

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge
H. Garrison Hill, Circuit Court Judge

Appellate Docket No.: 2013-001714

K&S Food Services, Inc. d/b/a Hailee's Bar and Grill . . Appellant,
v.

City of Mauldin and Mauldin City Council, John Gardner,
Brian Turner, and Callista, LLC,
Defendants,

Of whom City of Mauldin and Mauldin City Council,
John Gardner and Brian Turner are the Respondents.

BRIEF OF RESPONDENT

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SC Court of Appeals

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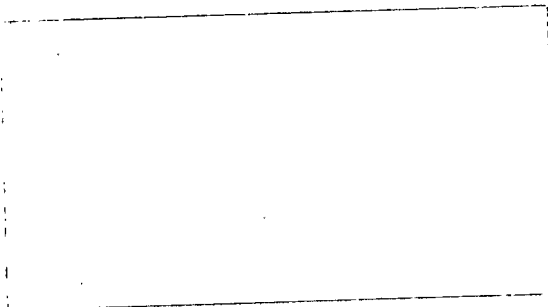


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STATEMENT OF THE ISSUE ON APPEAL

1. Did the trial judge abuse her discretion amounting to an error of law in the award of legal fees to the appellant?

STATEMENT OF THE CASE

K&S Food Services, Inc. owned and operated a bar known as Hailee's Bar & Grill ("Hailee's"). Hailee's was located in a shopping center owned by Callista, LLC. This shopping center was annexed into the City of Mauldin on June 21, 2010. Thereafter, the Mauldin Police Department responded to an inordinate number of calls at Hailee's concerning a variety of problems occurring at the bar. Finally, on February 15, 2011, Mauldin served the Appellant with Notice that it intended to revoke the business license of Hailee's because it constituted a public nuisance.

On July 18, 2011, Mauldin City Council adopted an Ordinance requiring all bars in the City to close at 2:00 a.m. The next day, Hailee's sued Mauldin in Civil Action No. 2011-CP-23-4773. Hailee's raised five causes of action which included: (1) an action challenging the validity of the Ordinance requiring bars to close by 2:00 a.m.; (2) an action challenging the validity of the business license Ordinance of the City; (3) an action alleging various acts of negligence; (4) an action challenging the validity of the annexation of the shopping center; and, (5) an action for inverse condemnation (ROA 43-53). Hailee's also sought a temporary and permanent injunction and temporary restraining Order to prevent the City from enforcing its Ordinance requiring bars to close by 2:00 a.m. The Court denied this request for injunctive relief by Order dated September 19, 2011 (ROA 15-22). Ultimately, the Court, by Orders dated May 2, 2012 (ROA 24-27) and May 14, 2013 (ROA 28-35) dismissed all five causes of action with prejudice.

On August 16, 2011, City Council conducted a due process hearing concerning the revocation of Hailee's business license. On September 19, 2011, a majority of City Council signed an Order just prior to a regularly scheduled council meeting that revoked

the business license of Hailee's (ROA 1-14). On September 22, 2011, Hailee's commenced a second legal action against the City denoted as Civil Action No. 2011-CP-23-6290 (ROA 54-61). In this action, Hailee's raised three causes of action: (1) a challenge to the revocation of the business license; (2) violations of the Freedom of Information Act; and, (3) the validity of Mauldin's business license Ordinance (ROA 54-61). The causes of action challenging the revocation of the business license and the validity of the business license Ordinance were dismissed by Order dated May 2, 2012 (ROA 24-27).

On November 5, 2011, prior to the conclusion of this litigation, Hailee's ceased operating and closed its doors.

The Court, by Order dated May 9, 2013, (ROA 28-35) found that City Council violated the provisions of the Freedom of Information Act ("FOIA") by signing the Order revoking the business license of Hailee's just prior to the council meeting rather than during the council meeting.

Ultimately, the Court awarded Appellant \$1,500.00 for legal fees by Order dated May 8, 2013 (ROA 36-40). This Appeal followed challenging the amount of the award.

ARGUMENT

THE TRIAL JUDGE DID NOT ABUSE HER DISCRETION AMOUNTING TO AN ERROR OF LAW IN THE AWARD OF LEGAL FEES TO THE APPELLANT.

