THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

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

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Appellate Case No. 2020-000770

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Jada Garris .....Respondent,

v.

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

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# FINAL BRIEF OF RESPONDENT

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**I. Did the trial court abuse its discretion in awarding Respondent her attorney's fees and costs?**

## STATEMENT OF THE CASE

This is an appeal from an order directing the Appellant, Lexington School District One (hereinafter "the District"), to pay the Respondent (hereinafter "Garris")'s attorneys' fees and costs following a trial in which Garris prevailed as to some, but not all, of the violations of the South Carolina Freedom of Information Act, S.C. Code Ann. § 30-4-10, *et seq.* (hereinafter "FOIA"), she maintained the District committed. (R. pp. 6-17; pp. 27-35.) The District does not appeal the underlying order that determined Garris prevailed in part on her case. (R. pp. 27-35.)

Garris sued the District, alleging that the District committed several FOIA violations, both as to open records matters and as to open meetings violations. (R. pp. 36-58.) Garris styled each alleged violation as a separate cause of action. (R. pp. 36-58.)

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' original complaint. (R. pp. 203-15; pp. 354-55.) Respondent dismissed the causes of action relating to the documents she sought and amended her complaint to seek only relief related to FOIA open meeting violations. (R. pp. 203-15; pp. 354-55; pp. 84-99.)

The case was tried before the Honorable William McKinnon. (R. pp. 281-551.) After the trial, the judge issued an order finding the District's actions at one of the subject meetings violated FOIA. (R. pp. 27-35.) The order found in the District's favor on the other alleged FOIA violations and provided the "parties shall file motions for attorneys' fees as appropriate." (R. pp. 27-35.)

Garris moved for attorneys' fees and costs. (R. pp. 118-49.) Garris provided affidavits of her counsel with her motion and, at a hearing set for the motion for

attorneys' fees (as well as on the parties' motions to reconsider various aspects of the order containing the court's trial decision), provided itemized time sheets. (R. pp. 122-26; pp. 132-35; pp. 222-32; p. 597 ln. 16 through p. 598 ln. 8.) Garris's counsel and the District's counsel pointed out that the District's lawyers had not had time to review the time sheets, and the trial judge accordingly set a follow-up hearing to give the District's attorneys time to review the records. (R. p. 597 ln. 24 through p. 600 ln. 9; p. 604 ln. 14; p. 606 ln. 20 through p. 609 ln. 23.) The trial judge invited the parties to submit any additional matter they wanted him to consider before the follow-up hearing, and Garris provided an additional affidavit of one of her counsel and affidavits of two unrelated attorneys attesting to the reasonableness of the fees incurred. (R. pp. 9-17; p. 239; pp. 222-32; p. 609 ln. 22-23.) Because of concerns about the unfolding COVID-19 pandemic, the parties and the court agreed to cancel that follow-up hearing and that the motion would be decided on the existing record and the parties' written submissions. (R. pp. 614-24.)

The trial judge issued an order granting Garris' motion for attorneys' fees and costs. (R. pp. 9-17.) The court awarded Garris all the attorneys' fees and costs she incurred in the case, "$48,995.80 ($47,427.54 in attorney's fees and $1,568.26 in costs)." (R. p. 16.) That order did not set a deadline for the District to provide the awarded funds to Garris. (R. pp. 9-17.)

Garris made a motion for the trial court to order a deadline for payment. (R. pp. 264-66.) The District made a motion to alter or amend the order granting attorneys' fees and costs. (R. pp. 267-77.) The trial judge issued a Form 4 order setting a deadline for the District to pay the awarded fees and costs. (R. pp. 6-8.) The order provided "[t]he award of attorney's fees and costs addressed in the Court's prior order shall be paid electronically within twenty (20) days of the date of this Order." (R. p. 6.) Two

weeks later, the judge issued an order denying the District's motion to alter or amend, which also extended the payment deadline to "within fourteen (14) days of this order." (R. p. 4.) This appeal followed, and the District has not provided the awarded funds to Garris.

