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.

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10. Did the Circuit Court err in determining that there were "claims" on which the Landowners "did not prevail," when the relevant inquiry would have been, first, whether the thing in question was actually a "claim," and, second, whether it was determined completely in favor of the Town, against the Landowners, and, regardless of the relevant inquiry, determining that there were things the Landowners did not prevail on?
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17. Did the Circuit Court err and "abuse its discretion" in failing to exercise discretion and being influenced by, in addition to the errors in the other issues on appeal, other errors, including but not limited to applying the two factors to determine and deduct time instead of to enhance the overall lodestar fee, applying the factors as a penalty for putative lack of "complexity" and "benefit," making complexity and benefit findings without any support in the Record and pursuant to other irrational processes, making other illogical and inconsistent factual findings, taking other illogical and inconsistent legal positions, misapplying and violating Hensley by docking time for inclusion of additional supporting grounds, working under the assumption that additional grounds adduced by the Landowners were determined adversely to the Landowners when they were not, violating the law of the case that there was evidence the easements were unnecessary in scope and overall, making observations or findings regarding the fee proceedings and the case in chief with no factual support in the record, and making other errors argued by Landowners in the court below?
18. Did the Circuit Court err in stating that the three cases had been merged?

STATEMENT OF THE CASE

I. Short Uncontested Statement

Two of three landowner-plaintiffs ("Landowners") in challenge actions appeal the amount of the Circuit Court's award of attorney's fees to them after they defeated the Town of Pawley's Island's attempt to condemn an easement on the oceanfront portion of each Landowner's improved oceanfront land.

The Landowners requested reimbursement of a share of fees charged by their one lawyer based on 950.5 of the hours he actually worked. The Circuit Court awarded fees based upon a share of 125 hours.

In June 2020, the Town sued each of three landowners, Sunset, Beattie and Stanton. In July 2020, each of the three filed suit, challenging the Town's condemnation attempt. Each Landowner used the same lawyer, Stanton.

The Landowners prevailed in each of the three challenge actions. They obtained summary judgment on January 8, 2021, quashing the condemnation notices. The 24-page formal judgment of Judge Nettles was entered on January 20, 2021, and re-entered on April 5, 2021. The April 5 order was not appealed and became the law of the case.

On January 25, 2021, Sunset and Beattie applied for reimbursement of attorney's fees and other expenses pursuant to the S.C. Eminent Domain Procedure Act (the "EDPA"). The third Landowner, Stanton, who was also the attorney in the three cases, waived his fees for his own representation, and sought only his other expenses.

For the three cases overall, request was made for fees based on two-thirds of a reduced account of the total time sworn to have been spent for all three cases at $190 per hour.

On October 6, 2021, the Court heard the fee petition. The Landowners' attorney adduced an updated affidavit of 1000.5 hours spent on the three cases. The Town conceded on the record that the hours the Landowners' counsel swore to have been worked were worked.

In the update, for the three cases overall, request was made for two-thirds of fees based on 950.5 hours sworn to have been spent for all three cases at $190 per hour. Of the approximately $180,000 product for all three cases, the Landowners Sunset and Beattie each requested award of approximately $60,000. Stanton waived claim to the remaining $60,000 for representing himself.

On November 23, 2021, Judge Nettles (i) found the three cases not to have been complicated, (ii) found the results in the three cases not to be very beneficial, and therefore (iii) found the time spent on the three cases to be excessive. The Court awarded each of the requesting Landowners $8,000 for attorney's fees, plus other nonfee expenses.

The Court based the $8,000 award on a finding of 125 reasonable hours of total time incurred in all three cases. The Court applied an hourly rate of $190, divided the overall fee by three, and awarded no fees to the Landowner lawyer (Stanton) who waived his claim to fees for representing himself.

The Court gave the following reasons for its reduction of the conceded hours actually worked:

(i) resolution was by summary judgment instead of trial,

(ii) the basis for summary judgment was procedural in nature,

(iii) the Landowners' counsel's preparation included analyzing only a handful of meetings at which decisions might have been made,

(iv) the Landowners did not have an expert,

(v) no testimony from the Landowners' deposition of the Town's appraiser was referenced in the order granting summary judgment, and

(vi) the Landowners were unsuccessful in their dispute with the Town over production and redaction of attorney fee statements in the later proceedings on the fee application.

On December 2, 2021, the Landowners made a motion for reconsideration, in which the Landowners asserted the award was erroneous and grossly inadequate. On January 28, 2022, the Circuit Court denied the motion. On February 28, 2022, the two appealing Landowners served notice of appeal.

II. Extended Statement of Uncontested Facts

It was in 2019 that the Town began requesting free easements from about 113 oceanfront landowners. The stated purpose was putting additional sand on the beach under the Town's announced "beach renourishment" project. In response, the Landowners herein each separately agreed to grant oceanfront easements on their land for sand work and related work. The offered easements were unacceptable to the Town. The Town rejected them.

The Town later declared the easements unnecessary. The Town proceeded with the project. In February 2020, the Town completed the sand supplementation. The Town then began requesting easements again.

On May 18, 2020, the Town Council held a meeting. There, they made their only decision of a formal resolution to authorize condemnation of easements to put sand on the beach on the Landowners' property.

In June 2020, by serving condemnation notices under the EDPA, the Town commenced the first three of six condemnation suits. Each suit by the Town was against a different homeowner-Landowner.

The Town sought to impose easements for the perpetual "right of public use and access" with respect to the oceanfront portion of the Landowners' property. The Town also included a perpetual right of the Town to perform "beach renourishment" on the Landowners' property,[1] including the right to destroy owner improvements, a perpetual right to engage in additional activities, including "operation of a public beach," and a perpetual right to impose certain additional restrictions on the use of the property.

The Town attempted to take these easements for zero compensation, based on an appraisal.

The condemnation notices each referred to an appraisal. Each certified that the appraisal had been made available. No appraisal had been made available.

No appraisals accompanied the papers. The results of the referenced appraisals had appeared in the newspaper. The condemnation notices warned of a 30-day window in which the Landowners must commence a challenge action or else waive all challenge to the right to take.[2]

Each Landowner subsequently obtained the 60-page appraisal the Town had commissioned for purposes of condemning that Landowner's property.

In July 2020, each of the Landowners sued pursuant to S.C. Code Ann. §28-2-470 (part of the EDPA) to stop the attempted condemnation. They each used Stanton, a lawyer, as counsel. They contracted to split the fees three ways.

These were the first three "challenge suits" (the "Challenge I cases"). Under the EDPA, each challenge suit stayed the respective condemnation attempt.

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[1] The Town itself owns no part of the beach whatsoever. The Landowners own the upper beach. The Landowners own to the mean high water mark of the Atlantic Ocean, and the State of Carolina claims to own the land below the mean high water mark in trust for the public of South Carolina under the "Public Trust Doctrine."

[2] Under S.C. Code Ann. §28-2-470, "[n]o issues involving the condemnor's right to condemn may be heard in the trial upon the issue of just compensation."

On July 31, 2020, the Landowners each filed an approximately 177-paragraph Amended Complaint in their respective Challenge I case.

On August 3, 2020, the Town filed motions pursuant to Rule 12(b)(6), SCRCP, to dismiss the three Challenge I cases for failure, on the face of the Amended Complaint, to allege facts sufficient to state any cause of action. The Town also obtained an expedited hearing of the Town's motions. The Town asserted that the challenges were brought in bad faith and requested that attorney's fees be assessed against the Landowners.

The Town also filed a motion to require each Landowner to post a ten-million-dollar bond. The bond was to serve as recourse for liability to be imposed against the Landowner for stopping the condemnation. The Town also moved to expedite the case overall.

On August 12, 2020, the Landowners served interrogatories and requests for production.

On August 17, 2021, the Court issued a roster notice of September 11, 2021 hearing.

On August 21, 2020, the Landowners filed a motion for summary judgment and supporting affidavit. They requested that the attempted condemnation be quashed on multiple grounds stated in detail.

On August 25, 2021, the Town filed a motion to halt discovery against the Town.

On August 28, 2011, the Town filed an affidavit of then Town Administrator Fabbri in support of the Town's 12(b)(6) motion.

On September 11, 2020, Judge Culbertson held a hearing in Georgetown on the Town's motion to dismiss. Both parties had briefed the motion. Judge Culbertson denied the motion. He denied the Town's motion to expedite the case overall. He denied the Town's motions to require $30,000,000 in bonds.

Judge Culbertson did not hear the Landowners' August 21 motion for summary judgment, did not hear the Town's motion to prohibit the Landowners from obtaining discovery, and did not hear a pending motion the Landowners had filed to compel the Town to respond to first interrogatories.

On September 18, 2020, the Town answered the Amended Complaint. The Town denied over 173 of the 177 paragraphs.

On September 28, 2020, the Court put the August 21 motion for summary judgment on the roster for October 30, 2020.

