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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM JASPER COUNTY
Court of Common Pleas

The Honorable Carmen T. Mullen, Fourteenth Judicial Circuit

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Unpublished Opinion No. 2016-UP-151 (S.C. Ct.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

Randy Horton.....Petitioner

-vs-

Jasper County School District.....Respondent

**PETITIONER’S REPLY TO RESPONDENT’S RETURN TO THE PETITION FOR A
WRIT OF CERTIORARI**

Pursuant to Rule 242(g), SCACR, Petitioner Randy Horton (Horton) submits this Reply to Respondent’s Return to the Petition for a Writ of Certiorari.

Respondent’s Return is an effort to argue issues that have already been decided by the trial court and are the unappealed law of this case. The trial court concluded that Horton’s South Carolina Freedom of Information Act (FOIA) requests related to public documents that fell within the confines of FOIA, that Horton’s FOIA requests were not “overly broad and tedious”, that Respondent denied Horton access to these records, and that Horton’s attorney fee affidavit “portrays commensurate time, nature, extent and difficulty expended by [counsel] in procuring the FOIA requested documents and litigation related thereto.” (App. pp. 21-22). Respondent never appealed any of these ruling, which are now the law of the case.

The only issue now before the Court is whether or not the trial court's selection of a \$100 per hour as a reasonable attorney's hourly rate in the Fourteenth Circuit for Horton's counsel was supported by any evidence contained in the Record. Respondent cannot identify any such evidence. Moreover, Respondent has not identified any legal authority to support the trial court's selection of an hourly rate that is not supported by any evidence. The only evidence in the Record supports the hourly rates set forth in Horton's fee affidavit, and there is no legal authority that would allow the trial court to make a decision unsupported by any evidence.

Notwithstanding the fact the Respondent's arguments are procedurally barred, they are also factually misplaced.

I. Respondent incorrectly states that Horton was not denied access to the records he requested under FOIA.

Respondent argues in its Return to the Petition for a Writ of Certiorari that "Horton was never denied access to these records." (Return p. 5). This statement is at odds with the law of this case, and the facts.

First, the trial court held that Horton "did not receive any documents" before he filed his lawsuit. (App. p. 21). The trial court also found that only after the motion for summary judgment was filed did Respondent provide Horton with "some, but not all, of the requested documents." (App. p. 21). Respondent did not appeal these rulings, which are now the law of the case. E.g. Atlantic Coast Builders and Contractors, LLC v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) ("[a]n unappealed ruling, right or wrong is the law of the case.").

Second, the Record reveals that Respondent did deny Horton access to the requested records. Horton made several South Carolina Freedom of Information Act (FOIA) requests to Respondent, including (1) FOIA request on November 22, 2011, (2) FOIA request on May 29, 2012, and (3) FOIA request on June 6, 2012. (App. pp. 42-47, p. 55). Horton did not receive the

documents he requested under FOIA and did not receive a letter denying his requests. (App. p. 94). Horton then filed a summons and complaint, in an effort to enforce FOIA. (App. pp. 34-40). Horton alleged in Paragraph 12 of his Complaint that he had not received any documents in response to his FOIA requests and had not received any correspondence denying his FOIA requests. (App. p. 37). In its Answer, Respondent admitted the allegations of Paragraph 12. (App. p. 58).

Third, in Paragraph 19 of his Complaint, Horton asked that the Court issue an order finding that he was entitled to immediately receive all of the public records listed in his FOIA requests. (App. p. 38). In its Answer, Respondent denied that Horton was entitled to the records. (App. p. 59). Respondent asked, in its Answer, that Horton's Complaint be dismissed "in its entirety." (App. p. 61)

Fourth, the trial court ordered Respondent "to produce the entirety of requested documents to the Plaintiff's satisfaction." (App. p. 27). Ultimately, Respondent provided Horton with documents in seven separate submissions. (App. p. 28). The documents were produced in a rolling production that did not end until July 8, 2014, over five months after the trial court ordered the documents produced. (App. p. 27).