## STANDARD OF REVIEW

The decision to award or deny attorneys' fees under FOIA will not be disturbed on appeal absent an abuse of discretion. Horton v. Jasper Cnty. Sch. Dist., 423 S.C. 325, 331, 815 S.E.2d 442, 444 (2018). "'[T]he 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 Kiriakides v. Sch. Dist. of Greenville Cty., 382 S.C. 8, 20, 675 S.E.2d 439, 445 (2009); Layman v. State, 376 S.C. 434, 444, 658 S.E.2d 320, 325 (2008)); see Sloan v. Friends of The Hunley Inc., 393 S.C. 152, 156, 711 S.E.2d 895, 897 (2011). "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." In re: Care and Treatment of Miller, 393 S.C. 248, 256, 713 S.E.2d 253, 257 (2011). "When a trial court's decision is made on a sound evidentiary basis and is adequately explained with specific findings — as the law requires — [the appellate court] defer[s] to the trial court's discretion." Horton, 423 S.C. at 331.

## ARGUMENT

### I. The trial judge did not abuse his discretion.

The District complains that Judge McKinnon did something he was authorized by law to do. As he wrote in his order denying the District's motion to alter or amend, "S.C. Code Ann. § 30-4-100 explicitly permits full attorney's fees to be awarded to a party who prevails only in part." (R. p. 4.) The statute sets this out quite plainly:

> 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.

S.C. Code Ann. § 30-4-100(B) (emphasis added).

That word "or" means what it says. Id. "When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning." Sloan v. Hardee, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007). When a court interprets a statute, "[w]ords must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." Id. at 499. "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. If a statute's language is plain, unambiguous, and conveys a clear meaning[,] the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Wigfall v. Tideland Utilities, Inc., 354 S.C. 100, 580 S.E.2d 100, 105 (2003) (internal citation and quotation marks omitted).

The controlling statute in this appeal does not, as the District argues, limit an attorney's fee award to a FOIA plaintiff who prevails in part to one "in reasonable proportion to the prevailing party's degree of success." (Initial Brief of Appellant p. 10.) The statute's plain language, rather, vests a trial court with discretion to award the FOIA plaintiff prevailing in part her reasonable attorneys' fees, in whole or in part, or not. S.C. Code Ann. § 30-4-100(B). Judge McKinnon's decision was within the parameters set by the statute. Id.

To do what the law expressly allows is not an abuse of discretion. Miller, 393 S.C. at 256. The District may not like that the trial judge awarded Garris all the

attorneys' fees she incurred in this case, but his decision was neither "controlled by an error of law" nor "based on unsupported factual conclusions." Id.

The District contends that the trial "court ignored its own conclusion – that Garris' suit was nearly fruitless" in its argument about the six attorneys' fee reasonableness factors. (Initial Brief of Appellant p. 11.) It is not so. The trial judge made a thorough and balanced analysis of these six factors – so balanced, in fact, that he found that the beneficial results factor "cuts against [Garris'] request for fees and costs." (R. pp. 9-17.)

The decision on the amount of attorneys' fees to award was within the discretion of the trial judge. E.g., Horton, 423 S.C. at 331. "There are six factors courts should consider in exercising that discretion: (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 Dept, 358 S.C. 339, 358, 594 S.E.2d 888, 898 (Ct. App. 2004) (citing Jackson v. Speed, 326 S.C. 289, 486 S.E.2d 750 (1997)). The six reasonableness factors are *factors*, not elements. E.g., Baron Data Systems, Inc. v. Loter, 297 S.C. 382, 383, 377 S.E.2d 296 (1989). They are not a checklist; rather, they are to be weighed and assessed, which is exactly what the trial court did here. Id. The trial judge did not ignore the "beneficial results obtained" factor. (R. pp. 9-17.) As his order explains, he evaluated it along with the other factors. (R. pp. 9-17); see Horton, 423 S.C. at 331. As the trial court observed, "[t]hough [the District] prevails on the last factor, the factors in Burton and Speed must be considered as a whole; no one factor is outcome determinative." (R. p. 15); see Horton, 423 S.C. at 330; Jackson, 326 S.C. at 289; Burton, 358 S.C. at 358. In contending that the trial judge "completely ignore[d] the 'beneficial results obtained'" factor (Initial Brief of

Appellant p. 12), the District makes a straw man argument, arguing against something that is not what the trial court did. See State v. Smith, 298 P.3d 1138 (Kan. App. 2013) ("straw man argument is where the arguer wishes to respond to an argument of his or her choosing and not one that is actually presented").

