

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

SC Court of Appeals

Honorable William A. McKinnon, Circuit Court Judge
Case No.: 2017-CP-32-04435

Appellate Case No.: 2020-000770

Jada Garris.....Respondent,

v.

Lexington County School District One..... Appellant.

INITIAL BRIEF OF APPELLANT

s/David N. Lyon

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September 8, 2020
Columbia, South Carolina

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STATEMENT OF ISSUES ON APPEAL

1. THE LOWER COURT ABUSED ITS DISCRETION IN AWARDING RESPONDENT HER FULL AMOUNT OF ATTORNEY'S FEES WHEN SHE PREVAILED ONLY IN PART.
2. THE LOWER COURT ABUSED ITS DISCRETION IN AWARDING ATTORNEY'S FEES FOR CLAIMS THAT RESPONDENT DISMISSED OR ABANDONED PRIOR TO TRIAL.
3. THE LOWER COURT ERRED IN FINDING THAT THE DISTRICT DID NOT CONTEST CERTAIN *BURTON* FACTORS.

STATEMENT OF THE CASE

This appeal follows the lower court's award of attorney's fees to the Respondent, Jada Garris ("Garris" or "Respondent"), following a one-day bench trial on the merits of Garris's Amended Complaint that Appellant Lexington County School District One (the "District" or the "Appellant") violated the South Carolina Freedom of Information Act ("FOIA") on five separate occasions. The lower court found that on only one of the five occasions, the District violated FOIA. (Order, Nov. 22, 2019). The lower court found for the District on the other four alleged violations. *Id.*

Following the trial, Garris sought the full amount of the attorney's fees her counsel charged, asserting that she was the "prevailing party" for the purposes of FOIA even though she only prevailed on one of the five causes of action at trial. Garris further claimed that she should be considered the prevailing party as to claims in her Initial Complaint that she voluntarily dismissed or abandoned months before trial. The court apparently agreed, awarding Garris her full amount of attorney's fees. The District appealed the lower court's decision regarding the attorney's fee award.

FACTS

Garris initially filed suit against the District on December 6, 2017, alleging multiple different FOIA violations and seeking declaratory and injunctive relief (hereinafter, the "Initial Complaint"). (Complaint, December 6, 2017). The Initial Complaint enumerated 12 Causes of Action (hereinafter "COAs"). COAs 2 and 5 were identical; accordingly, the Initial Complaint contained a total of 11 distinct COAs. COAs 1 and 12 alleged that the Board did not hold portions of its public meetings in a public place (hereinafter, the "meeting violations"). COAs 3, 7, and 8 alleged that, on three separate occasions, the District did not timely post its agendas to its website

(hereinafter “notice violations”). COA 4 alleged that the District failed to comply with Proviso 1.26 of Section 1, H.630, which mandates that certain financial transactions be posted to the District’s website (hereinafter “posting violation”).¹ COAs 6, 9, 10, and 11 generally alleged that, on separate occasions, the District did not comply or fully comply with Plaintiff’s detailed, extensive, and multi-part FOIA requests for documents (hereinafter, “records request violations”). COAs 2 and 5, which were identical, alleged that the District violated FOIA in refusing Garris’s request to provide an audio recording from a board workshop meeting (hereinafter, “workshop audio”).

The suit was served on or around March 13, 2018, more than three months after it was first filed. (Acceptance of Service, March 13, 2018). The District filed and served its Answer on May 14, 2017, denying all of the violations alleged. (Answer to Initial Complaint, May 14, 2017).

After the Initial Complaint and Answer were filed, Garris took no action to prosecute her claims for approximately six months. On November 6, 2018, Garris was elected to serve as a trustee on the District’s Board of Trustees. Thereafter, throughout the months of November and into December 2018, the parties engaged in settlement discussions hoping that a resolution of the suit would promote more positive working relations within the Board. As part of the negotiations, counsel for the District attempted to demonstrate that, with the exception of the workshop audio which was the subject of COAs 2 and 5, the District had adequately responded to Garris’s public records requests at the time she had made them. *See* Defendant’s Motion in Opposition to Plaintiff’s Motion for Attorney’s Fees and Costs, Attachments C, D, E, January 22, 2020). These

