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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable Michael G. Nettles, Circuit Court Judge

CASE NO. 20-CP-22-00600
CASE NO. 20-CP-22-00601

Sunset Lodge, LLC, ...Appellant,

v.

Town of Pawleys Island,.....Respondent.

and

Franklin D. Beattie, as trustee of the Franklin D. Beattie Preservation Trust, ...Appellant,

v.

Town of Pawleys Island,.....Respondent.

APPELLANTS' RETURN TO RESPONDENT'S MOTION TO STRIKE ARGUMENTS FROM APPELLANTS' REPLY BRIEF

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ARGUMENT

I. Summary

Respondent Town has moved to strike from Appellants' (the Landowners') Reply Brief, the Landowners' argument that in the Town's Respondent's Brief, the Town has played "hide the ball" and taken factually and legally contradictory positions on the same subject in related litigation pending in this same Court, and that this Court should take judicial notice of these material contradictions.

The main subject of these arguments is contradictory positions taken by the Town on what effect, if any, the remaining possibility of repeated attempts at condemnation should have on the Landowner's right to full recovery of actually incurred attorney's fees, when the Landowner succeeds in permanently quashing -- or forcing the Town to permanently abandon -- a particular condemnation attempt, but does not obtain a permanent injunction against the Town commencing a later condemnation action, thus allowing the Town, at its own risk of being confronted by the same defenses, to make further attempts in successive actions. The additional subject is the complicating and time-consuming effect these and other matters in the duplicated litigation brought by the Town have on the case, and the need to take judicial notice of the other file.

In the instant "Challenge I" case, the Town argues that the Landowner should not fully recover attorney's fees actually incurred because the "result obtained" in the dispositive order did not prevent the Town, in advance, from engaging in multiplicitous litigation. In the other, "Challenge II," case, however, the Town argues that the Landowner should fully recover attorney's fees precisely because that is the balance struck by routinely not preventing the Town

from engaging in multiplicitous litigation.[1] The Town emphasizes its incongruent argument by repetitively asserting that the Landowners "exhaustively pursued" permanent prohibitory relief in the instant "Challenge I" case, whereas the Town persuaded a different circuit judge in the "Challenge II" cases, that the Landowners did not pursue permanent prohibitory relief at all in the instant Challenge I case.

The grounds the Town advances for striking the Landowners' Reply Brief argument regarding the Town taking contradictory positions range from not being raised to the Circuit Court, to not being raised in the Appellants' Brief prior to being raised in the Appellant's Reply Brief,[2] to not being called "judicial estoppel."

The ability of this Court to take judicial notice of the Town's contradictory positions taken in related litigation, however, is not challenged in the motion, nor is the ability of this Court to take judicial notice, as requested by Appellants, of the occurrence of complicating proceedings in related litigation that the Town does not contest, but states it "does not stipulate to."

It is perfectly proper for any reply argument to state in direct response to copious assertions raised in the opposing party's Respondent's Brief, that the assertions are contradicted by the opposing party's own arguments elsewhere. As for judicial estoppel, it is a matter that can be raised sua sponte by the appellate court, and is not dependent upon a party raising it and calling it by name.

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[1] In the Landowners' Appellants' Reply Brief at 13, they thus rightly argue that the Town makes inaccurate and insufficient descriptions of the "nature" of the case and of the effect of winning it, and that "[t]here is not a grain of salt big enough to take with any of the Town's equivocal and constantly shifting, contradictory arguments."

[2] The Appellants' Reply Brief is, naturally, intended as a reply to arguments in Respondent's Brief, which the Appellants of course do not receive until after Appellants file their opening Appellants' Brief.

Nevertheless, the Town's taking positions contrary to positions it has already used to obtain judicial advantage elsewhere has been previously raised and the Town is well aware that the Landowners have noted it and complained of it.

While the remedy sought in the motion is to strike an entire section of the brief (which is cross-referenced in another section), and the grounds for the motion are essentially surprise or lack of ability to respond, the Town not only has previous knowledge of the repeated arguments about its contradictory positions, but essentially uses its motion simply to make a surreply to the Landowners' Reply Brief on the argument in question. This surreply argument actually confirms, rather than refutes, the fact that the Town contradicts its own positions on these material issues, and demonstrates the importance of the arguments in the Appellants' Brief and Appellants' Reply Brief. The Town's motion to strike should therefore be denied.

II. Actual Factual Background

The instant appeal arises from a grossly inadequate award of attorney's fees (less than 14% of hourly fees actually incurred by the winning party, using one lawyer, at a low rate, during a pandemic) following the Landowners defeating, by summary judgment, the Town's first condemnation attempt. Among other things, the Town's attempt to condemn an oceanfront easement for public access and other uses was based on a claim that the easement was necessary, when just months before, the Town declared that the easement was not necessary, and then completed the subject project without the easement. The Town's defective condemnation attempt was also based on false statements by the Town as to the nature and scope of the easement when soliciting the easement, false statements in the Town Council meeting when authorizing condemnation of the easement, false statements in obtaining a statutorily required

appraisal of the easement, and false statements in describing the required appraisal in the condemnation pleadings.

While the Landowners' instant "Challenge I" litigation was pending in Circuit Court, the Town sued the Landowners again for substantially the same thing on substantially the same bases. The Landowners then likewise challenged that second condemnation attempt, which is done in a separate "civil action" including a request that the condemnation attempt be quashed.[3] In the "Challenge II" case, the Landowners formally incorporated by reference, their Amended Complaint from the instant Challenge I case,[4] made numerous additional allegations, and requested that the condemnation attempt be quashed.[5]

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[3] This technically resulted in the pendency of 12 lawsuits – six pending, but unfiled, condemnation actions by the Town against three landowners, and six civil actions challenging the condemnation actions. In a "civil action," see Rule 2, SCRCP, governed by the South Carolina Rules of Civil Procedure, Rule 1, SCRCP, except in cases of default, "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." Rule 54(c), SCRCP.

[4] When suing the Landowners for the second time, by serving (but not filing) another condemnation notice which was backdated to the same date as the first condemnation notice, the Town would not respond to questions as to whether the service was intended to initiate a new suit, or was an attempt to amend the existing condemnation suit, which was statutorily stayed pending resolution of the Challenge I case. (Ch.II Amended Complaint ¶¶352-369, available in the record on appeal in 2020CP2200932, Ct. App. Case 2021-000757.) Much later, the Town stipulated that it had brought a new suit, but never explained what the additional suit was designed to accomplish. The stipulation is noted in at page 10 of the 4/22/21 order in the Challenge II case.

[5] This Amended Complaint in the Challenge II case formally incorporated the Amended Complaint of the Challenge I case under Rule 10(c), SCRCP. (Ch.II Am. Cmplt. ¶182 ("All of its allegations, by this paragraph, are hereby incorporated herein").) The Amended Complaint in the Challenge I case was in fact included as an exhibit to the original Complaint in the Challenge II case.

The Town persuaded the Challenge II circuit judge specifically to rule in the Challenge II case that "the pleading does not contain a request for preclusive relief that would permanently bar the Town from any future similar condemnation action." (4/22/21 dismissal order being appealed by Landowners in Ch.II cases, at pp.6-7 (emphasis added).)

However, in the Town's Respondent's Brief in the instant appeal of the fee award in the Challenge I case, the Town pervasively argues that "permanent prohibitive relief" was "exhaustively pleaded and sought." (Respondent's Brief at 18; see also Respondent's Brief at 15 (stating that the relief obtained was temporary "in relation to the full scope of what they sought"

and that the Landowners did not achieve "the real relief sought when the lawsuit was filed"), and at 7, 15, 19 and 21 (decrying failure to obtain "permanent" relief), and at 15, 17, and 19 (characterizing relief dismissing falsely based condemnation as "temporary").)

It is these inconsistent positions from which the Town should be estopped. Even in its instant motion to strike, the Town cloaks the fact that the Challenge I Amended Complaint was expressly incorporated into the Challenge II Amended Complaint. The Town does so in almost signature manner, by once again redefining the truth with inventive and unexplained nomenclature – this time, with the word "separate." The Town refers to the Challenge II Amended Complaint as "those separate Challenge 2 pleadings" (motion at 2), incorrectly implying that the Challenge II Amended Complaint consisted only of the part that did not expressly incorporate the Challenge I Amended Complaint.

In its motion, the Town never acknowledges to this Court that the Town did know the Challenge II Amended Complaint actually did contain the basis for prohibitory relief and a request for permanent prohibitory relief, and limits its argument to what the Town did or did not argue to the Challenge II judge that the pleading contained. The Town continues its chiaroscuro by stating that the Town had only argued to the different Circuit Court judge "that *those* separate pleadings did not request permanent relief." (Motion at 2-3, n.1 (emphasis in original).) Having completely inaccurately indicated that the Challenge II Amended Complaint did not include all or any part of the Challenge I Amended Complaint, the Town then argues in its motion to strike, "In these Challenge 1 cases, the Town argues that *these* [(Challenge I)] pleadings *did* seek permanent relief." (Motion at 2-3, n.1 (emphasis in original).)

As noted, based on a representation that the Challenge II Amended Complaint did not seek permanent relief, which is false, the Town obtained an order dismissing the Challenge II case as "moot." The Town thus concedes that it presented a false state of facts to the Challenge II judge and not only directly contradicted them to the Circuit Judge in the instant Challenge I case, but continues to do so in its instant Respondent's Brief.

The Town states in its motion at 2 that it is an "objectively true assertion" that "the Appellants sought," in the Challenge I case, "permanent prohibitive relief barring any future condemnation efforts by the Town." Since this assertion is objectively true, the Challenge II order of dismissal is based on an objectively false proposition by the Town, is erroneous, and should eventually be reversed.

This Court should note for purposes of judicial admissions and possible future judicial estoppel in the Challenge II appeal, that the Town will not take the position that the Challenge II circuit judge ruled as a matter of law that permanent injunction could not have been granted if it had been requested.

He based his ruling on a perception that a permanent injunction had not been sought (despite the Landowners asserting that it had been). In this regard, the Town declares in its motion at 3: "The order of dismissal found that the Challenge 2 pleadings requested only temporary procedural relief, and not permanent prohibitive relief. The circuit court discussed, but did not rule upon, the issue of whether such permanent relief could ever be available under the facts alleged." (Footnote omitted.) Thus, the false premise that no request was made and no permanent relief was sought was the basis of the relief the Town obtained in the Challenge II case.

After the Town lost the instant Challenge I case on summary judgment, the Town served "notice" that it was "abandoning" the second condemnation attempt. When the Landowners declined to dismiss their Challenge II case, indicated a desire to get discovery that continued to elude them, and indicated a desire – through amendment if necessary -- to obtain further relief against the Town, the Town successfully moved to dismiss the Challenge II case as "moot."

