, 2012 (hereafter July 2012 Application), the Plaintiff presented no evidence that a copy of that application was retained and existed when the FOIA request was made. [...] upon Ms. Brawley's June 2015 review of the County files during the discovery process, the July 18, 2012, a copy of the application was found. Counsel for the Defendant contends that during the discovery process for the present case, the County made a request to the USDA Rural Development Office to learn what was

> in their file. According to the Defendant, it is the information that was provided to the County from the USDA that Ms. Brawley found during discovery. However, there is no evidence in the record to support this origin of the documents found by Ms. Brawley.
>
> ...
>
> At trial, the Defendant did not provide any information from other Richland County (other than Andy Metts and Sara Salley) officials to show "a search reasonably calculated to uncover all relevant documents" was completed, **despite testimony from both Ms. Salley (Transcript at 97- 100, Salley Testimony) and Mr. Metts (Transcript at 164, Metts Testimony) stating that there was other documentation that the County likely had but was not included in the 6 pages provided to Ms. Brawley**.

R. pp. 33-4 and p. 35.

Indeed, in its own testimony at trial, through its representative Andy Metts, Richland County admitted that responsive documents existed in Richland County's files which were not produced to Mrs. Brawley as part of Richland County's FOIA response. See R. pp. 476-80, pp. 491-92, pp. pp. 496-99, p. 531, and p. 537. Specifically, Mr. Metts testified regarding multiple responsive documents in Richland County's possession but not produced to Mrs. Brawley in response to her Loan Documentation FOIA Request as follows:

> Q You did submit all of them to the USDA in support of the loan and grant application that you completed in July of 2012, correct?
> A Yes.
> Q And none of these records, to your knowledge, were ever destroyed or lost by the county, correct?
> A Correct.
> Q They just weren't provided to Representative Brawley in response to her FOIA request, correct?
> A Correct.
>
> ...
>
> Q And so at some point after July 21st, 2010, it came to be in your department's possession, correct?
> A Yes.

Q And, again, you have no reason to believe it was ever lost or destroyed, correct?
A No.
Q But it was not provided to Mrs. Brawley in response to her FOIA request, correct?
A Correct.

R. p. 480, lines 6-15 and p. 496, lines 16-24.

In short, the trial court simply concluded, based on the testimony presented to it at trial and the facts before it, that "the Defendant failed to provide all of the documentation that was contained in its files at the time of the Loan Documentation FOIA Request." R. pp. 20-21. Again, based on this Court's standard of review, the trial court's factual findings will not be disturbed on appeal unless a review of the record discloses that there is no evidence which reasonably supports the judge's findings. Barnacle Broad., Inc. v. Baker Broad., Inc., 343 S.C. 140, 146, 538 S.E.2d 672, 675.

ii. The Trial Court Properly Concluded that the Loan Documentation FOIA Request Clearly Described Documents that Richland County Failed to Produce.

Richland County next contends that the trial court refused to consider and evaluate the scope of the Loan Documentation FOIA Request and whether the request was "reasonably described such that the responding public body could understand it." Richland County's Brief, pp. 15-20. Again, this is simply incorrect. First, Richland County would have this Court believe that Ms. Brawley's Loan Documentation FOIA Request for "a copy of the application and supporting documentation Richland County submitted to the USDA Rural Development for grant and loan funding for the Lower Richland Sewer Project" was somehow so unclear that Richland County could not understand it. Richland County argues that "supporting documentation" is a term that "on its face is unclear and is subject to varying interpretations," never minding the fact that it is modified by the very clear terms "Richland County submitted to the USDA Rural Development

for grant and loan funding for the Lower Richland Sewer Project." Richland County's Brief, p. 16. Of course, this is sophistry. Andy Metts' testimony on this very issue makes abundantly clear that what was requested could be plainly understood by Richland County:

> Q Right. And, sir, I understand that your response to Mr. Lindemann's questions are that you thought putting together the application was okay, but you would agree with me that the FOIA didn't just ask for an application, it asked for the supporting documentation, correct?
> A The way I interpreted that was the supporting application, or documentation for the application.
> Q Right. Well, it says application, and then it says the supporting documentation. And the PER was supporting documentation, correct?
> A It was in support of the project. I can't say it was in support of the application.
> Q But, again, the only role USDA, the project had was processing the application and deciding whether to give Richland County money, correct?
> A Yes.
> Q They had no other role in the project other than processing the application and deciding whether to give Richland County money, correct?
> A Correct.
> Q **So anything that Richland County gave them was in support of its application for the USDA to give Richland County money, correct?**
> **A Correct.**

R. p. 531, lines 17-25 cont. lines 1-16 (emphasis added).

Second, after hearing testimony regarding the content and origin of the documents that Richland County failed to produce in response to the Loan Application FOIA Request, the trial court concluded that Richland County "failed to provide all of the documentation that was contained in its files at the time of the Loan Documentation FOIA Request" and that "Exhibits 5-15, 17, and 19-23, **are all responsive FOIA documents which were not provided to Ms. Brawley in the Original Response Documents.**" R. p. 20 (emphasis added). These again are

determinations of fact by the trial court based on the testimony presented at the hearing on the merits and not to be disturbed on appeal unless the record discloses that there is no evidence which reasonably supports the judge's findings. Barnacle Broad., Inc. v. Baker Broad., Inc., 343 S.C. 140, 146, 538 S.E.2d 672, 675.