On or around October 6, 2020, the Town served interrogatories and requests for production. The Landowners' counsel, after attempts to consult opposing counsel, later filed a motion for enlargement of time to respond, and subsequently fully responded.

On October 12, 2020, the Town Council held another meeting. They decided on another formal resolution. The resolution related to the existing condemnation attempt and the easement sought. The resolution did not reference additional condemnation actions.

On October 12, 2020 the Court sent a reminder notice for the October 30 consideration of summary judgment, indicating preference and availability of oral argument.

On October 14, 2021, the Town moved to continue the hearing of the motion. The Town asserted that discovery was not complete and stated certain personal conflicts as reasons for continuance.

On October 14, 2021, the Landowners filed an affidavit with a detailed response to the request for continuance.

Friday, October 16, 2020 was the day previously agreed for the Town's appraiser's deposition. On the first day of the deposition, October 16, 2020, the Town sued each of the three

Landowners again. The Landowners took the deposition, completing it on a day the following week. The one deposition for the three cases took approximately eight hours.

In the additional three condemnation actions, the Town again sought to take easements for perpetual public access to and use of the oceanfront portion of the Landowners' property, for the Town's right to perform "beach renourishment," including destruction of owner improvements, for the Town to engage in additional activities, including "operation of a public beach," and for the Town to be able to impose certain additional restrictions on the use of the property. The Town again sought to do so for zero compensation.

No appraisal accompanied the papers served. No additional appraisal was provided previously.

On October 21, 2020, the Court continued the October 30 summary judgment hearing.

On October 30, 2020, Ryan Fabbri, then Town Administrator, signed an affidavit for the Town. It was not at that time served on or provided to the Landowners.

On November 12, 2020, each of the three Landowners commenced a challenge suit to stop each of the three additional condemnation suits. These were the second three[3] challenge suits (the "Challenge II cases").

On November 20, 2020, the Town filed the October 30 affidavit of Ryan Fabbri.

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[3] The Landowners in the Challenge II cases and respective case numbers are as follows: Sunset Lodge, LLC, 2020-CP-22-00932, Franklin D. Beattie, as trustee of the Franklin D. Beattie Preservation Trust, 2020-CP-22-00931, and M. Baron Stanton, 2020-CP-22-00930.

Unless a difference is noted, the pleadings, motions, discovery, orders and other papers in the Challenge I cases were handled similarly to each other, and the pleadings, motions, discovery, orders and other papers in the Challenge II cases were also handled similarly to each other. Reference to an item in the Record on Appeal herein or otherwise, is generally a reference to a paper in in the Sunset case and is intended to include a reference to the corresponding item in each of the three corresponding challenge suits.

The Challenge I cases were consolidated at the trial level, but only at the end.

On December 4, 2020, Judge Nettles heard the Landowners' summary judgment motions.

Also pending were the Town's motion for protection from discovery and the Landowners' request to compel the Town to swear, pursuant to Rule 33, SCRCP, to October 26, 2020 answers to August 12, 2020 interrogatories, and to either answer, or answer fully, certain interrogatories.

The parties confirmed to Judge Nettles at oral argument that for purposes of all three cases, the Landowners had deposed the appraiser.

The Town acknowledged at oral argument that the Town had served additional condemnation notices on the Landowners, with respect to which the Landowners had filed actions 2020CP2200930, -931 and -932 (the Challenge II cases).

On January 8, 2021, the Judge preliminarily granted summary judgment on a "Form 4."

On January 14, 2021, the Town filed a motion to disqualify the Landowners' counsel. The motion asserted disqualification from representing Sunset and Beattie in the Challenge I cases. At 11:05 p.m., the Landowners filed a motion to strike the Town's motion for failure to consult between counsel as required before filing the motion.

On January 15, 2021, the Landowners served notice that the Landowners would take a deposition in all six cases of the then Town Administrator (Fabbri), on February 19, 2021.

On January 20, 2021, Judge Price heard the Landowners' motion to compel certain discovery from the Town.

On January 20, 2021, Judge Nettles entered the formal 24-page summary judgment order ("Summary Judgment Order," sometimes "Summary Judgment"), quashing and dismissing the condemnation attempt.

The Summary Judgment Order pursuant to Rule 56 ruled that approximately 50 facts

germane to the motion were undisputed. This order was re-entered April 5, 2021, was not appealed, is the law of the case,[4] and is binding on the parties and the Circuit Court in later proceedings in the same case.

These undisputed facts, in extenso, were as follows:

> The easement the Town seeks in the subject action, according to the proposed easement's actual, written terms, which are stated in the condemnation papers served, subjects the affected part of the owner's land to "public use and access." (See, e.g., Stanton Aff. ¶¶33 and 37.)
>
> These written terms also subject the affected part to 1.) "operation of a public beach" on the owner's land, 2.) "patrolling" on the owner's land, 3.) restriction of the owner's access to the owner's land and right of access to the ocean, 4.) destruction of existing and future owner improvements, and 5.) limitations on future access structures, as well as other features. (See, e.g., Stanton Aff. ¶¶33 and 37.)
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> The Town, when soliciting similar easements from other owners, described what it seeks as being for "beach renourishment," with no reference to the other objected-to encumbrances. (See, e.g., Stanton Aff. ¶¶3(a), 3(c), 5(a), 5(b)(iv), 5(c)(i)-(iv), 5(c)(vi)-(vii), 18-22, 31, 33, 38-56, 58-69, 71-90, and 94-99.)
>
> While there are suggestions in the Town's oral and written argument that the easement sought in the condemnation notice is a construction easement for sand placement, it is undisputed that the written terms of the easement provide that it is perpetual, it is for depositing and leaving dredged sand permanently on Plaintiff's land, and is "together with the right of public use and access" throughout the easement area.
>
> The map in the condemnation papers locates the easement area, spatially, two feet from homes, and in cases, envelopes owner improvements.
>
> The Town began requesting the easements before renourishing, but the renourishment has now been done. The right of public use and access, if granted or taken, is perpetual and not stated to be dependent upon renourishment occurring, occurring again, or occurring on any particular frequency. This perpetual right is also not stated to be dependent on the public, when exercising this right, assisting in doing the renourishment work.
>
> The Town's brief and the affidavit of Mr. Fabbri do not mention public access or destruction of owner improvements or unreasonable proximity. They explain that the easement and their descriptions of it are sufficient and accurate because it is not unreasonable to expect that a renourishment project may require "safe and suitable access" to the worksite (TOP brf. at 4), the ability to add "sand fencing and planting beach grass" (TOP brf. at 5), and the ability to undertake "all activities related to construction and maintenance of the renourished beach" (TOP brf. at 5).
>
> The Town represented that "[t]he easement is required solely for activities related to the construction and maintenance of the project, including sand placement and

[4] The law-of-the-case principle is recapped in the section on scope and standard of review, below.

associated earthwork, installation of sand fencing, and planting of beach grass associated with the project." (TOP brf. at 5 (emphasis added).)

However, the Town provided in the easement, in addition to the grant of permission to place sand on the beach, groom it, move equipment, add erosion control, plant vegetation, etc., a provision that the grant was "together with the right of public use and access." (Stanton Aff., e.g., ¶37(b).)

The Town started out with the above representations as to the sole activities the easement would allow, and that what the Town sent to be signed stated that the rights granted were "together with the right of public use and access," among other things. (TOP brf. at 5, admitting representation.)

Similar easements were sought in this manner for only about half of the Town's overall renourishment project. The easements were sought only for the limited part on the south end of the island, on which the Town had engaged in discussions and conditional agreements to get present and future assistance from the U.S. Army Corps of Engineers. (Stanton Aff. ¶¶16 and 17.) The rest of the project did not involve financial contribution by the Corps or any request for easements.

No such assistance was to be involved in the other part of the project, in the part north of where there might be Corps involvement, and no such easements have been proposed to Town Council members or other owners in that part. (Stanton Aff. 12,15-17, 24, 30, 32, 48(c)-(h), and 81-84.)

In 2019, all three condemnees provided to the Town signed deeds of easement. The easements they provided granted the Town the following:

A. The right to engage solely in activities related to the construction and maintenance of the project, including sand placement and associated earthwork, installation of sand fencing, and planting of beach grass associated with the project (compare TOP brf. at 5, stating this was the purpose of the easement);

B. The ability to establish safe and suitable access to the worksite (compare TOP brf. at 4, stating this was a requirement of the easement);

C. The ability to add sand fencing and plant beach grass (compare TOP brf. at 5, stating this was a requirement of the easement); and

D. The ability to undertake all activities related to construction and maintenance of the renourished beach (compare TOP brf. at 5, stating this was a requirement of the easement). (Stanton Aff. ¶¶34(b), 34(c), 34(e), 34(f), 35, 36, 48(b), 54, 59, 60, 61, 62, 66, 67, 69, 72, 74, 92, 99, 112, 113, and 126.)