The trial judge did not ignore this factor; he just did not agree with the District's interpretation of how he ought to evaluate it in the context of all the factors taken together:

> Defendant argues that Plaintiff's degree of success in the main action was minimal, in their opinion, and as such so the award of attorney's cost and fees should be reduced. Though Defendant is correct that Plaintiff only prevailed on one allegation of a violation of FOIA, the degree of a party's success must be measured as a whole. Here, even after being forced to turn over documents during the pendency of this litigation, the Defendant never conceded that they violated FOIA, forcing the Plaintiff to proceed to trial. Plaintiff then successfully proved at trial that Defendant violated FOIA. Reading *Burton* in the way argued by Defendant would mean the only way a prevailing party would receive the full amount of reasonable fees expended would be to prevail on every cause of action. This is not the law.

(R. p. 3.) The trial judge was right: this is not the law. See S.C. Code Ann. § 30-4-100(B). The factors are to be considered as a whole, with no one factor being outcome-determinative. See Horton, 423 S.C. at 330; Jackson, 326 S.C. at 289; Burton, 358 S.C. at 358.

The District's argument that the trial judge "erroneously awarded fees related to attorney time spent on alleged "'records requests' violations" fails for at least two reasons: 1) existing FOIA precedent establishes that a FOIA plaintiff whose claim is mooted because she receives previously refused documents during suit is a prevailing party as to the documents received and, 2) since Garris prevailed in part under an

unappealed decision of the trial court, the two issue rule would bar the District from success on this argument regardless of its merits.

The District argues that, in making his attorneys' fees decision, Judge McKinnon should not have considered Garris' dismissed allegations of the District's failure to produce unexempt public records in response to her requests. (Initial Brief of Appellant p. 12.) This argument fails in light of precedent authored by our Supreme Court. When a public body only produces requested records after suit is brought under FOIA, that moots the cause of action seeking production of those documents; however, the plaintiff who sought the requested information is still the prevailing party. Sloan v. S.C. Dept. of Revenue, 409 S.C. 551, 762 S.E.2d 687, 689 (2014); Sloan v. Friends of the Hunley, Inc., 393 S.C. 152, 711 S.E.2d at 897-98.

Garris gave uncontroverted testimony that the District provided her documents she sought in this suit only after it was filed: "Q. 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? A. June of 2019." (R. p. 354 ln. 24 through p. 355 ln. 5.)

Garris must also note some details to counter the District's potentially misleading characterization in this regard. One of the FOIA violations subject of Garris' original complaint stemmed from the District's determination that the "audio from [a] February 11, 2017 Board Workshop" was not a public record[1] as defined by S.C. Code Ann § 30-4-20(c) and its refusal to provide this document to Garris. (R. p.

[1] "Public record" includes all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body. S.C. Code Ann § 30-4-20(c).

41.) Another was the District's refusal to provide other documents, grounded in the District's determination that "all information contained in a binder that was in the possession of each school board member . . . during the April 25, 2017 board meeting" was "not subject to disclosure as explained in Section 30-4-70[2] of the South Carolina FOIA." (R. p. 45.) As the District notes in its initial brief, it did provide the workshop audio recording and a statement that it no longer had the requested binders or the documents within them. In exchange for the recording and that statement, Garris amended her complaint to proceed only with her claims regarding whether the District's conduct concerning school board meetings violated FOIA. (R. pp. 84-99.) Garris obtained the audio recording she sought, and the other written request claims were dismissed because the truth was finally learned[3]: those responsive records did not exist.[4] It would have been impossible for her to prevail on a claim seeking the District's production of documents it no longer had.

Garris dismissed the part of her complaint relating to the audio recording because it became moot when she received the file in 2019 from the District.

> A moot case exists where a judgment rendered by the court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the reviewing court. If there is no actual controversy, this Court will not decide moot or academic questions.

Sloan v. Friends of the Hunley, Inc., 369 S.C. 20, 25-26, 630 S.E.2d 474, 477 (2006).

[2] This section of FOIA is titled "Meetings which may be closed; procedure; circumvention of chapter; disruption of meeting; executive sessions of General Assembly." See S.C. Code Ann. § 30-4-70. A review of the substance of this section shows it concerns only when and how a public body may enter executive session. It does not concern, in any way, exemption claims or otherwise how to deal with a lawful request for information.

[3] A review of the original complaint reveals that with all these records request violations, Appellant never indicated at the time of the 2017 requests on their written determination that there were no records responsive to the requests. (R. pp. 36-58.) Essentially, it was not until two years later, and about four months before trial, that the District supplied a statement that it could not provide what it did not have.

[4] Garris will likely never know whether some or all of these records existed at the time of her request.

