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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

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.

FINAL REPLY BRIEF OF APPELLANT

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Columbia, South Carolina

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STATEMENT OF THE CASE

Appellant District adopts and incorporates by reference the Statement of the Case and Facts presented in its Initial Brief. The factual matters discussed below are in reply to assertions in the Respondent's Brief, which require a response because they are important to the proper adjudication of this appeal.[1]

The Respondent's Brief asserts: "During the pendency of the case, the District provided Garris what it stated were all the responsive records it could locate concerning the open records violations subject of Garris' [Initial] Complaint." (Resp. Br. p. 2). This is not accurate, and the record does not support this assertion. The Initial Complaint contained six (6) distinct, specific, and detailed causes of action ("COA"s)—COAs 2, 4, 5, 6, 9, 10 and 11—alleging the District did not, or did not properly and fully, respond to Garris's FOIA requests for records.[2] (R. pp. 36-58). The record establishes that, during this litigation, the District provided Garris with exactly one item from her FOIA requests which was not provided pre-litigation—the workshop audio referenced in COA 2/COA 5. (R. p. 346, ln. 24-p. 347, ln. 4; p. 380, ln. 25 – 381, ln. 23; p. 382, ln. 25-p. 384, ln. 7; p. 400, ln. 7-p.401, ln. 4; pp. 544-45). Garris's testimony establishes that some unidentified other set of documents related to the Initial Complaint's causes of action were sent by the District under cover letter dated December 6, 2017, the day the suit was filed, which Garris received the next day. (R. p. 381, ln. 4-22). Since the lawsuit was not served on the District until nearly three months later (and there is nothing in the record establishing that the District knew the

[1] Similarly, under the Argument section of this Reply Brief, the District adopts and incorporates by reference those arguments raised in its Initial Brief. For the sake of brevity, the District offers the arguments herein as a limited reply to those issues presented in Respondent's Brief.

[2] As noted previously, COA 2 and 5 were identical, so while there are seven (7) causes of action that fall generally into the records request category, there are only six (6) that are distinct.

suit had been filed), it cannot be said that the lawsuit prompted the District to provide this tranche of documents.

Respondent's Brief further asserts: "Garris dismissed *the part of her complaint relating to the [workshop audio]* because it became moot when she received the file in 2019 from the District." (Resp. Br. p. 9) (emphasis added). In fact, Garris also dismissed parts of her Initial Complaint *not* related to the workshop audio; namely COAs 4, 6, 9, 10 and 11, because the District demonstrated that it had already complied or substantially complied with its obligations under the FOIA by providing documents pre-litigation.

Respondent's Brief further contends: "Garris obtained the [workshop audio] she sought, and *the other written request claims* were dismissed because the truth was finally learned, those responsive records did not exist." (Resp. Br. p. 9) (emphasis added). Reference to the "other written requests claims" suggests that the District informed Garris that *all* of the documents subject to COAs 4, 6, 9, 10 and 11 did not exist. This is not accurate. The District informed Garris that it had no other documents in response to the FOIA request in COA 10 (which referenced documents from the Architectural Selection Committee) except for those that were provided pre-litigation.[3] Part of the reason Garris sued was because she believed there were more Architectural Selection Committee documents. There were not, which the District agreed to confirm in writing. The District provided this confirmation, along with the workshop audio, in exchange for Garris agreeing to dismiss COAs 2, 4, 5, 6, 9, 10 and 11. (R p. 382, ln. 25-p. 384, ln. 7; p. 400, ln. 7-p. 401, ln. 4; pp. 544-45).

[3] The Respondent's Brief erroneously asserts that the alleged lost documents relate to school board member's binders. They do not. Board member binders relate to Garris's FOIA request referred to in COA 6. (R. pp. 45-46).

Throughout Respondent's Brief, and in the proceedings below, Garris failed to distinguish among the various records request violations she alleged in the Initial Complaint. Instead, she referred very generally to "the records." This led to the fundamental erroneous assumption in the lower court's decision to award Garris her full attorney's fees—that the District turned over *all* of the records that were the subject of the Initial Complaint *because of* Garris's lawsuit. However, there is no specific evidence in the record about the District's pre-litigation responses to the detailed FOIA records requests in COA 4, 6, 9, 10 and 11.[4] Factual disputes remain as to what documents were provided and when, and whether the District's initial pre-litigation written determinations were valid or violative of the FOIA.

Those factual disputes might have been decided, but Garris agreed, voluntarily, to dismiss those claims and proceed to trial only on her five (5) open meeting violations, where she prevailed on only one (1). The lower court rightly refused specific testimony about her record request claims because Garris had dismissed them. However, the lower court nevertheless, and erroneously, returned to Garris's still-unsubstantiated claims of record requests violations when deciding to award her the full amount of attorney's fees requested. The lower court's Order effectively finds that Garris prevailed on all twelve (12) of the causes of action in her Initial Complaint.

