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SC Court of Appeals

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-40-1805

Wendy Brawley,..... Respondent-Appellant,

v.

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

APPELLANT'S BRIEF OF APPELLANT-RESPONDENT RICHLAND COUNTY

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the claims pled in her Complaint and received none of the relief that she actually sought in her Complaint?

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STATEMENT OF THE CASE

The Respondent-Appellant Wendy Brawley has brought this action pursuant to the South Carolina Freedom of Information Act (FOIA), S.C. Code Ann. § 30-4-10, *et seq*.[1] Brawley presented four separate FOIA requests to the Appellant-Respondent Richland County at the meeting of Richland County Council held on the evening of September 9, 2014. (R. 114-117). Brawley was sent correspondence regarding her FOIA requests on September 12, 2014 and October 1, 2014. (R. 129, 573). Thereafter, by letter dated October 3, 2014, the County provided a response to three of the four FOIA requests, and by letter dated October 8, 2014, the County provided a response to the fourth FOIA request. (R. 574).

Wendy Brawley and her co-Plaintiff -- Hopkins and Lower Richland Citizens United, Inc. ("HLRCU") -- brought this FOIA action in an attempt to enjoin the Lower Richland Sewer Project. In their Complaint, the Plaintiffs sought the following temporary and permanent injunctive relief:

> a. Enjoining Defendant 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;

[1] This is governed by the Freedom of Information Act as it was codified in 2014, which was prior to the amendments to FOIA as adopted as part of 2017 Act No. 67, which became effective on May 19, 2017.

b. Enjoining Defendant from entering into negotiations with residents of Hopkins and Lower Richland for the acquisition of easements; and

c. Enjoining Defendant from providing third reading to the Lower Richland Sewer Project.

See, Complaint, ¶ 40. (R. 111). The County filed a motion to dismiss, which Circuit Court Judge Clifton Newman granted by Order entered August 14, 2015. (R. 1-2). Judge Newman ruled that the injunctive relief as sought by the Plaintiffs is not relief contemplated or allowed under FOIA.

Later, after the parties had the opportunity to conduct discovery, Richland County filed a motion for summary judgment. By Order filed October 24, 2016, that motion was granted in part and denied in part by Judge Clifton Newman. (R. 9-16). Judge Newman resolved three of the four FOIA requests in the County's favor. Additionally, the Plaintiff HLRCU was dismissed for lack of standing by that Order.

The fourth FOIA request sought the production of "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." (R. 572). In his Order filed October 24, 2016, Judge Newman determined that "there appears to be a genuine issue of material fact in dispute that precludes the resolution of this claim at the summary judgment stage." (R. 10).

The case was tried before Circuit Court Judge DeAndrea Benjamin without a jury on September 5, 2019. By Order filed February 13, 2020, Judge Benjamin

ruled in favor of Wendy Brawley and found a FOIA violation by the County. (R. 12-24). The County subsequently filed a motion to alter or amend order pursuant to Rule 52(b) and Rule 59(e), SCRCP. (R. 208-216). By Order filed July 16, 2020, Judge Benjamin granted in part and denied in part that motion. (R. 29-38). The court agreed that the claim for injunctive relief had previously been dismissed by Judge Newman, but the judge allowed the award of declaratory relief to stand.

The County filed a Notice of Appeal on August 17, 2020, and Brawley filed a Notice of Appeal on the same date.

In the interim, on July 17, 2020, Brawley's counsel had filed an affidavit claiming an award of attorney's fees and costs. (R. 220-223). No motion was filed. Judge Benjamin held a hearing on the request for attorney's fees and issued an Order Awarding Plaintiff Attorney's Fees and Costs, filed November 30, 2020, awarding a combined $81,264.96 in attorney's fees and costs to Brawley. (R. 39-42). The County filed a motion to alter or amend order seeking reconsideration of the Order Awarding Plaintiff Attorney's Fees and Costs. (R. 241-248). After an additional hearing, Judge Benjamin issued an Amended Order Awarding Plaintiff Attorney's Fees and Costs, filed January 19, 2021, awarding $77,980.75 in attorney's fees and $2,864.96 in costs to Brawley. (R. 94-101).

The County then filed an Amended Notice of Appeal, and this appeal proceeded in this Court.

STATEMENT OF FACTS

Wendy Brawley presented four separate FOIA requests to Richland County at the meeting of Richland County Council held on the evening of September 9, 2014. The FOIA requests were delivered to the Ombudsman's Office the following day. In the four FOIA requests, Brawley sought documents as follows:

> (1) a copy of the minutes from the Richland County Council meeting when funds were approved by Council for waivers of tap on fees for the Lower Richland Sewer Project;
>
> (2) a copy of the minutes from Richland County Council's meeting when the Council gave Third Reading Approval for the Lower Richland Sewer Project;
>
> (3) a copy of Richland County's USDA Rural Development Application and supporting documentation submitted to the USDA for loan and grant funding for the Lower Richland Sewer Project; and
>
> (4) a copy of Richland County's MOU with City of Columbia regarding the sewer services agreement.

See, Complaint, Ex. 1. (R. 114-117).

Brawley was sent correspondence by the Ombudsman's Office regarding her FOIA requests on September 12, 2014 and October 1, 2014. (R. 573, 710). Thereafter, by letter dated October 3, 2014, the County provided a response to three of the four FOIA requests, and by letter dated October 8, 2014, the County provided a response to the fourth FOIA request. (R. 574). The County provided timely

correspondence to Brawley and did not assert any statutory exemptions to the requested information.