In obtaining this result, the Town argued that it had an unstoppable right to sue as many times as it wanted to, that in any event, the Landowners were precluded from obtaining a permanent injunction because they had not specifically requested permanent injunction in their pleading,[6] and that in any event, the availability of attorney's fees both for winning a challenge and for abandonment by the condemnor fully protected the Landowners from the expenses and other losses and damage resulting from being subjected to multiplicitous litigation by an entity funding the litigation with public money. Remarkably, the Town simultaneously confirmed that it intended to sue the Landowners again (a third time) for the same easement, with a "clean slate."[7] The Landowners' appeal of the Challenge II dismissal as "moot" is currently pending before this Court, the record on appeal has been filed, and the briefing has been completed. (See 2020CP2200932, Ct. App. Case 2021-000757.)

After the Challenge II case was dismissed as moot, the Town argued in the instant case that the Landowners should not recover all the fees actually incurred in defeating the Town's first condemnation attempt because the winning Landowners were actually unsuccessful. The Town's reasoning to the Circuit Judge – erroneously adopted by him – was that Town was not

[6] As previously noted, the Amended Complaint in the Challenge II case formally incorporated the Amended Complaint in the Challenge I case.

[7] No specifics were provided as to what would be put on the slate, once cleaned, other than substantially the same easement.

precluded from at least attempting to condemn again (for a third time). The Town, and, in turn, the Circuit Judge, ignored that in doing so, the Town would be subject to being confronted by the same defenses and the law and facts which were now established between the parties as the law of the case, and which would collaterally estop the Town in any subsequent cases – just as would have occurred in the second attempt the Town had already made and abandoned before the Challenge II case could proceed. The law and facts judicially determined in the Challenge I case would prevent the Town from using in a second attempt, for instance, illegitimate value estimates obtained by providing false information to the appraiser.

This fact had already resulted in ending the Town's second set of condemnation attempts. The reasoning the Town urged to the Circuit Judge, however – which was erroneously adopted by him – was that not obtaining an injunction permanently precluding the Town from even attempting again to condemn the same or differently described property for a different amount of money or different purpose meant that the winning Landowners (who were among few in history to win a challenge case, and who did so on summary judgment) were unsuccessful. The Town persuade the Circuit Judge to erroneously rule that, therefore, the Landowners should recover no more than a nominal amount of what they actually had to spend.

III. Discussion and Further Details of Argument

A. In the fee-award proceedings in the instant Challenge I case in the Circuit Court, the Landowners argued to the Circuit Judge, the contradictory positions taken by the Town in the Challenge II case.

Contrary to the grounds stated by the Town for its motion, in the fee-award proceedings in the instant Challenge I case in the Circuit Court, the Landowners argued to the Circuit Judge, the contradictory positions taken by the Town in the Challenge II case. The Town is thus

incorrect again.[8] For example, in the Landowners' 10/5/21 brief[9] to the Circuit Court at 4-5 and n. 3, the Landowners argued:

> It makes no sense, for example, to award a prevailing party $200,000 in fees incurred in one part of a case, if in order to obtain the award, the party then has to incur another $200,000 in noncompensable fees in another part of the case. This would only incentivize increased litigation by the nonprevailing party and establish a regime in which the prevailing party is discouraged and never made whole.
>
> Mr. Dillard has indicated agreement with this principle. However, he indicated this to a different judge in a case with the same parties, subject matter. In the instant case, he argues the opposite. The same landowner-plaintiffs brought a second of set of challenge cases (2020CP2200930, 931, and 932) when they were sued by the Town condemnation a second time while the instant action was still pending.
>
> The Town wanted those challenge cases dismissed after losing the instant challenge cases, and particularly did not want the Town Administrator deposed or for the landowner-plaintiffs to pursue any further discovery.
>
> There, Mr. Dillard assured a different judge of this Court that the plaintiffs' concerns with being sued yet a third time by the Town, still without discovery being sought, were misplaced, stating that "statutory rights to recover attorney fees and costs in the event of a condemnation abandonment or a successful challenge action ... clearly disincentive any condemnor from attempting to use 'multiplicity of litigation' to gain leverage over a landowner."

(Footnote 3 omitted; emphasis in original.)

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[8] In its motion at 4, incorrectly implying that the inconsistent positions of the Town in the two sets of cases were not brought to the attention of the Challenge I circuit judge, the Town emphasizes that, although the fee petition was filed along with supporting documents in January 2021, by virtue of delays, the Town had taken its inconsistent positions in the Challenge II case at least as early as June 3, 2021, and that, therefore, the Landowners could have apprised the Challenge I circuit judge of the contradictions by the time of the October 6, 2021 hearing on the January 2021 fee petition. ("As of the date of the hearing, Appellants certainly had notice of the purportedly 'contradictory" arguments.'") Still casting shadows in its motion at 5, the Town remarks parenthetically that its other arguments about the issue of material inconsistency are "assuming, hypothetically, that it had been preserved at the circuit level to begin with."

Finally, in its motion at 5, the Town's counsel states that, although it would have been possible for the Landowners to make the judicial estoppel argument to the circuit court, "to the best recollection of undersigned counsel they did not do so."

[9] This brief was a 10/4/21 reply brief (amended 10/5/21) to the brief the Town filed 9/20/21 in opposition to the motion the Landowners filed on 1/25/21, requesting an award of attorney's fees and other litigation expenses. The 10/4/21 brief is attached as "Exhibit A," and is also designated for inclusion in the Record on Appeal in the instant Challenge I case, which has not yet been filed.

In footnote 3 to the above passage, the Landowners specifically pointed to the contrary positions taken in the other litigation as follows:

> He so stated at page 5 of the Town's 6/2/21 memorandum opposing reconsideration of dismissal in Case 2020CP2200932. There, Mr. Dillard argued:
>
> > The General Assembly deemed it appropriate to protect landowners from the expense of condemnation disputes by, among other things, providing statutory rights to recover attorney fees and costs in the event of a condemnation abandonment or a successful challenge action. These statutory protections satisfy considerations of equity and due process, and clearly disincentive any condemnor from attempting to use "multiplicity of litigation" to gain leverage over a landowner.

In the same 10/4/21 brief at 12-13 and n. 9, the Landowners further argued to the Circuit Judge, the Town's contradiction of its own positions regarding whether the remaining ability of the condemnor, at its own peril, to try again, should in any way affect full reimbursement of reasonable hourly attorney's fees actually incurred by the Landowner in quashing the condemnation:

> Mr. Dillard's statements in the other cases – that the plaintiff won everything that could be won -- also contradict his own arguments in this case, in which he now adopts Mr. DuRant's casual statements and argues that although summary judgment was granted in favor of the plaintiff and the condemnation was quashed, the plaintiff did not really prevail at all.

(Footnote 9 omitted.)

In footnote 9 to the foregoing passage, the Landowners further addressed the direct contradictions in the Town's positions in the two sets of cases, as follows:

> Mr. Dillard specifically argued that the plaintiff had obtained all the relief that was possible under both sets of challenge actions.
>
> In the Town's 6/2/21 memorandum opposing reconsideration of dismissal in Case 2020CP2200932, Mr. Dillard argued throughout that generally no permanent injunction was attainable. He asserted that virtually all relief ever granted in a successful challenge action -- and all relief abandoned when the condemnor abandons -- is essentially without prejudice to attempting condemnation again another way.
>
> These arguments are substantially at odds with his <u>brand new</u> argument, in the instant case – after eight months of engaging in for "fee discovery" -- that the plaintiff did not prevail in the instant challenge case.

> This brand new argument also makes flies in the face of the legislature's intention to award fees regardless of whether the landowner wins the challenge action or whether, under threat of such victory, the condemnor abandons the underlying condemnation attempt. Mr. Dillard elsewhere acknowledges that the legislature intended to award attorney's fees to the landowner and make the landowner completely whole at the end of each action in either event.
>
> By his new reasoning, confronted with ten reasons why condemnation cannot go forward, the condemnor can temporarily abandon the condemnation and then argue that the landowner's attorney's fees should be reduced because maybe the landowner would have lost on a few of them if there had ever been a merits trial. The statute does not read this way.

In the same 10/4/21 brief at 16, the Landowners further argued, just as they argue now on appeal:

> The Town argues that the plaintiff did not obtain permanent relief, and therefore actually failed when the plaintiff got the Town's condemnation action quashed and dismissed on summary judgment. At another point in its brief, the Town describes this relief as "essentially temporary procedural relief."
>
> This ill-founded argument, which could have been made eight months ago when the matter was fresh in the memory of those who were actually there, is refuted in this brief above at footnotes 3 and 7 and accompanying text. There, the arguments of Mr. Dillard himself regarding the purpose and application of the EDPA attorney's fees provisions are discussed, as well as his contention elsewhere that the plaintiff obtained all the relief that is usually possible in a challenge case.

B. The Appellants' Brief also left no question that the Town took self-contradictory positions in the two sets of cases and that the Town should be estopped from maintaining both positions.

The Appellants' Brief also raised the issue of the Town's inconsistent position in the Challenge II case on whether a remaining prospect of repeated litigation should affect full reimbursement of the successful Landowners' incurred fees in any way other than militating that the fees should be fully awarded. It was the Respondent Town who then chose to pervasively assert in its brief to this Court that the answer should turn on the Landowners having "exhaustively pleaded and sought" a declaration of permanent anticipatory preclusion, when the a Town had asserted to a different circuit judge that the Landowners had made no such request in the Challenge I case at all.

In the Appellants' Brief at 32, n.14, the Landowners noted that Mr. Dillard, who also became the Town's additional counsel in the Challenge II cases, further successfully emphasized to the Circuit Court -- when his argument served a different objective -- that the plenary fee reimbursement scheme in the EDPA serves the purpose of protecting landowners from both actual and threatened repeated litigation. There, the Landowners stated, "The Town is judicially estopped from arguing for less than full reimbursement."[10]

Elsewhere in the Appellants' Brief, they consistently emphasized the Town's inconsistency, fictionalizing and self-contradiction, such as at 3 (noting error in relying on the Town's suppositions or characterizations of "unsuccessfulness" without evidentiary support), 24 (clarifying the permanent effect of the Circuit Judge's summary judgment ruling on any attempts at repeated dishonesty), 25 (refuting the Town's characterization of determined facts as undetermined, related facts as unrelated, and permanent effects as temporary), 33 n. 15 (noting Judge's failure to follow any consistent logic and using approaches with inherent conflict and incongruity), and 48 (stating that the 24-page summary judgment order rendered the condemnation notice "incurably defective"). These arguments were presented after first thoroughly recounting, in an uncontested[11] extended Statement of the Case, the integrated procedural history of both sets of cases, which set the stage for the arguments. These facts included the Landowners' argument to the Challenge II circuit judge "that in light of the Town's

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[10] The Town asserts that this argument (which is amplified and cross-referenced in other arguments to the Challenge I circuit judge) is "completely distinct." It is not. One has to understand the complicated cases in order to understand the context. This argument is on the same subject of the possibility of multiplicitous litigation and the issue of what effect that lingering possibility has on a full award of fees incurred up to the time of getting the condemnation attempt quashed.