Condemnee Stanton's signed easement was rejected by the Town. (Stanton Aff. ¶¶35 and 36.) Condemnee Beattie's signed easement was rejected by the Town. (Stanton Aff. ¶¶ 35 and 36.) Condemnee Sunset Lodge, LLC's easement was recorded by Sunset Lodge and remains of record but has been rejected by the Town. (Stanton Aff. ¶¶ 35 and 36.)

After obtaining easements from numerous other owners in the manner described above, the Town proceeded to complete the actual overall renourishment without the involvement of the Corps. (Stanton Aff. ¶¶26-28.)

The renourishment is done. (Stanton Aff. ¶28.) The Town did this without any easement from two condemnees and other owners from whom the Town had not obtained

easements or whose easements the Town rejected. (Stanton Aff. ¶¶35, 25-28.) The Town rejected the easements after publicly determining easements were "not necessary." (Stanton Aff. ¶27.)

After the renourishment was completed, the Town Council voted May 18, 2020, to condemn easements from remaining owners, describing the easements authorized to be condemned only as "renourishment easements," without describing the above objected-to encumbrances. (Stanton Aff. ¶¶33-48; see also ¶¶49-99.)

There is a full, official recording of the meeting, and before the condemnation action was served, there was no public record of Town Council considering the specific objections of the proposed condemnees to the easement requested. (Compare Fabbri Aff., devoid of any evidence of any such consideration.) There is also no public record of Town Council discussing, mentioning, or acknowledging that the three condemnees had provided the Town with signed easements providing the things in A-D, above, and more. (Compare Fabbri Aff., devoid of any evidence of any such discussion by Town Council.)

For purposes of the thus approved condemnation of a "renourishment easement," the Town then procured an appraisal report without describing these objected-to encumbrances to the appraiser. (Stanton Aff. ¶¶105, 106, 107, 111, 112, 113, 114, 115, 116, 128, and129.) The appraiser was not given a copy of the language of the proposed easement that fully disclosed the scope of the easement. (Stanton Aff. ¶¶105, 106, 107, 111, 112, 113, 114, 115, 116, 128, and129.)

Pursuant to pages 44-45 of the Appraisal Report, which is Exhibit C to the Town's brief, the appraiser states:

> Although no documents were provided, it is my understanding that the easements will only be used during the beach renourishment project, and only if access to the property is required for the work. I am unaware of the frequency of the planned renourishment work to be performed in the future.
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> ***

This appraiser was required by statute to be hired by the Town to value the easement "to determine the amount that would constitute just compensation for its taking." S.C. Code Ann. §28-2-70(A).

The Town did not make the appraisal report available to Plaintiff before serving the condemnation notice. (Stanton Aff. ¶123.)

The part of the owner's land subjected to the above-described, objected-to encumbrances – including public access and the ability to remove "obstructions" – under earlier versions of the proposed easement was the entire lot and house. (Stanton Aff. ¶¶37(f) and 37(g).) Under later versions, the subject part is the part running from the owner's eastern property boundary shown on the plat prepared by the Town (the mean high watermark on the ocean) west (landward) to two feet from the main supports of the main house. (Stanton Aff. ¶¶37(f) and 37(g).)

On or about November 20, 2020, the Town filed an affidavit of Ryan Fabbri. In the Affidavit, Mr. Fabbri, a Town employee, testifies to the intent of Town Council (e.g., Aff. at 4 and 7) and Town Council's awareness (e.g., Aff. at 5).

4/5/21 Summary Judgment Order, pp. 6-12 (omitting substantial footnotes regarding terms of federal programs, scientific studies and terminology), R. pp. 65-71.)

The Summary Judgment Order ruled that the Landowners had presented "about nine sometimes factually overlapping reasons for granting summary judgment." (Summary Judgment Order, p. 13 (setting forth reasons), R. p.72.)

Judge Nettles's discussion included rulings that the failure of the Town Council to identify and discuss the objected-to features in authorizing condemnation, and the failure of the Town to apprise the appraiser of the objected-to features, were fatal to the condemnation attempt.

On January 25, 2021, the Landowners filed a fee petition. In about 26 pages, it included a motion for award of attorney's fees and expenses, an affidavit of fees and expenses, a proposed order, and a proposed Form 4A. (Collectively, including later updates, the "fee petition.")

The fee petition included background on the lawyer, the case, and the work, and a specification of the sworn hours worked on the cases in tenths of hours. The petition requested that the contractual hourly rate of $190 be applied to a specified reduced number of the sworn hours, and did not request that the result be enhanced by a multiplier. The petition requested that the overall result be divided by three, that one-third be allotted to each Landowner, and that Sunset and Beattie each receive a third, while Stanton waived the one-third allotted to him.

The minimum number of hours sworn to have been devoted to all six challenge cases through January 24, 2021 was stated to be over 686.9 hours. A rate of $190 per hour and 686.9 hours represented $130,511 in fees overall through January 24, 2011, of which Sunset and Beattie each incurred and requested approximately $43,503.66 and Stanton incurred and waived $43,503.66.

This filing of the fee petition included time spent on the Challenge II cases. Subsequent update in April 2021 backed out about 54.9 hours of time for the Challenge II cases for separate submission.

At 9:59 p.m. on January 26, 2021, the Landowners filed a brief opposing the Town's January 14, 2020 motion to disqualify their counsel. The brief also supported Landowners' separately filed January 14 motion to strike for failure to consult.

On January 27, 2021, Judge Price entered an order granting the Landowners' motion to compel certain discovery from the Town, which motion had been heard January 20, 2021.

On January 29, 2021, the Town withdrew its motion to disqualify Landowners' counsel.

On January 29, 2021, the Town filed a motion to reconsider Summary Judgment.

The Town's contentions included an assertion that "[f]urther inquiry into the facts is necessary to determine, among other things, the Plaintiff's allegations in support of Plaintiff's challenge against the Defendant's authority to condemn," and that the Court should enter an order "directing the parties to complete pretrial matters."

Contained in the same January 29 document was a request by the Town for an evidentiary hearing, with live witnesses, on the fee petition. The Town requested delay of at least 120 days to engage in discovery.

On February 2, 2021, Judge Price amended his January 27, 2021 order granting the Landowners' motion to compel certain discovery from the Town, which motion had been heard by Judge Price January 20, 2021.

On February 3, 2021, the Landowners responded to the Town's January 29 motion to reconsider in which the Town also included requests for four-month delay and other matters.

On February 3, 2020, a third lawyer hired by the Town, Mr. Dillard, entered appearance.[5]

On February 4, 2021, the Landowners separately filed a brief replying to the fee-trial requests made in the Town's January 29, 2021 motion to reconsider Summary Judgment.

[5] It is undisputed that this lawyer, an affiant in the later proceedings on the fee petition, had not been involved in or responsible for the cases until shortly prior to entering his appearance.

On February 4, 2021, the Landowners supplemented the fee petition.

On February 5, 2021, the Town filed a brief opposing the fee petition, modifying the requests made in its January 29 paper.

On February 9, 2021, the Landowners filed a reply.

On February 10, 2021, the Town filed a notice in the Challenge II cases that the Town was abandoning its second three condemnation attempts. The Town later declared in papers and arguments that its abandonment was without prejudice to suing the Landowners for condemnation a third time and acknowledged it intended to do so.

On March 1, 2020, the Town filed a motion related to the fee proceedings and proposed that the motion be heard March 3, which was a day already scheduled for appearance before the Court relative to the fee proceedings. The Town modified the requests made in its January 29 paper, as modified by its February 5 paper.

On March 2, 2021, the Landowners filed a brief relative to requests by the Town and its March 1 motion, and objected to hearing the Town's March 1 motion on March 3.

On March 3, 2021, in the Challenge II cases, the Town filed motions for protection from then pending discovery sought therein by the Landowners, including the deposition of the then Town Administrator (Fabbri). The deposition had been continued by consent, without prejudice to the right of the Town to object to the deposition.

On March 5, 2021, in each of the Challenge II cases, the Town filed a motion to dismiss the challenge suit on the grounds that the suits were mooted by the Town's withdrawal of its condemnation notices without prejudice.

On March 17, 2021, the Landowners filed a brief in the fee-related proceedings in the instant case. The Landowners briefed their contention that South Carolina law concerning fee

applications does not require routine disclosure of private bills or routine disregard, waiver or breach of Rule 1.6 of the South Carolina Rules of Professional Conduct as a condition of requesting statutory fees.

On March 17, 2021, The Town filed a brief in support of its motion to reconsider Summary Judgment.

On March 18, 2021, the Landowners filed a brief opposing the Town's motion to reconsider.

On March 19, 2022, Judge Nettles heard the Town's January 29 motion to reconsider.

He also heard requests the Town had made in the January 29 motion paper, as later modified in the Town's February 5 paper and March 1 motion, relative to the fee petition.

On April 1, 2021, in Georgetown, Judge Culbertson heard the Town's March 3 motion for protective order and March 5 motion to dismiss in the Challenge II cases.