The FOIA request that remained at issue for the bench trial sought the production of "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." (R. 572). By letter dated October 8, 2014, the Ombudsman's Office provided a response to this FOIA request. The response included the Application for Federal Assistance dated March 16, 2010, as signed by then County Administrator J. Milton Pope, and consisted of six pages with attachments. (R. 574-582).

During the trial, Wendy Brawley acknowledged receiving the October 8, 2014 letter with the Application for Federal Assistance dated March 16, 2010. (R. 349-350). After the lawsuit was filed, Brawley and her counsel were given the opportunity as part of the discovery process to inspect what was represented to be the project files for the Lower Richland Sewer Project. That inspection occurred on February 10, 2016. She was allowed to mark the documents she wanted, and those documents were copied and Bates numbered and provided to her. (R. 353-355).

Many of those documents inspected by Brawley on February 10, 2016, were submitted into evidence, with Brawley contending that they were responsive to the original 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." Those exhibits are in the trial record as Plaintiff's Exhibits 6 through 15 and Plaintiff's Exhibits 17 through 23. Brawley was only able to testify that those exhibits were in the project file on February 10, 2016. She was unable to testify that those documents were actually in the County's possession in September 2014, when she made her FOIA request. (R. 357).

At trial, Brawley also presented the testimony of Andy H. Metts in her case-in-chief. Metts is the former Director of Richland County Utilities and was involved in locating the documents responsive to the FOIA request at issue. (R. 370, 377-379). The record reflects that other persons, including employees of the Ombudsman's Office and Sara J. Salley, were also involved in the process. Brawley presented only the testimony of Metts and Salley. Salley is a former employee of the County and served a number of roles, including as a grants administrator. She testified that she compiled some of the information made available to Brawley in response to her FOIA requests. (R. 364). No other witnesses involved in the search for responsive documents were presented by Brawley in her case-in-chief.

The FOIA request at issue sought "an application submitted to the USDA Rural Development and "supporting documentation," the latter being the term that on its face is unclear and is subject to varying interpretations. (R. 572). There is

no temporal aspect to the request. With her request, Brawley did not make it clear whether she was requesting solely documents that accompanied the application or whether she was seeking all documentation that was submitted to the USDA, regardless of whether the materials accompanied the application or were submitted at different times, separate and apart from the application itself. Andy Metts is the only witness who was questioned about his interpretation and understanding of the request.[2] Metts explained that he understood the request as seeking the Application for Federal Assistance as submitted to the USDA and the documents that accompanied that submission. (R. 521). He did not conclude that the request required the production of the following exhibits placed into evidence by Brawley from her February 2016 review of the project file:

* A timeline that Andy Metts did not prepare and was never submitted to the USDA
(Pl. Ex. 6). (R. 502-503, 628-631).

* Unsigned, incomplete and draft copies of applications that were never submitted to the USDA
(Pl. Ex. 7-9). (R. 507-510, 632-649).

* Letter of Transmittal not directed or sent to the USDA
(Pl. Ex. 11). (R. 510, 653).

* Emails from USDA personnel and between USDA personnel which were not submitted by the County to the USDA
(Pl. Ex. 12-15, 19-20). (R. 510-513, 654-659, 669-677).

[2] Sara Salley was not questioned as to her understanding of the meaning and scope of Brawley's FOIA request.

* USDA internal checklist
(Pl. Ex. 18). (R. 389-392, 666-668).

* Letter of Conditions dated January 30, 2013 from USDA to Richland County
(Pl. Ex. 21). (R. 514, 678-698).

* Loan Resolution
(Pl. Ex. 22). (R. 514, 699-706).

* February 4, 2014 letter
(Pl. Ex. 23). (R. 514-515, 707-709).

A reasonable person attempting to respond to Brawley's FOIA request as it was articulated would not conclude that the foregoing documents were responsive to the request for "supporting documentation."

Wendy Brawley testified that she was provided through discovery with a copy of a different Application for Federal Assistance dated July 18, 2012. (R. 650-652). However, there was no evidence presented that a copy of that application was retained and existed in the County's files in September 2014, when the FOIA request was made. Andy Metts testified that, based upon the search conducted of the files, a copy of this application had not been retained and was not in the County's possession at that time. (R. 517, 522). Brawley presented no evidence to contradict this.

During the discovery process in this litigation, the County made a request to the USDA Rural Development Office to learn what was in their file. The County provided that documents received from the USDA to Wendy Brawley and her

counsel as part of discovery. (R. 583-627). However, those documents were requested and obtained from the USDA after the lawsuit was filed. (R. 711-713).

STANDARD OF REVIEW

"Under South Carolina law, the determination of the amount of attorney's fees awarded pursuant to a statute is addressed to the sound discretion of the trial court and will not be reversed absent an abuse of that discretion." *O'Shields v. Columbia Automotive, LLC*, 435 S.C. 319, 867 S.E.2d 446, 454, n.10 (Ct. App. 2021). "An abuse of discretion occurs when the [circuit court's] ruling is based upon an error of law or, when based upon factual conclusions, is without evidentiary support." *Fontaine v. Peitz*, 291 S.C. 536, 354 S.E.2d 565, 566 (1987).

The standard of review for questions of law is *de novo*. The appellate court "may reverse where the decision is affected by any error of law." *Murphy v. Owens Corning*, 393 S.C. 77, 710 S.E.2d 454, 457 (Ct. App. 2011). The appellate courts are "free to decide matters of law with no particular deference to the fact finder." *Id*.

ARGUMENTS

I. The trial court erred in its award of declaratory relief to Wendy Brawley finding that Richland County committed a FOIA violation.