¹ Regarding this claim, Garris sought a declaratory judgment that the District had violated the Proviso by not adequately posting documents related to financial transactions and that failing to do so was a FOIA violation.

efforts were partially successful because on May 8, 2019, Garris’s attorney proposed amending the Initial Complaint by voluntarily dismissing or abandoning COAs 2 and 5 related to the “workshop audio;” COA 4, the “posting violation;” and COAs 6, 9, 10, and 11, the “records request” violations. *Id.* The proposal was based on two conditions: a) delivery of the workshop audio referenced in COAs 2 and 5; and b) written confirmation that there were no other documents referenced in COA 10 that had not already been provided to Garris before the suit. *Id.* Both parties felt that this would streamline the litigation on the “meeting violations” and “notice violations,” which the parties could not resolve. *Id.* In agreeing to allow the proposed amendment to the Complaint and in meeting Garris’s conditions, the District did not admit, and never has admitted, the alleged violations in the dismissed or abandoned causes of action.

On or around June 13, 2019, Garris filed the Amended Complaint. (Amended Complaint, June 13, 2019). The Amended Complaint contained five allegations and no others: the two “meeting violations” and the three “notice violations” from the Initial Complaint. The other COAs from the Initial Complaint were voluntarily dismissed or abandoned and were not realleged in the Amended Complaint or elsewhere. On June 28, 2019, the District filed its answer to the Amended Complaint, denying the violations alleged. ²

On October 24, 2019, the Honorable Judge William A. McKinnon presided over a bench trial on the five allegations in the Amended Complaint. During the trial, Garris’s counsel attempted to question her on the Initial Complaint and the dismissed or abandoned claims before “moving to the actual causes of action that are at play here in this case.” Trial Transcript, p 66, ln. 19-25. Defense counsel rose to object, but Judge McKinnon spoke first: “What’s the relevance to

² The District subsequently made a correction its Answer to the Amended Complaint. (Defendant’s Amended Answer to the Amended Complaint, October 24, 2019).

allegations that aren't being currently prosecuted?" Trial Transcript, p. 67, ln. 1-4. A long colloquy followed. *See generally*, Trial Transcript p. 67-74. Eager to establish a right to attorney's fees, Garris's counsel argued that Garris should be a prevailing party as to the dismissed causes of action because the District had provided the documents she initially requested through FOIA only after the litigation began. Trial Transcript p. 67, ln. 5-13, p. 68. ln. 12. At no point did Garris's counsel ever identify how the District's initial responses to Garris's FOIA requests were deficient or what documents were first provided after the litigation had begun.

Counsel for the District asserted that the District had provided records in compliance with Garris's FOIA requests in the first instance, prior to the suit, noting the one exception—the workshop audio referenced in COAs 2 and 5. Trial Transcript p. 68, ln. 13-p. 73, ln. 12. Defense counsel further argued that by amending the complaint, Garris dismissed or abandoned the COAs related to her FOIA document requests. *Id.* After hearing arguments from both sides, Judge McKinnon stated:

[M]y inclination is put this off. It seems to me—I mean, putting these aside, on the five issues we're here for today, if I rule in your favor, you're going to file a motion for attorneys' fees later, correct? I think that the better is just—I think when you file that motion, then you would include these claims as part of that motion. We'll have a hearing on that motion and decide it all then.

Trial Transcript p. 73, ln. 12 – 20. Garris's counsel requested to ask one further question regarding the original complaint, and, over Defendant's objection, the court allowed it. Trial Transcript p. 73, ln. 21-p. 74, ln. 22. The question was: "We were just discussing the FOIA violations that we brought concerning document requests that were either unfulfilled or denied. When, during the course of my representation, was the time you received the last of those documents in this litigation, initially?" Trial Transcript p. 74, ln. 24-75, ln. 4. Garris's response was, "June of 2019."

Trial Transcript p. 75, ln. 5. June 2019 referred to the date when the District provided the workshop audio referenced in COA 2 and 5 and also confirmed that it had no more documents than it initially provided in regards to COA 10. Trial Transcript, p. 111, ln. 25-p. 112, ln. 22; p. 128, ln. 25-p.129, ln.4; Defendant's Trial Ex. 7.