On April 5, 2021, in the instant case, Judge Nettles entered the final formal Summary Judgment Order against the Town.

On April 5, 2021, Judge Nettles entered a protective order providing for production of selected confidential billing materials in redacted form to the Town, and production of the selected billing materials, under seal, in redacted and unredacted form, to the Court for in camera review and determination of whether any redacted items should be unredacted.

On April 22, 2021, the Landowners updated the fee petition. Among other things, they backed out about 54.9 hours of their counsel's previously stated Challenge II time for separate submission and did not add subsequent time allocated to the Challenge II cases.

On April 22, 2021, Judge Culbertson in the Challenge II cases granted the Town's March 3 and March 5 motions to stop general discovery and to dismiss as moot.

On April 28, 2021, the Landowners each filed a motion to reconsider the Circuit Court's granting of the Town's March 3 and March 5 motions in the Challenge II cases. Among the Landowners' contentions were that in light of the Town's expressed intention to sue the Landowners a third time, the actions were not moot. The Landowners contended they should not be denied the opportunity to timely obtain the deposition of the then Town Administrator (Fabbri) and other discovery.

On May 5, 2021, the April 5, 2021 final Summary Judgment Order became final by nonappeal by the Town within 30 days.

On June 3, 2021, in Georgetown, Judge Culbertson heard and denied the Landowners' motions to reconsider his April 22, 2021 order granting the March 3 and March 5 motions of the Town in the Challenge II cases to preclude discovery and dismiss.

On July 2, 2021, the Landowners served notice of appeal of the Circuit Court's granting of the Town's March 3 and March 5 motions in the Challenge II cases.

On September 10, 2021, the Landowners filed the last of three updates (e.g., 2/4/21 and 4/22/21 updates) to the January 25, 2021 fee petition.

In the September 10, 2021 update, Sunset and Beattie each requested an award of actually incurred attorney's fees of $60,198.33, on the basis earlier described. That is, essentially, for the three cases overall, request was made for fees based on two-thirds of a reduced account of the total time sworn to have been spent for all three cases. No enhancement was requested.

On September 20, 2021, the Town filed approximately 104 pages of additional materials. These included a Memorandum in Opposition to the Landowners' 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."

On October 4, 2021, the Landowners replied. They filed a brief, an affidavit of Beattie, who is a retired lawyer, an affidavit of another attorney, Howard (a principal of the other party, Sunset), and other counteraffidavits by Stanton. The Beattie and Howard affidavits stated the experience of the affiants, stated that the affiants had observed the progress of the case from the beginning, stated that they were satisfied with the fees charged, and commented on the quality of the work.

On October 6, 2021, in Florence, Judge Nettles heard the Landowners' January 25, 2021 application for fees.

At the hearing, the Town's counsel stated for the record that the Town did not contend that the 1000.5 hours stated by the Landowners' counsel were not spent.

On November 23, 2021, Judge Nettles awarded Sunset and Beattie each $8,000 for attorney's fees, plus other nonfee expenses, making the rulings described in the short uncontested statement of the case, above (the "Fee Order").

This represented 125 total hours overall for the three cases, multiplied by $190 per hour, for a total of $24,000 overall, with no multiplier, of which one-third was awarded to Sunset, one-third was awarded to Beattie, and nothing was awarded to Stanton, who had waived a claim to fees.

On December 2, 2021, Sunset and Beattie served a motion to reconsider, asserting that the award was erroneous, contrary to statute, and grossly inadequate.

On January 28, 2022, the Circuit Court denied the motion without hearing in an order of the same date.

On Monday, February 28, 2022, Sunset and Beattie served notice of appeal.

SCOPE AND STANDARD OF REVIEW

Where, as here, the issue of the amount of attorneys' fees awarded hinges on the court's interpretation of "reasonable" attorneys' fees as contained in the operative fee award statute, the issue is a question of law, which the reviewing court reviews de novo. Layman v. State, 658 S.E.2d 320, 376 S.C. 434 (2008). This Court may determine the amount. See Layman.

Otherwise, the review of attorney's fees awarded pursuant to statute is governed by an abuse of discretion standard. See, e.g., Blumberg v. Nealco, 310 S.C. 492, 493, 427 S.E.2d 659, 660 (1993); Heath v. County of Aiken, 302 S.C. 178, 182, 394 S.E.2d 709, 711 (1990).

"'Abuse of discretion' does not mean any reflection upon the presiding Judge, and it is a strict legal term, to indicate that the appellate Court is simply of the opinion that there was commission of an error of law in the circumstances."[6] State v. Gregory, 171 S.C. 535, 548, 172

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[6] Even when the Court reviews a case under an "any evidence" standard of review, the reviewing court still should not address the sufficiency of the evidence supporting the lower court's findings, when the "[lower] court's findings are so tainted by errors of law as to require [reversal]." Callen v. Callen, 365 S.C. 618, 620 S.E.2d 59 (2005). This principle makes sense, because if there are one or more legal errors guiding the decision, review of factual error could be infinite or circular, and a search for evidence to support a factual finding which is guided by legal error or which is made for the purposes of applying erroneous perceptions of law is useless.

The term "abuse of discretion" also includes manifest error, in which the decision displays lapses of logic and appears so plainly against the greater weight of the evidence as to produce a result representing whim, caprice, or arbitrary decision. See State v. White, 218 S.C. 130, 61 S.E.2d 754 (1950)(discussing "manifest error" in discretionary probation revocation setting, and requirement of conscientious judgment, lack of arbitrary action, proper account of applicable law and the particular circumstances of the case, and absence of whim or caprice).

"An abuse of discretion occurs when the decision is controlled by some error of law or is based on findings of fact that are without evidentiary support." Lewis v. Lewis, 392 S.C. 381, 390, 709 S.E.2d. 650, 654-55 (2011) (citing Eason v. Eason, 384 S.C. at 479, 682 S.E.2d at 807 (2009)); Fontaine v. Peitz, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987). Accord, State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017) (citing State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)), and State v. Hatcher, 392 S.C. 86, 708 S.E. 2d 750 (2011).

An abuse of discretion is also found when the judge appealed from is vested with discretion to grant relief to the appealing party, but the ruling reveals no discretion was, in fact, exercised. Fontaine v. Peitz, 291 S.C. 536 at 538-39, 354 S.E.2d 565 at 566-67 (1987)(reversing because trial judge's belief he could not permit additional testimony was erroneous).

S.E. 692, 705 (1934) (citing Barrett v. Broad River Power Co., 146 S.C. 85, 143 S.E. 650, 654 (1928)). Accord, Bishop v. Bishop, 164 S.C. 493, 162 S.E. 756 (1932).

In the review of an attorney's fee award, there is no requirement of proportionality of an attorney's fee award to the relief obtained; an attorney's fee is not required to be less than or comparable to a party's monetary judgment, and may greatly exceed the principal recovery. Taylor v. Medenica, 331 S.C. 575, 580, 503 S.E.2d 458, 461 (1998)(recognizing the beneficial results obtained by the attorneys, both in terms of the money recovered under the subject claim and "in terms of the public benefit in deterring [the defendant] from similar conduct"); Baron Data Systems v. Loter, 297 S.C. 382, 377 S.E.2d 296 (1989).

Review of a Circuit Judge's interpretation of a fee award statute is de novo.[7] Layman v. State.

"A failure to exercise discretion amounts to an abuse of that discretion." Samples v. Mitchell, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct. App. 1997); Varn v. Green, 50 S.C. 403, 27 S.E. 862 (1897). "[T]he mere recital of the discretionary decision is not sufficient to bring into operation a determination that discretion was exercised. It should be stated on what basis that discretion was exercised." State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981).

[7] That is, the interpretation of a statute is not a finding of fact. Thompson v. Ford Motor Co., 200 S.C. 393, 21 S.E.2d 34 (1942). The issue of interpretation of a statute is a question of law for the court. Jeter v. S.C. Dep't of Transp., 369 S.C. 433, 438, 633 S.E.2d 143, 146 (2006) (citations omitted). Where the issue of the amount of attorneys' fees awarded hinges on the court's interpretation of "reasonable" attorneys' fees as contained in the operative fee award statute, the issue is a question of law, which the reviewing court reviews de novo. Layman v. State.

When interpreting a fee statute, "[a]ll rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." McClanahan v. Richland Cnty. Council, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002). "The determination of legislative intent is a matter of law." Eagle Container Co., LLC v. Cnty. of Newberry, 379 S.C. 564, 568, 666 S.E.2d 892, 894 (2008) (quoting Charleston Cnty. Parks & Recreation Comm'n v. Somers, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995)).

Determinations of such questions of law are therefore reviewed de novo. Samuel v. Mouzon, 282 S.C. 182, 314 S.E. 2d 612 (Ct. App. 1984). "[The appellate court] is free to decide questions of law with no particular deference to the lower court." Jeter.