[11] The Town stated in its Respondent's Brief that the Town did not contest the statement of facts in the Appellants' Brief, but "did not stipulate to them."

expressed intention to sue the Landowners a third time, the actions were not moot." (App. Brf. at 19.)

Judicial estoppel has been recognized as a theory that has been applied without a "label" and the "label" now applied to judicial estoppel was formerly applied to other theories while the principle presently referred to as "judicial estoppel" evolved and developed. See Whitacre P'Ship v. Biosignia, Inc., 358 N.C. 1, 21, 591 S.E.2d 870, __ (2004) (noting that in addition to invoking various other estoppel doctrines, the court had on other occasions estopped parties to assert inconsistent positions in the same or subsequent judicial proceeding without specifying the precise legal theory at work). Not calling its argument "judicial estoppel" at every turn is not dispositive of whether the Town was aware of the argument, whether the Landowners can present it, and whether the Court can consider it.

C. The portion of the Appellants' Reply Brief the Town seeks to strike is not limited to judicial estoppel; it asks the Court to take judicial notice of events and filings in the other proceedings for purposes other than judicial estoppel, it argues that that the Town's arguments are undermined by the Town's own other arguments and positions, and it requests that the Court judicially estop the Town from arguing that a massive fee penalty is justified because in addition to asking the that the Town's condemnation attempt be thrown out, the Landowners also asked that the Town not be allowed to make another attempt.

The portion of the Appellants' Reply Brief the Town seeks to strike is not limited to judicial estoppel; it asks the Court to take judicial notice of events and filings in the other proceedings for purposes other than judicial estoppel, it argues that that the Town's arguments are undermined by the Town's own other arguments and positions, and it requests that the Court judicially estop the Town from arguing that a massive fee penalty is justified because in addition to asking the that the Town's condemnation attempt be thrown out, the Landowners also asked that the Town not be allowed to make another attempt.

The Town does not dispute the ability of the Court to take the judicial notice requested, which includes notice of matters making the Challenge I case more complex and time-consuming to handle. Yet, the portion of the Reply Brief which the Town requests be stricken includes the request that the Court take judicial notice of the undisputed occurrence and contents of filings and events in the other litigation, which add context to the gross inadequacy of the fee award.

Additionally, whether resulting in estoppel or not, the argued inconsistency of both the Town's arguments and the order the Circuit Judge signed has been a pervasive issue on appeal and would remain if the Landowners had never written the words "judicial estoppel." The additional request that the Town be judicially estopped to preclude just part of the inconsistency and incongruent position-taking is further addressed in other parts of this Return.

D. The purpose of a reply brief is to allow the appellant to reply to the brief of the respondent, which is what the Landowners' Appellants' Reply Brief does.

In its motion at 1, the Town claims, "It is axiomatic that an issue cannot be raised for the first time in a reply brief" (citing McClurg v. Deaton, 395 S.C. 85, 87, 716 S.E.2d 887, 888 fn.2 (2011) (citing Chet Adams Co. v. James F. Pedersen Co., 307 S.C. 33, 413 S.E.2d 827 (1992)[12])).

[12] McClurg involved a party completely failing to present argument on an essential element required for its Rule 60(b) motion in the Circuit Court and accordingly failing to identify evidence on the element, and then presenting facially inadmissible evidence and argument concerning it only in the party's reply brief on appeal, and the Supreme Court taking the view that even if properly presented or properly considered, the evidence and the argument were insufficient. Chet Adams, relied upon in McClurg for the axiom, did not rest on an issue being raised for the first time in a reply brief. An affirmative defense regarding capacity to sue (governed by Rule 9(a)) was not raised in the trial court and was asserted for the first time on appeal.

The general purpose of a reply brief is to reply to the brief of the appellee/respondent. The Landowners' reply argument that the Town presents extensive assertions in its Respondent's Brief that contradict the Town's positions taken in other litigation cannot be made until the Town makes the assertions in its Respondent's Brief. Additionally, here, it is the Town which should be estopped by this Court from the arguments that the Town so profusely and repetitively makes throughout the Respondent's Brief, not the Circuit Court. The Circuit Court's error was addressed in the Appellants' opening brief.

It is perfectly proper for a reply brief to reply to the argument made in the Respondent's Brief. The function of a reply brief is in fact generally limited to responding to the points made in the respondent's response brief. See, e.g., Enercon GmbH v. International Trade Comm'n, 151 F.3d 1376, 1385 (Fed. Cir. 1998) (quoting Amhil Enters. Ltd. v. Wawa, Inc., 81 F.3d 1554, 1563 (Fed. Cir. 1996)); Robert J. Martineau, Modern Appellate Practice: Federal and State Civil Appeals 199 (1983). Thus it is said that appellate judges do not like a reply brief that attempts to traverse terrain already covered. Frank M. Coffin, On Appeal: Courts, Lawyering and Judging 120 (1994).

There thus becomes an issue of logic, definition and contradiction when two supposedly "axiomatic" principles collide: if the purpose of a reply is generally to respond to new matter raised by the respondent, how can the reply be limited only to matters already raised in the appellant's opening brief? The answer lies in sometimes dubious distinctions among new "issues," merely new "arguments" on existing issues, and "claims."[13] For example, the U.S.

[13] There are other axiom-breaking instances not covered by this answer, such as addressing "additional sustaining grounds" which are not raised initially by the appellant on appeal, but which South Carolina appellate law allows the appellate court to consider and allows a respondent to present, and jurisdictional or quasi-jurisdictional matters a respondent may raise or

Supreme Court has stated that bringing a new "claim" before the Court is generally not allowed, Sarah M.R. Cravens, Involved Appellate Judging, 88 Marq. L. Rev. 251 (2004). However, bringing a new "argument" often is. Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 382-83 (1995)(holding that the argument that Amtrak is part of the Government, even though Lebron disavowed it in both lower courts and did not explicitly raise it until his brief on the merits in the Supreme Court, is not a new claim, but a new argument to support his First Amendment claim); Kamen v. Kemper Fin. Svcs., 500 U.S. 90 (1991)(holding it is immaterial that Kamen failed to advert to state law until her reply brief in the proceedings below, since once an issue or claim is properly before a court, the court is not limited to the particular legal theories advanced by the parties but retains the independent power to identify and apply the proper construction of governing law).

If a "new theory" raises a purely legal issue and the underlying facts are not substantially in dispute, reviewing courts can (and usually will) consider it on appeal. See Yeap *v.* Leake, 60 Cal.App. 4th 591, 599 (1997). The rule that on appeal a litigant may not argue theories for the first time does not apply to pure questions of law. Carman v. Alvord, 31 Cal.3d 318, 324 (1982). "As an exception to the general rule, the appellate court has discretion to consider issues raised for the first time on appeal where the relevant facts are undisputed and could not have been altered by the presentation of additional evidence." American Indian Health & Services Corp., 24 Cal.App.5th 772 at 789, 234 Cal. Rptr. 3d 583 at __ (Ct. App. 2018). "[A]ppellate courts are most likely to consider an issue involving undisputed facts for the first time on appeal

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which a court may even raise sua sponte. Another is judicial estoppel itself, further discussed below.

where the issue involves important questions of public policy or public concern." Id. (internal citations and quotations omitted).

On the basis of exceptions, courts have therefore addressed even new questions of affirmative defenses, such as qualified immunity or issue and claim preclusion. Amanda Frost, The Limits of Advocacy, 59 Duke L.J. 447 at 462 (2009). Thus, axioms have limits, interpretations, and exceptions.

The Reply to the Respondent's arguments was proper.

E. Having actually had more notice of the issue than the Town even now admits to, and having additionally now taken the opportunity to effectually file a full surreply to what was supposed to be the last brief in the instant appeal, the Town is not unfairly prejudiced by the Landowners' argument that the Town contradicts the material positions it took in the other litigation.

The Town argues that the Town would be prejudiced by the Landowners being allowed to a make a "new argument" in their Reply Brief. As demonstrated herein, the argument is actually not in any way new to the Town and is on a pervasive issue raised in this appeal and argued extensively by the Town in its Respondents' Brief. That is, the argument concerns the effect, if any, the remaining prospect of additional litigation should have on a full award of attorney's fees incurred prior to extinguishing the first litigation.

The Town has additionally now taken the opportunity to fully respond and even to reiterate its own positions on other previously refuted issues in the appeal.[14] Its response by

[14] The Town states, "by way of background," that the Town attempted to condemn "beach renourishment easements," when, instead, as previously repeatedly clarified by the Landowners, the Town attempted to foist eternal unlimited public access easements onto the Landowners and 110 other owners under the guise of construction easements "simply to put sand on the beach." These perpetual easements were in some instances literally two feet from the back door. The Town did not have the guts to tell other owners what the Town was really asking for and getting (and so, lied), and has been afraid ever since, of the backlash from other owners if the Town admits what it did, even after a court declared what the Town did.

The Town states that the Circuit Judge "declined" to prohibit future condemnation attempts, when, instead, as previously clarified by the Landowners, the Judge never ruled against the Landowners on a single issue in the summary judgment order, never analyzed or made an adverse determination on the ultimate availability of permanent injunction or declaratory relief having the same effect, and simply quashed and dismissed the Town's attempt.

He ruled: "Whether described as jurisdictional defects or incurable failures to satisfy elements necessary to state a cause of action for condemnation, the defects in the way the Town went about initiating and pursuing its condemnation action require the action to be invalidated, dismissed, and prohibited. Therefore, summary judgment dismissing the Town's Condemnation Notice and the associated action is granted." He further ruled: "The Town's attempt to condemn the easement on Plaintiff's land, and the condemnation action represented by the subject Condemnation Notice which was served, is therefore prohibited. This ruling is without prejudice to another attempt and attendant defenses if applicable."

The Town further took the opportunity to state, as if a factual part of the "background," that the Landowners obtained only "temporary procedural relief," when the Landowners have repeatedly disputed this characterization and explained the lasting effects of the victory, including but not limited to extinguishing the Town's second attempt, which the Town withdrew.

The Town has also taken the opportunity to reiterate, as if it were uncontroversial "background," the very claim that the Landowners have asked that the Town be estopped from arguing – that the Landowners "sought, but did not obtain," "much broader permanent substantive relief."

Aside from the fact that the Town persuaded another judge that permanent injunction was not included in the Challenge I Amended Complaint, this "much broader permanent substantive relief " characterization and "sought but did not obtain" are meant to suggest something deeper – a waste of large amounts of time. The Town's convolution of nebulously derived premises requires a bit of patience to follow.