On cross-examination, Garris was asked about her understanding of the agreement to amend the complaint. She stated:

We agreed to amend the complaint if documents were provided -- I guess I should go back a little further and explain that on December the 7th of 2017 is when this lawsuit was filed. December -- no, December 6th, 2017 is when this lawsuit was filed.

On December 7th, 2017, I received a letter by e-mail from the District. Across the top of the letterhead, it was dated December 6th, 2017, and it included a lot of things in my original complaint. So that took care of a lot of those.

We still didn't have the recording and we still didn't have the architectural selection documents. And then we agreed to amend the complaint at some point in time. I don't remember if there was a formal agreement or verbal, to say, okay, if we give y'all the audio and we tell you we've lost two years' worth of documents from architectural selection committee meetings, do you agree to amend your complaint . . .

P. 109, ln. 4 – 22. In sum, the testimony amounts to an admission by Garris that, with the exception of the workshop audio and additional documents related to the architectural selection committee, she had received all of the documents complained of in her Initial Complaint via a letter from the District dated December 6, 2017, which she received on December 7, 2017. December 7, 2017 was a day after the suit was filed but nearly three months before it was served on the District. (Acceptance of Service, March 13, 2018). As is sufficiently clear from Garris's testimony, by December 7, 2017, the only outstanding requests were the workshop audio and additional documents related to the architectural selection committee referenced in COA 10 from the Initial

Complaint, which the District attested did not exist. (Defendant's Motion in Opposition to Plaintiff's Motion for Attorney's Fees and Costs, Attachment A, January 22, 2020).

On November 22, 2019, the lower court issued its ruling as to the five alleged "meeting" and "notice" violations. (Decision of the Court, November 22, 2019). The court found in favor of Garris on only one of her five causes and found in favor of the District on the remaining four causes of action. As to the single violation, the court found that the Board violated FOIA on November 14, 2017, because it did not vote to enter into executive session and announce its purpose for doing so in public. *Id.* at p. 4. The court declined to issue the injunctive relief which Garris had requested, noting that the testimony established that the Board had changed its procedures such that announcements of the purpose of each executive session were made in the public auditorium before any executive session was entered upon. *Id.* at p. 8. In short, Garris was a prevailing party in the most limited way possible: the court found only one FOIA violation of the five alleged, and it denied the injunctive relief Garris requested.

On December 2, 2019, the parties filed cross motions for reconsideration pursuant to Rule 59(e), SCRCF. Each party also filed responses to the other's motion. The court ultimately issued an amended Order clarifying the ruling, but the ultimate result did not change. (Amended Decision of the Court, January 28, 2020).

Also, on December 2, 2019, Garris filed a Motion for Attorney's Fees and Costs seeking the total amount of the fees incurred in the case from March 2017 through trial, which totaled \$40,510.04. (Plaintiff's Motion for Attorney's Fees, December 2, 2019). Garris's counsel acknowledged that Garris did not prevail on all of her causes of action at trial, but asserted that she was, nevertheless, a prevailing party under the FOIA. Garris's counsel also asserted that the court should consider Garris a prevailing party as to the "records request" violations claimed in the Initial

Complaint, contending that the District failed to respond to requests for documents under FOIA until June of 2019, when it “finally produced all the documents it had that were responsive to those requests.” *Id.* The motion did not include the time sheets or any affidavits supporting the reasonableness of the rates Garris’s counsel charged.

On January 22, 2020, the District filed a motion in opposition to the attorney’s fees request, contending, in relevant part, that although Garris was technically a “prevailing party” under FOIA, she was only minimally so, and only as to the matters in the Amended Complaint which were tried. The District further maintained that although it lacked a copy of the billing entries and therefore could not address all of the *Burton* factors, the factors it could address weighed in favor of no award or, at most, a minimal award of attorney’s fees.

The court held a hearing on January 27, 2020, intended to address the cross motions to reconsider and Garris’s motion for attorney’s fees. (Motions Hearing Transcript, January, 27, 2020). After it was pointed out that Garris’s counsel had failed to accompany the motion with billing entries and further evidentiary support that the time and rates charged were reasonable, the court determined that the attorney’s fee issue would have to be decided later. *See generally, id.* at pp. 45-55. Garris’s counsel subsequently provided their time sheets and supporting affidavits. (Plaintiff’s Counsel’s Time Sheets; Affidavits).