The single FOIA request that remained at issue for the bench trial sought the production of "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." (R. 472).[3] By letter dated October 8, 2014, the Ombudsman's Office provided a response to this FOIA request. (R. 574). The response included the Application for Federal Assistance dated March 16, 2010, as signed by then County Administrator J. Milton Pope, and consisted of six pages with the attachments. (R. 575-582).

The trial court broadly ruled that Richland County "failed to provide all of the documentation that was contained in its files at the time of Loan Documentation FOIA Request." (R. 20). The trial court recognized that the County took the position "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 to duplicate or re-create documents." (R. 21). The court rejected that position. The trial court further found that the County "fail[ed] to conduct a reasonable investigation to obtain and/or locate all relevant

[3] The trial court refers to the FOIA request at issue as the "Loan Documentation FOIA Request." (R. 13).

documents." (R. 23). In issuing this declaratory ruling of a FOIA violation, the trial court committed numerous errors of law.

A. The trial court erred in its application of the burden of proof in a FOIA case.

The trial court failed to recognize that the burden of proof rests with a plaintiff to prove a FOIA violation. The burden of proof lay with Wendy Brawley, as the requester, to prove the reasonable scope of the request and that any reasonably responsive documents were actually in the County's possession at the time the FOIA request was made but were not then disclosed in response. In response to a Rule 52(b) motion, the trial court ultimately shifted the burden of proof to the County to prove that a document need not be produced. However, the court confuses a prima facie claim under FOIA on which a plaintiff has the burden of proof on the elements of the claim with an exemption on which the governmental entity has the burden of proof. FOIA requires disclosure of records held by a public body unless the documents fall within enumerated exemptions set forth in S.C. Code Ann. § 30-4-40(a). *See, Burton v. York County Sheriff's Department*, 358 S.C. 339, 594 S.E.2d 888, 892 (Ct. App. 2004). The exemptions from disclosure under FOIA "simply allow public agencies the discretion to withhold exempted materials from public disclosure," and the justification for the exemption lies with the entity withholding the document. 594 S.E.2d at 893. This case, however, does not involve the assertion

by the County of any exemptions from disclosure. The County did not plead that it withheld disclosure of any public records based upon a statutory exemption, nor did the County argue any exemption at trial.

B. The trial court erred in refusing to consider and evaluate the scope of the FOIA request itself and whether the request was reasonably described such that the responding public body could understand what was requested.

In addition to incorrectly stating the burden of proof, the trial court also failed to consider or address the threshold issue in the case. As the County argued, the threshold issue is the scope of the request itself and whether the request was reasonably described such that the responding public body could understand what was requested. As a corollary of that requirement, Wendy Brawley had the burden of showing that a reasonable agency would understand that the contested documents were within the scope of the search.

As the federal courts have explained, "[b]efore addressing the adequacy of the search under FOIA, a court must first ascertain the scope of the request itself." *Judicial Watch v. United States Department of State,* 681 Fed. Appx. 2, 3-4 (D.C. Cir, 2017). "A requester bears the burden of reasonably describing the records its seeks such that the agency is able to determine precisely what records are being requested." 681 Fed. Appx. at 4. "A FOIA request must reasonably describe the records requested." *Landmark Legal Foundation v. Environmental Protection*

Agency, 272 F.Supp.2d 59, 64 (D.D.C. 2003). "The agency's obligation to search is limited to the four corners of the request." *Id*. "Where a FOIA request is unclear, an agency processing a FOIA request is not required to divine a requester's intent." *Id*.

Therefore, as a threshold issue, the trial court was required to assess the reasonable meaning and scope of the 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." (R. 572). The trial court failed to engage in such analysis and made no findings of fact or conclusions of law in that regard. Wendy Brawley sought an application submitted to the USDA Rural Development and "supporting documentation," the latter being the term that on its face is unclear and is subject to varying interpretations. Had the trial court examined the plain and ordinary meaning of that request, it would be immediately recognized that there is no temporal aspect to Brawley's FOIA request. In other words, Brawley did not make it clear whether she was requesting solely documents that accompanied the application or whether she was seeking all documentation that was ultimately submitted to the USDA over time, regardless of whether the materials accompanied the application or were submitted at different times, separate and apart from the application itself. The trial court should have recognized that the lack of clarity in the request has given rise to the controversy between the parties.

Andy Metts is the only witness who was questioned about his interpretation and understanding of the request.[4] Metts explained that he understood the request as seeking the Application for Federal Assistance as submitted to the USDA and the documents that accompanied that submission. (R. 521). He did not conclude that the request required the production of the following exhibits placed into evidence by Brawley from her February 2016 review of the project file:

* A timeline that Andy Metts did not prepare and was never submitted to the USDA
(Pl. Ex. 6). (R. 502-503, 628-631).

* Unsigned, incomplete and draft copies of applications that were never submitted to the USDA
(Pl. Ex. 7-9). (R. 507-510, 632-649).

* Letter of Transmittal not directed or sent to the USDA
(Pl. Ex. 11). (R. 510, 653).

* Emails from USDA personnel and between USDA personnel which were not submitted by the County to the USDA
(Pl. Ex. 12-15, 19-20). (R. 510-513, 654-659, 669-677).

* USDA internal checklist
(Pl. Ex. 18). (R. 389-392, 666-668).

* Letter of Conditions dated January 30, 2013 from USDA to Richland County
(Pl. Ex. 21). (R. 514, 678-698).

* Loan Resolution
(Pl. Ex. 22). (R. 514, 699-706).

