

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM JASPER COUNTY
Court of Common Pleas

S.C. SUPREME COURT

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

Appellate Case No.: 2016-001507

Randy Horton.....Petitioner,

vs.

Jasper County School DistrictRespondent.

BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. Did the circuit court commit reversible error in reducing an unreasonable attorneys fee request under FOIA?

STATEMENT OF THE CASE

Petitioner Randy Horton is an elected member of the Jasper County School District Board of Trustees. In and around June of 2012, Horton made a series of Freedom of Information Act (FOIA) requests to the District for itemized credit card receipts of District employees as well as information regarding bonus payments and payments the District made by certified check. (R. pp. 41-47). Two of the requests were undated and were submitted to the District's law firm, rather than the District. (R. pp. 46-47, 50).

The District Superintendent responded in writing acknowledging receipt of the requests. (R. p. 49). The District official responsible for responding to FOIA requests sent Horton a letter listing the various requests and asking that he confirm they constituted the entirety of his requests. (R. p. 55). Confirmation was necessary given the number of separate requests and the fact that some requests were submitted to the District and others to the District's attorney. (R. p. 58). Horton never responded to the District, and so the District did not, at that time, provide the documents requested. (R. p. 58).

On June 20, 2013, Horton filed suit against the District alleging violations of the FOIA and seeking a declaratory judgment. (R. pp. 34-40). Horton also sought an award of attorney's fees pursuant to the FOIA, S.C. Code § 30-4-100(b). (R. p. 40).

On August 22, 2103, the District filed its answer and affirmative defenses, denying that it failed to respond to Horton's requests and asserting that Horton did not respond to the District's attempts to confirm the accuracy and completeness of his requests. (R. pp.56-62). The

District also contested Horton's prayer for attorney's fees, given its attempts to confirm the FOIA requests with Horton and Horton's failure to respond to those communications. (R. p. 60).

On October 9, 2013, Horton filed for summary judgment, arguing in a short, five-page memorandum that the District violated FOIA because it did not provide Horton with a written notification of the determination of the availability of the requested records within the time limit, as required by S.C. Code § 30-4-30(c). The Honorable Judge Carmen T. Mullen, circuit court judge, heard the motion on January 31, 2013, at which time she requested additional briefs from both parties. (R. p. 21).

At a hearing on March 31, 2014, Judge Mullen granted Horton's motion for summary judgment and ordered the production of the requested records. (R. p. 21). When the records had been provided in full, Horton's attorneys submitted an affidavit of legal fees and costs seeking attorney's fees in the amount of \$37,861.26 and costs in the amount of \$1,096.56. (R. pp. 109-17, 119-20). The affidavit was accompanied by a copy of the firm's time sheets related to the case. (R. pp. 109-117, 119). Judge Mullen received an unredacted copy of the time sheets, whereas the District's counsel received a copy with the specific tasks redacted, leaving for their review dated entries showing only the time logged by each attorney and paralegal. (R. pp. 109-117, 119).

On September 5, 2014, Judge Mullen issued a written Order in which she awarded Horton attorney's fees in the amount of \$13,530.00 and costs of \$1,096.56, for a total award of \$14,626.56. (R. pp. 16-19). Judge Mullen applied the *Burton* factors to the case and determined it was appropriate to award attorney's fees at a rate of \$100 per hour for 135.3 hours claimed by Horton's attorneys. (R. pp. 17-18).

On September 16, 2014, Horton filed motions pursuant to Rules 52 and 59, SCRCPP requesting that the September 5, 2014 Order be reconsidered, altered and/or amended to award the

full amount of attorney's fees requested. (R. pp. 77-79). On November 3, 2013, Judge Mullen denied Horton's motions. (R. p. 3).

On December 4, 2014, Horton filed his notice of appeal with the South Carolina Court of Appeals. (R. pp. 24-25). In his brief, Horton asserted the lower court abused its discretion when it reduced his attorneys' billing rates to \$100.00 per hour. (R. p. 123). In a *per curiam* opinion, the Court of Appeals affirmed Judge Mullen's decision. (R. pp. 149-50). Horton petitioned the court for rehearing, which was denied. (R. pp. 151-160). Horton then petitioned this Court for certiorari, which was granted.

