

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM JASPER COUNTY
Court of Common Pleas

SC Court of Appeals

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

79577

Appellate Case No.: 2014-002612

Randy Horton.....Appellant

-vs-

Jasper County School District.....Respondent

APPELLANT'S PETITION FOR REHEARING

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Pursuant to Rule 221(a), Appellant Randy Horton petitions the Court of Appeals for a rehearing, respectfully submitting that the Court overlooked a critical lack of evidence in reaching its decision in this case.

I. This Court failed to recognize that there is no evidentiary support whatsoever for the lower court's decision.

The decision of whether to award attorney's fees under S.C. Code Ann. § 30-4-100(b) is left to the discretion of the lower court. *Kiriakides v. School Dist. Of Greenville County*, 382 S.C. 8, 675 S.E.2d 439 (2009). This gives the Court the power and privilege to *review the evidence* and make a decision as to what the lower court believes is fair and reasonable *based upon the evidence* before the lower court.

An abuse of discretion occurs when a lower court's ruling, if based upon factual conclusions, is without evidentiary support. *Bridges v. Wyandotte Worsted Co.*, 239 S. C. 37, 121 S. E. 2d 300 (1961); see also 16 S.C. Jur. Appeal and Error § 124. In addition, a ruling which reveals that the trial judge who was vested with discretion did not, in fact, exercise discretion is an error of law. *Fontaine v. Peitz*, 291 S. C. 536, 354 S. E. 2d 565 (1987); see also *CEL Products, LLC v. Rozelle*, 357 S.C. 125, 130, 591 S.E.2d 643, 645 (Ct. App. 2004) ("A failure to exercise discretion amounts to an abuse of that discretion."); *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 reduced the hourly rate associated with Appellant's attorney's fees award from \$295 per hour to \$100 per hour.¹ The question this court was required to ask is: was there *any* evidentiary support in the record to justify the rate

¹ The lower court actually reduced Attorney Twombly's hourly rate from \$295 per hour to \$100 per hour and Attorney Campbell's hourly rate from \$250 per hour to \$100 per hour. For ease of reference, when Appellant references the reduction of Twombly's rate from \$295 per hour to \$100 per hour, he is also referring to the reduction of Campbell's rate from \$250 per hour to \$100 per hour.

reduction to \$100 per hour? Assuming there is evidence in the record to support reducing the hourly rate to \$100 per hour, the lower court's order could stand. However, if there is no evidentiary support in the record to support the lower court's reduction of the hourly rate to \$100 per hour, this court is required to overturn the lower court's decision.²

A review of each and every one of 122 pages that makes up the record on appeal reveals that there is not a single page, sentence, clause or word of evidence to support an hourly rate of \$100 per hour for Appellant's Counsel. The only evidence in the record was supplied by Appellant's Counsel, who submitted a fee affidavit and verified that the rate of \$295 per hour was a "customary" rate "for litigation cases in the Fourteenth Judicial Circuit" and that these were the hourly rates Appellant's counsel "charges to virtually all of its clients that pay by the hour." (R. pp. 105-106, ¶ 6(f); R. pp. 76-85). Respondent submitted no evidence regarding hourly rates. Respondent did not object that the rate of \$295 per hour was too high. Respondent did not argue that the hourly rate of \$295 per hour was outside of the norm. Respondent did not argue that Appellant's counsel were not talented enough to garner an hourly rate of \$295 per hour. Respondent did not argue that Appellant did not prevail in the litigation. Respondent did not submit any evidence or argument whatsoever regarding hourly rates, and there was no

² The lower court properly found that Appellant was entitled to an award of attorney fees under each of the factors listed in *Burton v. York County Sherriff's Department*, 358 S.C. 339 (Ct. App. 2004). 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); 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) and that "[u]ltimately, my ruling produces beneficial results" for Appellant. (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).

evidentiary support to justify setting the hourly rate for attorney's fees at \$100 per hour.³

Thus, a review of the lower court's orders establishes that no discretion was exercised relating to the hourly rate of Appellant's counsel, and moreover, that the record contains no evidentiary support whatsoever for the lower court's decision. "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, for these reasons and as outlined in Appellant's Brief filed with this Court, the lower court's decision to reduce counsels' hourly rate to \$100 was an abuse of discretion and an error of law.

II. This Court failed to recognize that the lower court's Order has a chilling effect on protection of FOIA rights.

The lower court's reduction of the hourly rates for Appellant's counsel will have a chilling effect on the protection of FOIA rights. South Carolina Code Ann. § 30-4-100(b) was enacted to protect the rights granted by FOIA, and as the Supreme Court noted in *Society of Prof'l Journalists v. Sexton*, 283 S.C. 563, 324 S.E.2d 313 (1984), one reason to award attorney fees is 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).