The documents Horton requested under FOIA were provided over two years after he requested them under FOIA and over one year after he filed suit and only after the trial court ordered Respondent to provide the documents. Accordingly, Respondent's argument that Horton was not denied access to documents is misplaced.

II. Respondent misstates Horton's position relating to the discretionary nature of an award of attorney fees under FOIA.

Respondent contends that Horton interprets FOIA to provide a mandatory award of attorney fees. (Return pp. 2-3). This is not the case. Horton has always recognized that S.C.

Code Ann. § 30-4-100(b) provides that if a party seeking relief under FOIA prevails, he may be awarded attorney fees and costs. See, e.g. Horton's Complaint ¶ 20 (App. p. 39), Horton's Motion for Summary Judgment (App. p. 91), Affidavit of Counsel ¶ 3 (App. p. 104), and Horton's Brief to the Court of Appeals (App. pp. 129-130). In this case, the trial court, after consideration of the factors of Burton v. York County Sheriff's Department, 358 S.C. 339, 594 S.E.2d 888 (Ct. App. 2004), properly held that Horton was entitled to an award of attorneys fee "for a total of 135.3 hours documented by [counsel] for their work in compelling the document production at issue". (App.p.18). That holding has not been appealed by any party.

While the court was not required to award fees, it did, finding that counsel was entitled to an award "for a total of 135.3 hours." (App. pp. 21-22). Horton's position is that the trial court erred in arbitrarily selecting an hourly rate of \$100 per hour – which was not supported by any evidence - when the only evidence contained in the record supported the rates requested by Horton's counsel. (App. pp. 9- 11, pp. 104-107). There was no evidence in the record to establish that an hourly rate of \$100 per hour was reasonable or customary in the Fourteenth Judicial Circuit. The only evidence in the Record shows that the rates requested were reasonable.

When a court is called upon to make a decision left to its discretion, the court must consider the evidence and make a ruling based on the evidence. E.g. Kiriakides v. School District of Greenville County, 382 S.C. 8, 20, 675 S.E.2d 439, 445 (2009) ("An abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions."). The failure to exercise discretion, i.e., the failure to consider the evidence and make a ruling based on the evidence, is an abuse of

discretion. E.g. Fontaine v. Peitz, 291 S.C. 536, 354 S.E.2d 656 (1987). In this case, there is no evidence in the record to support the trial court's selection of an hourly rate of \$100 per hour.

III. Respondent misapprehends the "spirit of FOIA".

Respondent argues that "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." (Return p. 5). This argument was never made to the trial court, never ruled upon by the trial court, and is otherwise misplaced.

First, the trial court determined that Respondent violated FOIA and granted summary judgment in favor of Horton. (App. p. 22). Respondent did not appeal this ruling. Second, the trial court determined that it was appropriate to award attorney fees and costs in this case. (App. pp. 20-22). Respondent did not appeal this ruling. Third, the trial court specifically found that the 135.3 hours documented in the affidavit from Horton's counsel "portrays commensurate time, nature, extent and difficulty expended by [counsel] in procuring the FOIA requested documents and litigation related thereto." (App. pp. 21-22). Respondent did not appeal from this ruling. To the extent Respondent's Return can be read to challenge the trial court's ruling relating to the decision to award attorney fees, a challenge to the number of hours expended by counsel, or a challenge as to precisely how counsel spent his time to achieve the results obtained, these unappealed rulings are the law of the case. E.g. Atlantic Coast Builders, 398 S.C. at 329, 730 S.E.2d at 285.

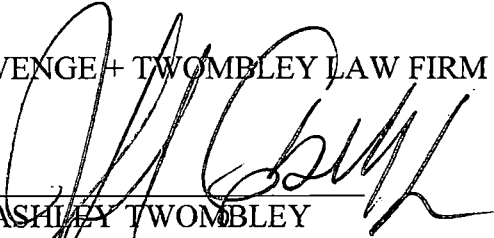
The spirit of FOIA is absolutely served by awarding Horton attorney fees at the hourly rates that are reasonable, customary, and supported by the only evidence contained in the Record.

