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

Appellate Case No.: 2016-0010507

Randy Horton.....Petitioner

-vs-

Jasper County School District.....Respondent

PETITIONER'S BRIEF

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STATEMENT OF ISSUE ON APPEAL

I. Did the trial court abuse its discretion when it reduced counsels' hourly attorney fee rates under FOIA to $100.00 per hour, when no evidence supported the reduction?

II. Did the Circuit Court's reduction of the hourly rate under FOIA conflict with the prior decisions of this Court?

STATEMENT OF THE CASE

Petitioner Randy Horton (Horton) is an elected member of the Board of Trustees for Respondent Jasper County School District (School District). Horton requested that the School District provide him with information and documents under the Freedom of Information Act (FOIA). (R. pp. 41-46). The School District failed to respond to Horton's FOIA requests and did not provide the documents requested. (R. pp. 30-54, R. pp. 92-93).

Horton then filed a Summons and Complaint dated June 19, 2013 alleging violations of the South Carolina FOIA. (R. pp. 30-54). Horton's Complaint also requested attorney fees. (R. pp. 30-54). The School District filed an Answer dated August 22, 2013, denying that Horton was entitled to any of the records he requested. (R. pp. 55-75).

Horton filed a Motion for Summary Judgment dated October 9, 2013. (R. pp. 86 - 102). The Motion included a memorandum of law outlining Horton's numerous attempts to obtain the documents in question without litigation, as well as relevant law that entitled him to the documents at issue. Id. In the motion, Horton asked that summary judgment be entered finding that the School District violated FOIA, and asked for an award of attorney fees and litigation costs under S.C. Code Ann. § 30-4-100(b). Id.

The Circuit Court heard arguments on the Motion for Summary Judgment on January 31, 2014 in Jasper County. Both of Horton's attorneys traveled to and appeared at the hearing. (R.p.81). The Circuit Court heard arguments on whether Horton was entitled to the requested records. At the conclusion of the hearing, the Circuit Court directed the parties to prepare additional briefs relating to the matter and scheduled another hearing for March 31, 2014.

On March 31, 2014, Horton's attorneys traveled to Jasper County for a second hearing on Horton's Motion for Summary Judgment. At the conclusion of the second hearing, the Circuit Court ruled from the bench that the School District was required to provide Horton with all of the documents he requested through FOIA, and directed Horton's counsel to submit a supplemental Affidavit related to attorney fees and litigation costs after all of the documents at issue were received. (R. pp. 118-119).

Over the next three and a half months, the School District produced the documents at issue in numerous productions and in numerous formats. (R.p.16, 9, 104). On July 9, 2014, Horton's attorneys filed an Affidavit relating to attorney fees and litigation costs. (R.pp.103-116). The Affidavit attached a redacted copy of the line item invoice related to legal services provided, and an unredacted copy was provided to the Circuit Court for an *in camera* review, without objection. (R.p.16, pp.103-116, pp.118-119). The Affidavit outlined the time Horton's counsel devoted to the case, the standard hourly rates of counsel, addressed each of the six (6) factors outlined in Burton v. York County Sheriff's Department, 358 S.C. 339, 594 S.E.2d 888 (Ct. App. 2004), and provided that the "hourly rates listed in this Affidavit are customary for litigation cases in the Fourteenth Judicial Circuit." (R. pp. 103-116). The Circuit Court was also informed that the hourly rates used in the Affidavit were the hourly rates Horton's counsel "charges

to virtually all of its clients that pay by the hour." (R.pp.76-85). The Affidavit also showed litigation costs of $1,096.56. (R.pp.103-116).

The School District never objected to or otherwise contested any of the matters covered in the Affidavit, never offered any counter affidavits, and never requested a hearing on the amount of the fees.

On September 5, 2014, the Circuit Court granted Horton's Motion for Summary Judgment. The Circuit Court found that the School District was a public body subject to FOIA, that Horton had properly requested documents under FOIA, that the School District was required to provide written notification as to the availability of the requested records within 15 days, and that the School District was ultimately required to produce the requested records to Horton. (R.pp.15-16). The Circuit Court further found that the School District did not comply with FOIA, did not provide written notification as to the availability of the requested records, and, after requesting an extension of time to file its Answer, "denied Plaintiffs entitlement to any of the requested documents." Id.

The Circuit Court found that Horton was "entitled to costs and attorney fees." (R.p.16). In doing so, the Circuit Court addressed each of the six (6) factors outlined in Burton v York County, finding in favor of Horton's counsel as to each element. (R.pp.16-17). The Circuit Court also found that the Affidavit submitted by counsel "portrays commensurate time, nature, extent and difficulty expended by [counsel] in procuring the FOIA requested documents and litigation related there to . . . . Counsel has a combined twenty-five years of experience in litigation. Ultimately, my ruling produces beneficial results for their client." (R.pp.16-17). The Circuit Court concluded that Horton's counsel was entitled to be compensated for "a total of 135.3 hours documented by [counsel] for their work in compelling the document production at issued." (R.p.17).

