

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM JASPER COUNTY
Court of Common Pleas

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The Honorable Carmen T. Mullen, Fourteenth Judicial Circuit
Case No.: 2013-CP-27-327

APR 01 2015
SC Court of Appeals

Appellate Case No.: 2014-002612

Randy Horton.....Appellant

-VS-

Jasper County School District.....Respondent

APPELLANT'S FINAL BRIEF

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STATEMENT OF ISSUE ON APPEAL

Did the trial court abuse its discretion when it reduced counsels' hourly attorney fee rates under FOIA to \$100.00 per hour?

STATEMENT OF THE CASE

Appellant Randy Horton (Horton) is an elected member of the Board of Trustees for Respondent Jasper County School District (School District). Horton requested that the School District provide him with information and documents under the Freedom of Information Act (FOIA). (R. pp. 41-46). The School District failed to respond to Horton's FOIA requests and did not provide the documents requested. (R. pp. 30-54, R. pp. 92-93). Horton then filed a Summons and Complaint dated June 19, 2013, with a cause of action alleging violations of the South Carolina FOIA. (R. pp. 30-54). Horton's Complaint also requested attorney fees. (R. pp. 30-54). The School District filed an Answer dated August 22, 2013, denying that Horton was entitled to any records. (R. pp. 55-75).

Horton filed a Motion for Summary Judgment dated October 9, 2013. (R. pp. 86 - 102). In the motion, Horton asked that summary judgment be entered finding that the School District violated FOIA, and asked for an award of attorney fees and litigation costs under S.C. Code Ann. § 30-4-100(b). (R. pp. 86-102).

A hearing on the Motion for Summary Judgment was initially held on January 31, 2014. The lower court asked the parties to prepare additional briefs relating to the matter and scheduled another hearing for March 31, 2014. Neither entitlement nor amount of attorney fees to be awarded was discussed at the January 31, 2014 hearing. At the March 31, 2014 hearing, the lower court ordered the School District to provide Horton with all of the documents he requested through FOIA, and directed Horton's counsel to submit a

supplemental Affidavit related to attorney fees and litigation costs after all of the documents at issue were received. (R. pp. 118-119). Neither entitlement nor amount of attorney fees to be awarded was addressed at the March 31, 2014 hearing.

On July 9, 2014, Horton provided the lower court and the School District with the requested Affidavit relating to attorney fees and litigation costs. The Affidavit stated that Horton's counsel spent over 135 hours working on this case at counsels' standard hourly rates of \$295.00 and \$250.00. The Affidavit also showed that the litigation costs were \$1,096.56. (R. pp. 103-116). The School District never responded to, objected to, or otherwise communicated with the lower court or with Horton relating to the Affidavit related to attorney fees and litigation costs. The School District never objected to the number of hours spent by counsel on this case, never objected to counsels' hourly rates, and never offered any counter affidavits. No hearing addressing the Affidavit related to attorney fees and litigation costs was scheduled by the lower court.¹

On September 5, 2014, the lower court granted Horton's Motion for Summary Judgment and awarded Horton all litigation costs of \$1,096.56 and awarded Horton attorney fees for each attorney hour spent on the file. However, the trial court reduced counsels' hourly rates from \$295.00 and \$250.00 to \$100.00 per hour.² (R. pp. 20-21). Horton timely filed a Motion for Reconsideration regarding what he believed was the improper reduction of counsels' hourly rates. (R. pp. 76-85) The lower court denied the

¹ Because the lower court never held a hearing addressing the amount of attorney fees and litigation costs to be awarded in this matter, there was no transcript for counsel to order prior to filing and serving the Initial Brief. Further, the amount of attorney fees and litigation costs were not addressed during the January 31, 2014 hearing or during the March 31, 2014; therefore, counsel did not order the transcripts for these hearings.

² The lower court did not award the paralegal and legal assistant time as set forth in the Affidavit. Horton is not challenging that portion of the decision.

Motion for Reconsideration, issuing a Form 4 Order, without holding a hearing. (R. pp. 2-18). Horton timely filed a Notice of Appeal.

