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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
DeAndrea Gist Benjamin, Circuit Court Judge

Appellate Case No. 2020-001135
Case No. 2015-CP-40-1805

Wendy Brawley,..... Respondent-Appellant,

v.

Richland County, South Carolina ..... Appellant-Respondent.

INITIAL REPLY BRIEF OF APPELLANT-RESPONDENT RICHLAND COUNTY

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I. The trial court erred in its award of declaratory relief to Wendy Brawley finding that Richland County committed a FOIA violation.

The irony of the Respondent's Brief filed by the Respondent-Appellant Wendy Brawley is extraordinary. She uses such terms as "obfuscations" and "twisted maze of logic" to describe position she does not like, when in reality it is Brawley who dodges addressing head on (or in some cases entirely) the issues raised by the Appellant-Respondent Richland County in its appeal. She has essentially cherry-picked what issues she wants to address and remarkably even addresses issues that were not even raised by the County on appeal.

This practice of "obfuscation" is quite evident in Brawley's discussion of the merits of her Freedom of Information Act (FOIA) claim. A prime example is Brawley's response to the threshold issue which asks whether the FOIA request was reasonably described such that the responding public body could understand what was requested. The County contends that the trial court was required to assess the reasonable meaning and scope of the FOIA request seeking "a copy of the application and supporting documentation Richland County submitted to the USDA Rural Development for grant and loan funding for the Lower Richland Sewer Project." (R. ___). The trial court failed to engage in such analysis and made no findings of fact or conclusions of law in that regard. On this point,

Brawley has not directed this Court to any findings or conclusions by the trial court.

The reality is that the trial court ignored this issue in her initial order on the merits (the Order filed February 13, 2020), but the court did briefly touch on the issue in the subsequent order ruling on the Rule 52(b) motion. In that Order filed July 16, 2020, the trial court shifted the burden to the County by ruling as follows: "No question concerning vagueness was made, nor did the Defendant file a request to the circuit court seeking relief from an overly broad request. Rather, the Defendant responded to the request with 6 pages of responsive information." (Order II, p. 4). The trial court ruled that the County had erred in not utilizing the process created by S.C. Code Ann. § 30-4-110(A), which provided the County a mechanism to "file a request for hearing with the circuit court to seek relief from unduly burdensome, overly broad, vague, repetitive, or otherwise improper requests." S.C. Code Ann. § 30-4-110(A). The *obvious* problem with the trial court's analysis is that S.C. Code Ann. § 30-4-110(A) did not exist in 2014; the statute was new to FOIA and was not enacted until 2017. *See*, 2017 Act No. 67. Thus, it is a clear error of law to hold the County to a process that had not been legislatively adopted in 2014, in order to justify the trial court's continued refusal to decide the threshold issue – one that is supported by numerous federal FOIA cases and by common sense. Remarkably, but not surprisingly, Brawley avoided

this entire issue. S.C. Code Ann. § 30-4-110(A) is not cited in her brief. She made no attempt to support or justify the clear legal error committed by the trial court. She did not concede the error was made and try to insist it was harmless (which it is not); Brawley just ignored it.

The issue is not harmless. It goes to heart of this FOIA case -- a requisite determination as to how an objectively reasonable person attempting to respond to the FOIA request would construe the meaning of "supporting documentation." As the County has explained, the use of the term "supporting documentation" is unclear and is subject to varying interpretations. Without any temporal reference, an objectively reasonable person could construe that as a request seeking the Application for Federal Assistance as submitted to the USDA and the documents that accompanied that submission. That is how the County construed it. (Tr. 256). However, as Brawley construes it, the request was for *all documentation* that was ultimately submitted to the USDA over time, regardless of whether the materials accompanied the application or were submitted at different times, separate and apart from the application itself. Those interpretations are vastly different and impact the types and quantity of documents being requested. Of course, if Brawley wanted "all documentation submitted to the USDA," there is no reason she could not or did not phrase it that way. But she did not. Without the benefit of the new procedure created in 2017 by the enactment of S.C. Code Ann. § 30-4-110(A), the

County was left to reasonably construe the scope of the request. The County provided the supporting documents submitted with the USDA application. There is no evidence that Brawley, after receiving the response, attempted to clarify her request to the County by stating that she wanted "all documentation" ever submitted to the USDA. (Tr. 280). Instead, she filed suit. The reason for that is obvious from the Complaint and Judge Newman's unappealed orders – Brawley was trying to improperly use FOIA as a means to impede or at least delay the Lower Richland Sewer Project to which she was opposed. *See*, Order filed October 4, 2016 ("The Plaintiffs are not permitted by law, however, to use FOIA as a mechanism to block or delay by judicial action the exercise of legislative and executive powers that are legal, lawful and constitutional"). Brawley's silence on this issue is quite telling. The issue merits a reversal.