Notwithstanding the above, the Circuit Court reduced counsels' hourly rates from $295.00 and $250.00 to $100.00 per hour.[1] (R. pp. 20-21). Horton timely filed a Motion for Reconsideration regarding what he believed was the improper reduction of counsels' hourly rates. (R. pp. 76-85). The Circuit Court denied the Motion for Reconsideration, issuing a Form 4 Order, without holding a hearing. (R. pp. 2-18).

Horton timely filed a Notice of Appeal with the Court of Appeals. On March 30, 2016, the Court of Appeals filed an unpublished opinion affirming the Circuit Court's decision. Horton timely filed a Petition for Rehearing, and the Court of Appeals denied the Petition for Rehearing on June 23, 2016. Horton then petitioned this Court for a Writ of Certiorari, and the Petition for a Writ of Certiorari was granted on April 13, 2017.

STANDARD OF REVIEW

When reviewing a ruling left to the discretion of the lower court, an appellate court will reverse the ruling if the ruling constitutes an abuse of discretion. E.g. Maybank v. BB&T Corporation, 416 S.C. 541, 579-80, 787 S.E.2d 498, 518 (2016) (decision to award or deny attorney fees will not disturbed on appeal absent an abuse of discretion); Laser Supply and Services, Inc., v. Orchard Park Associates, 382 S.C. 326, 676 S.E.2d 139 (Ct. App. 2009) (determination left to the discretion of the trial court will not be disturbed absent an abuse of discretion); Southeastern Housing Foundation v. Smith, 380 S.C. 621, 670 S.E.2d 680 (Ct. App. 2008) (appellate standard of review is limited to determining whether there was an abuse of discretion).

[1] The lower court did not award the paralegal and legal assistant time as set forth in the Affidavit. Horton is not challenging that portion of the decision.

ARGUMENT

I. The Circuit Court Abused Its Discretion in Lowering the Hourly Rate

A failure to 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."). Stated another way, "an abuse of discretion occurs when the conclusions of the court are . . . based on unsupported factual conclusions." Maybank, 416 S.C. at 580, 787 S.E.2d at 518 (internal quotations omitted).

The decision to award attorney's fees under S.C. Code Ann. § 30-4-100(b) is discretionary with the court. Id. at 579-80, 787 S.E.2d at 518; 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 a fair and reasonable award, based upon *the evidence*.

In this case, there was no evidence to support cutting a normal hourly rate to $100 per hour. The Record on Appeal contains not a single page, sentence, clause or word of evidence to support an hourly rate of $100 per hour for Horton's Counsel. The only evidence in the record was supplied by Horton's Counsel, who submitted a fee affidavit and verified that the rate of $295 per hour and $250 per hour were the "customary" rates "for litigation cases in the Fourteenth Judicial Circuit" and that these were the hourly rates Horton's counsel "charges to virtually all of its clients that pay by the hour." (R. pp. 105-106, ¶ 6(f); R. pp. 76-85). In addition, Horton's lead counsel is an AV Preeminent

rated attorney, and Horton's counsel has a combined twenty-five years of experience. (R. p. 105).

The School District submitted no evidence regarding attorney fees, hourly rates or customary hourly rates in the Fourteenth Judicial Circuit. The School District did not argue that the rates sworn to by Horton's counsel were too high. The School District did not argue that the hourly rates were outside of the norm. The School District did not argue that Horton did not prevail in the litigation. The School District did not submit any evidence or argument regarding attorney's fees or hourly rates, and there was no evidence to support reducing counsel's hourly rates from what the evidence established were "customary" rates "for litigation cases in the Fourteenth Judicial Circuit". Moreover, there was no evidence to support cutting Horton's counsels' rates from what they charge "virtually all of its clients that pay by the hour" to $100 per hour.[2]

Because there was no evidence to support reducing the hourly rate to $100 per hour, the court failed to exercise discretion in reviewing the evidence before it and selecting an appropriate hourly rate. The record contains no evidentiary support 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.