[4] Sara Salley was not questioned as to her understanding of the meaning and scope of the FOIA request.

* February 4, 2014 letter
(Pl. Ex. 23). (R. 514-515, 707-709).

As a result, the trial court erred in failing to find that an objectively reasonable person attempting to respond to the FOIA request as it was articulated would not conclude that the foregoing documents were responsive to the request for "supporting documentation." Accordingly, Brawley did not sustain her burden of proving that the County personnel should have properly determined that the documents at issue were responsive to her request and were withheld by the County in violation of FOIA. Moreover, based on a review of the documents themselves and the testimony explaining what they are (see above list), no reasonable fact finder could find that the "February 2016 Located Documents," as named by the trial court, would meet a reasonable person's interpretation of "supporting documentation" provided to the USDA with an Application for Federal Assistance.[5]

[5] Although there are inconsistencies in the trial court's findings which the court refused to correct in response to the County's Rule 52(b) motion, the "February 2016 Located Documents" are identified in the "Findings of Fact" as Plaintiff's Exhibits 7, 8, 9, 10, 11, 13, 17, 18, 19, 21, and 23. (R. 16). Creating confusion which the trial court refused to correct, in the "Legal Analysis" section, the court refers to "Exhibits 5-15, 17, and 19-23" as "all responsive FOIA documents which were not provided to Ms. Brawley in the Original Response Documents." (R. 20). On reconsideration, the trial court refused to address this inconsistency on the following basis: "Since the injunctive relief requiring Richland County to provide the documents to the Plaintiff is no longer requisite, this Court finds no need to make specific findings regarding the documents that were to be provided to the Plaintiff per the injunctive relief order." (R. 33). The trial court failed to recognize that those findings are a critical part of its declaratory relief as well. Nonetheless, in the list stated above, the County has demonstrated why "Exhibits 5-15, 17, and 19-23" would not meet a reasonable person's interpretation of "supporting documentation" provided to the USDA with an Application for Federal Assistance.

In addressing the County's Rule 52(b) motion on this very point, the trial court still refused to address this critical threshold question. Instead, the court again impermissibly shifted the burden to the County by ruling as follows: "No question concerning vagueness was made, nor did the Defendant file a request to the circuit court seeking relief from an overly broad request. Rather, the Defendant responded to the request with 6 pages of responsive information." (R. 32). In effect, the trial court relied on a newly-enacted provision of FOIA. There were significant amendments to FOIA that were adopted as part of 2017 Act No. 67. Those amendments, however, did not become effective ***until May 19, 2017***. S.C. Code Ann. § 30-4-110(A) now provides:

> A public body may file a request for hearing with the circuit court to seek relief from unduly burdensome, overly broad, vague, repetitive, or otherwise improper requests, or where it has received a request but it is unable to make a good faith determination as to whether the information is exempt from disclosure.

See, S.C. Code Ann. § 30-4-110(A) (Supp. 2017). Accordingly, the trial court committed an error of law in impermissibly and unfairly finding that the County failed to utilize the new provisions of S.C. Code Ann. § 30-4-110(A), *which were not even in existence in 2014*. And, in relying on a FOIA provision that did not exist, the trial court compounded its error by failing to decide the threshold question that requires the court to evaluate the reasonable meaning and scope of the FOIA request and how it was understood by the County. The court further

erred in finding that numerous documents, as delineated above, were responsive to the FOIA request and were improperly withheld, which is clearly not supported by the evidence or frankly common sense.

As an additional example, the trial court erroneously found that engineering reports and environmental studies associated with the project were also "supporting documentation" within the meaning and scope of the request. Unless those documents were submitted with the application and not at a later time, it was reasonable for the County personnel responding to the request to not consider engineering reports and environmental studies to be responsive to the request as "supporting documentation" of the application. Moreover, the engineering reports and environmental studies were not presented as evidence, and as a result, the trial court had no basis to determine if there was a sufficient temporal correlation to treat those documents as "supporting documentation" as a reasonable person would construe the term.

C. The trial court erred in adjudicating a "failure to conduct a reasonable investigation" claim that was never pled.

The trial court also erred in substantially altering the nature and scope of the case and, in essence, deciding a case that was never even pled. In its February 13, 2020 Order, the trial court made a declaration that the County failed "to conduct a reasonable investigation to obtain and/or locate all relevant documents." (R. 23).

In its Rule 52(b) motion, the County pointed out that "[t]he Court overlooked that such a claim was not pled by the Plaintiff in her Complaint and thus was not an issue or claim for the Court to consider or adjudicate." (R. 214). In its Order entered in response to the Rule 52(b) motion, the trial court still disregarded what was actually pled and still did not comment on this point. In short, a fair reading of the Complaint does not include any claim of an "unreasonable or inadequate investigation." As a result, that claim was erroneously decided by the trial court.

Additionally, to the extent the issue was properly to be considered, the trial court erred in disregarding that Brawley had the burden of not only pleading that claim but also proving it. Brawley presented only two witnesses, Andy Metts and Sara Salley, involved in the process of compiling the FOIA response. The record reflects that other persons, including employees of the Ombudsman's Office, were also involved in the process, but no other witnesses involved in the search for responsive documents were presented by Brawley. Clearly, Brawley did not meet her burden of proof on a claim or issue that was not pled and should not have formed the basis for the trial court's declaratory ruling in Brawley's favor and against the County. Moreover, even if the trial court's shifting of the burden of proof to the County was correct, the County still cannot be faulted for failing to present evidence on a claim that had never been pled or litigated. That is a basic application of due process, and the principles of fundamental fairness that control warrant reversal.