STANDARD OF REVIEW

“The decision to award or deny attorneys' fees under a state statute will not be disturbed on appeal absent an abuse of discretion.” *Sloan v. Friends of Hunley, Inc.*, 393 S.C. 152, 156, 711 S.E.2d 895, 897 (2011) (quoting *Kiriakides v. Sch. Dist. of Greenville Cty.*, 382 S.C. 8, 20, 675 S.E.2d 439, 445 (2009)). “The specific amount of attorneys' fees awarded pursuant to a statute authorizing reasonable attorneys' fees is left to the discretion of the trial judge and will not be disturbed absent an abuse of discretion or an error of law.” *Hueble v. S.C. Dep't. of Nat. Res.*, 416 S.C. 220, 232, 785 S.E.2d 461, 467 (2016). “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.” *Kiriakides*, 382 S.C. at 20, 675 S.E.2d at 445 (quotation marks and citation omitted). “When an attorney's services and the value of those services are determined by the trier of fact, an appeal will not prevail if the findings of fact are supported by any competent evidence.” *Laser Supply & Servs., Inc. v. Orchard Park Assocs.*, 382 S.C. 326, 340-41, 676 S.E.2d 139, 147 (Ct. App. 2009) (citing *Baron Data Sys., Inc. v. Loter*, 297 S.C. 382, 384, 377 S.E.2d 296, 297 (1989)).

ARGUMENT

1. **The Circuit Court acted within its discretion in determining a reasonable amount of attorney's fees in this FOIA action.**

Section 30-4-100 states that a person seeking to enforce FOIA through a declaratory judgment action or injunction “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 or appropriate attorney’s fees or an appropriate portion thereof.” Accordingly, the statute provides that the trial court has the discretion to determine whether fees should be awarded at all and what amount is reasonable given the circumstances. It is not and cannot be disputed that a trial judge may reduce the amount of attorney’s fees to a reasonable amount. *See e.g., Soc’y of Prof’l Journalists v. Sexton*, 283 S.C. 563, 324 S.E.2d 313 (1984) (trial court awarded 70% of the total attorney’s fee requested).

The statute itself does not state how attorney’s fees must be calculated or on what basis a court may reduce an unreasonable request. Instead, trial courts in FOIA actions consider the following six so-called *Burton* factors when analyzing the reasonableness of a fee request: “(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.” *Burton v. York Cty. Sheriff’s Dep’t*, 358 S.C. 339, 358, 594 S.E.2d 888, 898 (Ct. App. 2004). After considering these factors, the trial judge, in her discretion, may determine a reasonable fee award.

Here, Horton’s attorneys’ affidavit of fees and costs addressed the *Burton* factors. (R. pp. 105-106). In her order, Judge Mullen recited the *Burton* factors, reflected upon those factors in conjunction with the information provided in the affidavit, made findings as to the factors, and ultimately determined that the “appropriate” or reasonable fee award “under the

circumstances” of this case warranted an award based on an hourly rate of \$100.00. (R. pp. 17-18). The result was a decision awarding fees roughly equivalent to one-third of the amount sought. For a contingent fee FOIA action which, for Horton, involved the filing of a complaint alleging basic violations of one section of FOIA, an initial summary judgment brief, a follow-up brief ordered by the court, and two hearings, a fee of \$14,626.56 is objectively reasonable and is not an abuse of discretion. *cf. Brock v. Town of Mount Pleasant*, 415 S.C. 625, 785 S.E.2d 198 (2016) (trial court awarded \$42,000 in attorney’s fees for litigation that involved discovery, depositions, and a trial on at least three separate FOIA statutory questions). Given the relatively simple and legally straightforward nature of the issues and litigation process in this case (one statutory issue; no pre-trial discovery or merits hearing), the circuit court’s decision to reduce the fee request clearly was reasonable or, as the circuit court stated, “appropriate” in this case, and it did not result from an abuse of the circuit court’s discretion.¹ Accordingly, the record adequately supports the court’s decision regarding the amount of attorney’s fees that reasonably should be awarded in this case.

Horton contends that the circuit court’s reversible error was in its reducing the attorneys’ hourly rate from \$295.00 per hour for the senior attorney and \$250.00 per hour for a second attorney to a flat rate of \$100.00. Horton asserts that the only evidence in the record regarding legal fees was his attorneys’ claim that “the hourly rates listed in this Affidavit are customary legal fees for litigation cases in the Fourteenth Judicial Circuit.” Horton asks this Court

¹ Though not specifically stated, the court may have found that some of the time billed was not compensable. In discussing the time devoted to the case, the affidavit of fees and costs suggests that the great majority of time was spent “ensuring that the [District’s] document production . . . complied with the FOIA requests made.” (R. pp. 104-105). The court may have considered that such document review for compliance with the FOIA requests, as opposed to attorney work of a more “legal” nature, did not justify billing at the lawyers’ regular rate.

to adopt a rule similar to that discussed in *Marshal v. City of Miami, Dept. of Conventions and Marinas*, 920 So. 2d 107, 108 (Fla. Dist. Ct. App. 2006), a *per curium* decision in a worker's compensation case from the District Court of Appeal of Florida. In that case, an appellate court found "the judge erroneously determined that 'the fee customarily charged in the locality for similar legal services'" was \$150.00 when the only evidence presented was that the customary hourly rate would be \$275.00." *Id.* This Court has previously not required counter evidence as long as the judge addresses the required factors, there is support for the judge's findings as to the factors, and the award is reasonable. See *Farmers & Merchants Bank v. Fagnoli*, 274 S.C. 23, 26, 260 S.E.2d 185, 187 (1979); see also *Seabrook Island Prop. Owners' Ass'n v. Berger*, 365 S.C. 234, 244, 616 S.E.2d 431, 436 (Ct. App. 2005). Importantly, Judge Mullen did not determine a *customary* fee charged for similar legal services, but instead determined, in her informed discretion, the *appropriate* (i.e. reasonable) fee for the work done *in this case*.