STANDARD OF REVIEW

When reviewing a ruling left to the discretion of the lower court, an appellate court will reverse the ruling if the ruling constitutes an abuse of discretion. E.g. Laser Supply and Services, Inc., v. Orchard Park Associates, 382 S.C. 326, 676 S.E.2d 139 (Ct. App. 2009) (determination left to the discretion of the trial court will not be disturbed absent an abuse of discretion); Southeastern Housing Foundation v. Smith, 380 S.C. 621, 670 S.E.2d 680 (Ct. App. 2008) (appellate standard of review is limited to determining whether there was an abuse of discretion).

ARGUMENT

I. The lower court abused its discretion when it reduced counsels' hourly attorney fee rates under FOIA to \$100.00 per hour.

The lower court committed reversible error when it disregarded the hourly rates set forth in the Affidavit Regarding Legal Fees and Costs, ignored the fact that the School District never objected to the hourly rates and reduced Horton's counsels' hourly rates to \$100.00 per hour.

a. The lower court ignored the Affidavit Regarding Legal Fees and Costs and Motion to Reconsider.

In the Affidavit Regarding Legal Fees and Costs and Motion to Reconsider, Horton's counsel set forth evidence to show that the firm's hourly rates are \$295.00 for Partner and \$250.00 for Attorney. (R. pp. 103-104, ¶ 5). Horton's counsel also confirmed that these hourly rates are "customary legal fees for litigation cases in the Fourteenth Judicial Circuit" and that these were the hourly rates "Plaintiff's counsel charges to virtually all of its clients that pay by the hour." (R. pp. 105-106, ¶ 6(f); R. pp.

76-85). As to the experience of Horton's counsel, Horton's two attorneys are experienced litigators with combined twenty-five years of experience, and one of which holds a Martindale-Hubbard AV rating. (R. p. 105, ¶ 6(c)). Thus, the Affidavit and Motion for Reconsideration established that the hourly rates for Horton's counsel are \$295.00 for Partner and \$250.00 for Attorney, and that these are the rates that Horton's counsel charges to all of its hourly clients and that these hourly rates are customary in the Fourteenth Judicial Circuit. Nevertheless, the lower court disregarded the Affidavit and Motion to Reconsider without explanation.

b. The School District never objected to any aspect of Horton's fee request.

The School District never objected to Horton's requested legal fees and costs. The School District did not object to the hourly rates listed and did not argue that the hourly rates were not customary hourly rates fees in the Fourteenth Judicial Circuit or in South Carolina. The School District never offered any counter affidavits or any other evidence about customary hourly rates in the Fourteenth Judicial Circuit. Therefore, the only evidence before the lower court was that offered by Horton's counsel.

c. There is no evidence in the record to support the \$100.00 per hour fee.

When the lower court reduced Horton's counsels' hourly rates to \$100.00, the lower court did not cite any evidence to support its decision, because there was no other evidence in the record. Thus, there is no evidence in the records to support the fee reduction to \$100.00 per hour.

d. The lower court awarded a fee for each hour of time expended by Horton's counsel on the file.

The Affidavit Regarding Legal Fees and Costs established that J. Ashley Twombly expended 39.7 hours on the file and that Jennifer I. Campbell expended 95.6

hours on the file, for 135.3 total attorney hours on the file. (R. pp. 103-104, ¶ 5).³

In its Order, the lower court found that the Affidavit Regarding Legal Fees and Costs “portrays commensurate time, nature, extent, and difficulty expended by [Horton’s counsel] in procuring the FOIA requested documents and litigation related thereto.” (R. pp. 20-21). The lower court held that the legal fees relate to the preparation of the pleadings, preparation of a brief to the court relating to jurisdiction, standing, and the merits of the case, and review of over 2,000 pages of documents provided in seven separate submissions over the course of several months. (R. pp. 19-22). The lower court concluded that “[u]ltimately, my ruling produces beneficial results for their client.” (R. p. 21). The lower court awarded fees “for a total of 135.3 hours documented by J. Ashley Twombly, Esq. and Jennifer Campbell, Esq. for their work in compelling the document production at issue.” (R. p. 21). Therefore, the lower court found that Horton was entitled to an award of attorney fees for each hour spent by his attorneys.

e. The lower court concluded that Horton was entitled to an attorney fee award under Burton v. York County Sheriff's Department, 358 S.C. 339, 594 S.E.2d 888 (Ct. App. 2004).