Third, and perhaps most importantly, the trial court not only found that Richland County *could* understand the plain meaning of the Loan Documentation FOIA Request, but found as a matter of fact, based on the testimony presented before it at the hearing on the merits, that it *did* understand the request and nonetheless failed to produce documents which it knew to be responsive to it:

> Mr. Metts did testify that in his search for the grant application within the records of the Utilities Department, **that he found documents related to the application** which were not produced to Ms. Brawley as part of the Original Response Documents. (Transcript at 206-208, 211-215, 226-227, 231-234, 266, and 272 Metts Testimony).

R. p. 18 (emphasis added).

...

> At trial, the Defendant did not provide any information from other Richland County (other than Andy Metts and Sara Salley) officials to show "a search reasonably calculated to uncover all relevant documents" was completed, **despite testimony from both Ms. Salley (Transcript at 97- 100, Salley Testimony) and Mr. Metts (Transcript at 164, Metts Testimony) stating that there was other documentation that the County likely had but was not included in the 6 pages provided to Ms. Brawley**.

R. p. 35 (emphasis added).

Finally, testimony presented at the hearing on the merits evidenced Richland County clearly understood various and voluminous materials were submitted to the USDA over a

prolonged period related to Richland County's application. See generally, R. p. 398, pp. 407-10, pp. 415-20, pp. 423-27, p. 440, and p. 462. Moreover, testimony establishes Richland County likely kept copies of materials supporting the application in its files. See generally R. p. 394, p. 406, pp. 415-16, and pp. 476-77. The clear language of the "FOIA creates an affirmative duty on the part of public bodies to disclose information." Bellamy v. Brown, 305 S.C. 291, 295, 408 S.E.2d 219, 221 (1991). The legislative intent is that FOIA "must be construed so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their public officials at a minimum cost or delay to the persons seeking access to public documents or meetings." S.C. Code Ann. § 30-4-15. FOIA is to be liberally construed to carry out its purpose. Pope v. Wilson, 427 S.C. 377, 384–85, 831 S.E.2d 442, 446 (Ct. App. 2019). In short, the trial court correctly concluded:

> To reject the contention that engineering reports and environmental studies *retained by the Defendant* are documentary materials that should be considered "supporting documentation" would go against the plain language of the FOIA statute. In the present case, testimony by witness Mr. Andy Metts specifically stated that there was "some form of the preliminary engineering report" that was reviewed in connection with the application and *retained* by the Defendant that was not provided to Ms. Brawley. (Transcript at 148-150, Metts Testimony).

R. p. 33.

b. The Trial Court Correctly Concluded that Richland County Failed to Conduct a "Reasonable Investigation" of its Records as is Required of it by FOIA.

Finally, Richland County contends that the trial court erred in adjudicating a failure to conduct a reasonable investigation claim that was "never pled". Richland County's Brief, pp. 20-22. First, Ms. Brawley has pled repeatedly in her complaint that Richland County has failed and/or refused to respond to her FOIA request. R. pp. 107-11. Second, Richland County can point this court to no requirement that she plead specifically that that failure was due to Richland County's

failure to conduct a reasonable investigation. Requiring a Plaintiff to know the reason an agency failed and/or refused to provide FOIA responses *prior* to filing her lawsuit is of course an absurdity. Ms. Brawley, however, very clearly established at the hearing that no such reasonable investigation was done. Supra. And the trial court correctly held that it is the common law surrounding FOIA, not the pleading requirements of the Plaintiff, that establish a duty on an agency to conduct a reasonable investigation, which did not happen in this case:

> In *Ethyl Corp. v. U.S. Envtl.Prot. Agency*, 25 F.3d 1241, 1246 (4th Cir.1994), the Court held that "in judging the adequacy of an agency search for documents the relevant question is . . . whether the agency has demonstrated that it has conducted a search reasonably calculated to uncover all relevant documents." (citations and quotations omitted). Further, in *Ethyl Corp.*, the Court found that to comply with FOIA the agency must demonstrate that the search conducted include a search of all files likely to contain responsive materials." At trial, the Defendant did not provide any information from other Richland County (other than Andy Metts and Sara Salley) officials to show "a search reasonably calculated to uncover all relevant documents" was completed, despite testimony from both Ms. Salley (Transcript at 97- 100, Salley Testimony) and Mr. Metts (Transcript at 164, Metts Testimony) stating that there was other documentation that the County likely had but was not included in the 6 pages provided to Ms. Brawley. While the Defendant asserts that the Richland County Ombudsman office may have played a role in the search, the Defendant did not provide a witness from the Ombudsman office to that effect. Therefore, this Court finds that the original language regarding the search does not require amendment.

R. pp. 34-5.

II. The Trial Court did not Lose Jurisdiction to Award Attorney's Fees or Abuse its Discretion in its Attorney's Fees Award.