D. The trial court erred in failing to recognize that a public body has no duty under FOIA to retain documents, re-create documents that were not retained, produce documents not in its possession, or obtain documents from a third-party source.

The trial court also erred as a matter of law in disregarding the applicable law holding that FOIA does not require a party to obtain documents from a third-party source to satisfy a request. This Court has previously cited the case of *Kissinger v. Reporters Commission for Freedom of the Press*, 445 U.S. 136, 152 (1980), in which the United States Supreme Court ruled that FOIA "does not obligate agencies to create or retain documents; it only obligates them to provide access to those which it in fact has created and retained." 445 U.S. at 152 (as cited in *Trask v. South Carolina Dept. of Public Safety*, 2012 WL 10864175, *1 (S.C. Ct. App. 2012) (unpublished)). "FOIA is only directed at requiring agencies to disclose those 'agency records' for which they have chosen to retain possession or control." *Kissinger*, 445 U.S. at 151-152. "It is well settled that a FOIA request pertains only to documents in the possession of the agency at the time of the FOIA request." *Landmark Legal Foundation v. Environmental Protection Agency*, 272 F.Supp.2d 59, 66 (D.D.C. 2003). An agency "is under no obligation to obtain a duplicate or to re-create a record in order to fulfill a FOIA request." *James v. United States Secret Service*, 811 F.Supp.2d 351, 358 (D.D.C. 2011).

While this case was pending before the trial court on the attorney's fees request, this Court issued a published opinion in *Ballard v. Newberry County*, 432 S.C. 526, 854 S.E.2d 848 (Ct. App. 2021). In that case, this Court reversed the circuit court's "judgment that the County violated FOIA in failing to retain certain emails and text messages." 854 S.E.2d at 852. In short, this Court found no duty under FOIA to produce "documents … [that] did not exist and were not in the County's possession." *Id*. That would also demonstrate that there is no duty to re-create any records or to obtain a document in the possession of a third party for production as part of a FOIA request, which is precisely the position that was taken by the County in this case and was summarily rejected without basis by the trial court.

Additionally, the federal courts have held that "[a] challenge to any agency's search because it did not locate documents that may never have been created in the first instance, or may never have been retained as agency records, cannot succeed." *Saldana v. Federal Bureau of Prisons*, 715 F.Supp.2d 10, 23 (D.D.C. 2010). "An agency's failure to find a particular document does not necessarily indicate that its search was inadequate." *Id*. "In any case, an agency is not required to conduct interviews, to search in places where the requested documents are not likely to be found, or to search exhaustively." *Id*.

With respect to the different Application for Federal Assistance dated July 18, 2012, there was no evidence presented that a copy of that application was

retained and existed in the County's files in September 2014, when the FOIA request was made. Andy Metts testified that, based upon the search conducted of the files, a copy of this application had not been retained and was not in the County's possession at that time. (R. 517, 522). Wendy Brawley, however, presented no evidence to contradict this.

During the discovery process in this litigation, the County made a request to the USDA Rural Development Office to learn what was in their file. The County provided that information received from the USDA to Brawley as part of the discovery process after the lawsuit was filed. (R. 712). The origin of those documents are clearly stated in discovery responses (R. 712), but the trial court erroneously ruled that there was no evidence "supporting the origin for June 2015 Discovery Documents." (R. 21). The court improperly shifted the burden of proof and required the County -- not Brawley -- to prove (or rather disprove) whether those documents were in the County's possession in September 2014, when the FOIA request was made. The burden of proof, however, lies with a plaintiff, and Brawley has not shown that the July 2012 application was in the County's possession in September 2014, such that a diligent search would have revealed its existence and the need for production.

In short, the trial court did not need to decide whether the County's representations made in discovery responses is evidence or not. That is because the trial court erred in shifting the burden of proof -- particularly to the extent that

the court was critical that defense counsel did not testify about the origin of documents produced in discovery. Of course, defense counsel is prohibited by the Rules of Professional Conduct from testifying. Rule 407, SCACR (Rule 3.7). Additionally, as a matter of law, the County was precluded by Federal law from being able to call an employee of the United States Department of Agriculture as a witness. (R. 217-219).

In sum, the trial court erred in its award of declaratory relief to Wendy Brawley finding that Richland County has committed a FOIA violation. That award should be reversed as a matter of law.

II. The trial court erred in making an award of attorney's fees and costs to Wendy Brawley due to lack of subject matter jurisdiction. Alternatively, even if Brawley's made a timely request and was the prevailing party on one of the four FOIA claims, errors were made in not making greater deductions in the amounts awarded.

A. The trial court erred in finding that it possessed subject matter jurisdiction to consider Wendy Brawley's attorney's fees affidavit filed on July 27, 2020, or to make any award of attorney's fees and costs.

Richland County raised a jurisdictional challenge to Wendy Brawley's claim for attorney's fees and costs. The trial court rejected that position and concluded that it had subject matter jurisdiction to make the award of attorney's fees and costs.

By way of background, by Order filed February 13, 2020, the trial court entered a final judgment in Brawley's favor. In that Order, the trial court ruled that

Brawley "is entitled to reasonable attorney's fees incurred herein" and directed Brawley "to submit a schedule of fees ***and a motion*** to support the amount of the fees and costs incurred herein." (R. 23). (Emphasis added). Accordingly, by law, Brawley had ten days, or until February 24, 2020, in which to file a motion for attorney's fees and costs as directed by the Court. However, Brawley never filed a motion and did not even file the affidavit of her lawyer until July 27, 2020. (R. 220-223). By that date, the trial court had lost subject matter jurisdiction, and therefore, lacked the jurisdiction to make the award of attorney's fees and costs.

