

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM JASPER COUNTY S.C. SUPREME COURT
Jasper County Court of Common Pleas

The Honorable Carmen T. Mullen, Circuit Court Judge

Appellate Case No.: 2016-001507
Opinion No. 2016-UP-151 (S.C. Ct. App. Filed March 30, 2016)

RANDY HORTON..... Petitioner

v.

JASPER COUNTY SCHOOL DISTRICT..... Respondent

**RESPONDENT'S RETURN TO
PETITION FOR WRIT OF CERTIORARI**

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STATUTES:

Freedom of Information Act, §§ 30-4-10 through 1001, 2, 5

I. STATEMENT OF ISSUES ON CERTIORARI

Horton's petition for writ of certiorari from the decision of the Court of Appeals upholding the Circuit Court's award of attorneys' fees presents the following issues for the Court's review:

1. Does the Court of Appeals' opinion properly apply controlling precedent in holding that under S.C. Code Ann. § 30-4-100(B) the award of attorneys' fees is within the discretion of the court?
2. Does the Court of Appeals' opinion properly find that there was no abuse of discretion in the trial court's award of attorneys' fees?

II. STATEMENT OF THE CASE

On June 19, 2013, Horton filed his Complaint against the Jasper County School District seeking a declaratory judgment and attorneys' fees and costs for the alleged violations of the South Carolina Freedom of Information Act ("FOIA"), S.C. Code Ann. § 30-4-10, *et seq.* (R. pp. 33-54, Complaint.)

Thereafter, on October 9, 2013, Horton filed a motion for summary judgment. (R. pp. 86-102, Plaintiff's Summary Judgment Motion.) On September 5, 2014, the Honorable Carmen T. Mullen granted Horton's Motion for Summary Judgment and awarded him \$13,530.00 in attorneys' fees and \$1,096.56 in costs, for a total of \$14,626.56. (R. pp. 19-22, Order Granting Summary Judgment and Award of Costs and Attorneys' Fees.)

On September 16, 2014, Horton filed Motions pursuant to Rules 52 and 59, SCRPC, requesting that the September 5, 2014 Order be reconsidered, altered, and/or amended. Specifically, Horton's counsel requested an attorneys' fees award of \$37,861.26, which was calculated using the hourly rates of \$295.00 per hour for partner, J. Ashley Twombly, \$250.00 per hour for associate, Jennifer Campbell, \$150.00 per

hour for paralegal time, and \$75.00 per hour for legal assistant time. (R. pp. 76-79, Motion Pursuant to Rules 52 & 59.)

On November 3, 2013, the Honorable Carmen T. Mullen denied Horton's Motion for Reconsideration. (R. pp. 2-6, Motion for Reconsideration.) Horton filed a Notice of Appeal on December 4, 2014. (R. pp. 23-24, Notice of Appeal.)

The Court of Appeals filed an unpublished opinion on March 30, 2016, affirming that the Circuit Court's award of attorneys' fees. (Appendix p. 1.) Horton filed a petition for rehearing with the Court of Appeals on May 16, 2016. By order dated June 23, 2016, the Court of Appeals denied the petition for rehearing.

For the reasons discussed below, Horton's petition for writ of certiorari should be denied.

III. ARGUMENT ON QUESTIONS PRESENTED FOR REVIEW

1. The Court of Appeals Properly Applied Controlling Precedent in Holding that Under South Carolina Code Ann. § 30-4-100(b) the Award of Attorneys' Fees is Within the Discretion of The Court.

FOIA does not mandate the award of attorneys' fees, but permits the court, in its discretion, to award reasonable attorneys' fees to a prevailing plaintiff under the Act. Section 30-4-100(b) of the Act provides:

If a person or entity seeking such relief prevails, he or it *may* be awarded reasonable attorney's 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's fees or an appropriate portion thereof.

(Emphasis added.)

Clearly, Horton has no absolute right to the recovery of attorneys' fees, and the award of attorneys' fees rests in the discretion of the court. Horton wrongfully interprets this statute to provide for a mandatory award of attorneys' fees, and not a

discretionary function to be decided by a judge on a case-by-case basis.

The Court of Appeals properly applied the requirements of § 30-4-100(b) in finding that Horton is not entitled to attorneys' fee and that the award of attorneys' fees rests in the discretion of the court.

**2. The Court of Appeals Properly Found that there
Was No Abuse of Discretion in the Trial Court's
Award of Attorneys' Fees.**

The trial court's order awarding Horton his attorneys' fees was reasonable and supported by adequate findings. South Carolina case law is clear that so long as a trial court makes specific findings of fact on the record for each factor set forth by *Jackson v. Speed*, 326 S.C. 289, 486 S.E.2d 750 (1997), the order should be affirmed. *See Burton v. York County Sheriff's Dep't.*, 358 S.C. 339, 358, 594 S.E.2d 888, 898 (Ct. App. 2004); *See also Blumberg v. Nealco, Inc.*, 310 S.C. at 492, 427 S.E.2d at 659 (1993) ("When an award of attorney's fees is requested and authorized by contract or statute, the court should make specific findings of fact on the record for each factor.")