Finally, Richland County attempts to convince this Court, without any actual authority whatsoever establishing their position, that the trial court "lost subject matter jurisdiction" to award Mrs. Brawley attorney's fees because she was required to file a document captioned as a "Motion" within 10 days of the this Court's First Order on the Merits, ignoring the fact that: (1) the case was

stayed at the time Richland County alleges Mrs. Brawley failed to file support for her attorneys' fees award while the trial court was deliberating over Richland County's Feb. 24, 2020 Motion to Alter the First Order on the Merits; (2) Mrs. Brawley's attorneys' fees continued to run through the filing of Richland County's Motion to Alter or Amend the First Order on the Merits; (3) the trial court upheld Mrs. Brawley's Award of Attorneys' Fees in its subsequent July 20, 2020 Order ("Amended Order"); (4) Mrs. Brawley **timely** filed her Affidavit of Attorneys' fees following the trial court's Amended Order on the Merits; (5) Richland County timely filed its Memorandum Opposing Award of Attorneys' Fees, without even the first suggestion of prejudice as a result of Mrs. Brawley filing the support for her award of attorneys' fees as an "Affidavit" rather than a "Motion"; (6) Mrs. Brawley's Affidavit of Attorneys' Fees met every requirement of a Motion under the South Carolina Rules of Civil Procedure; and (7) the trial court continued to retain jurisdiction over the award of attorneys' fees as both Orders on the Merits were interlocutory, with further adjudication of the rights of the parties to be determined.

To navigate the maze of Richland County's position, the following timeline is instructive:

- March 25, 2015 – Mrs. Brawley filed the instant action, requesting Attorneys' fees pursuant to SC CODE ANN. §30-4-100(b) in three separate places in the Complaint. R. pp. 110-11 (¶37(d)), p. 112 (¶43), and p. 112.
- September 5, 2019 – The Parties tried the instant case before Judge Benjamin, wherein on multiple occasions Mrs. Brawley moved for attorneys' fees, including at the outset of the trial:

> MR. MANN: Your Honor, we are here today asking that the Court issue a declaratory judgment ordering that they produce all responsive documents to Ms. Brawley's September 9, 2014, FOIA request, and **that they award her attorney's fees and costs associated with having to bring this action** ...

R. p. 274, lines 4-9.

- February 13, 2020 – The trial court entered the First Order on the Merits, finding in favor of Mrs. Brawley on her FOIA action against Richland County and specifically awarding Mrs. Brawley reasonable attorneys' fees and costs, finding that the Mrs. Brawley **"is entitled to reasonable attorney's fees incurred herein."** R. p. 23 (emphasis added).
- February 24, 2020 – Richland County filed a Notice of Motion and Motion to Alter or Amend Order ("Motion to Alter or Amend"), seeking to alter or amend the First Order on the Merit's determination that Richland County violated FOIA and therefore, by extension, owed Mrs. Brawley attorneys' fees. The filing of this motion, of course, continued the accrual of Mrs. Brawley's attorneys' fees. R. pp. 208-16.
- July 16, 2020 – The trial court issued its Amended Order, addressing the issues raised in Richland County's Motion to Alter or Amend, modifying the First Order on the Merits regarding Mrs. Brawley's entitlement to injunctive relief, and, yet again, awarding attorneys' fees to Mrs. Brawley, finding that Mrs. Brawley is "**still entitled to reasonably[sic] attorney's fees incurred herein.**" R. p. 30 (emphasis added).
- July 27, 2020 – On the *tenth day* after the July 16, 2020 Amended Order, Mrs. Brawley filed and served an affidavit of attorneys' fees and costs ("Affidavit"), setting forth: (1) the caption in this action; (2) the nature of the action; (3) twenty-three (23) distinct categories of representation undertaken in connection with the representation of Mrs. Brawley in this matter; (4) citation to the South Carolina

case law by which awarded attorneys' fees in South Carolina are determined, e.g., Dedes v. Strickland, 307 S.C. 155, 160–61, 414 S.E.2d 134, 137 (1992); (5) the application of each element of the six-part test from Dedes v. Strickland to the representation of Mrs. Brawley; (6) a submission "that an award of attorneys' fees to the full extent set forth in this Affidavit is appropriate;" (7) the request that "Plaintiffs [sic] are entitled to recover" the "reasonable attorney's fees in this case total[ling] Eighty One Thousand Two Hundred Sixty Four and 96/100 ($81,264.96) Dollars"; and (8) the signature of the undersigned counsel for Mrs. Brawley. Affidavit of Attorneys' Fees and Costs.

- August 11, 2020 – Richland County timely filed its 11-page Memorandum Opposing Award of Attorneys' Fees, predominantly arguing for a technical "gotcha" but never once asserting that any aspect of Mrs. Brawley's attorneys' fees request caused any prejudice whatsoever to Richland County. R. pp. 249-59.
- November 30, 2020 – After "multiple hearings and ... oral arguments," the trial court issues its Order Awarding Plaintiff Attorney's Fees and Costs in the amount of $81,264.96, finding that these fees and costs "result from work done specifically on behalf of Plaintiff Wendy Brawley." R. p. 41.
- January 19, 2021 – After yet another 59(e) SCRCP Motion by Richland County, the trial court issued yet another order, an Amended Order Awarding Plaintiff Attorney's Fees and Costs in the amount of $80,845.71. R. pp. 94-101.

a. Another formal motion was unnecessary because Mrs. Brawley submitted - numerous prior requests for an award of attorneys' fees and costs in this case.