The determination of the amount of an award of legal fees in a Freedom of Information Act claim is a matter of discretion for the trial judge. Burton v. York County Sheriff's Dept., 358 S.C. 339, 357, 594 S.E.2d 888, 898 (Ct. App. 2004). The Court *may*, in its discretion, award reasonable attorney fees or an *appropriate portion* thereof if the party prevails in part. Society of Professional Journalists v. Sexton, 283 S.C. 563, 568, 324 S.E.2d 313, 315-316 (1984). For the reasons set forth herein, the trial judge did not abuse her discretion.

There are six factors to be considered when determining an award of legal fees: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and, (6) customary legal fees for similar services. Jackson v. Speed, 326 S.C. 289, 486 S.E.2d 750 (1997) and Glasscock v. Glasscock, 304 S.C. 158, 161 403 S.E.2d 313, 315 (S.C. 1991). The trial judge considered and made specific findings of fact for each of these six factors in her Order (ROA 37-39). There is sufficient evidence which reasonably supports the trial judge's findings.

(1) The nature, extent, and difficulty of the case

The trial judge found that the Freedom of Information Act issue was not factually or legally complicated, and did not require extensive work by Appellant's counsel (ROA 37). Specifically, the trial court noted that the Freedom of Information Act issue involved the simple

question of whether or not counsel violated the Act by signing the Order revoking the business license of the Appellant just prior to a council meeting (ROA 37).

The FOIA cause of action, the facts that supported it, and the trial judge's finding of a FOIA violation, stand independent of the seven other causes of action brought by the Appellant in the two legal actions. In other words, Appellant's burden of proving the FOIA violation did not rely upon the development of the facts in support of the other seven (7) unrelated causes of action. The FOIA cause of action is not intertwined with the rest of the case; and therefore, Appellant is entitled only to seek fees in pursuit of this very simple and straightforward issue. The trial judge's award of \$1,500.00 demonstrates a reasonable fee for counsel's services for the FOIA claim.

(2) The time necessarily devoted to the case

The trial judge next found that the amount of time allegedly expended by counsel for the Appellant pertaining to the Freedom of Information Act claim "was excessive in light of the simple, straight forward nature of the issue in controversy." (ROA 38). The evidence supports this finding.

The trial judge found that Counsel claimed an excessive amount of time preparing the FOIA cause of action (ROA 38). The following time entries are excessive in light of Counsel's experience handling FOIA cases. Counsel for Appellant listed 2.9 hours on September 20, 2011, to prepare the Freedom of Information Act cause of action (ROA 88). That cause of action begins at paragraph 16 of the Complaint and encompasses two pages (ROA 59-61). Almost half of those two pages are verbatim quotes of statutes in the FOIA. Counsel also listed 3.15 hours on September 22, 2011, to "Review September 19, 2011 decision and applicable minutes and notices by Counsel, along with FOIA applicability." (ROA 88). The Order of City Council was 14 pages in length (ROA 1-14). No minutes of the City Council meeting, which took place on the evening of

September 19, 2011, existed when this time entry was made. In addition, the document providing notice of the September 19, 2011 Council meeting was less than one page in length. The assertion that it took 3.15 hours by experienced counsel to do this work is not reasonable. Furthermore, counsel listed .95 hours on September 22, 2011 to "Finalize FOIA cause of action" and an additional .55 hours to "Revise FOIA c/a and file Amended Complaint. Letter to Clerk of Court." (ROA 88). In total, Counsel asserts that he expended 7.55 hours preparing the two page FOIA cause of action. The trial judge had a sound basis for her finding that the time claimed by counsel to prepare the FOIA cause of action was excessive.

On November 11, 2011, Counsel for Appellant listed .65 hours to "Review Defendant's Motion to Set Aside Default and reply to Motion for Entry of Default." The documents in question comprise less than two pages (ROA 88). It did not take .65 hours to read these two short documents. On November 16, 2011, Counsel for Appellant stated that he expended .55 hours to "Review Defendant's Motion to Dismiss, Motion to Quash." (ROA 88). A review of these documents reveals that they are short, standard forms that did not require experienced Counsel .55 hours to review. On December 8, 2011, Counsel for Appellant listed 3.75 hours to "Review submission of Defendant's numerous exhibits for hearing." (ROA 88). The exhibits in question were police Incident Reports and other documents that were submitted by Respondent in support of Council's decision to revoke Hailee's business license. These exhibits did not pertain to the FOIA cause of action.