First, to be clear, the the Landowners' Amended Complaint did indeed pray for dismissal, quashing, permanent injunction, etc.

The Town will argue that the "seeking" of injunction was tied exclusively to certain facts and vice versa, namely that "seeking" involved only exploring and presenting the Town's dishonesty, and that the Town's dishonesty was only relevant to permanent injunction. This is not correct, but the Town tacitly invites the Court to accept it as given, as with many things.

While making efforts to develop all relevant defenses, the Landowners won on summary judgement on undisputable facts. They therefore won without the expense of full discovery on disputed facts and other undisputable facts, and without full development and trial presentation (or subsequent summary judgment presentation) of all facts and deeper frauds. They never even got to the former Town administrator's preparing and filing an unauthorized easement purportedly on behalf of one of the Landowner-Appellants, the "nuclear option" inquiry of the mayor, the further details of what the appraiser had to say, the previous fraudulent 2019 appraisals on which the whole project was based, or the question of other secret agreements and communications.

The Town's repeated "much broader" characterization is meant to convey an impression that certain facts are assigned only to certain things, and a lack of interrelationship of facts. However, this whole – often tacit -- construct is based only on the Town's own self-appointed presumption that the law of condemnation is what the Town says it is.

motion additionally confirms the truth and merit of the arguments made by the Landowners, and the Town should indeed be prejudiced by its own response.

The Town's request that the Court strike a whole section of the Appellants' Reply Brief (which is cross-referenced by another section and integral to other arguments) or allow the Town to file yet another "reply to reply" (presumably after replying to the instant Return), should be denied.

F. It is not unclear what the Landowners' objection is, what the contradiction is, or what assertion the Town should be estopped from making.

The Town does not appear to understand that estoppel may operate to deny a party the ability to assert a proposition that is true.[15] In its motion at 1, the Town states that the

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Namely, the Town, with no authority other than two isolated "e.g."s to date, ties permanent relief only to certain types of fraud and dishonesty in certain contexts that the Town leaves to define for itself in a manner so as to not include the frauds of the Town.

The Town asserts – or will assert – that the availability of permanent injunction depends on a nexus not just with fraud and bad faith, but with the right kind of fraud and bad faith, which the Town reserves the right to define without case law. The Town would have this Court, like the Circuit Court, conclude without authority or even articulation, that the kind of dishonesty the Landowners not just explored, but adduced to the Circuit Court as undisputed was the wrong kind of dishonesty, made no difference, and was a waste of time. That is the significance of the Town insisting that "permanent relief" was "sought." As discussed herein, the Town had a different purpose in telling the Challenge II judge that "permanent relief" was not "sought."

[15] Thus, in an English case involving the former members of the punk band, The Sex Pistols, decided in 2021 by the High Court of Justice, Chancery Division, Steve Jones v John Lydon, EWHC 2321 (Ch)(Aug. 23, 2021), Sir Anthony Mann distinguished many estoppels and explained at Point 66: "The essence of an estoppel is that a party is forced to accept a legal factual position which is not necessarily the actual position."

In Hamilton v. Zimmerman, 37 Tenn. (5 Sneed) 39 (1857)(cited as seminal in Quinn v. Sharon Corporation, 343 S.C. 411, 540 S.E.2d 474 (Ct. App. 2000)(Anderson, J., concurring)), the court clarified: "[F]or all purposes of the present [lawsuit], the [prior] admission must be taken as true, without enquiring whether, as a matter of fact, it be so or not. The law as against [Hamilton], presumes that [the first asserted position] is true; and this presumption proceeds upon the doctrine of estoppel, which from motives of public policy or expediency, will not suffer a man to contradict what he may have previously said or done." Hamilton, 37 Tenn. (5 Sneed) at 47-48.

Landowners argue that Town should be judicially estopped from "drawing a distinction" between "the temporary procedural relief Appellants obtained and the much broader permanent substantive relief that they sought."

The argument is that the Town should not profit from arguing that "permanent substantive relief" was sought in this Challenge I case when the Town has obtained judicial advantage in another case by arguing that "permanent substantive relief" was not sought in this Challenge I case.

In its motion at 2, the Town acknowledges that the Reply Brief argues that the Town should be judicially estopped from making "the objectively true assertion" that "the Appellants sought" permanent prohibitive relief. Whether the matter is objectively true is not the inquiry in estopping a party from asserting it.

At another point, the Town states that "the exact scope of what Appellants seek to have 'estopped' is not clear." Again, the Town should be estopped from arguing, on the basis that the relief sought included "permanent relief," that no fees are deserved. The Landowners do seek, as the Town recognizes, "to prevent the Town from arguing that 'the main thrust of the [Appellants'] complaint was 'the permanent and prohibitive relief that the Appellants so extensively pleaded and sought.'"

G. Although the Town had plenty of notice of the Landowners' objections to the Town's inconsistent factual and legal positions in the two proceedings, and although these issues were raised below and in the instant appeal, judicial estoppel may be raised for the first time on appeal and may be raised by the appellate court sua sponte.

In State v. Duncan, 710 N.W.2d 34, 43-44 (Iowa 2006), the court held that, although neither party raised the issue in its brief, "[b]ecause the doctrine is intended to protect the courts rather than the litigants, an appellate court may raise estoppel on its own motion." Judicial estoppel may be raised by a reviewing court. Davis v. District of Columbia, No. 17-7071, 2019

WL 2398007 (D.C. Cir. June 7, 2019)(holding courts are not required to recognize a party's apparent waiver of a judicial estoppel argument). In Davis, the plaintiffs argued that the theory was an affirmative defense and that it was waived when the defendant did not raise the doctrine in its answer. The circuit court, however, held that while the doctrine may be raised as a defense, because it also protects the integrity of the judicial process, a court may invoke the doctrine sua sponte at its own discretion. It then affirmed the district court's dismissal of the plaintiffs' claims on estoppel grounds.

Other cases have reached similar results after first explaining that the theory raised in defense is not an affirmative defense. See Eilber v. Floor Care Specialists, Inc., 294 Va. 438, 807 S.E.2d 219 (2017). In Eilber, the court stated: "Consequently, 'it is generally recognized that a court, even an appellate court, may raise [judicial] estoppel on its own motion in an appropriate case.'" Id. (citing West Va. Dep't of Trans. v. Robertson, 618 S.E.2d 506, 512-13 (W.Va. 2005)(footnote 4 omitted).[16]

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[16] Eilber added in footnote 4:
The United States Courts of Appeals for the Fourth, Fifth, Seventh, Ninth, and Tenth Circuits, and the United States District Court for the Eastern District of Virginia, have similarly concluded that judicial estoppel may be raised and applied by a court sua sponte. *Cathcart v. Flagstar Corp.*, No. 97-1977, 1998 U.S. App. LEXIS 14496, at *23 n.2 (4th Cir. June 29, 1998) (unpublished; for table disposition, see 155 F.3d 558) ("Because the interests served by the [judicial estoppel] doctrine concern the judicial process more than fairness to the opposing party, it is appropriate for a court to raise the issue sua sponte, where the opposing party fails to raise it, and a party's failure to raise the issue does not foreclose our review."); *Grigson v. Creative Artists Agency L.L.C.*, 210 F.3d 524, 530 (5th Cir. 2000) ("[B]ecause [judicial estoppel] protects the judicial system, . . . we can apply it sua sponte in certain instances."); *Bethesda Lutheran Homes & Servs. v. Born*, 238 F.3d 853, 858 (7th Cir. 2001) (the doctrine of judicial estoppel "is for our protection as well as that of litigants, and so we are not bound to accept a waiver of it"); *Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597, 601 (9th Cir. 1996) ("Because [judicial estoppel] is intended to protect the dignity of the judicial process, it is an equitable doctrine invoked by a court at its discretion."); *Smith v. UPS*, 578 Fed. Appx. 755, 759 (10th Cir. 2014) ("But because it is an equitable doctrine that we may invoke at our discretion, 'we are not bound to accept a party's waiver of a judicial

One court has said that it not only has the right, but also an "independent duty," to raise judicial estoppel sua sponte to protect "the integrity of the judicial system independent of the interests of the parties." In re DeRosa-Grund, 544 B.R. 339, 369-70 (S.D. Tex. Bankr. 2016)(quoting In re Airadigm Communications, Inc., 616 F.3d 642, 664 n. 14 (7th Cir. 2010)).

Since the matter may be raised sua sponte, a fortiori, it may be raised and argued. Thus, while the matter was in fact adequately raised and preserved, and the Town was not in any way surprised by the particular head put on the point, the Town's arguments as to whether the matter was argued more vigorously or particularly in the Reply Brief, as opposed to the opening Appellants' Brief, or in circuit court arguments, are largely beside the point. The Town's motion to strike should be marked "denied."

Respectfully submitted,

s/M. Baron Stanton
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ATTORNEY FOR APPELLANTS
Sunset Lodge, LLC and Franklin D. Beattie as trustee

Date: Jan. 6, 2023

estoppel argument and may consider the issue at our discretion.'" (quoting *Kaiser v. Bowlen*, 455 F.3d 1197, 1204 (10th Cir. 2006))); *Thomas v. FTS USA, LLC*, 2016 U.S. Dist. LEXIS 8269 (E.D. Va. 2016) (holding that it was appropriate to address judicial estoppel despite the doctrine not being raised in the parties' pleadings because "the interests served by the doctrine concern the judicial process more than fairness to the opposing party").

Exhibit A to APPELLANTS' RETURN TO RESPONDENT'S MOTION TO STRIKE ARGUMENTS FROM APPELLANTS' REPLY BRIEF

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN)	CIVIL ACTION NO. 2020-CP-22-00600
)	
Sunset Lodge, LLC,)	
)	
Plaintiff,)	
)	
v.)	
)	
Town of Pawleys Island,)	
)	
Defendant.)	
)	

10/4/21
REPLY BRIEF OF PLAINTIFF TO
9/20/21 MEMORANDUM OF TOWN IN OPPOSITION TO
1/25/21 MOTION OF PLAINTIFF FOR
AWARD OF ATTORNEY'S FEES AND
OTHER LITIGATION EXPENSES (AMENDED 10/5/21)

On January 21, the Court entered an initial formal summary judgment order against the Town, quashing and dismissing the subject condemnation action.

On January 25, 2021, the plaintiff filed a motion for award of attorney's fees and other expenses, an affidavit of fees and costs, a proposed order, and a proposed Form 4A. (Collectively, the motion and the periodically updated affidavit may be referred to as the "fee petition.")

Subsequently, between the filing of the plaintiff's fee petition January 25, 2021 and September 19, 2021, there were various proceedings initiated by the Town relative to opposing the fee petition, as well as other activities in the case, such as the Town's motion for reconsideration.