Regardless of other general scopes of review, a court reviewing a fee award order should enforce, and not allow a change of, final determinations made in an earlier unappealed order granting summary judgment. A fee award order cannot change final determinations made in an earlier unappealed order granting summary judgment. Determinations of law or fact in an order on appeal which conflict with earlier determinations of law or fact made in an unappealed appealable order are ordinarily, right or wrong, invalid, and per se require reversal.

That is, determinations of law and fact in an appealable order which is not appealed are binding on the parties in later proceedings in the same action as the law of the case. See Cannon v. Georgia Attorney General's Office, 397 S.C. 541, 725 S.E.2d 698 (2012); see generally Jones v. Lott, 387 S.C. 339, 692 S.E.2d 900 (2010)(stating an unchallenged or unappealed ruling, whether right or wrong, is the law of the case); Judy v. Martin, 381 S.C. 455, 674 S.E.2d 151 (2009); see also Bakala v. Bakala, 352 S.C. 612, 576 S.E.2d 156 (2003) (holding that a family court judge could not overrule the prior unappealed order of another family court judge because it had become law of the case). See also In re Morrison, 321 S.C. 370, 468 S.E.2d 651 (1996) (noting that an unappealed ruling becomes the law of the case and precludes further consideration of the issue on appeal); Cooper Tire & Rubber Co. v. Perry et al., 261 S.C. 538, 201 S.E.2d 245 (1973) (holding that where a ruling on a demurrer to complaint is not appealed from, it becomes the law of the case); Watkins v. Hodge, 232 S.C. 245, 247-48, 101 S.E.2d 657, 658 (1958)(refusing to consider jurisdictional matter of underlying case where issue had been ruled upon and not challenged on appeal); Hurst v. Sumter County, 189 S.C. 376, 1 S.E.2d 238 (1939)(noting the general rule in civil cases that issues must be raised at the earliest opportunity, or they will be considered waived); Salley v. McCoy, 186 S.C. 1,195 S.E. 132 (1937)(holding the conclusions announced in a prior appeal would not be disturbed in a subsequent appeal);

Howard v. Roberson, 376 S.C. 143, 654 S.E.2d 877 (Ct. App. 2007)("The determination that Lawhorn was not liable is now the law of the case"); and First Union Nat'l Bank of S.C. v. Soden, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998)("The unchallenged ruling, right or wrong, is the law of the case and requires affirmance").

ARGUMENT

I. In intertwined error, the Circuit Judge misapprehended the fee award statute, misapprehended the amount of latitude he had under it, failed to follow it, ruled invalidly contrary to the law of the case, was guided by the inadmissible and flawed affidavit of Pagliarini and other multiple errors of law and logic, and applied the wrong legal standard to recovery of fees for fees, and the amount of his award was therefore error and an abuse of discretion.
(Issues 1, 2, 3, and 4-17)

It was the Landowners who were sued. Twice. Their counsel spent 1000.5 hours defending them the first time. Reducing the hours by 87 ½% for purposes of the fee award was error.

It is clear from the undisputed facts alone,[8] that: (i) the case had high stakes, was both procedurally and substantively complicated, and was immensely time-consuming; (ii) the Town conceded that the Landowners' counsel actually spent 1000.5 hours or more on the litigation; and (iii) the benefits obtained by Landowners' counsel for the Landowners,[9] for the public, and for the court system included all of the following: (A) winning, thus stopping the permanent pollution of the titles to millions of dollars' worth of oceanfront real estate; (B) permanently establishing as the law of the case and as res judicata, facts the Town had denied and repeatedly publicly misrepresented for two years; (C) defending a charge of bad faith by the Town and avoiding attorney's fees explicitly sought by the Town against Landowners; (D) avoiding a

[8] See the undisputed facts in the statement of the case, above.

[9] It is requested that this Court take judicial notice of how few successful challenge actions have come before this Court in any incidence in the last 100 years.

requirement of 30 million dollars in bonds sought by the Town against the Landowners and the attendant liability of the Landowners under same; (E) avoiding the necessity of a protracted bench trial of the challenge action on at least nine factually overlapping theories or issues, some potentially involving scientific or pseudo-scientific testimony; (F) avoiding the necessity of a protracted jury trial on valuation; (G) obtaining an order clearly exposing for 99 directly affected other property owners and numerous others, the Town's persistently concealed and misrepresented actions concerning the easements and other matters; (H) causing the Town to withdraw three additional cases brought by the Town against the Landowners, which cases again jeopardized millions of dollars' worth of real estate; (I) doing all of the above during a pandemic through one lawyer under a compressed timeframe, rather than through three or more lawyers; (J) charging each of two Landowners for only a proportionate share of the time actually worked on each case; and (K) waiving a claim for his own proportionate share of time and fees.

The overall approach of the Judge's Fee Order was to repetitively rule contrary to the law of the case. He did so, for instance, by erroneously applying a fiction that there were nonintertwined "claims" upon which Landowners did not "prevail." (R. pp. 5, 7, 8, and 9.) He incorrectly implied by this that the facts and legal theories in the case did not overlap or intertwine, that there were things in the principal case the Court had ruled against the Landowners on, and that established facts relating to the Town's dishonesty and the lack of necessity of the easement were somehow still disputed or undetermined. In this way, he indulged the fiction that the Town's dishonesty and the lack of necessity of the easement were not in any way involved in the previous acute rulings, which quashed the condemnation based on knowingly trying to condemn more than was considered in the appraisal.

He further erred in subjecting the "fees for fees" component of the fee application to the

same analysis as the rest of the case. He was instead required to more-or-less automatically separately award the fees for fees, without, for instance, conducting an inquiry as to whether the fee application itself was "successful."

The Judge erroneously deferred exercise of his own discretion. He relied on the hired inadmissible opinion of a lawyer, Mr. Pagliarini, who had never been involved in the case, who had no demonstrated expertise in attorney's fee awards,[10] and who took his marching orders

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[10] At the inception, the Circuit Court's Fee Order should be reversed as an error and abuse of discretion for allowing and relying on the affidavit of Pagliarini and the affidavit of Dillard. Expert opinion testimony is allowed when the proposed opinion witness has more education or experience on the matter than the average "man on the street." This "man," in most contexts, is a proxy for a jury sitting as a finder of a pure question of fact, or for a judge who is not also determining an integrated question of law. See Rules 701 and 702, SCREvid.

Here, however, the decider was not the "man on the street" charged with making a finding on a pure question of fact. The decider was, rather, a judge, charged with determining a mixed question of law and fact. Mr. Pagliarini had no special or superior qualification to be of any help to a judge on this type of question. Mr. Pagliarini did not even have personal familiarity with or participation in pure matters of fact and relied on another similarly unfamiliar lawyer for marching orders.

The peculiar mixed question of law and fact -- the proper application of a statute requiring "reasonable" attorney's fees to be taxed as costs -- is traditionally vested, not in a layman who benefits from assistance on a factual matter beyond common experience, but in the judge. The judge is expected to evaluate the legal dimensions of the question, not rely on an opinion of a stranger to the case on how the stranger, clouded with his own stated and unstated perceptions of legal dimensions, would judge the matter.

Here, determination of the legal dimensions of the question and the actual facts of the case was for the Judge. The Judge was remiss in not reviewing the file for himself and remiss in receiving opinions from Mr. Pagliarini which were inextricably entangled with Pagliarini's uninitiated notions of the law of attorney's fees and his grossly mistaken notions of legal principles and procedure in litigation and general practice of law.

The legal aspects of the question were for the judge, not the outside would-be "expert." As Justice Kagan concluded in the context of standard of review in U.S. Bank National Association v. Village at Lakeridge, 138 S.Ct. 960, 967 (2018), "the standard of review for a mixed question [of law and fact] all depends – on whether answering it entails primarily legal or factual work." Where the work is primarily legal, the standard of review is de novo. Lakeridge (concluding standard of review was for clear error, rather than de novo, where bankruptcy court's determination of non-statutory insider status was primarily factual). Review is made difficult if a mixed question of law and fact is improperly referred to an outside witness whose opinions on factual matters are infused with his own stated and unstated notions of law.

As appears from the opposing materials of Landowners in the Record and elsewhere in this Brief, Mr. Pagliarini was not shown to have any more practice experience or academic standing than the Judge.

Mr. Pagliarini also was not shown to have any particular experience at all in the setting or awarding of fees, or to have ever received a fee award. He was shown to have little or no extraordinary academic or teaching credentials, and to have limited years of practice experience. With isolated exceptions, Mr. Pagliarini's relevant practice experience was shown to be generally limited to real estate closings, representing government entities in taking land for roadways, and defending appraisers.

He claimed either relatively isolated or no experience in prosecuting challenge actions, in representing landowners, in awarding attorney's fees, in assessing or arguing matters of attorney professional responsibility, or in coastal zone matters. He claimed no prior familiarity whatsoever with renourishment, beach renourishment easements, government deception, or the Town of Pawleys Island. He was not shown to have any extraordinary academic credentials or practice experience regarding civil procedure, and his opinions demonstrated a lack of understanding of basic civil procedure. Further, the record shows that Mr. Pagliarini based his opinion on numerous gross legal and factual errors, some belying an unfamiliarity with basic civil procedure in court, and an inability to discern dishonesty as plain as the nose on one's face.

