

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No.: 2013-001880

George S. Glassmeyer,.....Respondent,

v.

City of Columbia,.....Appellant.

RESPONDENT'S RETURN TO APPELLANT'S
PETITION FOR REHEARING

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Attorneys for Respondent

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SEP 23 2015

SC Court of Appeals

Pursuant to Rule 240(e) of the *South Carolina Rules of Appellate Procedure*, Respondent George S. Glassmeyer (“Glassmeyer”) respectfully files this Return to Appellant City of Columbia’s (“City”) Petition for Rehearing, filed September 15, 2015, regarding the Court’s decision filed September 2, 2015. *Glassmeyer v. City of Columbia*, Op. No. 5347, 2015 WL 5132194.

City seeks to have this Court reverse its decision affirming attorneys’ fees awarded to Glassmeyer by the lower court. For the reasons stated herein, the Court did not misapprehend applicable law or facts and should deny City’s Petition for Rehearing.

ARGUMENTS

I. THE LOWER COURT’S AWARD OF FEES AND COSTS TO GLASSMEYER IS SUPPORTED BY ADEQUATE JUDICIAL DISCRETION AND REVIEW OF REQUISITE FACTORS.

Despite City’s assertion to the contrary (Appellant’s Petition for Rehearing at p. 3), the lower court’s decision to award Glassmeyer’s attorneys’ fees and costs was the product of an appropriate exercise of discretion pursuant to a review of the factors set forth in *Jackson v. Speed*, 326 S.C. 289, 486 S.E.2d 750 (1997). In *Jackson*, the South Carolina Supreme Court stated six factors to be considered by all courts when determining a reasonable attorneys’ fee: “(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 308, 486 S.E.2d at 760 (citing *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 427 S.E.2d 659 (1993)).

The Supreme Court has not required a lower court to separately or specifically analyze each factor in its order awarding a party’s attorneys’ fees and costs. Rather, the

Court has held, “on appeal, an award for attorney’s fees will be affirmed so long as sufficient evidence *in the record* supports each factor.” *Jackson*, 326 S.C. at 308, 486 S.E.2d at 760 (emphasis added). Evidence in the record of this case supports the lower court’s award of Glassmeyer’s attorneys’ fees and costs based on the factors enunciated in *Jackson*. Sufficient evidence of each *Jackson* factor supporting an award of attorneys’ fees was set forth in the Affidavit of Attorney’s Fees and Costs filed by Glassmeyer’s counsel (R. pp. 133-149) and, in addition, evidence supporting these factors was presented to the lower court during the parties’ cross motions for summary judgment.

City’s assertion that the lower court “offered no rationale for its award” (Appellant’s Petition for Rehearing at p. 4) is unsubstantiated. The lower court’s order awarding Glassmeyer’s attorneys’ fees and costs was issued after reviewing Glassmeyer’s affidavit of fees and costs which, as stated above, included evidence supporting each of the *Jackson* factors. (R. pp. 14-15.) The lower court’s order clearly stated the court had “reflected upon” the *Jackson* factors and found it “appropriate to award fees and costs” to Glassmeyer. (*Id.*) Moreover, the lower court’s reduction of fees and costs from \$12, 655.01 as requested by Glassmeyer to \$11,185.01 evidences an exercise of independent judicial discretion in determining a reasonable amount of attorneys’ fees and costs. (Compare R. p. 134. with R. p. 14.) Accordingly, City’s assertion that “the award of attorneys’ fees by the trial court is not deserving of the deference conferred on appeal” (Appellant’s Petition for Rehearing at p. 4) is wholly without merit.

The lower court properly exercised its discretion in awarding fees and costs to Glassmeyer and this Court’s affirmance of the lower court’s award should remain intact.

II. CITY'S OFFER TO PROVIDE GLASSMEYER'S COUNSEL WITH UNREDACTED COPIES OF THE REQUESTED DOCUMENTS IS NOT ANALOGOUS TO THE FACTUAL SCENARIO IN *SLOAN V. FRIENDS OF THE HUNLEY, INC.* AND THEREFORE FEES AND COSTS SHOULD NOT BE REDUCED.