The fee-related proceedings included, among other things, briefs of the parties relative to requests by the Town (e.g., plaintiff's briefs 2/5/21, 3/1/21 and 3/17/21), entry of a protective order, production of selected billing materials in redacted form to the Town and in redacted and unredacted form to the Court for in camera review, and periodic updates by the plaintiff of the time spent litigating this case to conclusion, including the fee request.

On April 5, 2021, the Court entered the final formal summary judgment order against the Town.

On September 10, 2021 the plaintiff filed the last of the updates to the fee petition. It is comprehensive of earlier affidavits.

In the last update, the plaintiff requests an award of litigation expenses of $61,112.02.

On September 20, 2021, the Town filed approximately one hundred and four (104) pages of additional materials, including a Memorandum in Opposition to the January 25, 2021 Motion for fees and expenses, an Opposing Affidavit of Pagliarini, an Opposing Affidavit of DuRant, an Opposing Affidavit of Henry, and an Opposing Affidavit of Dillard.

Subsequently, the Town also filed "Pre-hearing motions."

Overview

The sum total of the Town's response is that for prevailing in the case, the plaintiff should recover litigation expenses based on approximately one-tenth (1/10) of the actual hours spent and well under one-third (1/3) of what the Town itself has spent using three lawyers and a fourth outside lawyer hired to give an opinion on fees. The plaintiff hereby replies.

Brief Response

The task before the Court is not nearly as complicated as the Town makes it. The plaintiff's fee petition alone provides a sufficient basis for this Court to make a fair award, as follows.

The plaintiff has requested an award of $60,198.33 in attorney's fees in the case through October 6, 2021.

Together with $913.69 in other out-of-pocket expenses, the total requested award of litigation expenses is $61,112.02[1] through October 6, 2021.

This request includes the work in the case in order to prosecute the fee request itself to conclusion. This is legally proper,[2] but the legal side is largely ignored by the Town. It makes

1 This figure includes an estimate of $5700 made on September 10, 2021, before receiving Mr. Pagliarini's affidavit, of the work required between September 9 and October 6, 2021. Responding to Mr. Pagliarini's affidavit will require the plaintiff to exceed this estimate.

2 A statute requiring that the court award the prevailing party attorney's fees "reasonably incurred in litigating the proceedings" contemplates all the proceedings, including the portion of the proceedings devoted to pursuing attorney's fees incurred in obtaining the primary relief sought in the case. Ex parte Gregory, 378 S.C. 430, 663 S.E.2d 46 (2008)(holding that attorney's fees for seeking attorney's fees under Frivolous Proceedings Act were included in the fees required to be awarded); see Austin v. Stokes-Craven Holding Corp., 406 S.C.187, 750 S.E .2d 78 (2013)(holding that a statute mandating an award of attorney's fees mandated an award of trial-level fees, subsequent appellate fees, and subsequent post-appellate fees in the trial court, in which post-appellate trial-court proceedings, fees incurred in earlier stages were sought).

The policies supporting this rule are obvious, and are already applicable in the instant case. In Commissioner, Immigration and Naturalization Service v. Jean, 496 U.S. 154 (1990), the U.S. Supreme Court held that fees for obtaining fees are allowed under the fee shifting provisions of the Equal Access to Justice Act.

The Court held that, under the EAJA, a prevailing party may recover attorneys' fees for services rendered in seeking a fee award without regard to whether the position of the United States was substantially justified. Namely, if the prevailing party is entitled to fees in the main

no sense, for example, to award a prevailing party $200,000 in fees incurred in one part of a case, if in order to obtain the award, the party then has to incur another $200,000 in noncompensable fees in another part of the case. This would only incentivize increased litigation by the nonprevailing party and establish a regime in which the prevailing party is discouraged and never made whole.

Mr. Dillard has indicated agreement with this principle. However, he indicated this to a different judge in a case with the same parties, subject matter. In the instant case, he argues the opposite. The same landowner-plaintiffs brought a second of set of challenge cases (2020CP2200930, 931, and 932) when they were sued by the Town condemnation a second time while the instant action was still pending.

The Town wanted those challenge cases dismissed after losing the instant challenge cases, and particularly did not want the Town Administrator deposed or for the landowner-plaintiffs to pursue any further discovery.

There, Mr. Dillard assured a different judge of this Court that the plaintiffs' concerns with being sued yet a third time by the Town, still without discovery being sought, were misplaced, stating that "statutory rights to recover attorney fees and costs in the event of a

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action, then he is automatically entitled to fees for the time spent seeking fees. To hold otherwise could "spawn a 'Kafkaesque judicial nightmare' of infinite litigation for the last round of litigation over fees." *Id.* at 163. See also, e.g., Tri-County Metro. Transp. Dist. of Or. v. Aizawa, 362 Or. 1,___, 403 P.3d 753, 754 (2017) ("Ordinarily, a party entitled to recover attorney fees incurred in litigating the merits of a fee-generating claim also may receive attorney fees incurred in determining the amount of the resulting fee award."); and see Crandon Capital Partners v. Shelk, 219 Or. App. 16, 42, 181 P3d 773, __ (2008) (describing that rule as reflecting "longstanding precedent in Oregon").

condemnation abandonment or a successful challenge action ... clearly disincentive any condemnor from attempting to use 'multiplicity of litigation' to gain leverage over a landowner."[3]

Under the procedure described in Layman v. State,[4] the fees of the one plaintiff in this one case may be reasonably calculated as follows: 1000.5 hours x $250 per hour = $250,125.00.[5]

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3 He so stated at page 5 of the Town's 6/2/21 memorandum opposing reconsideration of dismissal in Case 2020CP2200932. There, Mr. Dillard argued:

> The General Assembly deemed it appropriate to protect landowners from the expense of condemnation disputes by, among other things, providing statutory rights to recover attorney fees and costs in the event of a condemnation abandonment or a successful challenge action. These statutory protections satisfy considerations of equity and due process, and clearly disincentive any condemnor from attempting to use "multiplicity of litigation" to gain leverage over a landowner.

4 376 S.C. 434, 658 S.E.2d 320 (2008).

5 As succinctly stated by Judge Miller in Maybank v. BB&T (Greenville County Court of Common Pleas, Order, Case 2011-CP-23-8578, Nov. 10, 2014):

> The specific award of attorneys' fees and costs is left to the discretion of this Court, and must be determined using a lodestar analysis. *Layman v. State*, 376 S.C. 434, 444, 457-58, 658 S.E.2d 320, 325, 332-33 (2008). This analysis requires determining a reasonable hourly rate and hours worked and then considering any exceptional circumstances justifying an enhancement of the lodestar figure. *Id.* at 458-61, 658 S.E.2d at 33-35. This requires considering the following: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) the professional standing of counsel; (4) the contingency of compensation; (5) the beneficial results obtained; and (6) the customary legal fees for similar services. *Id.* at 458, 658 S.E.2d at 333(citing *Jackson*, 326 S.C. at 308, 486 S.E.2d at 760).

Maybank v. BB&T (Greenville County Court of Common Pleas, Order, Case 2011-CP-23-8578, Nov. 10, 2014)(16 pages, single spaced), aff'd in pertinent part 416 S.C. 541,787 S.E.2d 498 (2016), reh. den.

In Maybank v. BB&T (Common Pleas, Case 2011-CP-23-8578), Judge Miller made his determination of "hours worked" as follows: "I have reviewed the fee affidavit of Plaintiff's counsel detailing the hours worked by each attorney and submitting their current hourly market rates."

In Maybank v. BB&T, 416 S.C. 541, 787 S.E.2d 498 (2016)(42 pages, single spaced), reh. den., the South Carolina Supreme Court affirmed Judge Miller's determination of "hours worked" from prevailing counsel's affidavit setting forth "hours worked."

The South Carolina Supreme Court rejected the appellant's argument that "the affidavit of attorneys' fees and costs submitted by Maybank's counsel was inadequate and lacked the necessary detail that would enable Appellants to respond." 416 S.C. at 5801, 787 S.E.2d at 518. The South Carolina Supreme Court rejected the appellant's argument that "Maybank failed to provide detailed billing statements to identify how the billed hours correlated to the claims alleged, especially since Maybank prevailed on only five of his eleven claims, and the Trust lost on all its claims." 416 S.C. at 5801, 787 S.E.2d at 518.

The Court also rejected the appellant's argument that "the insufficiency in the billing statements make it difficult to ascertain and delineate the work completed in furtherance of the UTPA claim -- which is the only claim upon which attorneys' fees and costs may be awarded." 416 S.C. at 5801, 787 S.E.2d at 518. Instead, the Court ruled: "We find all of Maybank's claims shared the same common facts and required combined efforts throughout the litigation process." The Court found to be a reasonable estimation, the trial court's reduction of fees by twenty percent to account for a distinction in the claims and the time allotted to defend claims unrelated to the UTPA claim, which was the only claim in the group of claims for which attorney's fees were allowed to be recovered. 416 S.C. at 5801, 787 S.E.2d at 518.

In this calculation pursuant to Layman and related cases, the 1000.5 hours are the hours sworn in the fee petition to have been actually reasonably devoted to the case after July 1, 2020. (See restated fee affidavit of September 10, 2021.) Layman does not require or recommend that private billing statements be presented.[6] As detailed in the fee petition, the plaintiff's counsel did not work these hours only over an even spread of daylight hours on weekdays, as the fictional calculations of Mr. Dillard would imply. The details provided clearly show that the plaintiff's counsel works nights and weekends.

The $250 per hour rate in the above calculation is the reasonable rate for a lawyer in the vicinity with comparable experience to charge, without an additional lodestar enhancement in the discretion of the Court for extraordinary demands or conditions on prevailing counsel, the difficulty of the case, the beneficial result obtained, or other factors.[7] The $250 per hour rate is

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Thus, South Carolina case law does not require that a fee application be supported with the lawyer's and client's actual confidential bills.

Neither does the applicable fee recovery statute in this case. Nor is the production of actual confidential bills required in states in which the detailed procedure for applying for fees is actually set forth in the state's rules of civil procedure. See, e.g., O.R.C.P. 68, Pleading, Allowance, and Taxation of Attorney Fees and Costs and Disbursements (nowhere specifying production of bills). There are reasons for this and they are amply set forth in the plaintiff's briefs to this Court.

Nevertheless, the Town moved, over the plaintiff's objection, for production of a healthy sampling of the plaintiff's representative bills, and was granted production of them, with many of the more sensitive or privileged matters fairly redacted, while the Court reviewed the bills in camera and determined fewer redactions to be made. No error whatsoever in the number of hours recounted in the plaintiff's counsel's fee affidavit has been alleged since then.