A second hearing was postponed several times and ultimately derailed as a result of the onset of Covid-19 and the accompanying travel and meeting restrictions. The parties agreed that the court could rule on the briefs, and the parties submitted supplemental briefs.³ (Defendant’s

³ While the District agreed to have the motion heard on the briefs, it continued to argue in its briefs that if the court were going to consider the merits of the abandoned claims regarding records request violations, a further evidentiary hearing would be necessary.

Supplemental Memorandum in Opposition to Plaintiff's Motion for Attorneys' Fees and Costs w/ attachments, March 10, 2020; Plaintiff's Memorandum In support of Plaintiff's Motion for Attorney's Fees and Costs, March 17, 2019).

On April 6, 2020, the court issued an Order awarding Garris the full amount of her requested attorney's fees and costs, which at that point totaled \$48,995.80 (\$47,427.54 in attorneys' fees and \$1,568.26 in costs). On April 16, 2020, the District filed and served a Rule 59(e), SCRCF Motion to Alter or Amend the Judgment, asking the court to reconsider its April 6 Order awarding the full amount of fees. (Defendant's Motion to Alter or Amend Judgment Pursuant to Rule 59(e), April 16, 2020). On April 17, 2020, Garris filed a Memorandum in Opposition to Defendant's Rule 59(e) motion. (Plaintiff's Memorandum in Opposition to Defendant's Motion to Alter or Amend Order Awarding Fees and Costs, April 17, 2020). On May 1, 2020, the court denied Defendant's motion. (Decision of the Court, May 1, 2020). On May 12, 2020, the District appealed.

STANDARD OF REVIEW

The decision to award or deny attorneys' fees under the FOIA will not be disturbed on appeal absent an abuse of discretion. *Kiriakides v. Sch. Dist. of Greenville Cty.*, 382 S.C. 8, 20, 675 S.E.2d 439, 445 (2009). "Similarly, 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." *Id.* (quoting *Layman v. State*, 376 S.C. 434, 444, 658 S.E.2d 320, 325 (2008) (quotation marks omitted)). An abuse of discretion occurs when a judge fails to exercise discretion, when a ruling is based upon an error of law, or when a ruling based on factual conclusions is without evidentiary support. *Fontaine v. Peitz*, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987). In considering the reasonableness of the amount of the fee

award, “the court should take into consideration the facts and equities of the particular case.” *Prevatte v. Asbury Arms*, 302 S.C. 413, 416, 396 S.E.2d 642, 644 (Ct. App. 1990). An appellate court will defer to the trial court’s discretion when the trial court’s decision “is made on a sound evidentiary basis and is adequately explained with specific findings—as the law requires.” *Horton v. Jasper Cty. Sch. Dist.*, 423 S.C. 325, 331, 815 S.E.2d 442, 445 (2018).

In this case, the lower court abused its discretion because its ruling was based on an erroneous view of the law applicable to an award of attorney’s fees under the FOIA and because its ruling was based on factual conclusions without evidentiary support.

ARGUMENT/LEGAL ANALYSIS

1. The lower court abused its discretion in awarding Garris her full amount of attorney’s fees when she only prevailed in part.

The FOIA provides, in relevant, part: “If a person or entity seeking relief under this section prevails, he may be awarded reasonable attorney's fees and other costs of litigation specific to the request.” If the person or entity prevails *in part*, the court may in its discretion award him reasonable attorney's fees or an *appropriate portion* of those attorney's fees.” *Id.* (emphasis added). While the FOIA provides for attorney’s fees to a prevailing party, it also explicitly states the fees should be “reasonable” and in “an appropriate portion” (i.e., in reasonable proportion to the prevailing party’s degree of success).