In its Initial Brief, Richland County argues that Judge Benjamin's First Order on the Merits and the Amended Order requested that Mrs. Brawley submit "a schedule of fees and a motion to

support the amount of fees and costs incurred herein" and that because Mrs. Brawley's detailed four-page Affidavit was not captioned a "Motion," Mrs. Brawley has forever waived her right to Attorneys' Fees. Richland County's Brief, p. 26. Richland County's arguments are without any citation to any South Carolina case law on point and, more importantly, ignore the fact that Richland County had repeated and ample notice both of Mrs. Brawley's numerous requests for attorneys' fees and costs and Judge Benjamin's repeated orders stating that Mrs. Brawley was entitled to an award of attorneys' fees and costs, all prior to Mrs. Brawley's submission of the Affidavit, which constituted her application for the specific amount of reasonable attorneys' fees and costs.

i. The Complaint demanded the statutory award of Attorney's Fees and Costs.

Richland County received notice of Mrs. Brawley's multiple requests for a judgment that included three specific requests for reasonable costs and attorneys' fees under SC CODE ANN. §30-4-100(b) when Mrs. Brawley sought that relief in her Complaint itself. Under Mrs. Brawley's "Prayer for Relief," the Complaint states: "WHEREFORE, having duly complained of each Defendant, Plaintiffs pray the court to enter judgment against Defendant and award the Plaintiffs ... reasonable costs and attorneys' fees...." Both the first and second causes of action note "Plaintiffs are entitled to recover costs and reasonable attorney's fees associated with compelling the Defendants complete responses in an amount approved by this court upon a finding that Plaintiffs are entitled to prevail under SC CODE ANN. §30-4-100(b)." R. pp. 110-11 (¶37(d)) and p. 112 (¶43). Richland County has never argued that the Complaint fails to sufficiently set forth a claim of relief for attorneys' fees and costs under Rule 8(a), SCRCP, and so the sufficiency of the claim for relief in Mrs. Brawley's Complaint is the law of this case.

Mrs. Brawley's prayer for a judgment that includes reasonable attorneys' fees and costs

under the Act against Richland County is not "an application to the court for an order" that even requires a Motion under Rule 7, SCRCP. Richland County obfuscates the law by implying that there is precedent requiring a formal post-trial motion under the Freedom of Information Act when Richland County cites to caselaw *that is construing the South Carolina Frivolous Proceedings Sanctions Act* ("FCPSA"), citing Holmes v. East Cooper Community Hospital, Inc., 408 S.C. 138, 758 S.E.2d 483 (2014) and Pitman v. Republic Leasing Co., Inc., 351 S.C. 429, 570 S.E.2d 187 (Ct. App. 2002). Richland County's Brief, p. 26 and p. 27. Richland County *fails to disclose that our Legislature expressly mandated a post-proceeding motion for an award of attorneys' fees under the FCPSA*. S.C. Code Ann §15-36-10(C)(1) ("At the conclusion of a trial and after a verdict for or a verdict against damages has been rendered or a case has been dismissed by a directed verdict, summary judgment, or judgment notwithstanding the verdict, **upon motion of the prevailing party**, the court shall proceed to determine if the claim or defense was frivolous.") (emphasis added). The Legislature included no such requirement under SC CODE ANN. §30-4-100(b).

ii. Mrs. Brawley sought reasonable attorney's fees and cost in open court at trial.

Not only did Richland County receive proper notice of Mrs. Brawley's claim for reasonable attorneys' fees and costs through her Complaint, but Mrs. Brawley also specifically requested in open court for an award of attorney's fees as permitted by Rule 7(b)(1), SCRCP. Moreover, Mrs. Brawley specifically asked permission to submit proof of attorneys' fees by "Affidavit" after Judge Benjamin determined the prevailing party. Judge Benjamin agreed that proof could be submitted following her final ruling and that another hearing would be had on the issue of attorneys' fees:

> MR. MANN: Your Honor, we are here today asking that the Court issue a declaratory judgment ordering that they produce all responsive documents to Ms. Brawley's September 9, 2014, FOIA request, and **that they award her attorney's fees and costs associated with having to bring this action**

....

...

MR. BLAKE: Your Honor, I put this in the pretrial brief, because obviously a request for attorney's fees and costs, can we preserve that as a post-order motion? I don't want to have to pull together all that, because we have to redact a lot of the time that was spent representing the other Defendant or the other Plaintiff in the case. **So can we submit our affidavit in support of fees and costs after you rule on who the prevailing party is? Or would you like it in the proposed order?**

THE COURT: Well –

MR. LINDEMANN: Part of the problem with that, Your Honor, from my perspective, even if Your Honor rules in their favor on this particular FOIA request, I mean, a substantial amount -- parts of this case we were the prevailing party, already are the prevailing party, on three out of four FOIA requests, plus the total injunctive relief cause of action. So, you know, ultimately we are going to be -- want to be able to argue to you that, you know, even if they prevail on that one particular issue, they are entitled to no or very limited attorney's fees and costs.

THE COURT: All right. So what we'll do is wait, because I have got to review the cases.

MR. BLAKE: Right. True.

THE COURT: And Mr. Lindemann says there are none in South Carolina other than -- and he cited a Supreme Court case, and we'll do some research. Is it Kissinger?

MR. LINDEMANN: Kissinger. Would you like a copy of that, Your Honor?