In addition, Brawley never addresses nor attempts to support the trial court's ruling that the FOIA request actually required the production of the following exhibits placed into evidence by Brawley from her February 2016 review of the project file:

* A timeline that Andy Metts did not prepare and was never submitted to the USDA
(Pl. Ex. 6) (Tr. 237-238).

* Unsigned, incomplete and draft copies of applications that were never submitted to the USDA
(Pl. Ex. 7-9) (Tr. 242-245).

* Letter of Transmittal not directed or sent to the USDA
(Pl. Ex. 11) (Tr. 245)

* Emails from USDA personnel and between USDA personnel which were not submitted by the County to the USDA
(Pl. Ex. 12-15, 19-20) (Tr. 245-248).

* USDA internal checklist
(Pl. Ex. 18) (Tr. 124-127).

* Letter of Conditions dated January 30, 2013 from USDA to Richland County
(Pl. Ex. 21). (Tr. 249).

* Loan Resolution
(Pl. Ex. 22) (Tr. 249).

* February 4, 2014 letter
(Pl. Ex. 23). (Tr. 249-250).[1]

As the County argued in the trial court and in its opening brief, an objectively reasonable person attempting to respond to Brawley's FOIA request, as it was articulated, would not conclude that the foregoing documents were responsive to the request for "supporting documentation." Yet, the trial court inexplicably ruled that the County failed to provide these documents in response to the FOIA request.

[1] It bears repeating here that there are inconsistencies in the trial court's findings which the court refused to correct in response to the County's Rule 52(b) motion. The "February 2016 Located Documents" are identified in the "Findings of Fact" as Plaintiff's Exhibits 7, 8, 9, 10, 11, 13, 17, 18, 19, 21, and 23. (Order I., p. 5). Creating confusion which the trial court refused to correct, in the "Legal Analysis" section, the court refers to "Exhibits 5-15, 17, and 19-23" as "all responsive FOIA documents which were not provided to Ms. Brawley in the Original Response Documents." (Order I, p. 9). On reconsideration, the trial court refused to address its own inconsistency and the resulting confusion, and in doing so, the court failed to recognize that these inconsistencies in her findings are material to her rulings on the remaining declaratory judgment claim. (Order II, p. 5). Once again, Brawley makes no attempt to explain or justify this error. She just ignores it.

Not surprisingly, Brawley is silent on this issue as well. She makes no attempt to justify that ruling. Even under the most lenient standard of review, the trial court's ruling cannot be supported, and Brawley could not support it – so she did even try to do so. She ignored it like other issues she could not figure out a way to address.

The County further contends that the trial court erred in adjudicating a "failure to conduct a reasonable investigation" claim that was never pled. This theory of liability is not in Brawley's Complaint, and at no time after discovery was completed did Brawley move to amend to bring such claim. Her excuse is unavailing. She insists that a plaintiff is not "require[ed] … to know the reason an agency failed and/or refused to provide FOIA responses *prior* to filing her lawsuit," and she calls such a requirement "an absurdity." *See*, Brawley's Respondent's Brief, p. 19. (Emphasis in original). The Rules of Civil Procedure do not support her position. South Carolina follows principles of "notice pleading." It is one of the cores of due process and fundamental fairness in the litigation process. It allows the parties to have fair notice – before going to trial – what the claims or defenses are. As this Court has held, "[t]he purpose of a pleading is fair notice to the opponent and the court." *Watts v. Metro Security Agency*, 346 S.C. 235, 550 S.E.2d 869, 871 (Ct. App. 2001). Obviously, that is to avoid trial by ambush. Nonetheless, at any level, Brawley's excuse is a poor one. Rule 15, SCRCP, allows a party to amend its pleadings to allege new claims or to

provide additional grounds to existing claims based on what is learned through discovery. As the record shows, the Complaint was filed on March 27, 2015, and case was not tried until September 5, 2019. (R. ___). Thus, Brawley had almost four and one-half years to amend her Complaint if she intended to prosecute a "failure to conduct a reasonable investigation" claim, but she did not do so.