The documents sought by Garris had been produced to her by the District to the extent it was possible for the District to do so; thus, had she not dismissed the parts of her complaint that sought them, the trial court would have done so, as those issues were moot. Id. Unlike what the District argues, the Sloan cases at issue (Sloan v. Dept. of Revenue, 409 S.C. 551, 762 S.E.2d 687, and Sloan v. Friends of the Hunley, 393 S.C. 152, 711 S.E.2d 895), do not rest their holdings about prevailing party determination on the public body's concession to the correctness of the FOIA plaintiff's position. The rationale, rather, is twofold. First, the Sloan rule prevents a public body from avoiding the consequences of its previous failure to provide requested documents by turning them over only after litigation has commenced. "When a public body frustrates a citizen's FOIA request to the extent that the citizen must seek relief in the courts and incur litigation costs, the public body should not be able to preclude prevailing party status to the citizen by producing the documents after litigation is filed." Sloan v. Friends of The Hunley, 711 S.E.2d at 898. Second, having received the previously withheld documents after bringing suit to get them, the FOIA plaintiff is, for all practical purposes, the victor in the case, despite it having become moot. The point is not whether the defendant acknowledged that the plaintiff is right; rather, it is that the plaintiff got what she wanted. Id. at 897-98.

It is so here. Whether Garris dismissed this part of the suit on her own or the trial court did so later, the outcome of dismissal on that part of Garris' case was a foregone conclusion, because it was moot. Garris, though, achieved her objective with regard to that part of her suit, bringing it within the scope of the Sloan rule on attorneys' fees. Sloan v. Dept. of Revenue, 409 S.C. 551, 762 S.E.2d at 689; Sloan v. Friends of the Hunley, 393 S.C. 152, 711 S.E.2d at 897-98.

The District is not correct about its Sloan rule argument, but, even if it were, the two-issue rule would prevent it from being entitled to reversal. "Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case." Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010). Even if Garris were not a prevailing party on the documents issue, she would still be a prevailing party on the ground on which the trial court found for her. (R. pp. 18-35.) She, for this independent reason, is a party who prevailed in part under FOIA. S.C. Code Ann. § 30-4-100(B). The District did not appeal the order under which the trial judge found for Garris in part on the merits of the case. (R. pp. 18-35.) The law of the case is that Garris prevailed in part. That Garris prevailed in part gave the trial judge discretion to award her all, part, or none of her attorneys' fees. S.C. Code Ann. § 30-4-100(B). The trial judge, exercising that discretion, chose to award all of Garris' attorneys' fees.

The trial judge did so with good reason. He found that "awarding some fraction of the attorney's fees would greatly reduce the incentive for filing FOIA claims." (R. p. 3.) His ruling supports the principles and purposes of FOIA. Embodied in FOIA "is the principle of an open, transparent system of government, vital to maintaining an informed electorate and preventing the secret exercise of power with its potential corruption." Disaboto v. S.C. Assn. of Sch. Administrators, 404 S.C. 433, 439, 746 S.E.2d 329, 332 (2013). The provisions of FOIA "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. FOIA is to be liberally construed to carry out the purpose mandated by the legislature. Horton v. Marion Cnty. Hosp.

Dist., 354 S.C. 274, 281, 580 S.E.2d 163, 166 (Ct. App. 2003). FOIA exists to make government information accessible to the public at a minimum of cost, expense, and delay. S.C. Code Ann. § 30-4-15. The award of Garris' full attorneys' fees and costs in this case serves as a significant reminder to the District of its obligations to the public under FOIA.

The District's brief treats this appeal as though the standard of review were *de novo*. It is not. While another judge may have decided Garris' motion for attorneys' fees differently, that does not make the ruling of the trial judge an abuse of discretion. The "trial court's decision is made on a sound evidentiary basis and is adequately explained with specific findings[.]" Horton, 423 S.C. at 331. It is neither "controlled by an error of law" nor "based on unsupported factual conclusions." Miller, 393 S.C. at 256. The District has not shown what it must for this court to reverse.

## CONCLUSION

There is no abuse of discretion here. The trial court's decision was "made on a sound evidentiary basis" and was "adequately explained with specific findings[.]" Horton, 423 S.C. at 331. This court should affirm.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

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I certify that the foregoing final brief of Respondent in this appeal complies with the requirements of Rule 211(b), SCACR.

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PROOF OF SERVICE

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I certify that I have served Respondent's final brief and certificate of counsel in this case on by providing a copy of it by email to opposing counsel at the email addresses shown below and on the date shown below:

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