This was Appellant's Counsel first ever FOIA case, and if the lower court's order stands, Appellant's counsel will have to seriously consider getting involved in another

³ The lower court did not explain why it felt it was appropriate to reduce counsels' hourly rates or how it reached its decision as to which hourly rate to use. Appellant filed a Motion for Reconsideration asking that the lower court to either award attorney fees at the hourly rates set forth in the fee petition and affidavit, or explain why an hourly rate of \$100 was used. The lower court denied the motion with a Form 4 Order which included no justification for the lower court's decision. (R. pp. 76-85; R. pp. 2-18).

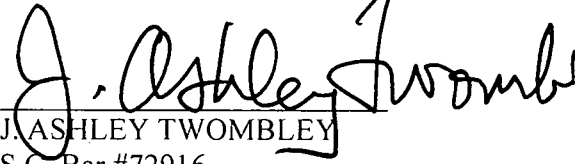
one, even if it is clear that FOIA rights have been violated. Blindly awarding attorney fees at a rate of \$100 per hour with no evidentiary support, which is a steep reduction from the customary hourly rate of \$295, will discourage litigants from bringing litigation under FOIA and discourage lawyers (Appellant's counsel) from taking FOIA cases, even when it is clear that rights under FOIA have been violated by state agencies. Litigants could be discouraged from bringing FOIA cases knowing that the court can, without *any* evidentiary support and without any explanation or justification, drastically reduce an attorney's *standard* hourly rates, potentially leaving the prevailing litigant personally responsible for the difference. Such a result is diametrically opposed to the legislature's intended effect of encouraging compliance with FOIA, and rewarding litigants and lawyers who prevail in enforcing FOIA rights. Ironically, the lower court's decision could place lawyers who defend state agencies pursuant to fee agreements that guarantee payment (even though the state agency is found to have violated FOIA and loses the FOIA litigation) stand to be compensated at a higher rate than the prevailing attorney who agreed to take on the representation on a contingency basis. Such a result is unfair, improper and at odds with FOIA attorney's fee jurisprudence.

CONCLUSION

For the reasons contained herein, the Petition for Rehearing should be granted and this Court should issue an Opinion reversing the lower court order reducing counsel's hourly rates to \$100 per hour. Moreover, because the only evidence in the record supports the rates requested by counsel, this court should award fees as requested in Appellant's Counsel Affidavit Regarding Legal Fees and Costs.

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Randy Horton.....Appellant

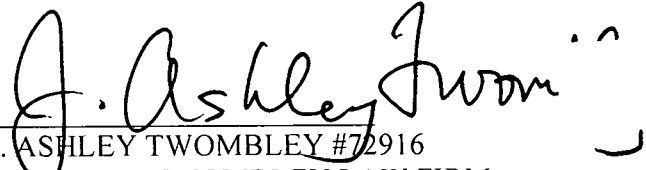
-vs-

Jasper County School District.....Respondent

AFFIDAVIT OF SERVICE

The undersigned, J. Ashley Twombly of TWENGE + TWOMBLY LAW FIRM, Attorneys for Appellant, and that on the 16th day of May 2016, a true and accurate copy of the attached of Appellant's Petition for Rehearing 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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May 16, 2016

Via Hand Delivery

The Honorable Jenny Abbott Kitchings
Clerk of Court
S.C. Court of Appeals
1220 Senate Street
Columbia, SC 29201

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SC Court of Appeals

**RE: Randy Horton v. Jasper County School District
Appellate Case No.: 2014-002612**

Dear Ms. Kitchings:

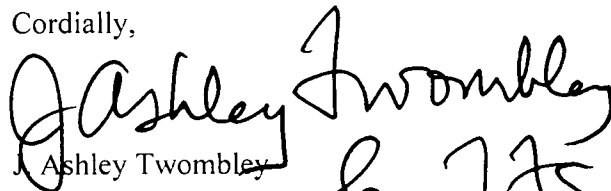
Please find enclosed an original unbound and seven (7) bound copies of Appellant's Petition for Rehearing in the referenced matter. I would appreciate it if you would file the original and six (6) copies and return a clocked copy to me. Enclosed is a check in the amount of \$25.00, which represents the requisite filing fee.

By copy of this letter, I am serving opposing counsel with the same.

Thank you for your assistance in this matter. If you have any questions, please do not hesitate to contact me.

With kindest regards, I remain,

Cordially,


J. Ashley Twombley
by JTS

cc: Dwayne T. Mayzck, Esquire