On January 3, 2012, and January 5, 2012, Counsel for the Appellant listed a total of 7.1 hours preparing for a hearing and attending the January 5, 2012 hearing before Judge Hill (ROA 89). This hearing pertained to a Motion filed by the Respondent to

dismiss the first lawsuit and to dismiss the second lawsuit which included two causes of action unrelated to the FOIA claim. This hearing addressed primarily the first lawsuit and the two substantive causes of action in the second lawsuit which were subsequently dismissed by Order of Judge Hill (ROA 24-27). The Court took very little time during the hearing addressing the FOIA issue. Most of the time spent in preparation for and attending the hearing addressed the seven substantive causes of action in the two lawsuits which were unrelated to the FOIA claim. It is unreasonable for Appellant to request fees for 7.1 hours when the FOIA claim involved the simple issue of whether or not Council violated FOIA by signing the Order while not in a public hearing.

On January 12, 2012, Counsel for Appellant listed .5 hours to "Review Order of Court."

(ROA 89). The Order of the Court was only two pages in length. On January 22, 2012, Counsel for Appellant listed 1.95 hours to "Review Motion to Dismiss by Defendants." (ROA 89). The documents in question, which were 2 pages in length, did not require almost 2 hours to read by experienced Counsel.

The trial judge also found that the time claimed by counsel for Appellant was excessive because it included time for clerical services (ROA 38). The next group of time entries are ordinarily done by a paralegal or legal assistant rather than an attorney. On September 26, 2011, Counsel for Appellant listed 1.0 hour for "Prepared Civil Action Coversheet, Summons, Complaint, and letter to Clerk." (ROA 88). On September 27, 2011, Counsel for Appellant listed .4 hours to "Fax to process server" and "Letter to Clerk of Court regarding Affidavit of Service." (ROA 88). On October 20, 2011, Counsel for Appellant listed .2 hours to "Fax to process server." (ROA 88). On October 26, 2011, Counsel for Appellant listed 1.0 hour spent for "Prepared Affidavit of Default,

Certificate of Service and letter to Clerk of Court and Letter to City of Mauldin.” (ROA 88). On November 3, 2011, Counsel for Appellant listed .85 hours for “Prepare Motion Coversheet, Motion for Default Judgment, Certificate of Service and Letter to Clerk.” (ROA 88). A Motion for Default Judgment is a standard form that requires very little time for Counsel to prepare. On November 9, 2011, Counsel for Appellant listed .75 hours for “Prepared Notice of Hearing for Default Judgment, Certificate of Service, Letter to Clerk of Court and Letter to Duggan.” (ROA 88). On November 11, 2011, Counsel lists .2 hours to prepare “Letter to Clerk of Court with Certificate of Service.” On March 7, 2012, Counsel for Appellant listed 1.15 hours to “Prepare Motion Coversheet, Motion to Compel, Certificate of Service, Letter to Clerk of Court and Letter to Duggan.” (ROA 89). Not only is this work clerical in nature, it also pertained to the first lawsuit initiated by Hailee’s. It had nothing to do with the FOIA claim subsequently initiated in Plaintiff’s second lawsuit. On May 22, 2012, Counsel listed 2.65 hours for “Prepared Motion Coversheet, Motion for Summary Judgment, Certificate of Service, Letter to Clerk of Court and Letter to Duggan.” (ROA 88). The Motion for Summary Judgment was a standard one page Notice of Motion form often filed by Counsel.

On May 29, 2012, Counsel listed .75 hours to “Review Order of Judge Hill.” (ROA 89). Almost all of Judge Hill’s Order pertained to the five causes of action in the first lawsuit and the two causes of action in the second lawsuit which were dismissed by the Court. Again, these causes of action had nothing to do with the Freedom of Information Act issue. In fact, only two paragraphs of Judge Hill’s Order addressed the Freedom of Information Act (ROA 26). Most of this time listed by Counsel was for service he rendered unrelated to the FOIA claim.

On June 14, 2012, Counsel for Appellant listed .5 hours to "Review Affidavit of Bob Cook." (ROA 89). Mr. Cook was the presiding City Council Member at the business license revocation hearing. His Affidavit was one page . It did not require Counsel .5 hours to read.