Under Burton, the six factors to be considered when determining an award of attorney’s fees are (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. Id. at 357, 594 S.E.2d at 898. The lower court concluded that Horton was

³ In response to the FOIA requests, the School District ultimately produced over 2,460 pages of documents in seven separate mailings. The documents were provided in three different formats (consolidated monthly bills, individual cardholder statements, and monthly computer print-outs). The School District also provided individual statements and monthly computer print-outs for cardholders not included in the FOIA requests. (R. pp. 104-105, ¶ 6(b)). In addition, the School District redacted some of the documents. Counsel for the parties discussed the redaction, and the School District agreed to provide unredacted documents. (R. p. 117). These issues resulted in a significant amount of time being spent on the case.

entitled to attorney fees.

Specifically, the lower court found that Horton's counsel expended "commensurate time, nature, extent, and difficulty" in obtaining the FOIA requested documents and litigating this matter. (R. pp. 20-21). The lower court noted that counsel has "a combined twenty-five years of experience in litigation." (R. pp. 21). The lower court found that the legal fees appropriately relate to the preparation of the pleadings and briefs to the court as well as review of the documents provided. (R. pp. 21). The lower court concluded that "[u]ltimately, my ruling produces beneficial results for their client." (R. pp. 21). Thus, the lower court correctly found that Horton was entitled to an award of attorney fees in this matter under Burton and awarded a fee for each hour requested by Horton's counsel.

f. The lower court failed to exercise discretion and issued a ruling that abused discretion.

The decision about whether to award attorney's fees under a state statute like S.C. Code Ann. § 30-4-100(b) is left to the discretion of the lower court. See Kiriakides v. School Dist. Of Greenville County, 382 S.C. 8, 675 S.E.2d 439 (2009). An abuse of discretion occurs when a judge fails to exercise discretion, when a ruling is based upon an error of law, or, when a ruling based on factual conclusions is without evidentiary support. See Fontaine v. Peitz, 291 S.C. 536, 538, 354 S.E.2d 656, 566 (1987) ("An abuse of discretion occurs when the judge's ruling is based upon an error of law or, when based upon factual conclusions, is without evidentiary support.") and Samples v. Mitchell, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct. App. 1997) ("A failure to exercise discretion amounts to an abuse of that discretion."). In this case, the lower court failed to exercise any discretion as the hourly fee amount.

1. The lower court failed to exercise discretion.

The lower court reduced counsels' hourly rate from their customary rates, down to \$100.00 per hour, across the board. The lower court did not explain why it felt it was appropriate to reduce counsels' hourly rates. After Horton filed a Motion for Reconsideration asking that the lower court to either award attorney fees at the hourly rates listed in the Regarding Legal Fees and Costs or explain why an hourly rate of \$100.00 was used, the lower court denied the motion with a Form 4 Order. (R. pp. 76-85; R. pp. 2-18). Thus, a review of the lower court's orders establishes that no discretion was exercised relating to the hourly rate of Horton's counsel. "When a trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred." Fontaine, 291 S.C. at 538, 354 S.E.2d at 566. Accordingly, the lower court's decision to reduce counsels' hourly rate to \$100.00 amounts to an abuse of discretion and an error of law.

2. The lower court's ruling reduced counsels' hourly fee to \$100.00 without evidentiary support.

In this case, the only evidence before the lower court relating to counsels' hourly rates and the customary rates in the Fourteenth Judicial Circuit was the Affidavit Regarding Legal Fees and Costs. There was no evidentiary support for the lower court to reduce counsels' rates from \$295.00 and \$250.00 to \$100.00 per hour.