THE COURT: If you have a copy, that would be great. And any other cases you all want me to review, you can go ahead and send those with your proposed orders. **So what we'll do is wait for the ruling. And then once we get the ruling, if I rule in your favor, I'm sure we will have to have another hearing about attorney's fees.**

R. p. 274, lines 4-9; & p. 568, lines 9-25 cont. p. 569, lines 1-23 (emphasis added).

"The award of fees and costs to the prevailing person or entity in a suit brought pursuant to section 30–4–100(a) is entrusted to the discretion of the trial court." Sloan v. S.C. Dep't of Revenue, 409 S.C.551, 556, 762 S.E.2d 687, 690 (J. Pleicones, concurring in part and dissenting in part) (citing S.C. Code Ann. §30-4-100(b) (2007)). Following the trial, Judge Benjamin

exercised her discretion - twice, once on February 13, 2020 and again on July 16, 2020 - and announced that she was awarding attorneys' fees and costs to Mrs. Brawley. Motion to Hold Appeal in Abeyance, pp. 17-18 and p. 35.

b. Richland County's contention that the trial court lost jurisdiction prior to the filing of the Affidavit is baseless.

i. There is no ten -day requirement to file a "motion" without jeopardizing the court's jurisdiction in this instance; the Amended Order vested the trial court with continuing jurisdiction over the issue of attorney's fees until it issued a final order on that issue.

Under South Carolina law the trial court retained jurisdiction over the attorney's fees determination. It is black letter law in South Carolina that "[a]ny judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory [and not final]." Culbertson v. Clemens, 322 S.C. 20, 23, 471 S.E.2d 163, 164 (1996) (alteration added by Culbertson Court) (citation and quotation marks omitted). Here, the Court's First Order on the Merits and Amended Order found that Mrs. Brawley **"is entitled to reasonable attorney's fees incurred herein"** and Brawley is "**still entitled to reasonably[sic] attorney's fees incurred herein**" respectively, and specifically further held that Mrs. Brawley would submit her "schedule of fees" to be addressed by Richland County. R. p. 23 (emphasis added); R. p. 30 (emphasis added). As a result, both orders were interlocutory, leaving a further act to be done respective to the parties' right, and as such the Court could not be divested of jurisdiction until such determination was made. Culbertson, 322 S.C. at 23, 471 S.E.2d at 164. The trial court correctly concluded in its Order Awarding Plaintiff Attorney's Fees and Costs that it was "vested [] with continuing jurisdiction over the case until a final order on the merits was issued and attorney's fees and costs...determined." R. p. 96.

ii. Even if a ten-day submission requirement existed, Mrs. Brawley satisfied it.

Perhaps the most perplexing part of Richland County's twisted maze of logic is the assertion that Mrs. Brawley failed to file the Affidavit within the ten-day window Richland County alleges (erroneously) that she had to do so. This, of course, is simply false. On the tenth[3] day following Judge Benjamin's Amended Order, Mrs. Brawley submitted both the schedule of fees and the support for the fees sought in her Affidavit pursuant to the request she made in open court at trial and both subsequent Orders of the trial court. Therefore, even if additional application under Rule 7, SCRCP were required within the ten (10) day period that Mrs. Brawley possessed to file a motion for reconsideration of the Order dated July 16, 2020, the Affidavit was timely *within ten days*, was signed by counsel, included both the schedule of fees and the legal and factual basis for the award of fees, and otherwise met all of the requirements of an application to the court contemplated by Rule 7, SCRCP [*see infra* for further discussion]. In short, the trial court correctly concluded "Within ten (10) days, on July 27, 2020, Plaintiff filed an affidavit of attorney's fees and costs" and that "there is no prejudice to the Defendant as a result of Plaintiff filing an affidavit of attorney's fees rather than a motion." R. p. 96 and p. 95.

1. Mrs. Brawley's Affidavit satisfies all of the requirements of a Motion.

Richland County's argument that the trial court has lost subject matter jurisdiction over the attorney's fees dispute because Mrs. Brawley did not file a document entitled "Motion" is the perhaps the ultimate example of its efforts to elevate form over substance to date in this case. Rule 7(b) of the South Carolina Rules of Civil Procedure governs the form requirements of a motion. Per Rule 7(b) SCRCP, a motion shall: 1) "be in writing;" 2) "state with particularity the grounds

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[3] The tenth day technically fell on a Sunday, July 25, 2020, and so the Affidavit was filed and served on the following day.

therefor;" and 3) "set for the relief or order sought." Mrs. Brawley's Affidavit more than meets these requirements. It is, of course, in writing and it unquestionably sets forth, with particularity, the grounds for the attorney's fees sought: 1) detailing the twenty-three (23) distinct categories of representation performed by Mrs. Brawley's attorneys in connection with their representation of Mrs. Brawley in this matter; 2) citing controlling South Carolina case law by which awarded attorney's fees in South Carolina are determined, Dedes v. Strickland, 307 S.C. 155, 160–61, 414 S.E.2d 134, 137; and 3) applying each element of the six-part test from Dedes v. Strickland to the representation of Mrs. Brawley and the attorney's fees sought therefor. Likewise, the Affidavit "sets forth the relief or order sought," explicitly noting that "an award of attorney's fees to the full extent set forth in this Affidavit is appropriate" and that "Plaintiffs [sic] are entitled to recover" the "reasonable attorney's fees in this case total[ling] Eighty One Thousand Two Hundred Sixty Four and 96/100 ($81,264.96) Dollars." And again, it bears the signature of the undersigned counsel for Mrs. Brawley.