6 See the discussion in the preceding footnote.

7 Alternatively, the Court could use a lower hourly rate such as $190, and then increase the

the same rate charged by both Mr. DuRant, the first lead counsel hired by the Town, and Mr. Dillard, the second lead counsel hired by the Town, as verified by publications online by the Town and Town responses to FOIA requests.

However, the plaintiff has conservatively requested a fee award based on only 950.5 hours, and based on only $190 per hour.

Further, the request is conservatively based on the resulting fee then being divided by three. This request results straightforwardly in aforestated requested fee award of $60,198.33 for the plaintiff.

Further, the plaintiff has requested that the court take notice that, of the two similarly situated plaintiffs in the two related separately filed cases handled by the same attorney, one asks for only the same $60,198.33, and the other does not request a fee award. This is collectively a discount of another one-third. This effectual thirty-three and one third (33 1/3%) reduction for all three cases more than accounts for any possible quibbles or attempts of the Town to re-litigate every detail of the plaintiff's successful case in dim hindsight now.

All of these conservative steps result in a total fee award of only $120,396.64 for all three related cases, rather than a conceivable and defensible total fee award of $750,375.00, had the three landowner-plaintiffs not combined and shared one lawyer, who represented himself in one of the cases.

The fee award requested is reasonable, and should be awarded.

Further Discussion of the Town's Contentions

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total fee by a multiplier of 1.31, taking into account the lowness of the rate. The result is the same.

The Town's 9/20/21 Opposition Memorandum is based on four (4) affidavits on seemingly every conceivable aspect of the case, so the plaintiff will address them before further reply to any argument in the Opposition Memorandum. First, however, this memorandum must address, as well, the Town's "pre-hearing motions," on three subjects.

The Town's "Pre-hearing Motions"

As to the three things the Town requests, as the plaintiff previously advised the Town, the plaintiff consents to the first, and the other two are unnecessary. None should take up extra court time.

That is, the plaintiff consents to consolidation of the three related cases under the case number for the Sunset Lodge case.[8]

The remaining two requests by the Town are already covered by the protective order and rulings of this Court and are unnecessary to be requested again, argued again, submitted again, or reconsidered.

This is with one exception, as the plaintiff has previously advised the Town. The Town wishes for both the redacted and unredacted billing statements submitted by the plaintiff to the Court for in camera review to be filed by the Court under seal in this case. The Court's 4/5/21 Order "protective order," compelling production of billing statements under protective order under stated conditions, allows that.

The plaintiff does not consent to this per se, because the plaintiff did not agree with all

8 This is just as the plaintiff moved for in the other three challenge actions which the landowner-plaintiffs filed when the Town sued each of them for condemnation a second time. Although we may be close to the end of the proceedings in this Court, if either party argues further or takes an appeal, it will likely cut down on the number of papers, filings, and filing fees.

aspects of the order itself. But the Order allows the Town to request that the Court file the materials in this manner. Assuming the Court agrees to do that, the plaintiff's objection in this regard can be noted and the matter can move forward. There is no need to hear further from the Town on the matter at the hearing of the plaintiff's motion for litigation expenses pursuant to statute.

The Opposing Affidavit of Mr. Pagliarini

As will be detailed further in reply affidavits, there are serious problems with the affidavit of Mr. Pagliarini.

His affidavit should be disallowed and the testimony of Mr. Dillard relying on it should be disallowed. Among other things, (i) Mr. Pagliarini is incompetent as a fact fitness, having no personal familiarity with the matter, (ii), he is incompetent as an opinion, or "expert," witness, because he lacks education or experience of any degree that will be of assistance to the Court as a factfinder, (iii) his testimony makes clear that he has not actually read or examined many of the things on which he bases his opinions, or otherwise grossly misunderstands what he has read, (iv) he relies on information selectively supplied by others, which in turn was not the product of personal familiarity or expertise, and which will be shown to be grossly erroneous and untrustworthy, and (v) his own observations, conclusions or opinions will be shown to be an inseparable mixture of insufficient or incorrect factual information and incorrect legal conclusions, the latter being the province of the court in any event.

Among other things, Mr. Pagliarini's opinion is materially based on unsworn materials subjectively, and erroneously, prepared by Mr. Dillard. Mr. Pagliarini expressly states that he relies on the materials supplied by Mr. Dillard. These materials are grossly incomplete and

grossly incorrect, and Mr. Dillard, new counsel in the case, has no personal familiarity with the case either, until after the time summary judgment was granted to the plaintiff.

Even if allowed, Mr. Pagliarini's testimony is materially incorrect and incomplete and, for reasons which will be further detailed, cannot be given any credibility.

The Opposing Affidavit of Mr. DuRant

As will be detailed further in reply affidavits, Mr. DuRant's affidavit is incorrect.

He denies the plaintiff's counsel's characterization of the Town as an adversary which will (i) "say anything" and (ii) "stop at nothing."

Reply affidavits for the plaintiff actually give specific examples instead of empty adjectives or denials with no specifics. The vacillation of Mr. Henry, the mayor, on his e-mail to the Corps of Engineers inquiring about the availability of a "nuclear option," is but one example. The case(s) and the events also speak for themselves to a large extent.

A self-described "Bulldog" on his website, Mr. DuRant now denies that he was a bulldog. Undeniably he made considerable work for the plaintiff's counsel. In general, this is no crime, but the statutes require that the Town now pay for that work, instead of denying that the work occurred or denying that the work caused by the Town was necessary, or denying that the plaintiff won the case.

Mr. Durant incorrectly states that the summary judgment ruling included rulings that "certain issues lacked merit." Once again, saying this does not make it so. As a corollary, nor does the Town saying it repetitively make it so.

There is not a single instance of such a ruling. There is not one single merits ruling by the Court in favor of the Town. "Litigants in good faith may raise alternative legal grounds for a

desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee." Hensley v. Eckerhart, 461 U.S. 424 at 435–36 (1983).

There were issues in favor of the plaintiff which the Court did not see a need to fully reach in order to dismiss the condemnation on summary judgment. But there was not a single ruling against the plaintiff, and for that matter, there was not a single finding that the facts the plaintiff presented as undisputed were anything other than undisputed. Not one.

On the other hand, even in the summary judgment proceedings, the Town contended that a proposed easement granting "public use and access" did not grant public use and access. Instead, the Town said that it was a mere construction easement for the deposit of sand. Saying this did not make it so. The Court expressly ruled on the fallacy of this contention as well in its order at 6.

In the related challenge cases the landowner-plaintiffs were forced to bring by being sued twice, Mr. Dillard also contradicts these unsubstantiated remarks by Mr. DuRant in which Mr. DuRant incorrectly implies that there were merits determinations adverse to the plaintiff.

Mr. Dillard's statements in the other cases – that the plaintiff won everything that could be won -- also contradict his own arguments in this case, in which he now adopts Mr. DuRant's casual statements and argues that although summary judgment was granted in favor of the plaintiff and the condemnation was quashed, the plaintiff did not really prevail at all.[9]

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9 Mr. Dillard specifically argued that the plaintiff had obtained all the relief that was possible under both sets of challenge actions.

In the Town's 6/2/21 memorandum opposing reconsideration of dismissal in Case 2020CP2200932, Mr. Dillard argued throughout that generally no permanent injunction was attainable. He asserted that virtually all relief ever granted in a successful challenge action -- and

Mr. DuRant, on a course of logic no more valid or fact specific than making ad hominem arguments, joins in Mr. Dillard's and Mr. Pagliarini's page-counting arguments. He states that the Amended Complaint was "excessively lengthy at 57 pages." Impliedly, prevailing counsel should therefore be hated for this or judged incompetent, and his clients should recover only an eighth to a tenth of the fees they have actually incurred.

Yet, those were the same 57 pages containing much of the material that resulted in a grant of summary judgment. Under the Rules of Civil Procedure, it is not an excuse for denying the truth of all 57 pages, that the defendant's counsel considered them long.

In another extraordinary example of curative fiction, Mr. DuRant also incorrectly states that he found it extremely difficult to engage in productive communications with the plaintiff's counsel, and never cites a single example.

This is his excuse for not trying to communicate, as required by the rules, or else

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all relief abandoned when the condemnor abandons -- is essentially without prejudice to attempting condemnation again another way.

These arguments are substantially at odds with his brand new argument, in the instant case – after eight months of engaging in for "fee discovery" -- that the plaintiff did not prevail in the instant challenge case.

This brand new argument also makes flies in the face of the legislature's intention to award fees regardless of whether the landowner wins the challenge action or whether, under threat of such victory, the condemnor abandons the underlying condemnation attempt. Mr. Dillard elsewhere acknowledges that the legislature intended to award attorney's fees to the landowner and make the landowner completely whole at the end of each action in either event.

By his new reasoning, confronted with ten reasons why condemnation cannot go forward, the condemnor can temporarily abandon the condemnation and then argue that the landowner's attorney's fees should be reduced because maybe the landowner would have lost on a few of them if there had ever been a merits trial. The statute does not read this way.

certifying futility, which he did not do either. As shown in reply affidavits, when there were consultations, they were actually cordial, if not productive, and the main problem and the thing that cost the plaintiff and the Court time, was Mr. DuRant not communicating at all, and filing the things he filed. Again, this is not an indictment of Mr. Durant's strategy, but an explanation of what the Plaintiff had to contend with in the case and the time and expenses which were accordingly incurred.

The Opposing Affidavit of Mr. Henry

As will be detailed further in reply affidavits, Mr. Henry's testimony now purporting to state what he meant by "nuclear option" when asking the Corps if it was available is completely false. His actions show that he will say anything expedient.

Attached as "Exhibit A" is the 8/23/21 e-mail of the Town Administrator, Mr. Fabbri, who, just weeks ago, relayed that Mr. Henry stated that he did not remember what he meant by "nuclear option" when he asked if such an option were available to deploy against his constituents, the landowner-plaintiffs.

Specifically, Mr. Fabbri advised: "I'm not sure what the 'nuclear option' was and I've asked Mayor Henry to explain what was meant by that comment, and he could not recall. There were no emails, notes, memos, or any other kind of documentation regarding a 'nuclear option'."

Opposing Affidavit of Dillard

For such opinion as Mr. Dillard offers, he states that one of his material sources is the opinion of Mr. Pagliarini.

However, Mr. Pagliarini states that he formed his opinion by relying on materials prepared by Mr. Dillard. These materials are shown in the reply affidavits to be subjectively

compiled, and replete with error. See the Stanton Reply Affidavit to Pagliarini Affidavit. Mr. Dillard had no familiarity with this case before summary judgment was granted against the Town, and Mr. Pagliarini has no first-hand familiarity with the case at all.

Their testimony is expressly inextricably intertwined. The plaintiff objects to both. Neither is competent as a fact witness to much, and neither is competent or credible as an opinion witness at all. Therefore, Mr. Dillard's affidavit should be stricken, and otherwise be accorded no credibility. It provides no assistance to the Court as factfinder, and consists of largely slickly disparaging innuendo.