Courts consider six factors in determining the discretionary award of attorney’s fees: (1) nature, extent, and difficulty of the case; (2) 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). In determining a reasonable attorney’s fees award,

“[c]onsideration should be given to all six criteria in establishing reasonable attorney's fees; none of these six factors is controlling.” *Baron Data Sys., Inc. v. Loter*, 297 S.C. 382, 384, 377 S.E.2d 296, 297 (1989). However, where a party prevails in a most limited way, the beneficial results factor, even if not “controlling,” should weigh heavily on the court’s decision. Specifically, this factor must weigh, at the very least, in favor of reducing the petitioned for fee if, as here, the plaintiff’s success is minimal, “since the time and labor devoted to the issues [the plaintiff] lost should not, in equity, be charged against the opposing party who prevailed on those issues.” *Prevatte*, 302 S.C. at 417, 396 S.E.2d at 644.

Here, of the five issues adjudicated at trial, Garris prevailed on only one. In analyzing the *Burton* factors, the court found that any beneficial results obtained by Garris were “minimal;” that “this factor cuts against the Plaintiff’s request for fees and costs;” and that the District “prevail[ed]” on this factor.⁴ Inexplicably, the court ignored its own conclusion—that Garris’s suit was nearly fruitless—and awarded Garris all of the attorney’s fees requested anyway. In doing so, the court abandoned its responsibility to exercise its discretion to determine a reasonable and proportionate fee award. *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 [the court’s] discretion.”). In effect, the court rewarded Garris’s attorneys not for vindicating their client’s interest but for showing that counsel’s expenditure of time and hourly billing rates were not unreasonable. The lack of

⁴ It does appear that the court’s decision was influenced by the “Plaintiff’s status as the prevailing party concerning the documents Defendant turned over prior to trial.” (Order, p.7, April 6, 2020). As demonstrated below, *infra* p. 13-16, it was error for the court to consider these dismissed claims. Additionally, the evidence in the record points to only one document turned over for the first time after service of the lawsuit. Nevertheless, the court still determined that the results obtained were “minimal.”

meaningful beneficial results, apparently, did not matter, even though this directly and necessarily relates to the reasonableness of the amount of time and labor spent on the case.

If courts can completely ignore the “beneficial results obtained” prong, as the court did here, then FOIA plaintiffs will be emboldened to include in their pleadings dubious allegations of violations, necessarily increasing the amount of work and attorney time devoted to prosecuting those claims, in the hope of prevailing on merely one claim but recovering the entire attorney’s fees amount. FOIA will become a money-making proposition rather than a means to ensure public bodies comply with the sunshine law.

2. The lower court abused its discretion in awarding attorney’s fees for claims that Respondent dismissed or abandoned prior to trial.

a) Respondent should not be the “prevailing party” as to claims she dismissed or abandoned.

In arriving at its decision to award Garris the full amount of attorney’s fees requested, the court erroneously awarded fees related to attorney time spent on alleged “records requests” violations (COAs 2, 4, 5, 6, 9, 10, and 11) that Ms. Garris included in her Initial Complaint, but which she later dismissed or abandoned. Specifically, the court found that “Plaintiff was the prevailing party as she not only recovered documents from the Defendant prior to trial but prevailed on an allegation at trial.” (Order, p. 4., April 6, 2020).

The court erred in finding Garris was a prevailing party as to claims that she voluntarily dismissed or abandoned. Our courts have defined a prevailing party as “one who successfully prosecutes an action or successfully defends against it, prevailing on the *main* issue, even though not to the extent of the original contention [and] is the one in whose favor the decision or verdict is rendered and judgment entered.” *See Sloan v. Friends of Hunley, Inc.*, 393 S.C. 152, 156, 711 S.E.2d 895, 897 (2011) (emphasis added) (quoting *Heath v. County of Aiken*, 302 S.C. 178, 182-

83; 394 S.E.2d 709, 711 (1990)). Quantitatively, as well as qualitatively, Garris did not prevail at trial regarding the “main” issues.

Voluntary dismissal or claims abandonment, as occurred here, leaves the claims “unadjudicated upon the merits,” and it becomes as if the claims had never been filed. *McKinney v. CSX Transp., Inc.*, 298 S.C. 47, 50, 378 S.E.2d 69, 71 (Ct. App. 1989); *See also* 9 Charles Alan Wright, et al., *Federal Practice and Procedure* § 2367 (3d. ed. 2014) (voluntary dismissal “leaves the situation as if the action never had been filed”). Since Garris obtained no judgment in her favor as to the COAs she dismissed or abandoned, the court erred in determining that she was a prevailing party as to dismissed claims. Accordingly, Garris is not entitled to any attorney’s fees and costs based on dismissed or abandoned claims.