The South Carolina Supreme Court has taken up the issue of efforts by one party to elevate form over substance in the very similar context of technical compliance with Rule 7(b) in Camp v. Camp, 386 S.C. 571, 573, 689 S.E.2d 634, 635 (2010). In Camp, the Defendant filed a motion for reconsideration that simply said, in its entirety:

> PLEASE be advised that the Defendant through his undersigned attorney, will move before the Honorable David Sawyer, Jr., to reconsider the ruling in his Order dated July 26, 2006, in awarding Plaintiff, William James Camp's college expenses and costs.

Camp v. Camp, 386 SC 571, 573, 689 S.E.2d 634, 635. Addressing specifically whether this "motion" met the particularity requirements of Rule 7(b), the Camp Court held that it did, reasoning:

> Applying an overly technical analysis in this instance would not reduce prejudice

> to either party nor would it assure the court that it would be able to deal with the motion fairly. In our view, neither party was prejudiced by Father's motion for reconsideration, and it appears from the record the court was able to both comprehend the motion and deal with it fairly.

Id., 689 S.E.2d 634, 576, 386 SC 571, 636-37. Ultimately, the Camp Court concluded: "When neither party is prejudiced and the court is able to deal fairly with a motion for reconsideration, **applying an overly technical reading of the rules does not serve the purpose of Rule 7(b)(1)** SCRCP." Id., 689 S.E.2d 634, 576, 386 SC 571, 637 (emphasis added). See also Chapman v. S.C. Dep't of Soc. Servs., 420 S.C. 184, 189, 801 S.E.2d 401, 404 (Ct. App. 2017) (holding that when a letter contains the same information required by a particular form, the ALC mistakenly elevated form over substance); Gordon v. Busbee, 367 S.C. 116, 120-21, 623 S.E.2d 857, 859-60 (Ct. App. 2005) (reversing the circuit court's dismissal of an action for failure to file a specific probate court form when the appellant's filing accomplished precisely what the probate court form required, and to affirm would be to elevate form over substance where the purpose of the form, to provide notice of a claim against the estate, was satisfied.)

Here, the analysis is identical. Mrs. Brawley requested attorney's fees in her complaint and repeatedly in open court in this action prior to filing the Affidavit with the trial court and the trial court held in two written orders that Mrs. Brawley **"is entitled to reasonable attorney's fees incurred herein"** and Mrs. Brawley is "**still entitled to reasonably[sic] attorney's fees incurred herein.**" R. p. 23 (emphasis added); R. p. 30 (emphasis added). Mrs. Brawley's Affidavit of Attorney's Fees contained every element required of a motion by Rule 7(b), SCRCP, and Richland County timely filed its response to Mrs. Brawley's Affidavit without even a hint that it was somehow prejudiced by the lack of a motion. In short, for Richland County to even argue that a document that otherwise meets all requirements of a motion under the South Carolina Rules of Civil Procedure, but was not entitled such, deprives Mrs. Brawley of attorney's fees provided to

her by statute is the epitome of arguing form over substance and runs counter to South Carolina Supreme Court precedent on the application of Rule 7(b) SCRCP.

c. The Trial Court did not Abuse its Discretion in its Award of Attorney's Fees;

As the trial court correctly noted, "the award of fees and costs to the prevailing person or entity in a suit brought pursuant to section 30-4-100(a) is entrusted to the discretion of the trial court." R. p. 96 (citing Sloan v. S.C. Dep't of Revenue, 409 S.C. 551, 556, 762 S.E.2d 687, 690 (J. Pleicones, concurring in part and dissenting in part) (citing S.C. Code Ann. §30-4-100(b) (2007)). As such, this Court will not alter a trial court's award of attorney's fees "absent an abuse of that discretion." See EFCO Corp. v. Renaissance on Charleston Harbor, LLC, 370 S.C. 612, 621, 635 S.E.2d 922, 926 (concerning award of attorney fees under the mechanic's lien statute).

There was no such abuse. The very concerns Richland County raises in its Initial Brief, wherein it alleges that the trial court abused its discretion by failing to exercise discretion altogether, are directly addressed meticulously by the trial court in its orders awarding Mrs. Brawley attorney's fees and costs.

Despite Richland County's contention that the trial court did not even consider "the partial or limited success of the litigation in determining the reasonable fees," nothing could be further from the truth:

> Plaintiff submitted billing records indicating attorney's fees and costs in the amount of $91,591.96 have accrued since March 3, 2015. The Court finds that it is not required to make evidentiary findings as to each billing entry; **however, after careful review, the Court has deducted attorney's fees and expenses relating to Plaintiff's injunctive relief claim, Defendant's Motion to Dismiss, and appellate matters.** Furthermore, **the Court finds a fifty percent (50%) reduction in attorney's fees and costs incurred prior to August 10, 2015 to be fair and reasonable to account for time allocated to the representation of dismissed co-Plaintiff**

R. p. 99 (emphasis added).

Likewise, the trial court considered the fact that one of the Plaintiffs had been dismissed from the action and concluded that: "Upon review of Plaintiff's counsel billing records and itemized costs this Court finds that the fees and costs requested result from work done primarily on behalf of Plaintiff Wendy Brawley." R. p. 98.

