

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE
COMMON PLEAS COURT

Letitia H. Verdin, Circuit Court Judge
Appellate Case No.: 2014-1718

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AUG 11 2014

SC Court of Appeals

K&S Food Services, Inc. d/b/a Hailee's Bar and Grill, ...Appellant,

v.

City of Mauldin and Mauldin City Council, John Gardner,
Brian Turner, and Callista, LLC,

Defendants,

Of whom City of Mauldin and Mauldin City Council, John Gardner
and Brian Turner are the, ... Respondents.

APPELLANT'S FINAL BRIEF

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ISSUES ON APPEAL

1. Did the Court err in failing to find specific facts to support its determination of a reduced amount of attorney fees and costs?
2. Did the Court err in failing to make specific findings or to state its method for calculating attorney fees and costs?
3. Did the Court err in its calculations of an attorney fee and costs award?
4. Did the Court err in limiting Appellant's award attorney fees and costs necessary in the bringing and maintaining of the FOIA claim?

STATEMENT OF THE CASE

This matter came to Court by way of two Complaints filed by K&S Food Services alleging 8 causes of action, including a FOIA claim. The Defendants timely filed an Answer. The matter subsequently was resolved by summary judgment for the Defendant on two causes and for the Plaintiff on the FOIA claim. A hearing was later held on Plaintiff's request for attorney fees and costs pursuant to FOIA. An Order was entered on May 14, 2013, by the Honorable Letitia Verdin awarding Plaintiff attorney fees and costs. The Plaintiff filed timely post trial motions seeking to alter or amend the judgment. A Supplemental Order was entered on July 15, 2013 by way of a Form 4 denying Plaintiff's post trial motion. The Appellant timely filed notice of appeal.

Appellant was represented by Robert C. Childs, III, at the trial and on this appeal.

The Respondent was represented at trial and on appeal by John B. Duggan.

ARGUMENT

I. THE COURT ERRED BY FAILING TO AWARD A REASONABLE AMOUNT OF ATTORNEY FEES AND COSTS ON PLAINTIFF'S FOIA CLAIM.

Plaintiff brought this case against the city alleging several causes of action. Subsequent to mediation and hearing the summary judgment was granted in favor of the Plaintiff on its FOIA cause of action and for the Defendant on all other causes of action. As the prevailing party on a FOIA claim the Plaintiff sought attorney fees and costs pursuant to Section 30-4-100, et seq. Plaintiff claimed \$19,941.87 in attorney fees and costs relating solely to the FOIA claim or in which the FOIA and other issues were intertwined. A hearing was held and the trial court awarded attorneys fees and costs to the Plaintiff, but limited the recovery to only \$1,500.00. As the record will show, the trial court's severe limitation of fees constitutes an abuse of discretion.

Due to the lack of specific findings it is impossible to determine the method, if any existed, in the trial court's calculation of fees in this case. Counsel's hourly rate is \$350.00. This rate was applied to all time spent on the case, including the FOIA issue. The court held the \$350.00 hourly rate was excessive. It failed however to explain how the rate was excessive, or more importantly, what it determined the appropriate hourly rate to be. As show in his affidavit, Plaintiff's counsel charged a rate of three hundred and fifty dollars per hour for all time expended on the case. Although the Defendant contended that three hundred and fifty dollars was excessive, it offered no evidence, nor any suggestion as to what an appropriate rate would be appropriate. The Plaintiff, however, offered the Laffey Matrix in support for his fee rate. (Matrix). The Matrix is recognized and used by federal courts to determine the reasonableness of attorney fees in litigated cases. (R. p. 149). The Matrix indicates a rate of five hundred and

five dollars an hour is appropriate for attorneys with over twenty years of experience. Counsel has twenty-nine years in practice and extensive experience in FOIA cases. Although the court makes a reference to "market rates for similar services in this area and fees in similar cases," it failed to make any specific findings as to what those rates were or how they were applied in the court's calculations. The trial court's order fails to find facts sufficient to support its determination that counsel's hourly rate was excessive.