The instant case is distinguishable from the *Sloan* cases upon which Garris relied below. Unlike the *Sloan* cases, the alleged FOIA violations in this case have neither been adjudicated by a court nor conceded by the District. In *Sloan v. South Carolina Department of Revenue*, Sloan filed a FOIA action alleging that the Department of Revenue (“DOR”) failed to produce public documents he had requested in a proper FOIA request. 409 S.C. 551, 552, 762 S.E.2d 687, 687 (2014). After the suit was filed, the DOR produced all the requested information and moved to dismiss the complaint asserting that Sloan's action was mooted. *Id.* The Supreme Court ultimately held that the DOR “did not comply with the statutory dictates of FOIA.” *Id.* Upon that determination, the court ruled that the underlying action was mooted, but Sloan was nevertheless entitled to an award of fees and costs. *Id.* at 554-56; 762 S.E.2d at 688-8.

In *Sloan v. Friends of Hunley, Inc.*, Sloan’s public records request was initially rebuffed by the Friends organization, which claimed it was not a public body under the FOIA. 393 S.C. 152, 155, 711 S.E.2d 895, 896 (2011) (*Sloan II*). Sloan initiated suit against the Friends, which

later conceded that it was a public body subject to the FOIA and provided the documents initially requested. *Id.*; see also *Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 26, 630 S.E.2d 474, 478 (2006) (“*Sloan I*”). In doing so, Friends conceded the FOIA violation.

In both *Sloan* cases, there was either a finding or a concession that the public body violated the FOIA. That is not the case here. In fact, when Plaintiff voluntarily dismissed or abandoned her records request causes of action, she also abandoned any claim of a violation. It was as if the claims had never been filed. *McKinney*, 298 S.C. at 50, 378 S.E.2d at 71.

Moreover, Garris agreed to dismiss her claims in exchange for the District agreeing to produce the one record the District had not previously produced prior to trial—the workshop audio—and to state in writing that it had already produced all of the architectural committee selection documents when it first responded to her, prior to the litigation. The purpose of this agreement was to simplify the matters for trial. In doing so, Plaintiff avoided expending attorney time and money on claims she was likely to lose. For the court to award attorney’s fees based on these abandoned causes of action is to assume that Plaintiff would have prevailed on these claims, which is unjust. The present circumstances are the opposite of those in the *Havre* case, cited in *Friends of Hunley*, where the Montana Supreme Court expressed concern about a public body, which, “after extensive litigation, at the eleventh hour, and facing imminent defeat, simply moot[ed] a case in order to dodge this fee-shifting statute.” *Friends of Hunley*, 393 S.C. at 157, 711 S.E.2d at 897 (quoting *Havre Daily News, LLC v. City of Havre*, 333 Mont. 331, 142 P.3d 864 (2006)). Here, it was Garris who mooted the claims, by dismissing or abandoning them, to avoid expending attorney time and resources on dubious claims, which might have resulted in no fees being awarded for those claims.

Furthermore, if Garris, during the pendency of the action but before trial, believed that the District had admitted to a FOIA violation in finally providing “all the documents,” as of June 2019, the proper procedure for seeking to establish liability pre-trial on those issues would have been to file a motion for partial summary judgment. Garris failed to take this step and instead sought simply to assert violations of the FOIA regarding production of the records without the court deciding the merits of the issue during trial or in a subsequent hearing during the attorney’s fees phase. Should Garris’s attorneys seek to argue that the court did not give counsel an opportunity to present evidence regarding these claims, the argument must be rejected because counsel failed to object and preserve the contention for any necessary appeal. As it turned out, the court, without any evidence taking concerning the issue, rendered a determination of awardable fees based, apparently, on a presumption that one or more records request violations were present such that Garris had prevailed on those issues. The court’s conclusion, premised on a presumption lacking evidentiary support, was error.