Further, the trial court, in its discretion, specifically rebutted Richland County's position that supervised staff billing for reasonably necessary services are not within the court's ambit of discretion to award fees for:

> Without legal authority, Defendant asserts that S.C. Code Ann. §30-4-100(b) does not provide for the recovery of fees charged for paralegals or staff. Plaintiff contends that "reasonable attorney's fees" includes fees charged for work done by supervised office staff including paralegals. As such, Plaintiff has submitted billing records including fees recoverable for work done by supervised paralegals. Defendant has provided no support for the excluding fees charged for supervised staff. This Court finds that a trial judge has discretion to consider and include in its award of attorney's fees the services expended by paralegals if it is reasonable to do so.

R. p. 97.

Richland County's reliance on O'Shields v. Columbia Auto., LLC, 435 S.C. 319, 867 S.E.2d 446 (Ct. App. 2021), reh'g denied (Oct. 26, 2021) for the proposition that this court should strike down the award of attorney's fees for paralegal time is bordering on the absurd. O'Shields does not involve FOIA, concerns apportioning attorney's fees among multiple parties, does not explain why paralegal time is not included, and, unbelievably, **is based an award of attorney's fees under the North Carolina Unfair Trade Practices Act**. O'Shields v. Columbia Auto., LLC, 435 S.C. 319, 334-40, 867 S.E.2d 446, 454-57.

Finally, Richland County's argument that the trial transcript's inclusion in the trial court's

award of fees and costs is error and that it should be deducted as it was obtained as part of "appeal related fees" epitomizes Richland County's repeated spurious positions. As Richland County is fully aware, having obtained the transcript at the same time and for the same purpose, Mrs. Brawley obtained the transcript on November 12, 2019 for the purpose of preparing the proposed order in this case for the trial court, not for any appeal. It is clear from Richland County's Initial Brief, the trial court deducted all other appeal-related costs from its award. Richland County's Brief, p. 36.

d. Mrs. Brawley Prevailed on Every Contested Issue, Including Establishing the County's Conduct Repeatedly Violated FOIA and Forcing Richland County to Respond Meaningfully to her Request.

After the hearing on the merits and repeated and Richland County's successive and repeated Rule 59(e) SCRCP motions and hearings, the trial court correctly and flatly rejected Richland County's attempts to argue that Mrs. Brawley only prevailed on "a fraction of her claims." Richland County's Brief, p. 29; See R. pp. 94-101; See R. pp. 39-93. That claim by Richland County strains credibility, particularly when one compares the denials of the Complaint and the numerous defenses stated by Richland County in its Answer dated April 27, 2015 to what actually transpired in the course of this case. At the time Mrs. Brawley was forced to file her FOIA action, she had received only a *six-page response* to her FOIA request and, recognizing this was of course incomplete, on March 25, 2015, Mrs. Brawley was forced to file the instant lawsuit pursuant to the South Carolina Freedom of Information Act (FOIA), S.C. Code Ann. § 30-4-10, et seq. seeking, inter alia, the production of all responsive documents to the Loan Documentation FOIA Request and the attorney's fees and costs provided for under the Act. On June 3, 2015, after suit was filed, Defendant produced 55 pages of additional *responsive* documents. The documents provided were:

a) Application for Assistance dated July 18, 2012;
b) Instructions for the SF-424
c) Budget Information – Construction Programs;
d) Instructions for HUD-424C;

e) Richland County Utilities Department - Lower Richland Sewer System - Preliminary Engineering Report - July 2012 – Cost Estimate – Phase I;
f) SC WEP Guide 1 – Processing the Initial Application;
g) Certification of Outstanding Debts dated July 18, 2012;
    - Richland County – Ratios of Outstanding Debt by Type – Last Ten Fiscal Years;
    - Richland County – Direct and Overlapping Governmental Activities Debt– As of June 30, 2011;
    - Richland County – Legal Debt Margin – Last Ten Fiscal Years;
    - Richland County – Ratios of General Bonded Debt Outstanding – Last Ten Fiscal Years;
h) Lower Richland Sewer Revenue/Expenditure Projections;
i) Balance Sheet (Governmental Funds; Capital Projects Fund; Water/Sewer Enterprise Fund) and related documents;
j) Lower Richland Water/Sewer – Statement of Net Assets;
k) Hopkins Utility System Enterprise Fund – Statement of Net Assets;
l) Letter dated October 20, 2010 to the United States Department of Agriculture Rural Development from Richland County;
m) Memorandum entitled "Richland County for Richland County/Utilities Department" dated February 23, 2007;
n) Memorandum entitled "Information Needed for Organizational Review"
o) Minutes of a Meeting Hopkins Community Water Project – Hopkins Park – Monday 28 August 2006;
p) Letter dated April 12, 2010 to the United States Department of Agriculture Rural Development from South Carolina Budget and Control Board;
q) Memorandum entitled "Lower Richland Community Sewer System Project";
r) Memorandum entitled "Development of a Richland County Owned and Operated Sewer System to Serve Lower Richland County";
s) Lower Richland Sewer – Monthly User Fee and New Customer Connection Rate Comparison;
t) Three (3) USDA Memoranda with Subject referring to "Richland County Utilities Department – Lower Richland County Sewer Project";

See R. pp. 12-25; See R. pp. 29-38.