Opinion testimony is generally allowed if the opinion would be of assistance to the fact finder in making its own decision of a question of fact. Considerations made by the judge in admitting such opinion testimony when it relies on material otherwise inadmissible in evidence include whether the otherwise inadmissible materials the opinion witness relied on are materials customarily relied on by other "experts" in the field. See Rule 703, SCREvid. Here, again. there was no showing that outside witnesses opining on the fees of other lawyers customarily rely, as here, on only unsworn partial selections and estimates first made by another lawyer (Mr. Dillard) who himself has no first-hand familiarity with the primary part of the case.

In Dawkins v. Fields, 354 S.C. 58, 66, 580 S.E.2d 433, 437 (2003), the South Carolina Supreme Court found an affidavit by the late Professor Freeman, a nearly legendary emeritus law professor with actual extensive law practice background, inadmissible. 354 S.C. at 66-67, 580 S.E.2d at 437. In Dawkins, the Supreme Court found most of the affidavit was legal argument regarding why the trial court should deny summary judgment. Id. The Court stated: "Professor Freeman's affidavit inappropriately attempted to usurp the trial court's role in determining whether petitioners were entitled to summary judgment." Id. at 65, 580 S.E.2d at 437. Here, Mr. Pagliarini's affidavit improperly usurped the province of the Judge, but also did so as a document signed by an unqualified witness, relying on inadmissible materials.

The Court in Dawkins noted an opinion is not objectionable simply because it embraces an ultimate factual issue to be decided by the trier of fact. Id. The Court also found the affidavit contained "some helpful, factual information," such as, Professor Freeman's opinion on the value of stock and that selling it for significantly less than that value was improper. Id. at 66, 580 S.E.2d at 437.

Here, there was no helpful factual information from Mr. Pagliarini, who borrowed demonstrably inaccurate and inadmissible information from another lawyer. (See, e.g., Stanton Rply. Aff. to Pagliarini Aff, ¶14A, n. 8 (outlining Pagliarini express reliance on unsworn "chart" provided by Dillard, only selectively going off-docket-sheet, and severely omitting "events" that occurred in the case), R. pp. 1356-58, and ¶16A (outlining Pagliarini reliance on inadmissible

from another lawyer, Mr. Dillard. Dillard was almost equally unfamiliar with the case and equally unqualified to give scholarly or experiential fee-awarding advice.

The second lawyer, Dillard, had prepared an inaccurate set of estimates concerning selected items, rather than all items, in the case. He did not swear to either the completeness of the list of items he selected or to the accuracy of the estimates he made concerning the items he selected.

He gave this set of estimates and other materials to Pagliarini to rely upon in coming up with a target figure of 125 hours for all three cases and a fee of $8000 each for Sunset and

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other Dillard chart misestimating eight hours of deposition time by over 100% at 17.3 hours), R. p. 1359. See also id. ¶14A, n. 8 (outlining, with respect to Mr. Dillard's page-counting approach to attorney's fee analysis, Dillard's omission from the Pagliarini chart, of page counts for certain papers served by the Town, Dillard's omission of page counts for bills redacted and produced to the Town, and Dillard's omission of page counts for orders filed by the Court.)

In Vortex Sports Entertainment Inc v. Ware, 378 S.C. 197, 662 S.E.2d 444 (Ct. App. 2008), the admissibility of Professor Freeman's opinion on breach of fiduciary duty was challenged. The existence of a fiduciary duty is a question of law for the court. However, the trial court had ruled on the legal issue of whether Ware owed Vortex a fiduciary duty, determining the duty was owed. Professor Freeman's testimony consisted of specific acts Ware committed and how those acts constituted a breach of his fiduciary duty. Specifically, Professor Freeman testified Ware participated in self-dealing by sacrificing Vortex's interests for Ware's own interest. Additionally, Professor Freeman testified Ware was deceptive to Vortex. Professor Freeman noted the lack of documents detailing Vortex's agreements and policies and testified Ware, as Vortex's general counsel, would have been responsible for preparing such agreements and his failure to do so should not entitle him to a "free pass." This testimony was allowed.

Here, Mr. Pagliarini provided few such component insights. He made generalizations about his own forms-based road condemnation practice, apparently implying that his forms could be used to print out a generic beach renourishment challenge complaint. This was despite the lack of evidence that he had ever brought and won a challenge action for any landowner, even on a roadway case. He also made generalizations about the length, "intelligibility," or necessity of certain fully intelligible documents, and his affidavit should have not only been disregarded as unqualified, but viewed with great skepticism.

In the instant case, Mr. Pagliarini, who is not a law professor on the subject of fees, civil procedure, or any other subject, when basing his testimony on incorrect legal procedure and standards, grossly incorrect factual and "legal" observations, and unsworn inadmissible estimates given second hand by a successor lead counsel almost equally unfamiliar with the facts, does not warrant an exception to the non-opinion rule.

Beattie only.[11] This Court is requested to take notice that, even as to limited matters recounted in

[11] Mr. Dillard prepared a events chart, in which he defined case "events" largely as some, but not all, papers filed and hearings held, as appearing on the docket sheet. Strangely, he also included items only up to April 22, 2021, rather than through October 6, 2021 and later.

Within this restricted period, he selected as "events," certain papers and hearings on the basis of whether he decided they were "significant" and "relevant," with no further criteria.

He accompanied some, but not all, of these selected "events" with an insinuation "judging the book by the cover." This he presented as a mere count of the number of pages, rather than an assessment of content. His counts apparently included attached exhibit materials.

For example, he assessed the Landowners' Amended Complaint as an impliedly shameful "61 pages," whereas he assessed the Answer of the Town (the nonprevailing party), to the Amended Complaint, at a frictionless count of only "5 pages."

Yet his page-counting "analysis" does not disclose that the Town's "easy" Answer simply denied virtually every single one of the 177 clearly understandable paragraphs of the Amended Complaint. The Town quickly and cheaply denied allegations instead of "fairly meeting the substance" of them and denying them only if there was "good ground to support it," as required by Rules 8(b) and 11(a), SCRCP.

For further example, he implies that it took the Town only "2 pages" to baselessly, without prior consultation, and without briefing, quickly, publicly, move to disqualify Landowners' counsel only after the Town lost on summary judgment. In contrast, it took Landowners' counsel somewhat more pages and effort to respond to a baseless public accusation of an ethical infraction.

Further, in his assessment of "events," Mr. Dillard did not indict the filings by the Court by counting the 24-pages of the Summary Judgment Order, did not count the pages of some items generated by the Town, and did not count the pages requested by the Town, such as numerous pages of the carefully redacted bills produced by the Landowners at the request of the Town, or other documents produced in discovery.

The dates of and number of pages involved in the Rule 34 productions of documents by the parties were in fact not set forth at all. Mr. Dillard provides no explanation for the selective exclusion of this as an "event," even though Mr. Dillard selected a deposition, which was not on the docket sheet, for inclusion.

If he did select an "event" on the docket sheet or, without statement of criteria, decided to select some isolated other non-docket-sheet "event" as "relevant," and the "event" was a hearing, deposition or other thing the length of which it was inconvenient to state, he stated no page length or other measure. The length or duration of some of these things may have been impossible for him to state, because he was not involved in them, did not know about them, or never reviewed them directly himself.

Mr. Dillard gave this unsworn assessment to Mr. Pagliarini as part of Pagliarini's marching orders.

Pagliarini states that he relied on it. He attached it to his affidavit as an exhibit. (See, generally, Pagliarini Aff. Exhibit C, R. p. 1231, Pagliarini Aff. ¶7, R. p. 1211, and Dillard Aff. ¶5 (stating and affirming that he "prepared" the "case events" chart for Mr. Pagliarini, but never attesting to its completeness or the accuracy of page counts), R. p. 1240.)

the extended statement of uncontested facts, above, it would be virtually impossible for any responsible lawyer to participate in all of it in 125 hours.

The effect of the Circuit Court's Fee Order was to impose a penalty. It was a ruling that the two Landowners, who each requested reimbursement of over $60,000 in actual fees incurred in defending themselves, should each be reimbursed for litigation expenses based only on

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Pagliarini then parroted at P.Aff. ¶22, R. p. 1214, the incomplete page-counting analysis, and transitioned to making "rough estimates" after sublimating Mr. Dillard's partial list of "significant" "events" into something even more restrictive, which Pagliarini termed "major" case elements.

In this tortured process, Mr. Pagliarini has been shown to have omitted large numbers of "items" in his "major case elements" approach. For example, he states at P.Aff. ¶15, R. p. 1213, that there were two (2) hearings, when there were five (5) to seven (7), depending on how two were viewed. He implies at P.Aff. ¶15, R. p. 1213, that there were only about six (6) motions when there were fifteen (15) or more motions before April 22, 2021 alone.