This is even more egregious because it was the trial court who initially raised a "failure to conduct a reasonable investigation" claim in her initial order. In that order, the trial court determined that the County failed "to conduct a reasonable investigation to obtain and/or locate all relevant documents." (Order I, p. 12). Yet, when the County pointed out in its Rule 52(b) motion that such a claim was never pled and should not have been considered, the trial court just referred back to its initial order that did not address whether the claim was properly raised and before the court for trial. (Order II, p. 6). Then, to add the proverbial "insult to injury," the trial court criticized the County for not defending the unpled claim by failing to call a witness from the Ombudsman's Office or others that were involved in the search of responsive records to the FOIA request. (Order II, p. 7). The trial court, however, never justified adjudicating a claim that was never pled.

In addition to claiming that she could not possibly be expected to plead such a claim (despite this case taking four and one-half years to be tried), Brawley also claims that the trial court followed "the common law surrounding FOIA." *See*,

Brawley's Respondent's Brief, p. 19. There is no such "common law." Finally, Brawley almost seems to suggest that such a claim was properly raised. However, her pre-trial brief makes no mention of it. (R. ___). In fact, the term "reasonable investigation" does not appear in the trial transcript. Instead, the claim first appeared in Brawley's proposed order submitted to the trial court *after the trial*. (Brawley's Proposed Order, p. 11). That is not commensurate with fundamental fairness and due process.

Lastly, in following through on this observation that Brawley did not address the issues that she did not want to or could not support, it should also be noted that she never addresses Issue I.D from the Statement of Issues on Appeal. In her initial remarks, Brawley acknowledges that issue by pointing out that the County argues that the trial court "erred in failing to recognize that Richland County has no duty to retain documents that were not retained, produce documents in its possession, or obtain documents from a third-party source." *See*, Brawley's Respondent's Brief, p. 11. However, Brawley never addresses that issue. That should also be indicative that an error of law was committed.

II. The trial court erred in making an award of attorney's fees and costs to Wendy Brawley due to lack of subject matter jurisdiction. Alternatively, even if Brawley made a timely request and was the prevailing party on one of the four FOIA claims, errors were made in not making greater deductions in the amounts awarded.

A. The trial court erred in finding that it possessed subject matter jurisdiction to consider Wendy Brawley's attorney's fees affidavit filed on July 27, 2020, or to make any award of attorney's fees and costs.

Richland County maintains that the trial court lacked subject matter jurisdiction to make an award of attorney's fees and costs. The County relies on the well-settled principle that "[g]enerally, a trial judge loses jurisdiction over a case when the time to file post-trial motions has elapsed." *Russell v. Wachovia Bank*, N.A., 370 S.C. 5, 633 S.E.2d 722, 730 (2006). The Supreme Court has made it clear that the ten-day deadline for filing post-trial motions is an "absolute deadline" and is not subject to extension by the trial court. *Overland, Inc. v. Nance*, 423 S.C. 253, 815 S.E.2d 431, 433 (2018).

Nonetheless, Wendy Brawley contends that ten-day deadline somehow does not apply to a request for attorney's fees and costs under FOIA. She suggests, without authority, that such a requirement applies only to motions for sanctions under the South Carolina Frivolous Civil Proceedings Sanctions Act.

Brawley's position not only is contrary to well-settled law, as cited above and in the County's opening brief, but it also ignores Rule 54(d), SCRCP, which

compels the same result. A motion for attorney's fees and costs, whether brought in a FOIA claim or any other civil claim, is governed by Rule 54(d), which provides in pertinent part: "A motion for costs, supported by an affidavit that the costs are correct and were necessarily incurred in the action, may be filed by the prevailing party within 10 days of the receipt of the written notice of the entry of final judgment." Rule 54(d), SCRCP. Rule 54 includes within the scope of "taxable costs" a claim for attorney's fees "in favor of the prevailing party *under any statute* or Rule of Civil Procedure." Rule 54(e)(1), SCRCP. (Emphasis added). The "under any statute" language certainly is inclusive of FOIA. In sum, attorney's fees and litigation costs as awarded in this case are "taxable costs" under Rule 54(e), and as a result, must be sought within the ten-day time limit set by Rule 54(d), SCRCP. The reason for that is the well-settled rule that a trial court loses subject matter jurisdiction after the expiration of ten days from final judgment. Notably, Brawley makes no mention in her brief of Rule 54(d) and its impact on the jurisdictional issue.