The South Carolina Supreme Court has held that "[g]enerally, a trial judge loses jurisdiction over a case when the time to file post-trial motions has elapsed." *Russell v. Wachovia Bank*, N.A., 370 S.C. 5, 633 S.E.2d 722, 730 (2006). Both appellate courts have consistently held that a motion for attorney's fees is a post-trial motion and must be filed within ten days of the entry of final judgment. *See e.g.*, *Holmes v. East Cooper Community Hospital, Inc.*, 408 S.C. 138, 758 S.E.2d 483 (2014); *Pitman v. Republic Leasing Co., Inc.*, 351 S.C. 429, 570 S.E.2d 187 (Ct. App. 2002).[6] As this Court explained in *Pitman*, "[a]bsent specific statutory language vesting the trial judge with continuing jurisdiction, we refuse to hold that a trial judge retains jurisdiction to consider a motion for sanctions beyond ten days after entry of the judgment. Such an interpretation would run counter to our

[6] This is also consistent with Rule 54(d), SCRCP, which includes a ten-day limit for filing a motion for costs.

established case law that a trial judge loses jurisdiction over a case when the time to file post-trial motions has elapsed." 570 S.E.2d at 190. (Emphasis added). *See also, Rutland v. Holler, Dennis, Corbett, Ormond, & Garner*, 371 S.C. 91, 637 S.E.2d 316, 319 (Ct. App. 2006) ("because a trial judge retains jurisdiction pursuant to Rule 59(e), SCRCP, to alter or amend a judgment within ten days of its issuance, a motion for sanctions would be timely if filed within ten days of judgment"). Importantly, the FOIA does not vest the trial judge with continuing jurisdiction. *See*, S.C. Code Ann. § 30-4-100(b). Moreover, it is well settled that the ten-day deadline for filing post-trial motions is an "absolute deadline" and is not subject to extension by the trial court. *Overland, Inc. v. Nance*, 423 S.C. 253, 815 S.E.2d 431, 433 (2018).

Although the trial court did not set a ten-day deadline in its Order for Brawley to file a motion for attorney's fees, that deadline is set by rule and, like any other jurisdictional requirement, cannot be enlarged by the trial court for any reason. Brawley should have been aware of the foregoing case law as well as Rule 54(d), SCRCP, which includes a ten-day limit for filing a motion for costs.

As indicated, the trial court entered final judgment in Brawley's favor on February 13, 2020. Thus, she had ten days, or until February 24, 2020, to file a motion for attorney's fees. The County did file a timely Rule 52(b) motion which allowed the trial court to continue to exercise jurisdiction until that post-trial motion was decided. However, the Rule 52(b) motion was decided with finality on

July 16, 2020, and it was on that date that the trial court was divested of subject matter jurisdiction over this case. As this Court has held, "a trial judge loses jurisdiction over a case when the time to file post-trial motions has elapsed." *Pitman*, 570 S.E.2d at 190. That occurred by July 16, 2020, and in fact, that is the date on which the thirty days for filing an appeal began to run -- which is further indication that that is the date on which the trial court was necessarily divested of jurisdiction.[7] To repeat, by July 16, 2020, Brawley had filed no motion for attorney's fees. Her lawyer filed an Affidavit as to Attorney's Fees and Costs on July 27, 2020, but by that time the trial court had lost its jurisdiction. Consequently, the trial court erred in making an award of attorney's fees and costs in the absence of subject matter jurisdiction. On that basis, the award should be reversed.

B. Even if the trial court had jurisdiction to award attorney's fees and costs, Wendy Brawley prevailed, at most, on only a fraction of the claims pled in her Complaint and received none of the relief that she actually sought in her Complaint.

In the event the Court determines that the trial court retained subject matter jurisdiction beyond July 16, 2020, and the absence of a timely post-trial motion for attorney's fees is not fatal, the trial court also abused its discretion in its

[7] The parties acted consistently with the understanding that the thirty days to file an appeal commenced on July 16, 2020. Brawley, like the County, filed her Notice of Appeal on Monday, August 17, 2020, which was within the thirty-day deadline based on July 16, 2021 being the date that the appeal time began to run.

determination of reasonable attorney's fees. S.C. Code Ann. § 15-78-100(b) of the FOIA governs a discretionary award of attorney's fees:

> If a person or entity seeking such relief prevails, he or it may be awarded reasonable attorney fees and other costs of litigation. *If such person or entity prevails in part, the court may in its discretion award him or it reasonable attorney fees or an appropriate portion thereof.*

S.C. Code Ann. § 30-4-100(b). (Emphasis added). As the highlighted language indicates, a court must initially determine whether the party seeking attorney's fees qualifies as a prevailing party, and if so, then the court must determine the extent to which the party prevailed.

That is critically important in this case as borne out by the procedural history of the case. The Plaintiffs, which included the dismissed Hopkins and Lower Richland Citizens United, Inc. ("HLRCU"), brought this FOIA action in an attempt to enjoin the Lower Richland Sewer Project. In the Complaint, the Plaintiffs sought the following temporary and permanent injunctive relief:

> a. Enjoining Defendant 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;
>
> b. Enjoining Defendant from entering into negotiations with residents of Hopkins and Lower Richland for the acquisition of easements; and
>
> c. Enjoining Defendant from providing third reading to the Lower Richland Sewer Project.