With these and other profound omissions, Pagliarini does not provide calculations of time actually spent. The time actually spent was plainly already provided by the Landowners. Rather, Pagliarini provides only normative estimates, in bulk, of what should be allowed for such things, such as: "motion preparation/briefs: 20 hours" and "motion hearings:10."

For the actual fifteen (15) or more motions before April 22, 2021 alone, Paliarini's "allowance" would be an arbitrary assumption that on average, it should take an unrealistic 1.33 hours to prepare, brief, and file each motion, including any reply or supplemental/amended briefs necessary, regardless of the subject matter. If Pagliarini was thinking closer to six (6) motions (we do not know), his average goes up to a still unrealistic 3.33 hours per motion. Putting aside the completely inappropriate approach and the unrealistic estimates, the inaccuracy of the count starts Pagliarini out omitting three-quarters of the fees for even his "allowed" times.

For the five (5) to (7) motions hearings in this out-of-town case, Pagliarini's "allowance" is less than two hours per hearing. That is to prepare for argument, get to the courthouse and park (in the case of in-person hearings), get to the right courtroom, wait one's turn, argue, have colloquy or discussion afterwards, make notes, report to the multiple clients, and return.

It is a five-hour round trip drive from Columbia to Georgetown. It is a two-and-a half-hour round trip from Columbia to Florence. Even without the driving time, the "Pagliarini allowance" is grossly inadequate and is made in the dark.

In his own affidavit, Mr. Dillard has been shown to have erred by 100% or more on accounts of putative actual time spent on certain items, such as the deposition of the deceived appraiser (stating 17.3 hours instead of the actual 8), even when he should have had a record.

Mr. Pagliarini reviewed and relied on Mr. Dillard's affidavit and was hired by Mr. Dillard. See discussion in the footnote above, regarding the inadmissibility of Mr. Pagliarini's affidavit and Mr. Dillard's.

approximately one twenty-fifth (1/25)[12] of the actual hours spent by his one lawyer on the case.

The Judge's implication was that each Landowner should have been able to prevail in the case, while responsibly protecting his interests and protecting against reconsideration or appeal, by having a lawyer do only work commensurate with a charge of $8,000. The $8,000 awarded was an amount well under one-tenth (1/10)[13] or one-twelfth (1/12) of what the Town itself spent to lose the challenge action. It took $60,198.33 to win, including completing the case and asking for fees.

The Town used four lawyers, including the outside lawyer who had a narrow practice and no fee expertise.

In coming to his draconian result, the Judge did not outright determine that the Town had the right to be taxed for fees differently than private litigants, or the right to get repeated "free bites at the apple" at the Landowners' great expense and ultimate discouragement.

Instead, the Circuit Judge went through an incongruent, multi-error mulling of sometimes-irrelevant, dead-end observations, vague or partial findings, and seemingly pointless statements of some legal principles, which omitted specific conclusions about specific amounts of hours worked. The Judge bypassed the proper and orderly Layman approach and jumped to adopting the figure of 125 hours based on, in turn, the similarly flawed mullings of others. The whole mix bleeds together and eludes short summary.

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12 125 ÷ 3 ÷ 1000.5 = .041 = ±1/25

13 E.g., $8,000 ÷ $80,000 = 0.1 = 1/10

The Circuit Court began by completely disregarding the letter and intent of the pertinent EDPA fee statute.[14] The statute required reimbursement of actual fees incurred, which at that point was over $60,000 per Landowner. Eight thousand dollars was simply nowhere close.[15]

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[14] If the applicable fee-shifting statute sets forth a specific procedure or measure, the method or measure should be followed. S.C. Dep't Transp. v. Revels, 411 S.C. 1, 761 S.E. 2d 700 (2014)(stating that the cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature and holding that statute's mention of reimbursing "actual" time and "actual" expenses, required an award reflective of same, rather than actual contingent fee actually incurred).

The legislature has specifically amended the statutory condemnation procedures over the years, to supply missing protections for landowners, including fee protections. For example, Ex parte Savannah River Elec. Co., 169 S.C. 198, 168 S.E. 554 (1933) was a pre-EDPA case which recognized that the then-applicable Act of 1924 had changed the manner and timing of the prior common law right of the condemnor to abandon a condemnation attempt.

However, the 1924 act did not provide fees for a pre-award abandonment during a challenge action by the landowner. The EDPA has since expressly changed the attorney's-fees point decided in the case. The EDPA provides for compensation upon pre-award abandonment occurring during a challenge. This illustrates that the EDPA fee provisions were intended as a deliberate improvement in landowner protection. In making such revisions, the legislature intended "must award the litigation expenses incurred in the action" to mean very closely what was stated.

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. He stated and argued at page 5 of the Town's 6/2/21 memorandum opposing reconsideration of dismissal in Case 2020CP2200932:

> 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.

(Quoted to the Circuit Judge in the instant case in the Landowners' 10/4/21 brief, p. 5, n. 3, R. p. 1269.) The Town is judicially estopped from arguing for less than full reimbursement.

Mandated in the EDPA is award to the wholly or partly prevailing landowner of all the reasonable "litigation expenses" "incurred" in "the action" challenging the condemnor's right to take. S.C. Code Ann. §28-2-510(A)(emphasis added). "Litigation expenses" are those necessarily "incurred from and after the service of the Condemnation Notice" for "preparation or participating in" the "condemnation action." Id. §28-2-30(14). "Action" and "condemnation action" include "all acts incident to the process of condemning property after the service of a Condemnation Notice." Id. §28-2-30(1) and (5)(emphasis added.) The qualifiers, "reasonable"

The Circuit Court further misinterpreted current law regarding awards of attorney's fees, which refers to a guiding star, or "lodestar," in awarding fees. The lodestar referred to is generally the initially determined "normal" fee resulting from the "reasonable number of hours expended," and a reasonable hourly rate.

The reasonable number of hours expended is generally determined by first determining all hours actually expended on the litigation as supplied from records of the prevailing party, if available. Layman. All these hours are then either taken straight up or adjusted by legally cognizable considerations. See, id. (adjusting hours spent by 3% "in and abundance of caution" where the same hours generally were also spent on similar claims that were not subject to a fee award and the time might have included some work on the similar claims which was not

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and "necessarily" obviously only authorize exclusion of fees which are not necessary at the time the Landowner incurred them.

[15] The Court also did not follow any consistent logic. When it suited the Town's arguments, the Court stated that the Court was not "controlled" by the fee agreement or actual billing. (Fee Order, p. 3, R. p. 104.) The Circuit Judge indulged the Town's insistence on examining legal bills of the Landowners. This insistence is a largely irrelevant concern if actual time spent is to be ignored completely, in favor of after-the-fact "block estimating" of "allowances" for only selected, broadly described, tasks and functions, from scratch.

When it suited the Town's arguments, the Court disregarded the actual contract of the Landowners to base the fee on actual time spent. But the Court used the contractual rate instead of a reasonably higher noncontractual one. The contract was to divide the overall fee on three cases three ways, although in a real sense, each of the three cases received the benefit of the bulk of all the time spent on all three. (Fee Petitition, ¶73, p. 24, R. p. 1177.) Compare Layman v. State (applying overall time to each of two sets of cases, awarding $445,226.60 fee, although recognizing that the same time that counsel spent on claims for which the fee was being awarded was also spent on claims for other parties in other proceedings for which a fee was not being currently awarded, and reducing the time spent by only three percent "in an abundance of caution").

Disregarding the contractual hours, the Circuit Judge nevertheless then adopted the contractual measure of dividing the resulting fee by three, to further shockingly reduce the award to each Landowner.

There is inherent conflict, incongruity and legal error in this approach, constituting "abuse of discretion," as that term is defined in law.

pertinent to the claims before the court); see also Sauders v. South Carolina Pub. Serv. Auth., C.A. no. 2:93-3077-23 (D.S.C. Mar. 30, 2011)(citing Layman)(adjusting hours by 3%), and Edmonds v. United States, 658 F.Supp. 1126 at 1135 n. 18, 1147 n. 44 (D.S.C.1987)(cited in Layman)(performing a lodestar analysis and adjusting the time devoted to litigating the underlying case by two to three percent in order to account for the fact that "some hours may not be properly compensable").

Together, the reasonable rate and the reasonable hours expended then produce a lodestar fee. This serves as the guiding star for purposes of any enhancement by applying further considerations under Blumberg which stand out as extraordinary. See Layman (enhancing previously determined lodestar fee in light of time-compressed nature of case and benefit of 100% monetary recovery).

The Circuit Court, however, erroneously jumped straight into using inaccurate versions of the Blumberg factors of "the nature of the case" and "the beneficial results obtained" to never determine actual hours. Repeatedly calling the conceded 1000.5 hours only "claimed time," the Judge, out of hand, simply rejected all consideration of the vast number of actual hours worked, and determined a number of 125 built up from scratch.