Brawley not only scoffs at the ten-day jurisdictional limit, but she also contends that no motion is required to make a proper claim for attorney's fees. That ignores once again the clear instructions of Rule 54(d), which directs that a prevailing party may claim costs – which by the definition in Rule 54(e) includes attorney's fees awarded by statute – by filing a motion "supported by an affidavit."

Rule 54(d), SCRCP. It states nothing about filing an affidavit alone, that is, without a motion. Moreover, the requirement of a motion was made not just by Rule 54(d), but also by the trial court which directed Brawley "to submit a schedule of fees ***and a motion*** to support the amount of the fees and costs incurred herein." *See*, Order filed February 13, 2020, p. 12. (Emphasis added).

Further, Brawley is incorrect in her assertion that a Rule 59(e) motion "stays" a case. *See*, Brawley's Respondent's Brief, p. 20. Not surprisingly, no authority was cited for that. A timely filed Rule 59(e) motion will stay the time to file an appeal, but it does not stay the actual case such that Brawley is excused from filing her motion for attorney's fees and costs within ten days of the issuance of the Final Order on the Merits filed February 13, 2020. *See, Elam v. South Carolina Department of Transportation*, 361 S.C. 9, 602 S.E.2d 772, 775 (2004) ("[a] timely post-trial motion, including a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCP, stays the time for an appeal for all parties until receipt of written notice of entry of the order granting or denying such motion").

In addition, Brawley's suggestion that the Final Order on the Merits filed February 13, 2020, was an "interlocutory order" lacks merit. As the caption states, the trial court intended that order to be a final order on the merits – that is not an interlocutory order by definition. That was a final judgment on which an immediate appeal could have been filed, except that the County chose to file a timely Rule 52(b)

motion. That Rule 52(b) motion did not transform a final order into an interlocutory order.

Thus, the time for filing an appeal was stayed in this case until such time as the trial court ruled on the County's Rule 52(b) motion. That ruling occurred on July 16, 2020. The parties acted accordingly – both filed their notices of appeal by Monday, August 17, 2020, which was the final day to appeal. In short, July 16, 2020 is the date that the trial court lost its jurisdiction. The Plaintiff's filing of its affidavit for attorney's fees and costs on July 27, 2020, was beyond the deadline and after the trial court had been divested of jurisdiction. Hence, the award of attorney's fees and costs should be reversed and vacated due to the absence of subject matter jurisdiction.

B. Even if the trial court had jurisdiction to award attorney's fees and costs, Wendy Brawley prevailed, at most, on only a fraction of the claims pled in her Complaint and received none of the relief that she actually sought in her Complaint.

As the record clearly reflects, Wendy Brawley was not the prevailing party on the *entirety of her injunctive relief claim* and on 75% of her declaratory judgment claim, and she received none of the relief that was actually sought in her Complaint. Brawley lost at summary judgment on three out of four of her FOIA requests that were litigated together in this lawsuit. (SJ Order).

In its opening brief, the County fully acknowledged that the trial court, in adjudicating the Rule 52(b) motion, did make some downward adjustments to the award of attorney's fees and costs. However, the trial court's lack of specific findings fails to demonstrate whether the court properly exercised its discretion or exercised discretion at all with respect to the three FOIA requests on which Brawley clearly lost and was not a "prevailing party." As indicated, without providing specific findings, the trial court states that "after careful review, the Court has deducted attorney's fees and expenses relating to Plaintiff's injunctive relief claim, Defendant's Motion to Dismiss, and appellate matters." (Order II, p. 6).[2] Additionally, without specifying the amount, the trial court also applied "a fifty-percent (50%) reduction in attorney's fees and costs incurred prior to August 10, 2015 to be fair and reasonable to account for time allocated to the representation of dismissed co-Plaintiff HLRCU." (Order II, p. 6). However, as the County points out, there is no indication that the trial court even considered the fact that the County prevailed on three out of four of the FOIA requests at issue and Brawley received none of the relief actually sought in her Complaint. In her response brief, Brawley does not refute this argument and instead simply argues that "nothing could be further from the truth" than the County's position. *See*,