On September 14, 2012, Counsel for Appellant listed 5.1 hours for "Preparation for FOIA issues on Summary Judgment" and also listed 3.75 hours on September 17, 2012 to "Prepare for and attend Summary Judgment hearing on FOIA." (ROA 89). Counsel did not prepare a Legal Memorandum to submit to the Court including research or discussion of the FOIA issue. The FOIA issue was a simple factual question, that is, whether or not Council violated FOIA when it signed the Order outside a public meeting. This did not require any appreciable preparation time to research and argue. Furthermore, most of the time expended during this hearing on September 17, 2012, involved Respondent's Motion to Dismiss the Appellant's negligence cause of action. This was wholly unrelated to the FOIA claim. Little time was spent arguing the FOIA motion. Claiming 8.85 hours preparing for and arguing the FOIA issue before the Court was excessive.

On January 7, 2013, Counsel for Appellant listed .45 hours to review emails from opposing Counsel and the Clerk of Court scheduling the hearing to determine the attorney fees (ROA 89). These short emails did not take .45 hours to read and did not require genuine legal services rendered by Counsel pertaining to the FOIA issue.

In summary, the conclusion of the trial judge that the time claimed by Counsel for Appellant was excessive is amply supported by the record.

(3) Professional standing of counsel

The trial judge made an appropriate finding concerning the professional standing of counsel for the Appellant (ROA 38).

(4) Contingency of compensation

Because the Appellant did not indicate to the trial judge that counsel was representing Appellant on a contingency basis, the Court concluded that this was not a factor to be considered in the determination of the award of an appropriate fee (ROA 38).

(5) Beneficial results obtained

The trial judge also considered the results obtained by counsel for the Appellant. The Court noted that of the eight causes of action initiated by Appellant in its two lawsuits, all seven of the substantive causes of action were dismissed by the Court leaving only the uncomplicated claim under the Freedom of Information Act. Therefore, the trial judge concluded that the results obtained by Counsel for the Appellant were not particularly beneficial (ROA 39).

(6) Customary legal fees for similar services

The Appellant, who had the burden of proof to establish that the fee it sought was at market rates, offered no evidence to the Court in support of its assertion that \$350 per hour was an appropriate market rate in similar cases other than to briefly mention in passing during oral argument the Laffey Matrix concerning fees in Federal Court litigation (ROA 149), not state court Freedom of Information Act litigation. And, the Appellant did not submit the Laffey Matrix to the trial court for its consideration. Having failed to submit evidence to the Court concerning market rates for similar litigation, it is too late to claim on appeal that the Court committed error concerning its finding regarding market rates.

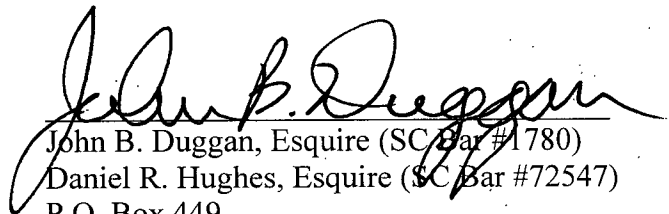
The trial judge found that the hourly rate of \$350 sought by counsel for the Appellant was excessive taking into consideration the uncomplicated nature of the issue and market rates for fees in similar cases. The trial court acted properly in doing so.

CONCLUSION

The trial judge considered all of the required factors in assessing the determination of the legal fee. The trial judge did not abuse her discretion in the amount of the legal fee awarded to the Appellant. The evidence supports the award and should be affirmed.

Respectfully submitted,

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July th28, 2014.

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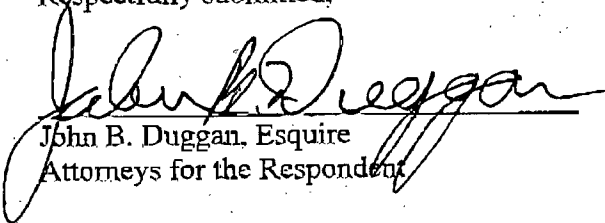
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Respondents.

CERTIFICATE OF COUNSEL

I certify that the Respondents' Final Brief complies with the requirements of Appellate Rule 211(b).

Respectfully submitted,


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Attorneys for the Respondent

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CERTIFICATE OF SERVICE

This is to certify that I did on this date, serve a copy of the **Brief of Respondent** in regard to the above-referenced matter upon the Appellant, by depositing same in the United States mail with postage prepaid and affixed thereto, addressed as follows:

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