See, Complaint, ¶ 40. (R. 111). As Judge Clifton Newman agreed, the injunctive relief as sought by the Plaintiffs is not relief contemplated or allowed under FOIA. Judge Newman granted the Defendant's motion to dismiss *in toto* by Order entered August 14, 2015. (R. 1-2). Noticeably absent in the Complaint is any claim for injunctive relief seeking the documents that the Plaintiffs contend have not been provided by the County. Initially, in its Order entered February 13, 2020, the trial court granted such injunctive relief despite it never being sought in the Complaint, but that was corrected in the Order entered on July 16, 2020, where the trial court "remove[d] the injunctive relief requiring Richland County to provide the documents to the Plaintiff." (R. 30).

S.C. Code Ann. § 30-4-100(a) allows a court to issue "a declaratory judgment and injunctive relief to enforce the provisions of this chapter."[8] Therefore, the available relief is limited to the enforcement of the provisions of FOIA. Based upon existing precedent, a court may presumably invalidate an ordinance that was enacted in violation of FOIA's open meeting requirements or order the disclosure of public records that are not exempt from disclosure and have been wrongfully withheld. However, in this case, Brawley sought injunctive relief

[8] To reiterate, this case is controlled by the Freedom of Information Act as it was codified in 2014, which was prior to the significant amendments to FOIA as adopted as part of 2017 Act No. 67, which became effective on May 19, 2017. In its Order filed February 13, 2020, the trial court correctly applied the pre-2017 version of FOIA, as noted in footnote #1 of that Order. (R. 12). However, in its Order filed July 16, 2020, the trial court erroneously applied the 2017 version of the Act in unfairly and erroneously ruling that the County failed to utilize the new provisions of S.C. Code Ann. § 30-4-110(a), which were not even in existence in 2014. (R. 32).

that does not enforce the provisions of FOIA and which is much broader than the relief contemplated or allowed under S.C. Code Ann. § 30-4-100(a). Therefore, it is clear that Brawley's claims for injunctive relief -- which was the heart of this litigation -- were denied in August 2015. The County thus prevailed *in toto* on the injunctive relief claims. (R. 1-2, 4-8).

That left *only* the declaratory relief claims for further adjudication. As explained above, those claims involved four separate and distinct FOIA requests. In those four requests, Wendy Brawley sought documents as follows:

> (1) a copy of the minutes from the Richland County Council meeting when funds were approved by Council for waivers of tap on fees for the Lower Richland Sewer Project;
>
> (2) a copy of the minutes from Richland County Council's meeting when the Council gave Third Reading Approval for the Lower Richland Sewer Project;
>
> (3) a copy of Richland County's USDA Rural Development Application for Loan and Grant Funding Lower Richland Sewer Project; and
>
> (4) a copy of Richland County's MOU with City of Columbia regarding the sewer services agreement.

See, Complaint, Ex. 1. (R. 114-117). Those four FOIA claims were considered by Judge Clifton Newman on the Defendant's motion for summary judgment which was heard on August 23, 2016. As Judge Newman found:

> At the commencement of the hearing, counsel for the Plaintiffs conceded that the County fully responded to

> three of the four FOIA requests, specifically the request seeking a copy of the minutes from the Richland County Council meeting when funds were approved by Council for waivers of tap on fees for the Lower Richland Sewer Project, the request seeking a copy of the minutes from Richland County Council's meeting when the Council gave Third Reading Approval for the Lower Richland Sewer Project, and the request seeking a copy of Richland County's MOU with City of Columbia regarding the sewer services agreement. As a result, summary judgment is granted to the Defendant Richland County with respect to those three FOIA requests.

(R. 10).

Thus, Judge Newman granted summary judgment on three of the four FOIA claims at issue. In fact, Brawley conceded on those three claims after well over a year of litigation. Thus, Brawley was not the prevailing party on the *entirety of her injunctive relief claim* and on 75% of her declaratory judgment claim and she received none of the relief that was actually sought in the Complaint.

The attorney's fees opinions of the United States Supreme Court, while perhaps not controlling in state court, should provide this Court with compelling authority in evaluating what a court should require in assessing the reasonableness of attorney's fees being claimed by a prevailing party. The leading case is *Hensley v. Eckerhart*, 461 U.S. 424 (1983), which was liberally cited by this Court in its

recent decision in *O'Shields v. Columbia Automotive, LLC*, 435 S.C. 319, 867 S.E.2d 446 (Ct. App. 2021).[9] As this Court cites, in *Hensley*, the Supreme Court explained:

> The product of reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the "results obtained." This factor is particularly crucial where a plaintiff is deemed "prevailing" even though he succeeded on only some of his claims for relief. In this situation two questions must be addressed. First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?

Hensley, 461 U.S. at 433, cited in *O'Shields*, 867 S.E.2d at 456. The *Hensley* Court explained that "the most critical factor is the degree of success obtained." *Hensley*, 461 U.S. at 436. This Court thus concluded that "the circuit court retains discretion – after making a decision about apportionment – to reduce the amount of fees based on the partial or limited success of the litigation, whether the claims are related or not." *O'Shields*, 867 S.E.2d at 457.