The trial court further erred in its analysis of the nature, extent, and difficulty of the case. The court's order states that FOIA issue "involved an uncomplicated, straight forward matter.... and did not require sophisticated legal services or extensive work by the Plaintiff's counsel". (R. p. 38). While the Court may be correct that the issue should not have required extensive work, it is in error finding that it did not require extensive work. The trial court's ruling overlooks the fact that however straight forward the issue may have seemed in retrospect, the Defendant aggressively defended the FOIA claim and caused the Plaintiff to have to expend a large amount of time on the issue by intertwining it in their defense of the case as a whole. The Defendant denied the FOIA violation in its Answer. (R. p. 65). The Defendant then made a motion to dismiss the present case and a related case. The Defendant's motion included the FOIA claim. (R. p. 68-77). In support of the Defendant's motion to dismiss it filed a seven page memorandum of law. (R. p. 71-77). The memorandum cited Holden v. Cribb, Lennon v. S.C. Coastal Council, Byrd v. Irmo High, Jackson v. State, Seabrook v. City of Folly Beach, Linda Mc Co. v. Shore, Berry v. Zahler, and Fabian's Uptown Charleston, Inc., v. SC Tax Comm'n. Defendant's motion cited eight cases in addition to the Tort's Claim Act. In addition to the eight cases, the Defendant cited the Tort's Claim Act in general. The Defendant's motion to dismiss necessitated the

Plaintiff's response. The eight cases alone required as much as 57 pages of review for Plaintiff's counsel in his analysis of the motion, and does not include any of the cases referenced within those eight cases. While the FOIA may have been a straight forward issue, the Defendant complicated the case by its defense and necessitated a thorough handling of the issue by the Plaintiff. The court therefore erred in its determination of the complexity of the issue.

The Defendant subsequently filed a motion with attachments totaling 24 pages seeking summary judgment on the FOIA cause of action. This necessitated the Plaintiff expend time in the preparation and defense of the motion. The Defendant's Notice and Motion for Summary Judgment with attachments was over twenty four pages long. It presented legal argument and disputed every factual allegation made by the Plaintiff in his FOIA cause of action. (R. p. 115-144). The Defendants continued to contest the FOIA issue, stating in their Memorandum "In summary Council did not violate the requirements or the Spirit of the Freedom of Information Act." (R. p. 85). A review of the record reflects an appropriate amount of time devoted to each of the out of court tasks identified in counsel's affidavit. This is especially true in light of the fact that most were necessitated by the position or actions taken by the Defendant. The trial court's finding that the FOIA issue was simple and straight forward is therefore in error.

The trial court further failed in its consideration of the time necessarily devoted to the FOIA issue. The trial court appears to have attempted to segregate out time for court hearings relating to the case because there were other issues involved in addition to the FOIA claim. It is however, impossible to determine the method used by the court in its reduction of fees as the court failed to identify all of the items it was excluding or reducing, or the method it was using to calculate a reduction. To the extent that the court attempted to segregate out a portion of the fees

relating to other issues, the court overlooked the fact that the issues were so intertwined that the FOIA claim could not simply be segregated out from the case as a whole.

The Court's award in this case is insufficient to even compensate for the filing fees, costs and time required for just for mediation and court appearances. Here parties were each required to attend mandated mediation in this case. The Plaintiff's attorney fee affidavit indicates 4.75 hours devoted to the mediation. The trial court made no findings as to how the time devoted to mediation was inaccurate or unreasonable. Plaintiff's attorney fee affidavit also included time devoted to the court attendance. The parties were each required to attend a Summary Judgment hearing. Plaintiff's attorney fee affidavit shows only 3.75 hours for the preparation and attendance at the hearing. Again, the trial court made no findings, or otherwise explained how time relating to court appearances would be an unreasonable cost. The trial court therefore erred in holding that counsel spent excessive time on the FOIA claim.