City asserts it attempted to cooperate with Respondent after the subject action was initiated by “wr[iting] to Glassmeyer’s counsel, . . . offering the opportunity to review unreacted application materials.” Appellant’s Petition for Rehearing at pp. 2, 4 (citing R. p. 115). City fails to acknowledge its counsel’s offer was made only to Glassmeyer’s counsel and no opportunity was provided by City for Glassmeyer to review the unredacted applications. City’s attempt to analogize its offer to the offer in *Sloan v. Friends of the Hunley, Inc.*, 393 S.C. 152, 711 S.E.2d 895 (2011), should be rejected.

In *Sloan*, Mr. Sloan submitted a Freedom of Information Act request to Friends of the Hunley, Inc. (“Friends”) seeking “a list of documents pertaining to Friends’ corporate structure and legal relationship with the Hunley Commission, a state agency.” *Id.* at 154-55, 711 S.E.2d at 896. After Friends denied Sloan’s request, he filed a complaint seeking production of the documents. *Id.* at 155, 711 S.E.2d at 896. Approximately one month later, Friends “fully complied with Sloan’s document request,” subject to a reservation of its legal assertion that it was not subject to the FOIA. *Id.* The lower court granted Friends’ motion for summary judgment, finding Sloan lacked standing to maintain the action and no justiciable controversy existed since Friends had produced the very documents sought in the complaint. *Id.* Sloan appealed.

Prior to oral argument on Sloan’s appeal, Friends conceded it was a public body. *Id.* Despite this concession, the appellate courts affirmed the lower court’s grant of summary judgment to Friends on the basis the action was moot and non-justiciable in

light of Friends' previous production of unredacted documents to Sloan. *Id.* (see also *Sloan I*, 369 S.C. 20, 25-28, 630 S.E.2d, 474, 477-478 (2006)). Although finding Sloan succeeded on the merits of his action—that Friends was a public body subject to the FOIA—the appellate courts denied Sloan the ability to recover attorneys' fees under the FOIA beyond the time Friends produced the requested information in redacted form. *Sloan II*, 393 S.C. at 154, 711 S.E.2d at 896.

Friends' production of unredacted versions of the requested records *to Sloan* is significant. Although maintaining it was not a public entity subject to the FOIA, Friends nevertheless turned over the requested records *without limitation*, allowing the requesting party, Sloan, to review them without restriction and enabling him to use the documents as he saw fit. Thus, Friends' provision of unredacted records to Sloan in effect amounted to full compliance with the FOIA's requirements.

City argues Glassmeyer is not entitled to attorneys' fees past the date City offered to provide unredacted copies of the requested documents to Glassmeyer's counsel. (Appellant's Petition for Rehearing at p. 4 ("Glassmeyer refused this offer, resulting in extensive litigation")) City's argument lacks merit because City did not "fully comply" with Glassmeyer's FOIA request as Friends did in the *Sloan* case. Rather, City offered to provide unredacted copies in a confidential fashion for Glassmeyer's attorneys' eyes only. City's offer to Glassmeyer's counsel does not have the same effect as Friends' provision of unredacted requested documents to Sloan, the requesting party. The restrictions placed by City on the offer to review unredacted records, which prevented Glassmeyer from reviewing them, does nothing to further the FOIA's public policy aims and should not preclude Glassmeyer from recovering attorneys' fees and costs.

III. GLASSMEYER PREVAILED, IN WHOLE OR IN PART, AND IS THEREFORE ENTITLED TO AN AWARD OF ATTORNEYS' FEES AND COSTS PURSUANT TO THE FOIA.

City asserts this Court should have reversed the lower court's award of attorneys' fees and costs based on this Court's reversal of the lower court's decision granting summary judgment in Glassmeyer's favor on City's redaction of applicants' home addresses, personal telephone numbers, and personal email addresses. *See* Appellant's Petition for Rehearing at p. 3. City implies at the very least this Court should have "independently determine[d]" an appropriate award of attorneys' fees and costs to Glassmeyer based on this Court's decision that home addresses, personal telephone numbers, and personal email addresses were appropriately withheld¹ by City.