[2] The trial court's downward adjustment of costs by $301.50 does not include the appellate costs that have been improperly awarded, specifically Brawley's appellate filing fee and the cost of the trial transcript, both of which are recoverable only after prevailing on appeal and are not included in the categories of "taxable costs" under Rule 54(e), SCRCP. Those wrongly awarded costs total $1,069.75, and cannot be accounted for by the downward adjustment of $301.50.

Brawley's Respondent's Brief, p. 31. That is a meaningless argument and should be treated as such – a non-cogent response.

The County's concerns are legitimate, and the record indicates that the trial court did abuse its discretion in not making a downward adjustment for work on the three out of four FOIA requests which she lost at the summary judgment stage. The trial court similarly abused its discretion by failing to recognize the fact that the co-Plaintiff HLRCU was actually dismissed on October 24, 2016; yet, the trial court limited that fifty-percent reduction only to fees incurred through the much earlier date of August 10, 2015.

C. The trial court erred in awarding fees incurred for work performed by paralegals and other support staff.

Finally, as to the issue of paralegal fees, the County relied on this Court's recent decision in *O'Shields v. Columbia Automotive, LLC*, 435 S.C. 319, 867 S.E.2d 446 (Ct. App. 2021). In its opening brief, the County fully acknowledged that the choice of law for that case was supplied by North Carolina law. *See*, Richland County's Opening Brief, p. 33, n. 9 Yet, this Court instructed on remand for "[t]he circuit court [to] eliminate any redundant fees, improper cost, and paralegal fees as it had in the previous award." 867 S.E.2d at 457. This Court did not reference a specific North Carolina case for that proposition, but even so, the

premise that an attorney's fees award should not include paralegal fees unless authorized by statute is a valid premise. It is far from "bordering on the absurd," as Brawley suggests with her usual hyperbole. The Court is once again urged to apply that rule of law to this case even if it is governed by South Carolina law.

CONCLUSION

Based on the foregoing discussion and analysis, the Appellant-Respondent Richland County respectfully renews its request that the Court reverse the Orders issued by Circuit Court Judge DeAndrea Benjamin finding a FOIA violation and awarding declaratory relief to the Respondent-Appellant. Richland County further requests that the Court reverse and set aside the Order issued by Judge Benjamin awarding $80,845.71 in attorney's fees and costs.

Respectfully submitted,

LINDEMANN & DAVIS, P.A.

BY: *s/ Andrew F. Lindemann*

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May 17, 2022

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Wendy Brawley,..... Respondent-Appellant,

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CERTIFICATE OF SERVICE

Pursuant to Section (d)(1) of the Supreme Court's Order RE: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended May 6, 2022), the undersigned employee of Lindemann & Davis, P.A., counsel for the Appellant-Respondent Richland County, does hereby certify that service of the **Initial Reply Brief of Appellant-Respondent Richland County** and **Appellant-Respondent Richland County's Designation of Matter to be Included in the Record on Appeal** was made upon all counsel of record by email only this the 17th day of May 2022:

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May 17, 2022

Via Email Only
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
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RE: Wendy Brawley v. Richland County, South Carolina
Appellate Case Number: 2020-001135
Civil Action Number: 2015-CP-40-1805
Our File Number: 314.9670

Dear Ms. Kitchings:

In accordance with Section (b)(2) of the Supreme Court's Order RE: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amened May 6, 2022), please find enclosed for filing the **Initial Reply Brief of Appellant-Respondent Richland County** and **Appellant-Respondent Richland County's Designation of Matter to be Included in the Record on Appeal** in the above referenced matter. In accordance with Section (d)(1) of this same order, I am hereby serving copies on all counsel of record by email only.

If you have any questions, please advise. Thank you for your assistance.

Sincerely,

LINDEMANN & DAVIS, P.A.

Andrew F. Lindemann

AFL/jmb
Enclosures

cc: Jenkins M. Mann, Esquires *(Via Email Only)*
Shaun C. Blake, Esquires *(Via Email Only)*