Because the trial court's order is lacking in findings, it is impossible to know what method the court used to determine \$1,500.00 as the appropriate amount of fees to award in this case. At the hearing to determine attorney fees and costs, the Defendant's argued council's lack of bad faith as a basis for limiting Plaintiff's attorney fee award. To the extent that the trial court may have considered argument by the Defendant as to the lack of bad faith, or any remedial measures, it erred in the reduction of Appellant's attorney's fee award. Good faith, or the lack of bad faith, is not a consideration for award of fees. See Society of Professional Journalists v. Sexton, 283 S.C. 563, 324 S.E.2d 313 (1984). Nor does action by a public body taken after filing of a lawsuit to resolve the question negate a violation of FOIA. Society of Professional Journalists v. Sexton, 283 S.C. 563, 324 S.E.2d 313 (1984). The clear purpose of awarding

attorney fees under Section 30-4-100, *et seq*, is to enforce compliance with FOIA. As a result, the beneficial effect in prevailing on the FOIA claim exceeds any issues which the Appellant did not prevail on. The trial court erred in failing to consider the benefit of FOIA enforcement as a major factor in its determination of attorney's fees and costs. *See Sloan v. Friends of the Hunley, Inc.*, 369 S.C. 20, 26, 630 S.E.2d 474, 477 (2006) *citing* (*Heath v. City of Aiken*, 203 S.C., 178, 182-183, 394 S.E. 2d 709-711 (1990)).

Although the Plaintiff's case involved issues other than the FOIA claim, Plaintiff's affidavit excluded the time devoted solely to other issues. To the extent that counsel's time was devoted to work on the FOIA and non-FOIA issues simultaneously, Plaintiff is entitled to recovery even if he does not prevail on the non-FOIA issues. In the present case, because the FOIA and non-FOIA issues were intertwined, the Plaintiff is entitled to the recovery of attorney's fees related to the time devoted to matters which included the FOIA claim. *See Charleston Lumber Company v. Miller Housing*, 318 S.C. 471, 458 S.E.2d 431 (S.C. App. 1995); *Hardaway Concrete v. Hall*, 374 S.C. 216; 647 S.E.2d 488 (S.C. App. 2007).

In this case, the trial court's severe limitation of Plaintiff's attorney fees and costs to only \$1,500.00 places an unreasonable burden on the Appellant in what resulted in a successful effort to enforce FOIA in this case. Placing such a financial burden on a single citizen because he did not prevail on other allegations in the complaint will have a chilling effect on the public's willingness to continue to safeguard and enforce compliance with FOIA when violations are discovered. The overriding public benefit of prevailing on a FOIA claim warrants a full award of fees and costs related to that claim.

The trial court failed to set forth its method of calculating attorney fees. It failed to find

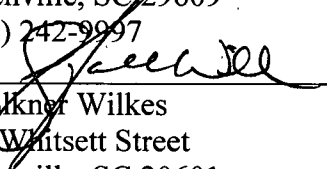
what a reasonable fee should be or the amount of time that should have been expended on the FOIA claim. The court's ruling that counsel's rate and time expended were excessive is unsupported by specific findings, or facts in record. The decision of the trial court limiting the recovery of attorney fees and costs should therefore be reversed.

CONCLUSION

Based on the foregoing, the relevant portions of the lower court's decision should be reversed and remanded for further findings or, to the extent possible, an appropriate award of attorney fees and costs ordered.

Respectfully submitted,

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August 8, 2014.

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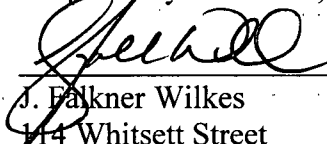
Defendants,

Of whom City of Mauldin and Mauldin City Council, John Gardner
and Brian Turner are the, ... Respondents.

CERTIFICATE

I certify that the Appellant's Final Brief complies with Rule 211(b).

Respectfully submitted,



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August 8, 2014.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge
H. Garrison Hill, Circuit Court Judge

Appellate Docket No.: 2013-001714

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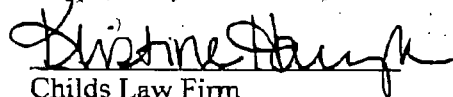
Of whom City of Mauldin and Mauldin City Council,
John Gardner and Brian Turner are the.....Respondents.

CERTIFICATE OF SERVICE

This is to certify that I did on this date, serve a copy of the Final Brief in regard to the above-referenced matter upon the Respondents, by depositing the same in the United States mail with postage prepaid and affixed thereto, addressed as follows:

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August 8, 2014