In the instant case, the court recited the *Burton* factors, reflected upon the factors, made specific findings of fact on the record regarding the factors, and after doing so, concluded that "an award of costs and attorney's fees is appropriate under the circumstances and hereby award attorneys' fees at a rate of \$100 an hour." (R. pp. 19-22, Order Granting Summary Judgment and Award of Costs and Attorneys' Fees.) Specifically, the court addressed the time, nature, extent and difficulty of the case; counsels' preparation of pleadings; document review; and the fact that counsel has a combined twenty-five years of experience in litigation.¹ By expressly considering the *Burton* factors and by reducing the amount awarded to Horton from the original amount

¹ However, the argument that they have a combined 25 years of litigation experience is irrelevant when the majority of the time they are attributing to this case had little to nothing to do with litigation, but collecting and cataloging documents requested by Horton.

requested, the trial court appropriately evidenced its exercise of discretion in awarding Horton his attorneys' fees and costs.

Further, Horton's argument that it was unreasonable for the trial court to reduce his attorneys' rate from \$250-295 to \$100 is misplaced. In *Farmers & Merchants Bank v. Fagnoli*, 274 S.C. 23, 260 S.E. 2d 185 (1979), the court propounded "[t]he law requires, however, that the award must be reasonable." *Id.* at 26, 260 S.E.2d at 187. See also *Seabrook Island Prop. Owners' Ass'n v. Berger*, 365 S.C. 234, 243, 616 S.E.2d 431, 436 (Ct. App. 2005). Thus, the award of attorneys' fees is the basis of reasonableness, not the reasonableness of the hourly rate charged by the attorneys. In the instant case, after the trial judge considered the *Burton* factors, within her discretion, she awarded reasonable attorneys' fees of \$13,530.00 plus costs.

Horton's contention that he is entitled to more because the District never objected to his requested legal fees and costs is not accurate. In its brief in response to Plaintiff's Motion for Summary Judgment, the District stated that it was aware that attorneys' fees may be awarded, and that the award was within the discretion of the court. Although the District believes no fee is justified, an award of \$13,530.00 and \$1,096.56 in costs was granted, within the court's discretion, and the District made a business decision to not pursue appeal.

Moreover, the essential purpose of the FOIA is to protect the public from secret government activity. *Campbell v. Marion Cnty. Hosp. Dist.*, 354 S.C. 274, 280, 580 S.E.2d 163, 166 (Ct. App. 2003). However, the purpose of FOIA was not to allow the public or even school board members to demand copies of thousands of pages of documents at no cost. There are only two alternatives for who will bear the cost of compliance with requests for documents: requesters or taxpayers. FOIA clearly imposes compliance costs on requesters, at the same time that it protects the requesting public's

rights by limiting what may be charged to what is “reasonable” and does “not exceed the cost.” S.C. Code Ann. § 30-4-30.

In this case, Horton was never denied access to these records. He was informed several times that he would be required to pay for the time to locate, search, and copy the records. Horton also requested copies of “bonus checks” and the District denied this pursuant to Sections 30-4-40(a)(6)(b) and (c) of FOIA because he did not have Board approval to pursue this request. However, the District provided Horton the ranges of bonuses as issue and the total amount of bonuses distributed. The District would like to clarify that if a majority Board decided it was necessary to review the records requested, they would have been provided to all Board members at no cost. However, the Board found no legitimate reason to review the records because all Board members are able to review the budget quarterly where they can track every penny that is spent. Accordingly, Horton had no qualifying need as a Board member to be provided with the information he specifically requested, in the manner he specifically requested.

Further, the District previously provided Horton with thousands of pages of documents, at no charge. This production of documents required many hours, and the District had to assign an employee to organize Horton’s requests. Clearly, the spirit of FOIA does not contemplate allowing attorneys to collect fees to review each and every document from an overly burdensome and tedious request to ensure compliance.

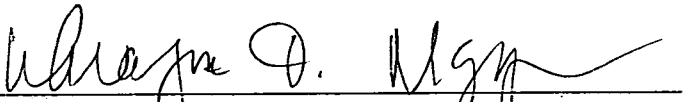
IV. CONCLUSION

Certiorari review is not a matter of right and will only be granted where there are special and important reasons. Here, no special or important reasons justifying certiorari review exist: no novel question of law is presented; there is no dissent in the Court of Appeals’ decision; the Court of Appeals’ decision does not conflict with any decision of this Court; and no substantial constitutional issue is directly involved.

Accordingly, for the foregoing reasons, the Respondent respectfully asks the Court to deny Horton's petition for certiorari review.

Respectfully submitted,

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August 30, 2016
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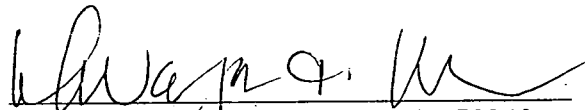
PROOF OF SERVICE

The undersigned hereby certifies that he has served Respondent's Return To
Petition For Writ of Certiorari by mailing a copy of the same as follows:

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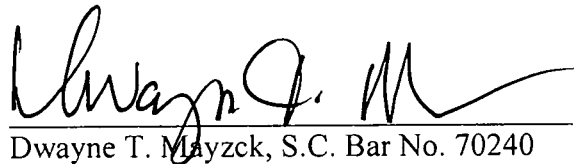
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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Appendix contains all additional materials proposed to be included by Respondent and not any other materials.

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