The purpose of pointing out these factual disputes is not, as Respondent's Brief contends, an attempt to seek *de novo* review from this court. (Resp. Br. p. 12). That is clearly not the standard. Rather, it is to demonstrate that there is no "sound evidentiary basis" that "is adequately explained with specific findings" supporting the lower court's determination that the District turned over all

[4] Footnote 3 in the Respondent's Brief essentially admits that the District provided written determinations as to Garris's FOIA requests at some point prior to the suit. These written determinations were not in evidence below.

of the records referenced in Garris's Initial Complaint during the litigation. *See Horton v. Jasper Cty. Sch. Dist.*, 423 S.C. 325, 331, 815 S.E.2d 442, 445 (2018) (stating that the law requires that the trial court's decision be "made on a sound evidentiary basis" that "is adequately explained with specific findings"). This was clearly the basis for the lower court's finding that Garris was entitled to her full amount of attorney's fees, and the lower court therefore abused its discretion.

ARGUMENT IN REPLY[5]

1. The lower court erred in basing its decision on claims Respondent voluntarily dismissed, which are different from the mooted claims in the *Sloan* cases.[6]

As noted in Appellant's Brief, it was legal error for the lower court to base its fee award decision on dismissed claims. Garris contends that it is immaterial whether she dismissed her claims voluntarily or whether the lower court would have done so later because the claims were moot once Garris "received [all] the previously withheld documents after bringing suit to get them." (Resp. Br. p 10). However, as discussed above, there remain unadjudicated disputes and conflicting testimony concerning Garris's FOIA requests (other than the workshop audio). The disputes remain because Garris dismissed her six (6) records request COAs and the lower court rightly did not hear specific testimony or receive evidence as to the dismissed claims at trial other than the nonspecific testimony discussed above.

Garris contends this case is no different from the *Sloan* cases and that a dismissed claim is the same as a moot claim. This is not correct. A case becomes moot "when some event occurs

[5] The Respondent's Brief makes no arguments in response to the District's argument that the lower court erred in finding that the District did not contest several of the *Burton* factors. Accordingly, this point is conceded.

[6] *Sloan v. Friends of the Hunley, Inc.*, 393 S.C. 152, 157, 711 S.E.2d 895, 897 (2011); *Sloan v. S.C. Dep't of Revenue*, 409 S.C. 551, 555, 762 S.E.2d 687, 689 (2014).

making it impossible for the reviewing court to grant effectual relief." *Sloan v. Greenville Cty.*, 380 S.C. 528, 535, 670 S.E.2d 663, 667 (Ct. App. 2009). Voluntarily dismissed claims, on the other hand, are as if they had never been filed. *McKinney v. CSX Transp., Inc.*, 298 S.C 47, 50, 378 S.E.2d 69, 71 (Ct. App. 1989). While both types of claims remain unadjudicated, there is a significant difference between the two, especially in the FOIA context, since a FOIA suit can become moot and still result in attorney's fees being awarded to the FOIA plaintiff. *See Sloan*, 409 S.C. at 555, 762 S.E.2d at 689. This would not be the case had a suit never been filed.

If, as Garris contends, that the District provided some or all of the documents she FOIA'd only after the litigation had commenced, she should have sought a declaratory judgment as Sloan did against the Department of Revenue. *Sloan*, 409 S.C. at 554, 762 S.E.2d at 688. Instead, Garris agreed to dismiss her claims, such that, legally, they were akin to having never been filed. In dismissing the claims, Garris indicated that those claims (other than the workshop audio claim) were no longer at issue and therefore, not the proper subject for testimony, further adjudication, or consideration in the attorney's fee decision. However, the lower court's decision on attorney's fees holds the District accountable as if it had been found liable for all twelve (12) of Garris's alleged FOIA violations in the Initial Complaint. This is not a just result and constitutes an error of law.

2. Even if it was not legal error for the lower court to consider claims Respondent voluntarily dismissed, the lower court abused its discretion in basing its decision on factual conclusions that are not supported by evidence and for which there are not specific findings.

The lower court based its decision to award Garris the entire amount of attorney's fees requested on the same non-specific, generalizations reflected in the Respondent's Brief. The only conclusion that can be drawn from the lower court's decisions is that it believed that *all* of the FOIA'd records referenced in Garris's Initial Complaint were unlawfully withheld and provided

for the first time after litigation commenced. For example, the lower court's April 6, 2020 Order, granting attorney's fees stated: "[Garris] first filed suit in December 2017, asserting 12 violations of the FOIA. Prior to trial, but not before [Garris] sought counsel and incurred costs, [the District] produced *the documents* [Garris] had been seeking." (R. p. 9) (emphasis added).[7] The only inference that can be drawn from the lower court's order is that it believed the District produced *all* of the records Garris had FOIA'd *because of* the litigation. This inference surfaces later in the lower court's decision rejecting the District's suggestion that the attorney fee award should be reduced to reflect only Garris's success on the issues that Garris took to trial. The lower court stated that the District's proposed calculation did not "take[] into account [Garris's] status as the prevailing party concerning the documents [the District] turned over prior to trial." (R. p. 15). Here again, the lower court's order can only be read as concluding, without the benefit of crucial factual development, that the District turned over all of the records Garris FOIA'd after and because Garris filed a lawsuit.