In addition, though Horton's attorneys asserted that their rates were customary for work in litigation cases, they did not put forward any evidence of what constituted "customary legal fees for *similar services*," as *Burton* requires. A case such as this one—a simple FOIA violation matter, which was proved to the court's satisfaction by Horton's FOIA requests, the District's letters in response, and Horton's two-page affidavit stating he did not receive the requests—would not be similar, for example, to a legally more complicated corporate case or personal injury litigation, and would therefore not justify a premium fee.

A trial judge must have the discretion to evaluate an asserted hourly fee in conjunction with the particular tasks undertaken necessarily by the attorney in light of the nature

and complexity of the issues.² That is the only explanation for Judge Mullen's fee determination in this case, and it cannot be concluded that she abused her discretion.

2. The purpose of FOIA's attorneys fee provision is served by the circuit court's award of attorney's fees.

It is undisputed that the availability of attorney's fees under FOIA is meant to encourage agencies to comply with legitimate records requests. *See Sexton*, 283 S.C. at 567, 324 S.E.2d at 316. In this case, the District did not appeal the decision and, therefore, accepted the court's admonition and the resulting award of attorney's fees. The award served its purpose as "an impetus" for future compliance. *Sloan v. Friends of Hunley, Inc.*, 393 S.C. 152, 158, 711 S.E.2d 895, 898 (2011). An award of over \$14,000 against any public-school district in South Carolina, especially a small, poor, rural school district,³ is not an insubstantial amount of money. Additionally, the District was not reimbursed for the costs of collecting and producing nearly 2,500 pages of financial records. Awarding the full fee request of \$37,861.26 would be punitive against the District and would serve no legitimate purpose.

CONCLUSION

This Court should affirm the Court of Appeal's decision, which correctly determined that Judge Mullen did not abuse her discretion in determining a reasonable attorney's fee award in this FOIA action. Should the Court conclude on some basis that Judge Mullen's fee award determination constitutes reversible error, the case should be remanded to the trial court, as

² The record in the case does not include an unredacted copy of Horton's attorneys' time sheets so it is impossible to know what specific tasks were undertaken and listed. It seems clear, however, that all of the attorneys' time was charged at the same rate. That is, the attorneys charged the same rate for its briefs and arguing at the hearing as it charged for collecting and cataloguing the District's documents which, as argued above in footnote 1, *supra*, is highly questionable.

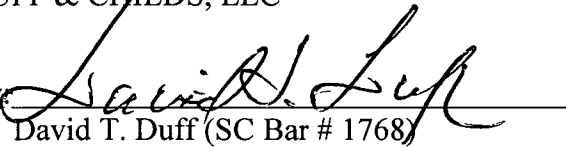
³ As this Court is no doubt aware, the Jasper County School District was one of the plaintiff districts in *Abbeville Cty. Sch. Dist. v. State of South Carolina*, 410 S.C. 619, 767 S.E.2d 157 (2014).

the redacted time sheets contained in the record do not allow this Court to make its own determination as to the appropriate fee. *See Blumberg v. Nealco, Inc* , 310 S.C. 492, 494, 427 S.E.2d 659, 661 (1993) (instructing that an appeal court must remand issues regarding attorney's fees if it finds insufficient evidentiary support for the trial court's determination). Judicial economy, however, is served by ending the litigation through an affirmance of the decisions below rather than remanding to the trial court for another discretionary reasonableness determination.

Respectfully submitted,

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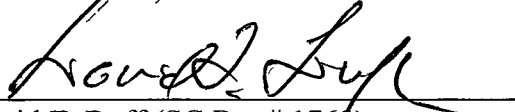
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June 30, 2017
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CERTIFICATE OF COUNSEL

The undersigned, David T. Duff, certifies that this Brief of Respondent complies with Rule 211(b) of the South Carolina Appellate Court Rules.

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AFFIDAVIT OF SERVICE

The undersigned, Kim Chatman, hereby avers that she is a Paralegal with Duff & Childs, LLC, Attorneys for the Respondent Jasper County School District, and that on the 30th day of June 2017, a true and accurate copy of the attached Respondent's Brief was served, by mailing, postage prepaid, and return address clearly indicated, to the following:

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