Conclusion

For the reasons set forth above and for the reasons set forth in Horton's Petition, Horton respectfully requests that this Court grant his Petition for a Writ of Certiorari and reverse the decision of the Court of Appeals.

TWENGE + TWOMBLEY LAW FIRM

BY:



J. ASHLEY TWOMBLEY
S.C. Bar #72916
311 Carteret Street
Beaufort, SC 29902
Telephone: (843) 982-0100
Facsimile: (843) 982-0103
www.twlawfirm.com
Attorneys for Petitioner

Beaufort, South Carolina

September 8, 2016

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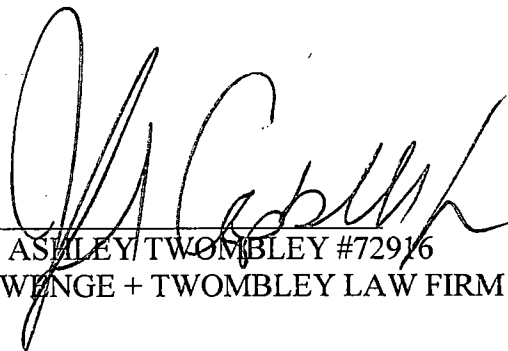
Jasper County School District.....Respondent

AFFIDAVIT OF SERVICE

The undersigned, J. Ashley Twombly of TWENGE + TWOMBLY LAW FIRM, Attorneys for Appellant, and that on the 8th day of September 2016, a true and accurate copy of the attached of Appellant's Reply to the Return to the Petition for Writ of Certiorari was placed in an envelope with first class postage thereon prepaid through the United States Postal Service and mailed to the following:

Dwayne T. Mayzck, Esquire
CHILDS & HALLIGAN, P.A.
P.O. Box 11367
Columbia, SC 29211-1367
Telephone: (803) 254-4035
Facsimile: (803) 771-4422
dmazyck@childs-halligan.net
Attorney for Respondent

BY:


J. ASHLEY TWOMBLY #72916
TWENGE + TWOMBLY LAW FIRM

TWENGE + TWOMBLEY LAW FIRM

311 CARTERET STREET
BEAUFORT, SOUTH CAROLINA 29902
PH.: 843.982.0100 + FX.: 843.982.0103

WEB: TWLAWFIRM.COM

J. ASHLEY TWOMBLEY
KARL D. TWENGE
JENNIFER I. CAMPBELL

LICENSED IN SC - GA
OF COUNSEL

September 7, 2016

Via U.S. Mail

The Honorable Daniel E. Shearouse
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

**RE: Randy Horton v. Jasper County School District
Appellate Case No.: 2016-001507**

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Dear Mr. Shearouse:

Please find enclosed an original unbound and seven (7) bound copies of Petitioner's Reply to Respondent's Return to the Petition for a Writ of Certiorari 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 in the enclosed self-addressed, stamped envelope.

By copy of this letter, I am serving a copy of the same upon The Honorable Jenny Abbott Kitchings and opposing counsel, Dwayne T. Mayzck, Esquire.

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,

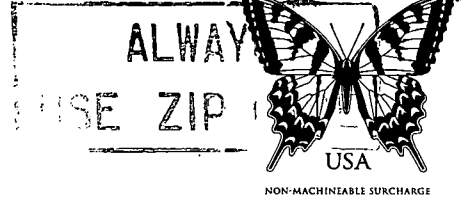

J. Ashley Twombley

cc: The Honorable Jenny Abbott Kitchings
Dwayne T. Mayzck, Esquire

TWENGE + TWOMBLY LAW FIRM LLC

311 CARTERET STREET
BEAUFORT, SOUTH CAROLINA 29902
PH:: 843.982.0100 + FX:: 843.982.0103

WEB:: TWLAWFIRM.COM



The Honorable Jenny Abbot Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

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