That the lower court drew the wrong conclusion is further evident in the following statement from its decision denying the District's motion to reconsider:

> Though Defendants now argue that they substantially complied with all FOIA requests prior to trial, and only turned over one responsive document [the workshop audio] during the pendency of the trial. However, that was not reflected in the trial evidence. In fact, Plaintiff Garris testified she did not receive the last of the requested documents until June 2019, approximately 18 months after this action was filed.

(R. p. 2). It is technically true that the workshop audio, which was turned over in June 2019, was the last of the items from Garris's FOIA requests that she received. However, this does not mean,

[7] When Garris sought counsel and incurred costs is not relevant; what is relevant for the prevailing party inquiry pursuant to the *Sloan* cases is whether the District produced documents only as a result of or in response to the lawsuit.

as the lower court wrongly inferred, that the District produced the rest of the documents referenced in COA 4, 6, 9, 10 and 11 after litigation had commenced. The testimony established only that Garris received the workshop audio in June 2019, but that the District sent out a tranche of documents on December 6, 2017, the day the lawsuit was filed, but before the lawsuit was served. The lower court clearly drew inferences from this testimony that are not supported in the record and ruled based on those erroneous inferences. In doing so, the lower court abused its discretion.

3. The lower court abused its discretion in ignoring the "beneficial results obtained" factor from the *Burton* analyses.

The District does not dispute that Garris is a partial prevailing party by virtue of the fact that she prevailed on one (1) of the five (5) open meeting claims she took to trial. The District also does not dispute that, pursuant to the *Sloan* cases, Garris is a partial prevailing party by virtue of the fact that the District provided the February workshop audio for the first time after litigation had commenced. But that is the extent of Garris's prevailing party status. Her record of success is one-for-five if considering only the open meeting claims that she took to trial. Even if this court finds it was proper for the lower court to base its attorney's fee award on records request claims that were dismissed and remain contested, the record below only supports that Garris was two-for-eleven. At most, Garris proved 20% of her case, yet she was awarded 100% of her attorney's fees. This is not reasonable or just. *See Prevatte v. Asbury Arms*, 302 S.C. 413, 417, 396 S.E.2d 642, 644 (Ct. App. 1990) (holding that for a partially prevailing party, "the factor of beneficial results accomplished will weigh in favor of reducing the fee, since the time and labor devoted to the issues [s]he lost should not, in equity, be charged against the opposing party who prevailed on those issues").

Garris asserts there is no error because the FOIA statute gives the lower court discretion to award a partially prevailing party "reasonable attorney's fees or an appropriate portion of those attorney's fees." S.C. Code Ann. § 30-4-100(B). Garris focuses on the word "or" to assert that the lower court had total discretion to award *all* the fees requested *or* only some partial amount. The word "or" is not the correct focal point; nor does the statute require that the court award *all* fees or just some partial amount. Instead, the statute requires that the fee award be *reasonable*. The word "reasonable" is the correct focal point, and the District's argument is that the fee award here was not reasonable.

Courts routinely rely upon the six factors laid out in *Burton v. York Cty. Sheriff's Dep't*, 358 S.C. 339, 358, 594 S.E.2d 888, 898 (Ct. App. 2004) to determine whether an attorney's fee award is reasonable. Garris objects to the District's assertion that the lower court ignored the "beneficial results obtained" factor. While it is true that the lower court discussed this factor, its finding that the results obtained were "minimal" and that "this factor cuts against [Garris's] request for fees and costs" is irreconcilable with its decision to award the full amount of fees. The District does not argue that the FOIA requires mechanistic, exact proportionality between success on the merits of the claim and the fee awarded in all cases. However, the lower court's ultimate decision in determining the reasonableness of the fee cannot be so divorced from its finding on the individual factors as to make the analysis perfunctory. This constitutes a failure to exercise discretion. *See 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."). The result is the same as if the court had ignored this factor entirely, which our Supreme Court has ruled an abuse of discretion. *Horton*, 423 S.C. at 331, 815 S.E.2d at 445.

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.

Respectfully submitted,

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CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that the *Final Reply Brief of Appellant*, Lexington County School District One complies with Rule 211(b), SCACR.

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