

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
Case No.: 2013-CP-27-327

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Appellate Case No.: 2016-001507

JUL 12 2017

SC Court of Appeals

Randy Horton.....Petitioner

-vs-

Jasper County School District.....Respondent

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

Table of Authorities ii

Reply Argument 1

 I. Respondent’s Brief raises an issue that is not preserved for review and
 challenges an unappealed ruling that is the law of the case 1

Conclusion 3

Certificate of Counsel 4

TABLE OF AUTHORITIES

Fontaine v. Peitz,
291 S. C. 536, 538, 354 S. E. 2d 565, 566 (1987).....2

Hardaway Concrete Co., Inc. v. Hall Contracting Corp.,
374 S.C. 216, 647 S.E.2d 488 (Ct. App. 2007) 1

Lucas v. Rawl Family Ltd. P’ship,
359 S.C. 505, 598 S.E.2d 712 (2004)..... 1

REPLY ARGUMENT

I. **Respondent's Brief raises an issue that is not preserved for review and challenges an unappealed ruling that is the law of the case.**

Respondent now argues, for the first time, that Petitioner's counsel was not entitled to be compensated for all of the hours of legal work performed in this case. Said differently, Respondent argues that Petitioner's counsel spent too much time working on this case. This argument is not properly before the Court and is diametrically at odds with the lower court's expressed ruling.

First, Respondent never raised this argument to the lower court, and the lower court never entered any such ruling. Therefore, this issue is not preserved for review. E.g., Lucas v. Rawl Family Ltd. P'ship, 359 S.C. 505, 598 S.E.2d 712 (2004) (holding that it is well settled that an appellate court cannot address an issue unless it was raised to and ruled upon by the trial court); Hardaway Concrete Co., Inc. v. Hall Contracting Corp., 374 S.C. 216, 647 S.E.2d 488 (Ct. App. 2007) (stating that to be preserved for review, issues must be raised to and ruled upon by the trial court).

Second, the lower court expressly and specifically found in its Order that Petitioner's counsel were due to be awarded "for a **total of 135.3 hours** documented by [Petitioner's counsel] for their work in compelling the document production at issue" (R.pp.19-22) (bold added), and further found that the

affidavit regarding legal fees and costs submitted July 9, 2014, **portrays commensurate time, nature, extent and difficulty expended by both [Petitioner's counsel] in procuring the FOIA requested documents and the litigation related thereto.** Legal fees claimed relate to counsel's preparation of pleadings, briefing the court regarding jurisdiction over this issue, standing and the merits of the case. Document review was conducted over the course of several months. Once production was complete, individual documents totaled over two thousand pages over the course of seven different submissions.

(R.pp.19-22) (bold added). Respondent's assertion that Petitioner's counsel spent too much time on the file is procedurally flawed and at direct odds with the lower court's specific findings that Petitioner's counsel expended "commensurate time" for the litigation. (R.pp.19-22).

The only issue that is properly before the Court is whether there was any evidence presented to the lower court that would support the hourly rate selected by the lower court of \$100 per hour. While it is beyond dispute that the lower court had some discretion in selecting a reasonable hourly rate, the discretion must be based upon some evidence. Otherwise, the lower court's discretion is boundless and can essentially be substituted for evidence. Such a procedure that would allow a court to issue a ruling not supported by evidence is at odds with attorney's fee jurisprudence in the State of South Carolina.

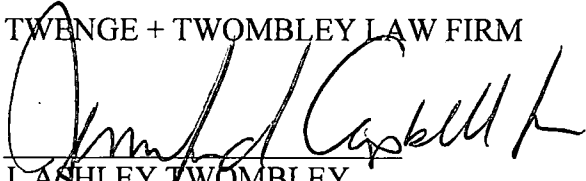
There was no evidence at all presented to the lower court to support cutting Petitioner's counsel's customary hourly rate to \$100 per hour. There was no evidence at all presented to the lower court to support an hourly rate of \$100 per hour as being reasonable or otherwise customary in the Fourteenth Judicial Circuit. Because there was no evidence at all to support the reduction, the lower court failed to exercise discretion in reviewing the evidence before it and selecting an appropriate hourly rate. "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 v. Peitz, 291 S. C. 536, 538, 354 S. E. 2d 565, 566 (1987).

CONCLUSION

This Court should reverse the Court of Appeals' decision and award the full attorney fees as requested in the Affidavit Regarding Legal Fees and Costs.

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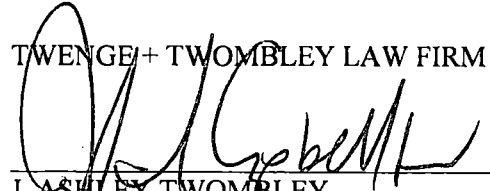
July 10, 2017

CERTIFICATE OF COUNSEL

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

BY:

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