About half of Mr. Dillard's affidavit is devoted to a putative timeline on the one phase of the case which did involve him, the "fee discovery" phase. As outlined in the Stanton Reply Affidavit to Dillard Affidavit and as is apparent from the other papers in the case, that timeline is incomplete and inaccurate.

The Town's Arguments and Other Matter in its Opposition Brief

A. Averaging of Hours

The Town makes pointless calculations of what the average hours worked by the plaintiff's counsel would be if they had been worked other than at the time worked. As shown in the fee petition, the plaintiff's counsel worked nights and weekends, often on a compressed schedule, not solely on business hours over a five day week, not with an even distribution of burden.

This is reiterated in the Stanton Reply Affidavit to Pagliarini Affidavit. What the purpose or point of these calculations is other than pseudo-science or pseudo-analysis is still never made. There is no apparent point to these observations of the Town, unless they are for innuendo that

the hours were not worked. This cannot be backed up by the Town, who in other places appears to set about proving that the plaintiff's attorney did a great volume of work. No matter how hours might be averaged, their total remains. The total is 1000.5.

B. After Eight Months of Waiting, A New Argument, I.E., That Plaintiff Did Not Prevail or Otherwise that the Result Was Not Beneficial Enough to Allow an Enhancement of the Lodestar Calculation of Rate Multiplied by Actual Hours

The Town argues that the plaintiff did not obtain permanent relief, and therefore actually failed when the plaintiff got the Town's condemnation action quashed and dismissed on summary judgment. At another point in its brief, the Town describes this relief as "essentially temporary procedural relief."

This ill-founded argument, which could have been made eight months ago when the matter was fresh in the memory of those who were actually there, is refuted in this brief above at footnotes 3 and 7 and accompanying text. There, the arguments of Mr. Dillard himself regarding the purpose and application of the EDPA attorney's fees provisions are discussed, as well as his contention elsewhere that the plaintiff obtained all the relief that is usually possible in a challenge case.

It should also be noted that the plaintiff has not even requested a Layman multiplier to enhance the result of multiplying the rate by the number of actual hours. The attack on benefits obtained is therefore irrelevant in addition to be factually and legally incorrect. The Town argues that a negative "multiplier" should be used to penalize the plaintiff on the basis that winning summary judgment on undisputed facts and sparing the parties and the Court a trial was not good enough. This argument speaks for itself.

In the Stanton Reply Affidavit to Pagliarini Affidavit is additional discussion of the

lasting effects of the result in the case, e.g., the inability of the Town to proceed again with a false appraisal, as it has now done not once, but twice.

The plaintiff still owns the subject one-third of the plaintiff's land, free any right of the public to traverse it or camp out on it, free of any right of Town agents to go four-wheeling on it with the vehicles currently being used for that purpose, free of any right of the Town to put giant trash cans on it, free of any right of the Town "or its assignees" to destroy the plaintiff's deck, steps or other improvements, and free of many other burdens.

This is a significant and highly beneficial result. It should be noted, however, that the fee request calculated by the plaintiff is without any enhancement of the lodestar calculation for the beneficial result obtained and this is still within the Court's discretion to add.

C. The Recurring Fallacious Characterization of the Town's Fatally Unacceptable Acts as Mere "Procedural Deficiencies" Not Involving Falsity, Dishonesty or Purposefully Prejudicial Omissions, Nondisclosures or Concealment

Much like the proposed easements themselves, the main of the Town's overall brief and argument is dependent on willingness to accept curative fiction stated by the Town, and analysis employing the facts not as they truly are.

In further press of its argument that summary judgment dismissal of the Town's action is not enough success or any success at all, the Town makes much argument under the false premise that the acts and omissions of the Town forming the basis of the Amended Complaint were "either/or" facts which were either exclusively "procedural" or exclusively "fraud."

The Town similarly stakes its arguments on the false premise that the acts and omissions of the Town forming the basis for summary judgment were exclusively "deficiencies in procedures."

As explained in detail in the Stanton Reply Affidavit to Pagliarini Affidavit, the "deficiencies" in behavior by the Town were fundamentally infused with dishonest practices and material effects on the proposed condemnation.

Even if, hypothetically, one believed that lying is not dishonest, or that engaging in activities which repetitively and successively result in false acts is not fraudulent, the facts which the plaintiff alleged to constitute dishonest behavior were the same facts on the basis of which summary judgment was granted.

For example, the plaintiff alleged that keeping the easement terms from the appraiser was dishonest and resulted in an appraisal of something different from what was being condemned. If, hypothetically, one thought the appraisal was the result of honest behavior -- in spite of the consistency of the misrepresentation of the easement with multiple prior Town misrepresentations of the nature and scope of the proposed easement -- the lack of an appraisal by an appraiser who was given the terms of what he was appraising was still fatal to the condemnation, requiring it to be dismissed. The "fraud" facts and alleged "fraud" acts, and the "procedural" facts and alleged "procedural" acts, were not mutually exclusive and were largely the same.

The facts were further inextricably intertwined, as were the numerous theories of recovery arising from them.

For an example of how just a few were woven together, (i) the fact that the Town had already declared the whole easement was unnecessary, just as it was for mid-island, and (ii) the fact that the plaintiff contended the easement was unnecessary in light of the burdens imposed, and (iii) the fact that the Town had already acknowledged that certain discrete features were not

necessary and could be feasibly changed, and (iv) the fact that the project was already finished and any later project was not certain to occur at all, all were matters for Town Council to consider in weighing the question of whether to condemn, and, if so, what to condemn.

On summary judgment, the Court ruled that the failure of Town Council to fairly deliberate, taking into consideration relevant factors, was fatal to the condemnation. These facts therefore all folded into, among others, the "failure to truthfully deliberate" theory of recovery successfully advanced by the plaintiff and affirmatively ruled on by the Court.

Softball descriptions of the several instances of the Town's behaviors as "procedural" do not make any of the underlying interrelated facts go away.

In authorizing condemnation, the Town Council publicly described the easement to be condemned fundamentally differently from the one the Town tried to condemn.

In thereafter preparing for condemnation, the Town did not give the appraiser the terms of the easement which defined the very thing he was supposed to put a value on, and which were the very things that defined its value and the burdens it imposed.

In thereafter pursuing condemnation, the Town knowingly used the false appraisal, and incorporated the materially incorrect value in the offer made in the condemnation notice, which, under the EDPA, was the same amount the Town would thereafter have to post with the court for the landowner's security before the Town could go forward if the condemnation had gone forward. The Town was supposed to make the appraisal available to the landowner before suing the landowner, i.e., before serving the landowner with a condemnation notice, but did not. But the Town falsely certified in the condemnation notice that the Town did so.

To address the impropriety of the above described several acts and omissions, the

landowner-plaintiff was required to bring a challenge action. That is, the landowner was not legally allowed to bring these things up as a defense in the "direct condemnation action" brought by Town and could only do so by bringing the landowner's own separate challenge action. The plaintiff did so, and won, and the condemnation action of the Town was quashed and dismissed.

The acts described above were the things that formed the so-called "procedural deficiencies" which were described in granting summary judgment. That the same acts were both dishonest and a per se violation of the EDPA does not make them different or unrelated acts.

D. The Heart of the Challenge: to Successfully Challenge the Condemnation Attempt

In order to inaccurately set the stage for its arguments that the result for the plaintiff was not beneficial enough or beneficial at all, the Town indulges in more curative fiction in its brief at 6, where the Town selectively lists, not the eight or nine theories of recovery listed by the Court in the summary judgment order or the eight examples of dishonest acts in a brief of the plaintiff quoted by the Town at 6-7, but a nonexclusive enumeration of four items the Town here calls the claims "at the heart of the plaintiff's challenge action."

In doing so, the Town does not even cite the same source for the four selected heart pieces. The effect of this selectivity and artificial truncation is to avoid items tending to highlight the intertwinedness of the facts and legal theories.

In this and the rest of its brief, the Town does not once recite accurately and comprehensively the theories of recovery implicated in the Amended Complaint or the large mass of overlapping facts which support numerous bases for the same relief – quashing the condemnation and dismissing it. The relief was not to require an amendment to correct a mere

procedural or typographical deficiency. The deficiencies were, among other things, time-sensitive, and dependent on underlying acts and content, and could not be corrected by amendment like a scrivenor's error as the Town repetitively implies in its pat descriptions. The relief was to quash and dismiss the action for material acts that could not be changed by amendment.

E. Calling Facts and Acts "Claims"

Our courts do not segregate attorney's fees for efforts spent on proving, or preparing to prove, intertwined facts. The Town calls facts "claims," so that the Town can argue that even though a fact was part of the basis for summary judgment, the decision of the Court to grant summary judgment based on the fact without reaching the question of all the qualitative features and implications of the fact means a "claim" "failed." The facts were all intertwined and the plaintiff was successful in having the condemnation case dismissed.

The fraud facts were not just "broad," as the Town states in its brief at 6, although calling them "claims." There, the Town recounts an eight-point enumeration by the plaintiff of fraudulent acts by the Town. The facts were also – as not acknowledged by the Town – specific and detailed.[10] The Town argues that none of these "claims" challenging the Town's "fundamental right to ever condemn the easements" were "addressed" in the Order. What the Town avoids in choosing these words is that every single one of the enumerated facts – all eight

10 These and other interrelated facts resulted in a multi-paragraph Amended Complaint the length of which the Town repeatedly complains of as a substitute for actual analysis. That papers are long or hours are long is no more logical a form of argument or analysis of content than name-calling.

of them – were facts that supported the Court's order and were largely employed by the Court in deciding to dismiss the condemnation.

For example, item "(vi)" in the list, "attempting, dishonestly, to condemn interests in real estate which were different or greater in scope than the interests in real estate which were the subjects of the appraisals," is exactly what the Judge based summary judgment on. This is with the exception that he did not state that the huge discrepancy between what the appraiser appraised and what the Town attempted to condemn was "dishonest" or the result of dishonesty.

He instead concluded that this fundamental disconnect was per se a violation of the EDPA, and invalidated the condemnation papers and the condemnation attempt without need of proof of fraud or bad faith. He therefore stated he did not feel it "appropriate" to go into analysis of fraud, but never at any time stated there was no fraud or dishonesty shown by the facts.

This was a summary proceeding and a summary disposition and not a merits trial after more discovery by the plaintiff. The plaintiff had not even yet gotten to the point of presenting, in a trial setting, other potential evidence bearing on the existence, or depth or breadth of fraud and bad faith. For example, as discussed in the Stanton Reply Affidavit to Pagliarini Affidavit, the withholding of the information from the appraiser while also supplying him with incorrect information resulted in potentially a $270,000 to $400,000 difference in the appraisal of each property.