It is well settled that a circuit court's failure to exercise discretion is itself an abuse of discretion. *See, Samples v. Mitchell*, 329 S.C. 105. 495 S.E.2d 213, 216 (Ct. App. 1997) ("[w]hen the trial judge is vested with discretion, but his ruling

[9] The County recognizes that the *O'Shields* case involved claims on which North Carolina substantive law was applicable. This Court recognized that "[i]n North Carolina cases discussing reasonable attorney's fees, no matter the outcome, the touchstone is *Hensley*." 867 S.E.2d at 456. South Carolina courts should view *Hensley* the same way.

reveals no discretion was, in fact, exercised, an error of law has occurred"); *Balloon Plantation, Inc. v. Head Balloons, Inc.*, 303 S.C. 152, 399 S.E.2d 439, 441 (Ct. App. 1990) ("[i]t is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly").

In the case at bar, it is questionable whether the trial court even considered within its discretion the partial or limited success of the litigation in determining the reasonable fees. Without providing specific findings, the trial court states that "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." (R. 99). Additionally, without specifying the amount, the trial court also applied "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 HLRCU." (R. 99-100).[10] There is no indication, however, that the trial court even considered the fact that the County prevailed on three out of four of the FOIA requests at issue and Brawley received none of the relief actually sought in her Complaint. Based on prevailing South Carolina law, the failure to exercise discretion is itself an abuse of discretion. The

[10] The parameters of this deduction itself are questionable in that the co-Plaintiff HLRCU was actually dismissed by Order filed October 24, 2016. (R. 9-10).

absence of specific findings also do not allow for a meaningful review to confirm what, if any, exercise of discretion was done.

One clear example of an abuse of discretion that is evident from the record involves Brawley's claim for attorney's fees and costs related solely to appellate matters, specifically the appeals filed by the County and Brawley on August 17, 2020, including the preparation of appellate documents, motions, other filings, and appeal-related research. Those appeals are obviously still pending. Brawley has not been determined to be the prevailing party on appeal. Moreover, attorney's fees incurred in appellate matters are recoverable only from the appellate courts under Rule 222, SCACR, and are capped by a Supreme Court Order dated January 17, 2018. Thus, it was improper for Brawley to have even claimed appeal-related fees in the trial court. Likewise, the costs associated with an appeal, as set forth in Rule 222(b), which include trial transcript costs and filing fees, are recoverable only from the appellate courts under Rule 222, SCACR. It is similarly improper for Brawley to seek the recovery of costs of $819.75 for a trial transcript and $250 for the filing fee for her appeal. In its Amended Order, the trial court states that she has deducted attorney's fees and costs relating to "appellate matters." (R. 99). The court did not specify the amount of fees that it deducted for appellate matters; however, it can be determined that the total amount of costs deducted from the total in billing expenses is a mere $301.50 ($3,166.46 minus $2,864.96 equals $301.50). Yet, it is also clear that the appellate costs that are improper total at least $1,069.75, for the filing fee and

trial transcript. Thus, it is obvious that the trial court abused its discretion in allowing for appellate costs. It is just as likely – given the absence of any findings or specific amounts being deducted – that an abuse of discretion was also made with regard to attorney's fees charged for appellate matters. The trial court proclaims that "it is not required to make evidentiary findings as to each bill entry." (R. 99). While that may be true, the trial court did not provide sufficient findings to allow for meaningful review as to whether discretion was properly exercised. On this additional basis, the award of attorney's fees and costs should be reversed.

C. The trial court erred in awarding fees incurred for work performed by paralegals and other support staff.

In the trial court, the County argued that S.C. Code Ann. § 30-4-100(b) allows only for the recovery of reasonable attorney's fees but does not provide for the recovery of fees charged for paralegals or other support staff. The trial court recognized that Brawley "submitted billing records including fees recoverable for work done by supervised paralegals." (R. 97).[11] The trial court nonetheless ruled that it "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. 97). In *O'Shields v.*

[11] The billing records as submitted fail to identify the persons who performed the work for each time entry. There are numerous different persons identified by initials only. Brawley never identified those persons by name or distinguished whether they are attorneys or paralegals or legal assistants or some other non-professional staff members.

Columbia Automotive, LLC, 435 S.C. 319, 867 S.E.2d 446 (Ct. App. 2021), this Court provided directions on remand for the trial court to redetermine its award of attorney's fees and specifically directed that "[t]he circuit court should eliminate any redundant fees, improper cost, and *paralegal fees* as it had in the previous award." 867 S.E.2d at 457. (Emphasis added). Thus, as this Court has ruled in *O'Shields*, the award in the case at bar should not have included non-lawyer time, including fees for paralegals, legal assistants, and any other non-professional staff members.

CONCLUSION

Based on the foregoing discussion and analysis, the Appellant-Respondent Richland County respectfully requests that the Court reverse the Orders issued by Circuit Court Judge DeAndrea Benjamin finding a FOIA violation and awarding declaratory relief to the Respondent-Appellant. Richland County further requests that the Court reverse and set aside the Order issued by Judge Benjamin awarding $80,845.71 in attorney's fees and costs.

Respectfully submitted,

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July 21, 2022

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SC Court of Appeals

CERTIFICATE OF COUNSEL

The undersigned counsel for the Appellant-Respondent Richland County certifies that the Appellant's Brief of Appellant-Respondent Richland County complies with Rule 211(b), SCACR.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Appellant-Respondent Richland County certifies that the Appellant's Brief of Appellant-Respondent Richland County complies with the Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.

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July 21, 2022

CERTIFICATE OF SERVICE

Pursuant to Section (d)(1) of the Supreme Court's Order RE: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended May 6, 2022), the undersigned employee of Lindemann & Davis, P.A., counsel for the Appellant-Respondent Richland County, does hereby certify that service of the **Appellant's Brief of Appellant-Respondent Richland County** was made upon all counsel of record by email only this the 21st day of July 2022 as follow:

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