Recognizing Richland County's production was *still* incomplete, in February 2016, nearly a year and a half after the Loan Documentation FOIA Request was originally submitted, Mrs. Brawley insisted on the inspection of Richland County's Lower Richland Sewer Project file at their attorney's office as part of discovery in this action. Id. In reviewing Richland County's files, Mrs. Brawley identified roughly 120 pages of unique and relevant documents *which Richland County refused to produce either originally or as a part of the June 2015 Discovery Documents*. Id. The newly

discovered documents Mrs. Brawley found included the following:

a) "New" Application for Federal Assistance SF-424 for Sewer System Improvements, Hopkins Service Area;
b) "New" Application for Federal Assistance for Sewer System Improvements, Hopkins Service Area dated July 18, 2012;
c) "Continuation" Application for Federal Assistance SF-424 for project affecting "Hopkins Community, Lower Richland Community, Town of Eastover";
d) "New" Construction Application for Federal Assistance for Lower Richland County Sewer System, that included (i) Budget Information – Construction Programs, (ii) Certification Regarding Debarment, Suspension, and Other Responsibility Matters, and (iii) Certification of Outstanding Debts;
e) "Continuation" Non-Construction Application for Federal Assistance for Sewer System Improvements for Hopkins Community, that included Budget Information – Construction Programs dated March 16, 2010;
f) Letter of Transmittal dated June 7, 2010 from Wilbur Smith indicating sending (i) Environmental Assessment for USDA (client copy); (ii) HUD Modified Environmental Assessment (client copy), among other items;
g) South Carolina Rural Infrastructure Authority Grant Checklist;
h) Letter from the USDA to Richland County dated January 5, 2011 providing comments to the revised "PER dated July 2012";
i) Letter from the USDA to Richland County dated August 2, 2012 providing comments to the revised "PER dated July 10";
j) Letter from the USDA to Richland County dated January 30, 2013, 21 pages in total, providing conditions which Richland County "must understand and agree to before further consideration may be given to [Richland County's] application.";
k) Letter from Richland County to the USDA dated February 4, 2014 confirming Richland County is moving forward with the sewer project and is working to meet all "items contained in the Letter of Conditions dated January 30, 2013";

See R. pp. 12-25; See R. pp. 29-38.

Thereafter, Mrs. Brawley was never offered *any* reimbursement of the attorney's fees and costs she had incurred to obtain the documentation the trial court has repeatedly determined were both in Richland County's possession and should have been produced to Mrs. Brawley in response to her FOIA. Instead, Mrs. Brawley was forced to try the case and forced to prove, and did prove:

a) That Mrs. Brawley's FOIA application was sufficiently specific that Richland County knew or should have known that the documents she subsequently discovered after filing suit were responsive to her request;

b) That Richland County failed to undertake a reasonable search to locate responsive documents;

c) That, at most, Richland County undertook "minimal efforts" to locate said documents;

d) That Richland County's violation of FOIA was more than "a mere technical error;"

e) That Richland County understood numerous other documents were related to the Mrs. Brawley's FOIA application;

f) That Richland County possessed the additional responsive documents at the time it failed to produce them to Mrs. Brawley in response to her FOIA application; and

g) That as a matter of law in South Carolina a public body, at a minimum, must undertake reasonable investigative measures to provide requested public records.

See R. pp. 12-25; See R. pp. 29-38.

These failures by Richland County to respond to Mrs. Brawley's FOIA request, and further recalcitrance to simply own that failure and forthrightly resolve it, resulted in the trial court's award of attorneys' fees.

It is for these reasons, and after multiple hearings on the issue of attorney's fees and costs alone, that the trial court concluded:

> The Court has taken into consideration [] that Judge Newman granted Defendant's Motion to Dismiss and Motion for Summary Judgement on three of the four FOIA claims at issue. Nonetheless, this Court does not find that the fact Plaintiff did not prevail on the entirety of her injunctive relief claim calls for a significant reduction in the award of attorney's fees and costs. "If the person or entity prevails in part, **the court may in its discretion** award him reasonable attorney's fees or an appropriate **portion of those attorney's fees.**" Section §30-4-100 (emphasis added).

R. p. 98 (emphasis in original).

CONCLUSION

Based upon and consistent with the foregoing reasons and analysis, Mrs. Brawley respectfully requests that the Court affirm the Orders issued by Circuit Court Judge DeAndrea Benjamin finding FOIA violations and awarding Mrs. Brawley $80,845.71 in attorney's fees and costs.

Respectfully submitted,

s/ Jenkins M. Mann
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July 20, 2022

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
DeAndrea Gist Benjamin, Circuit Court Judge

Appellate Case No. 2020-001135
Case No. 2015-CP-40-01805

Wendy Brawley .....Respondent-Appellant,

v.

Richland County, South Carolina, ...Appellant-Respondent.

CERTIFICATE OF SERVICE

I certify that the Final Respondent's Brief of Respondent-Appellant Wendy Brawley complies with the requirements of Rule 211(b), SCACR.

s/ Jenkins M. Mann
Jenkins M. Mann S.C. 74894
Attorney for Respondent-Appellant

July 20, 2022