The plaintiff may not have even presented the fact that the Town Administrator told the appraiser that the Town Administrator "did not have" the language of the easements. These appraisals were done in May to June of 2020, a year after the Town Administrator had begun collecting signed easements to file and had engaged in exchanges with property owners like

Stanton about specific landowner objections to the language and scope of the proposed easements.

There was no merits determination against the plaintiff on any claim. It is also obvious the Town never moved for summary judgment that no fraud, bad faith or abuse of discretion could be proved. The Town would have lost such a motion.

The Town filed a notice of condemnation stating that it had done what was required to take the property and stating that it had the right to take. The Court dismissed the action commenced by that notice, not allowing the Town to take. This is success in a challenge.

The EDPA provides attorney's fees to a successful challenge action plaintiff and also, in a sibling subsection of the same section of the statute, provides that attorney's fees are recoverable any time the condemnor abandons a condemnation. The clear legislative intent is to compensate the landowner for fees incurred any time the attempt is discontinued, whether involuntarily by court order, or voluntarily, by abandonment. Thus, conceptually, any time a condemnation is curtailed after a challenge, it is treated as a success of the challenger.

F. Misplaced Concept of "Non-Prevailing Theories" and Incorrect Facts Presented in Support

The Town's argument of no compensation for "non-prevailing theories" is, first, incorrectly applied even to the Town's fictional characterization and segregation of intertwined facts, as there was not a single merits determination against the plaintiff. Secondly, the Town's argument is based on the Court first accepting the pure fiction that the facts were not intertwined and none of the "procedural deficiencies" (e.g., lying in the course of authorizing condemnation, preparing for condemnation and pursuing condemnation) were relied on as part of the claims of dishonesty and none of the lying or falsity was involved in any of the "procedural deficiencies."

The notion of docking fees for not prevailing on a significantly distinct claim (e.g., one with a generally separate core of facts or a legal theory of recovery with few if any overlapping required elements, if not also a different remedy) requires the otherwise prevailing party to have the claim affirmatively determined against him on the merits, usually in a merits trial.

No issue or claim was determined against the plaintiff on the merits. The notion of excising compensation for so-called non-prevailing claims, to the extent recognized in South Carolina, generally does not apply to additional sustaining theories not reached by the Court on summary judgment for the prevailing party or not presented by the prevailing party because not in a posture for summary disposition or because of other factors.

The case cited by the Town, Rice v. Multimedia, Inc., 318 S.C. 95, 456 S.E.2d 381 (1995), involved seven truly distinct claims (commission based on being the effective cause of procurement of seven different contracts, on which the plaintiff won on four and lost on three). In Rice, there was a full merits jury trial. There was an actual determination against the otherwise prevailing party on certain claims in a multi-claim case in which each commission claim turned on a different set of facts. "Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee." Hensley v. Eckerhart, 461 U.S. 424 at 435–36 (1983)(reducing fees after merits determination, in three week trial, against prevailing party on distinct claim relating to staffing, as opposed to other successful claims for which the staffing claim did not provide grounds).

G. Alleged "Unnecessary Unsuccessful Objection" "Associated With" Production of Fee Statements

The Town cites one case for the proposition that fees should be excised for unsuccessful opposition associated with motions. The Town contends that fees "associated with" objection to "production of fee statements" should somehow be identified and excised.

Among the problems with the Town's argument are that the precedent requires wholly unsuccessful opposition to a motion, that was unnecessary and not beneficial. The example is bringing a sanctions motion and losing it flatly and completely.

As more fully addressed in the Stanton Reply Affidavit to Dillard Affidavit, the Town can barely identify a motion it made instead of emerging requests embedded in briefs with no formal statement of grounds. When the Town made a motion for production of billing statements, the plaintiff had already volunteered to produce them. The main objection to the motion was not to "production of billing statements," but to a change in the terms the plaintiff's counsel reasonably believed were necessary to protect his client's confidential information under the Rules of Professional Conduct.

The contested part of the defendant's motion was not successful. Nor was the plaintiff's objection to the contested part of the defendant's motion wholly successful. The sample of billing records was produced as originally volunteered by the plaintiff's counsel, but the Court allowed fewer redactions than the plaintiff preferred and more than the defendant preferred. And the production was additionally subject to a protective order the original prototype of which was drafted by the plaintiff and changed over the course of various exchanges.

The plaintiff definitely was not wholly unsuccessful. The defendant was no more successful than the plaintiff. The actions taken were reasonable under the Rules of Professional Conduct and the results were beneficial in that the confidential information of the plaintiff

received some degree of protection from disclosure and was not subject to wholesale exposure as originally sought by the defendant.

This matter is addressed at length in the Stanton Reply Affidavit to Dillard Affidavit. There is no basis for reducing fees of the prevailing party based on isolated, eight-months-delayed, sub-evaluations of motions in the course of the case. The motion handling involved reasonable action by any responsible lawyer in the course of handling a case, and that action was not unsuccessful and it did produce a beneficial result.

H. Alleged "Unnecessary Unsuccessful Opposition" "Associated With" the Town's Motion to Motion to Quash Town Administrator's Deposition

This argument is fully refuted by the facts set forth in the Stanton Reply Affidavit to Dillard Affidavit.

The deposition was noticed 1/15/21, before, not after, summary judgment was granted.

It was noticed in both the instant case and in the still pending second challenge case. The notice came with a note stating, "Attached and served are notices of deposition in each of the three new challenge cases, the "900 series," for the new condemnation notices. I have also included notices in the 600 series in case there is anything left to do in those."

The Town had moved for reconsideration of the summary judgment order entered on January 21, 2021, and the final summary judgment order was not entered until April 5, 2021.

Cooperating with opposing counsel, the plaintiff's counsel even agreed to reschedule the date on convenience grounds, conditioned on preservation of the Town's counsel's ability to object to the deposition on other grounds. He eventually did so, and there is no record in the instant case of objection filed by the plaintiff's counsel, who handled the motion with brief

colloquy at a hearing of other matters, including matters in the other challenge cases.

Time in due course was consumed discussing discovery matters with the defendant's counsel when the discovery was now straddling two cases. The plaintiff's counsel did not split hairs along the way as to which case the deposition was for, as the intent was to let it serve in both cases to the extent applicable. Other than normal review and reflection and going to the hearing, little or no time was spent opposing the motion in the instant case per se once summary judgment was finalized, but the plaintiff's counsel did object to dismissing the second challenge cases, and accordingly objected to curtailing discovery in those cases if the cases were not going to be dismissed.

So there was some argument or discussion, and reasonably so, in the other cases. There, to paraphrase, the judge said, "I think what I'll do is if I don't dismiss the case, I will not grant the motion for protective order; if I do dismiss the case, I will grant the protective order."

There is nothing wrong with the way this was handled by the plaintiff's counsel, particularly when it was the Town that started the multiple litigation by commencing a second set of condemnation cases.

I. "NO CHARGE" Entries on Plaintiff's Counsel's Billing Statements Which Plaintiff's Counsel's Billing Software Will Not Render Any Other Way

The Town argues that "NO CHARGE" entries appearing on plaintiff's counsel's billing statements were not charges and should not be recovered. As recapped in the Stanton Reply Affidavit to Affidavit of Dillard (for lack of a better place), and as is covered in the fee petition, these entries were, to the contrary, charged and billed.

As is obvious from the manually added description, "(Noted, not billed.)," included in

each of the subject entries on the bills themselves, as well as in an explicit explanation footnoted to the bills, these are entries of deferred time, are not free, and are subject to being charged on a later bill. The clients perfectly understood this and had no contrary agreement or understanding. That is, the entries are expressly not actually "no charge" items, but the plaintiff's counsel's billing software will not render the entries any other way using any other automatically generated wording, and still have the items show on a present bill but with no present charge.

As confirmed in the fee petition, and the referenced Reply Affidavit, these time items were indeed later billed. Plaintiff doubts that there is a math error in how many items initially were deferred, and has not checked it yet, as it does not matter, because the charges were billed. The plaintiff's counsel will be happy to look.

J. Case Not Difficult

It was, and is.

K. Appraiser's Deposition Not Necessary

It was necessary. This is fully addressed in the Stanton Reply Affidavit to Pagliarini Affidavit. Mr. Pagliarini and the Town could not be more wrong.

L. With All the Pseudo-Precise Quibbling, the Town's Failure to Ever Address or Account For the Effectual 1/3 Deduction Already Built Into the Plaintiff's Reasonable Fee Request

The Town so fails.

M. Argument that the Plaintiff's Counsel Does Not "Appear" to Have Special Knowledge (Impliedly in Eminent Domain Matters)

This is wrong. He does. See Stanton Reply Affidavit to Affidavit of Pagliarini.

N. Repeated Reference to "Proposed Reduction Table"

The reduction table is a homemade monstrosity of impropriety, error and inadmissibility,

as described in factual detail in the Stanton Reply Affidavit to Pagliarini Affidavit. It should be ignored entirely.

O. False Statement by Town that the Plaintiff's Counsel Worked Nearly a 1000 hours over "A Few Months"

As set forth in the fee petition, the Plaintiff's counsel worked, rather, 1000.5 hours over, rather, one (1) year, two (2) months, and (1) week.

P. Further Correct Legal Authorities

The footnotes in the previous sections of this reply brief set forth adequate law on the law of attorney's fees, but the referenced 2/5/21, 3/1/21 and 3/17/21 briefs of the plaintiff, which the Court may wish to consult again, set forth additional cases commenting on the lead cases, and many historical cases leading to the present state of the law, and the plaintiff respectfully incorporates them herein and is at the disposal of the court to supply research on any principle in doubt.

The fee petition should be granted, with leave given to the plaintiff to submit supplemental post-9/9/21 actual fees and expenses (net of prior estimate) to be added to the award.

Respectfully submitted,

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10/4/21

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable Michael G. Nettles, Circuit Court Judge

CASE NO. 20-CP-22-00600
CASE NO. 20-CP-22-00601

Sunset Lodge, LLC, ...Appellant,

v.

Town of Pawleys Island,.....Respondent.

and

Franklin D. Beattie, as trustee of the Franklin D. Beattie Preservation Trust, ...Appellant,

v.

Town of Pawleys Island,.....Respondent.

CERTIFICATE OF SERVICE

I, M. Baron Stanton, do hereby certify that I have, on this date, served the foregoing **Appellants' Return to Respondent's Motion to Strike Arguments from Appellants' Reply Brief** upon the Respondent by causing a copy to be e-mailed in accordance with current rules to

will@belserpa.com . The postal mailing address of the above addressee is:

William C. Dillard, Jr., Esquire
Post Office Box 96
Columbia, SC 29202

s/M. Baron Stanton
M. Baron Stanton

Date: Jan. 6, 2023