3. There was no reason to reduce counsel's hourly rate.

Even if there were evidence in the record to support an exercise of discretion reducing counsels' hourly rates to \$100.00 per hour, counsel is not aware of any reason why the lower court would have wanted to implement such a reduction here. It is clear that the School District violated Horton's rights and refused to produce documents

Horton was entitled to under FOIA. The lower court concluded that counsel spent an appropriate amount of time on the case, that counsel was entitled to be compensated for each hour expended on the file, that counsels' work produced beneficial results to Horton, and that counsel had favorable professional standings in the Lowcountry legal community. There simply is no known reason to support the hourly rate reduction, even if the reduction were supported by evidence in the record.

g. The lower court awarded attorney fees at an hourly rate that results in inadequate protection of FOIA rights.

South Carolina Code Ann. § 30-4-100(b) was enacted to protect the rights granted by FOIA, and the lower court's award of attorney fees at an hourly rate of \$100.00 results in inadequate protection of FOIA rights.

In Society of Prof'l Journalists v. Sexton, 283 S.C. 563, 324 S.E.2d 313 (1984), the appellant urged the Court to reverse a FOIA attorney's fee award on grounds that the state agency acted in good faith reliance on a regulation. The South Carolina Supreme Court declined to do so, holding the "trial judge did not abuse his discretion in awarding fees to encourage agencies to comply with FOIA requests." *Id.* at 568, 324 S.E.2d at 316. See also Sloan v. Friends of the Hunley, 393 S.C. 152, 711 S.E.2d 895 (2011) (honoring legislative intent of FOIA by awarding attorney fees serves as an impetus to comply with FOIA); Samples, 329 S.C. at 105, 495 S.E.2d at 213 (imposition of a sanction should serve to protect the rights provided by the Rules).

In this case, awarding statutory attorney fees at a rate of \$100.00 per hour, which is a steep reduction from the customary hourly rates of \$250.00-\$295.00, will likely discourage litigants from bringing litigation under FOIA, even when it is clear that their rights under FOIA have been violated. In fact, if the lower court's order stands, Horton

could be left with a debt of over \$24,331.26 for the attorney's fees incurred. Moreover, the lower court's ruling could discourage experienced attorneys from representing clients in cases similar to Horton's, even when counsel correctly believes that a state agency has violated FOIA. The lower court's ruling will not have the coercive effect of encouraging compliance with FOIA as intended by the South Carolina legislature.

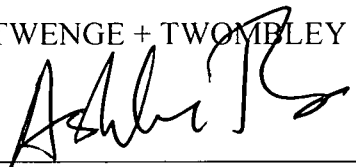
For these reasons, this Court should reverse the lower court's hourly rate of \$100.00 and order the School District to pay the full attorney fees as requested in the Affidavit Regarding Legal Fees and Costs.

CONCLUSION

For the reasons contained herein and as may be raised in any Reply Briefs or Supplemental Briefs and at oral arguments, this Court should reverse the lower court's hourly rate of \$100.00 and order the School District to pay the full attorney fees as requested in the Affidavit Regarding Legal Fees and Costs.

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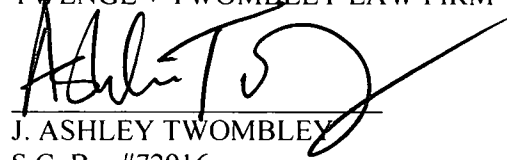
March 30, 2015

CERTIFICATE OF COUNSEL

The undersigned, J. Ashley Twombly, certifies that the herein Final Brief of Appellants complies with Rule 211(b) the South Carolina Appellate Court Rules.

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BY:

A handwritten signature in black ink, appearing to read 'Ashley Twombly', is written over a horizontal line.

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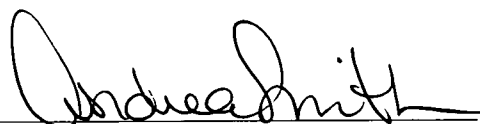
Jasper County School District.....Respondent

AFFIDAVIT OF SERVICE

The undersigned, Andrea Smith, hereby avers that she is a Paralegal with TWENGE + TWOMBLEY LAW FIRM, Attorneys for Appellant, and that on the 30th day of March 2015, a true and accurate copy of the attached of Final Brief of Appellant was placed in an envelope with first class postage thereon prepaid through the United States Postal Service and mailed to the following:

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