In exercising discretion to set hourly rates associated with an attorney's fee award, a lower court's decision must be based on the evidence before the court. While there is no South Carolina case articulating this basic principle, other appellate courts

[2] The Circuit 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 apply. Horton filed a Motion for Reconsideration asking that the 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 court denied the motion with a Form 4 Order which stated simply that that Horton's Motion for Reconsideration was denied. (R. pp. 76-85; R. pp. 2-18).

have recognized the same. For example, in Marshall v. City of Miami, Dep't of Conventions & Marinas, 920 So. 2d 107, 108 (Fla. Dist. Ct. App. 2006), a District Court of Appeal of Florida overruled a lower court when it reduced a workers compensation attorney's hourly rate from $275 per hour to $150 per hour, when there was no evidence in the record to support the rate selected by the lower court:

> We agree with claimant that the judge erroneously determined that "[t]he fee customarily charged in the locality for similar legal services" was $150.00 per hour, when the only evidence presented was that the customary hourly rate would be $275.00. See Morris v. Dollar Tree Store, 869 So.2d 704, 706-07 (Fla. 1st DCA 2004) (the standard of review from a determination of a reasonable hourly rate for an attorney's fee is whether the determination is supported by competent substantial evidence and, therefore, **the judge may not choose an hourly rate unsupported by any evidence**); Smith v. U.S. Sugar Corp., 624 So.2d 315, 319 (Fla. 1st DCA 1993) (reversing an attorney-fee award based on a $150.00 hourly rate when **the only evidence established that $200.00 would be a reasonable rate**, and remanding with directions to award fees at the rate of $200.00 per hour)."

Id. (emphasis added).

Accordingly, the lower court's decision to reduce counsels' hourly rate to $100 was an abuse of discretion and an error of law.

II. The Circuit Court Decision Conflicts with Decisions of This Court

The School District violated S.C. Code Ann. § 30-4-30(c). It failed to respond to Horton's request for documents, failed to provide the documents requested, and denied Horton was entitled to any documents in their Answer to this lawsuit. (R.pp.15-17). The General Assembly delineated the rationale and purposes of FOIA:

> The General Assembly finds that it is **vital** in a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of

> public policy. Toward this end, provisions of this chapter **must be construed** so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their public officials **at a minimum cost or delay** to the persons seeking access to public documents or meetings.

S.C. Code Ann. § 30-4-15 (emphasis added). As this Court recently re-affirmed, "the essential purpose of FOIA is to protect the public from secret government activity." Brock v. Town of Mount Pleasant, 415 S.C. 625, 628, 785 S.E.2d 198, 200 (2016) (internal quotations omitted).

In the case before the Court, the School District's refusals and delays contravened these purposes. Indeed, even after suit was filed, the School District continued to refuse and delay production of public documents.

South Carolina Code Ann. § 30-4-100(b) protects FOIA rights. Horton petitioned the Circuit Court for costs and attorneys' fees pursuant to S.C. Code Ann. § 30-4-100(b), the FOIA attorneys' fees provision (R. pp. 72-79).

> (b) If a person or entity seeking such relief prevails, he or it may be awarded reasonable attorney 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 fees or an appropriate portion thereof.

S.C. Code Ann. § 30-4-100(b).

This Court ruled 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) (awarding reasonable attorney fees honors legislative intent of FOIA and serves as an impetus to comply with FOIA).

Reducing an attorney fee award from $295 per hour to $100 per hour with no evidentiary support is not reasonable or fair. Moreover, it will discourage litigants from bringing FOIA litigation and discourage skilled attorneys from taking FOIA cases, even when it may be clear that FOIA has been violated. Such a result is at odds with the legislature's intent to encourage compliance with FOIA, and reward litigants and attorneys who prevail in enforcing FOIA rights, and with this Court's decisions relating to the award of attorney fees under FOIA.

Such a result is unfair, improper and at odds with FOIA attorney's fee jurisprudence, including opinions issued by this Court.

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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CERTIFICATE OF COUNSEL

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

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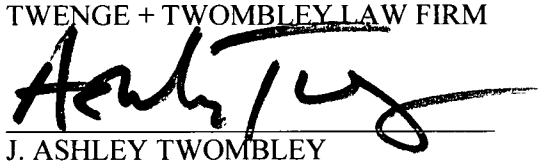
BY: 

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Court of Common Pleas

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

Appellate Case No.: 2014-002612

Randy Horton.....Petitioner

-vs-

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AFFIDAVIT OF SERVICE

The undersigned, Andrea Smith, hereby avers that she is a Paralegal with TWENGE + TWOMBLEY LAW FIRM, Attorneys for Appellant, and that on the 11th day of May 2017, a true and accurate copy of the attached of Petitioner's Brief 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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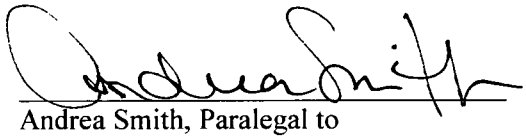
BY: 
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