Finally, unlike the *Sloan* cases, the District produced nearly all of the records requested and referenced in the suit before it was aware of the suit. The evidence in the record regarding what was requested and what was produced is limited. However, Garris admitted at the bench trial that she received a letter dated December 6, 2017 (the same day the Initial Complaint was filed) that “included a lot of things in my original complaint. So that took care of a lot of those.” Trial Transcript p. 109, ln. 4 – 22. Her testimony indicated that the only outstanding items were the workshop audio and supposedly missing architectural selection committee documents, which the District ultimately established did not exist. *Id.*

In short, Garris’s voluntary dismissal of claims related to alleged record request violations should not be factored into her attorney’s fee award, since it was her decision to abandon these

claims and not pursue them at trial. Garris benefited by dropping claims and avoiding further litigation on matters that might have further diminished her status as a partial prevailing party. She should not benefit a second time.

b) Even if Respondent can be a “prevailing party” as to claims she dismissed or abandoned, the evidence in the record supports only one instance where a FOIA requested document, previously withheld, was provided after the litigation began.

The factual basis for the court’s decision, as written in its April 6 Order, is not supported by the record. The Order indicates that the court believed the District produced all of the documents about which Plaintiff complained in her Initial Complaint *because of* the lawsuit. In its decision denying the District’s Motion to Reconsider, the court stated “[t]here was un rebutted testimony at trial that Plaintiff dismissed several of her allegations against Defendant only after Defendant turned over documents requested by the Plaintiff under FOIA.” (Decision of the Court, May 1, 2020, p. 2). The implication is that the court believed Plaintiff dismissed or abandoned seven COAs from her Initial Complaint in exchange for all, some, or, at the very least, more than one of the documents Garris had initially requested.

As the evidence established, there were no specific facts in the record as to what documents were produced in response to Garris’s detailed, multi-part FOIA requests or when those documents were produced. The only record evidence is that Garris received the workshop audio in June 2019 (Trial Transcript p. 75 ln. 2-5), and that the rest of the documents had been sent to her on or before December 6, 2018 (Trial Transcript p. 109 ln. 9-13), the day that her suit was filed. Because the District was not served with the suit papers until March 2018 (Acceptance of Service, March 13, 2020), it cannot be said that the documents provided by letter dated December 6 were *the result of* the litigation filed such that Garris can claim prevailing party status as to the alleged records

request violations. Nor can it be said, as the lower court stated, that multiple documents from Garris's FOIA request were turned over in exchange for Plaintiff agreeing to abandon seven of her cause of action from the Initial Complaint.

As noted above, it is clear that the court chose to award Garris her entire attorney's fee request, at least in part, because it considered her a "a prevailing party concerning the documents Defendant turned over prior to trial." (Order, April 6, 2020). Although it is unclear from the opinion what weight the court gave to this conclusion in determining the fee award, it is apparent the court considered it and placed substantial weight upon it in the award, given the minimal success Garris achieved on the causes she tried.

Because the award of attorney's fees is based on factual findings not supported by the record, the decision to award the entire amount of attorney's fees to Garris should be reversed.

3. The Court erred in finding that the District did not contest the *Burton* factors.

a. The Court erred in finding that the Defendant did not contest the nature and difficulty of the case.

In its Memorandum in Opposition to Plaintiff's Motion for Attorney's Fees, the District noted that the litigation was unnecessarily drawn out, there being an absence of prosecution for the first six months after service and, after the case had sat idle for more than a year, very limited discovery. (Defendant's Motion in Opposition to Plaintiff's Motion for Attorney's Fees and Costs, January 21, 2020, p.11). Additionally, the District noted that Plaintiff failed to avail herself of the procedure under FOIA § 30-4-100(A) which provides an opportunity for a possible prompt

resolution to alleged FOIA violations.⁵ Had Plaintiff utilized § 30-4-100(A), significant portions of the case might have been resolved much earlier and without unnecessary delay or expense. The court apparently did not consider any of these factors in determining that Garris should receive all of her requested attorney's fees.

b. The court erred in finding that the District did not challenge the time and labor necessarily devoted to the case.