This Court correctly affirmed the lower court's award of fees and costs to Glassmeyer as the prevailing party. The Supreme Court has held a party need not prevail in whole in order to be entitled to a statutory award of fees and costs. *See Heath v. County of Aiken*, 302 S.C. 178, 182-83, 394 S.E.2d 709, 711 (1990) (defining a "prevailing party" as "[t]he one who successfully prosecutes the action or defends against it, prevailing on the main issue, *even though not to the extent of the original contention* [and] is the one in whose favor the decision or verdict is rendered and judgment entered.") (quotation omitted) (emphasis added). "[A] party need not be successful on all issues in order to be found a prevailing party." *Id.* at 182, 394 S.E.2d at 711.

This Court did not merely affirm the lower court's award of Glassmeyer's fees and costs upon "a mere designation of [Glassmeyer] [as] the prevailing party." *See*

¹ Glassmeyer filed a Petition for Rehearing on this, and other, issues on September 17, 2015. *See* Respondent's Petition for Rehearing. Glassmeyer does not concede that home addresses, personal telephone numbers, and personal email addresses of the final five applicants for the position of City Manager were appropriately withheld by City pursuant to the FOIA personal privacy exemption, S.C. Code Ann. § 30-4-40(a)(2).

Appellant's Petition for Rehearing at p. 4. Instead, the Court analyzed the lower court's award and found the award could appropriately be affirmed based on the lower court's finding "City failed to provide any basis for its redactions when it produced the responsive documents," a decision which City "did not appeal." *See* Order, Op. No. 5347, 2015 WL 5132194 at *6. This failure applied to all categories of information withheld by City, including home addresses, personal telephone numbers, and personal email addresses. In addition, Glassmeyer challenged the redaction of other information, which the City has provided to him since commencement of this litigation. Even if the Court's decision to reverse the lower court on certain categories of information is correct, Glassmeyer prevailed as to all categories of information based on City's failure to provide the grounds for its redaction as required by FOIA, S.C. Code Ann. § 30-4-30(c), and prevailed, in part, on other categories of information which City initially withheld.

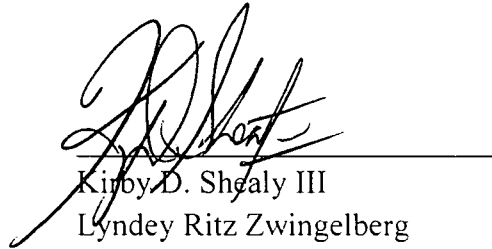
As required by *Sloan v. Friends of the Hunley, Inc.*, 393 S.C. 152, 158-59, 711 S.E.2d 895, 898 (2011), this Court appropriately analyzed the lower court's award of Glassmeyer's fees and costs and determined the extent to which Glassmeyer prevailed and the attorneys' fees associated with his successful prosecution. This Court should not reconsider its decision on this issue.

CONCLUSION

For the reasons stated above, this Court should deny Appellant's Petition for Rehearing.

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Respectfully submitted,

A handwritten signature in black ink, appearing to read "Kirby D. Shealy III", is written over a horizontal line.

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September 23, 2015.

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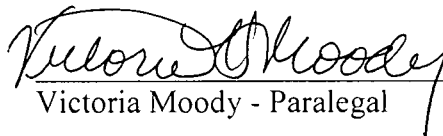
George S. Glassmeyer,.....Respondent,

v.

City of Columbia,.....Appellant.

PROOF OF SERVICE

I certify that I have served Respondent's Return to Appellant's Petition for Rehearing, by depositing a copy in the United States Mail, postage prepaid, on September 23, 2015, addressed to his attorney of record, W. Allen Nickles, III, Esquire, at 1122 Lady Street, Suite 610, Columbia, South Carolina 29201.


Victoria Moody - Paralegal

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SC Court of Appeals

September 23, 2015

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VIA Hand Delivery:

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RE: *City of Columbia v. George S. Glassmeyer*
Appellate Case No.: 2013-001880
A&R File No.: 053004-000001

Dear Ms. Kitchings:

Enclosed for filing in the above-referenced matter are the original and seven (7) copies of Respondent's Return to Appellant's Petition for Rehearing. Please file the original and six (6) copies pursuant to Rule 240, SCACR, and return the extra copy to me via our courier.

By copy of this letter, I am serving all counsel of record with the Return as set forth in the enclosed Proof of Service. Thank you for your attention to this matter.

Sincerely,


Kirby D. Shealy III

KDSIII/LRZ/vhm
Enclosures

cc: W. Allen Nickles, III, Esquire (w/enc.)

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