The District has strongly maintained that Garris should not be reimbursed fees for any work on the seven COAs she dismissed or abandoned. It necessarily follows that any time spent litigating those claims was unnecessary and therefore "excessive." Initially, Garris's counsel failed to provide time sheets with its motion for attorney's fees, which would have allowed the District to challenge the time expended and the rate charged. (Defendant's Motion in Opposition to Plaintiff's Motion for Attorney's Fees and Costs, January 21, 2020, p.10). When the time sheets were provided, there was no way to determine the amount of work expended on the abandoned claims versus those that went to trial. For this reason, the District proposed to the court two methods of calculating an appropriate award of attorney's fees, based on Plaintiff having prevailed on only one of the causes of action that she originally brought. The District proposed a calculation based on a 1/12 success rate, taking into consideration the original 12 COAs, the subsequently dismissed seven COAs, and Garris's success at trial on only one of the COAs. Alternatively, the District also

⁵ S.C. Code 30-4-100(A) states in relevant part: "Upon the filing of the request for declaratory judgment or injunctive relief related to provisions of this chapter, the chief administrative judge of the circuit court must schedule an initial hearing within ten days of the service on all parties. If the hearing court is unable to make a final ruling at the initial hearing, the court shall establish a scheduling order to conclude actions brought pursuant to this chapter within six months of initial filing."

proposed a calculation based on a 1/5 success rate taking into account that of the five COAs that actually went to trial, Garris prevailed only on one.⁶

The court rejected both formulas on the ground that neither method “took into account Plaintiff as the prevailing party concerning the documents Defendant turned over prior to trial.” (Order, April 6, 2020, p. 7.). As demonstrated above, it was error to consider dismissed or abandoned claims, and even if it was not error, there was no factual basis for the determination that the District withheld records and turned over all of the documents (plural) for the first time prior to trial. Nevertheless, since counsel’s time records did not allow the court to parse the time allocated to the different causes of action, it simply awarded the entire amount of fees requested. This outcome punishes the District and rewards Garris and her attorneys for deficiencies in time entries which failed to differentiate among the causes of action and the time expended on each.

CONCLUSION

For the reasons stated above, the decision of the lower court should be reversed and the matter remanded for further consideration of the fee request, in light of this Court’s ruling as to the proper application of the FOIA’s attorney’s fee provision, the *Burton* factors, and the record evidence.

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⁶ This court may apply either of these methods if it wishes to act in its own discretion and determine the appropriate fee award given Plaintiff’s minimal success.

Respectfully submitted,

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Attorneys for Appellant the Lexington County
School District One

September 8, 2020
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

Sep 08 2020

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

SC Court of Appeals

Honorable William A. McKinnon, Circuit Court Judge
Case No.: 2017-CP-32-04435

Appellate Case No.: 2020-000770

Jada Garris,.....Respondent,

v.

Lexington County School District One, Appellant.

PROOF OF SERVICE

I certify that on September 8, 2020, I have served the Initial Brief of Appellant and Designation of Matter to be Included in the Record on Appeal on the Respondent, Jada Garris, by e-mailing a copy of the same to her respective counsel of record, addressed as follows:

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September 8, 2020

VIA ELECTRONIC MAIL ONLY

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate St.
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jkitchings@sccourts.org

RECEIVED
Sep 08 2020
SC Court of Appeals

Re: Jada Garris, Respondent vs. Lexington County School District One, Appellant
Appellate Case No.: 2020-000770

Dear Ms. Kitchings:

Enclosed herewith for filing are copies of the following documents:

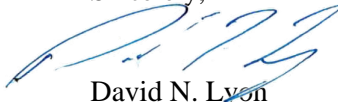
1. Initial Brief of Appellant;
2. Appellant's Designation of Matter to be Included in the Record on Appeal (inclusive of Certificate of Counsel); and
3. Proof of Service.

I would appreciate you date stamping the documents and providing our office with copies of same.

The Respondents' attorneys of records are being served contemporaneously.

Thank you for your time and cooperation.

Sincerely,



David N. Lyon

DNL/kc
Encls

c: Taylor M. Smith, IV, Esquire (via email only)
Andrew S. Radeker, Esquire (via email only)
David T. Duff, Esquire (via email only)