He built this 125 number based, not on actual hours, but on sweeping general "allowances," which were made, not for all things a lawyer had to do, but only for "major" functions, as determined by an incompetent affidavit witness.

In the course of this error of "putting the cart before the horse," and then untying and never coming back for the horse, the Circuit Judge misapplied the two Blumberg considerations he employed. He did not use them to enhance or decline to enhance the initial guide star, which

he never determined. Rather, he employed them to impose a preemptive gross 87 ½% time penalty.

The Judge imposed this penalty in the form of a bizarre preemptive lopping off of hundreds of hours actually worked, amounting to an eighty-seven-and-a-half (87 ½%) percent reduction in the actual hours expended.

To be clear, he did not examine the components of the 1000.5 actual hours and specifically make an initial determination that there were specific hours worked that were not "reasonably devoted" to the case. If he had, his determination could have been shown to be incorrect in the amount deducted for time spent, and incorrect in making any deduction at all, such as in the case of "fraud and bad faith." This was one area he identified legally incorrectly under the construct Dillard confusingly called a "nonprevailing claim."

The initial adjustment of actual time spent is ordinarily done only in special circumstances not present here, such as when (i) specific hours were wholly unreasonable to incur (at the time incurred) for the thing they were attributed to, or when (ii) specific hours were related only to a claim for which there was no statutory authorization to award a fee, or when (iii) specific hours were incurred on nonoverlapping, nonintertwined matters that were determined completely, affirmatively adversely to the overall prevailing party in the case.[16]

Rather, he simply determined that because, in his estimation, the case was not "complex" and did not produce a "beneficial result," the work was excessive and the Landowners should not

[16] Under the law of the case in effect at the time of the Fee Order, all theories of recovery were directed to quashing the condemnation attempt. They were thus all covered by the fee award statute. Under the law of the case, all the facts were intertwined and related to factually overlapping legal theories directed to invalidating the condemnation attempt. For example, the Town's repeated dishonest statements of the lack of features of the easement were a major cause of quashing the condemnation. Under the law of the case, in the resolution of the case in chief, no facts or legal principles were determined even partly adversely to the Landowners.

be reimbursed all of the fees they incurred for the hours their counsel earnestly worked in order to defend them and win.

Never focusing on the actual time expended, the Judge then did not deduct a specific number of hours from specific actual hours for a specific task or even deduct a gross number of hours from gross actual hours for a gross description of tasks. He vaguely stated that the time spent (the amount of which he conspicuously never actually confirmed as 1000.5 hours) was "excessive," and proceeded with a number of 125 hours pulled from a hat – the unreliable Pagliarini affidavit.

The Judge also misunderstood the meaning and use of the "nature" of a case. It includes subject matter, timeframe, adverse conditions, the things at stake for the parties, public or civic issues involved, etc. That is, the factor is a broader concept than mere simplicity or "complexity." The properly regarded factor is also better used for determination of a multiplier of the guidestar amount, than, as here, a bypass device to avoid determination of the guidestar amount and delete hours on a bulk, unspecified basis.

He also misunderstood the meaning and use of the question of "benefits" obtained, which includes exposure of useful public or civic information, resolution of issues of public concern, avoidance of liability, curtailment of related litigation, deterrence, etc. That is, the factor is a broader concept than merely the amount of money or permanency of relief awarded. It likewise is better used for determination of a multiplier of the guidestar amount, not as a bypass device to avoid determination of the guidestar amount and delete hours on a bulk, unspecified basis.

Under these compound errors, the Circuit Judge thus erroneously assumed he had an undelimited prerogative to simply disregard the fee statute as an initial step. Other than by reference to certain broad topics or categories discussed further below (e.g., the deposition, bad

faith, lack of necessity of the easement, and redaction of bills), he did not identify a single particular activity for which time was unreasonably incurred. Even as to the "topic or category" references, he provided no specifics as to which or how many hours were unreasonable.

He instead vaguely stated that the reasonable hours for the activities were "accounted for" or reflected generally in the arbitrary 125 figure. Literally, they were not accounted for. No amounts assigned to them were identified. This is particularly important because the Judge also legally erred, sometimes in different or multiple ways, on each topic or category he referenced. Effectually, the only accounting was total deletion.

On this vague basis alone, of excessive-because-not-complex-and-not-very-beneficial, he simply selected the exact same arbitrary 125 hours and $8000 fee selected by the incompetent, inadmissible affidavit of Pagliarini. The actual amount of the fee award was the ultimate issue that was supposed to be entrusted to a judge, not to an unqualified opinion affiant.

Implied by the inadmissible affidavit is that the "Judge" constructed the erroneous and drastically reduced $8000 fee from scratch. For this step, he impliedly used "guesstimates" or normative allowances (e.g., the total amount of time that should be allowed for filing and briefing of all motions in the case) made by the Pagliarini-Dillard mishmash.

The commingled affidavits made these "allowances" for only the functions or tasks in the case decided by the Town's chief affiants to be "major" generic functions and tasks usually found in a given case.

These normative allowances themselves (e.g., the total amount of time of 20 hours allowed for filing and briefing of all motions) were grossly incomplete and inaccurate as to the functions to which they were addressed (e.g., for the "motions" function, giving only 20 hours total for perhaps 6 motions, when there were actually 15 or more motions). The selection and

number of functions was also incomplete (e.g., listing "drafting pleadings" and "written discovery" as major functions, but not document production, drafting or redlining potential conveyancing documents, making site visits, drafting settlement proposals, locating or considering experts, attending or finding and reviewing records of meetings, reading government manuals, project descriptions, scientific reports, etc.). This further compounded the distortion of reality and pushed the unfounded "estimate" downward, to the Landowners' gross detriment.

As an example of the "bootstrapping" of lack of familiarity, lack of expertise, and inaccurate inadmissible information, Mr. Dillard, who had limited first-hand participation in the case, gave his unsworn selections and estimates as marching orders to Mr. Pagliarini, who had no involvement in the case whatsoever. Pagliarini adopted Dillard's incomplete selections and estimates completely and uncritically. For his affidavit testimony, Mr. Pagliarini relied on the work of Mr. Dillard, and Mr. Dillard stated that his affidavit testimony relied on the affidavit testimony of Mr. Pagliarini.

The Court's 125 hours brought these multiple errors to bear in a horribly unjust manner on the time spent by Landowners' counsel up through the first 632 hours spent getting the first formal January 21, 2021 Summary Judgment Order entered against the Town.[17] However, the Landowners were not merely shorted by 507 hours.

The Court compounded the errors and the gross inadequacy of the award by also leaving the Landowners completely short for the approximately 443.5 additional hours the Town caused the Landowners to incur after January 25, 2021 in order to (i) conclude the case and (ii) recover their fees. Non-fee-pursuit work late in the case included discovery, opposing an ill-founded

[17] The 686.9 hours included in the initial fee petition included some work on the Challenge II cases, of which about 54.9 hours was later backed out for separate submission.

motion to disqualify Landowners' counsel, exploration of settlement, reconsideration of Summary Judgment, and extending courtesies and accommodations to yet another lawyer, Dillard, brought on by the Town. The mammoth deduction of an unspecified amount of the actual hours spent after Summary Judgment was initially entered clearly includes hours spent on any non-fee activities unfortunate enough to share the same time period.

The Fee Order is jumbled so that it is difficult to decipher the manner of exercise of the Judge's discretion on the question of fees for fees or how the 125 hours is allocated. It appears under some statements of the Court that the Court nebulously spread its "noncomplexity-nonbeneficial" penalty for the case in chief over the entire case including the fee application and all associated proceedings. This is contrary to law.[18]

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[18] 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). See also Layman v. State, 2008-03-10-01 (S.C. Sup. Ct. dated March 10, 2008)("Layman III Order")(ordering full enhanced payment of $588,872.56 in fees for fees, despite prior substantial reduction of fees for principal case). See also e.g., Tri-County Metro. Transp. Dist. of Or. v. Aizawa, 362 Or. 1, 2, 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 P.3d 773, __ (2008) (describing that rule as reflecting "longstanding precedent in Oregon").

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, however, 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 on the fee award was substantially justified. Namely, if the prevailing party is entitled to fees in the main action, then he is automatically entitled to fees for the time spent

Under yet another view, the Circuit Judge intended distinct and total disregard of all fees for fees, and based this solely on the fact that the Court did not rule 100% with the Landowners on limited discovery issues within the overall fee proceedings. These discovery issues pertained only to redaction and production of billing statements. He stated that he found the plaintiffs were "unsuccessful"[19] in "their dispute with the Town over production and redaction of attorney fee statements" (R. p. 109), and when he elsewhere listed things that the 125 hours "accounted for," he listed only issues in the principal case, not including the fee proceedings (R. p. 110).

The reasoning appears to be that the Judge jettisoned a mammoth number of hours on the basis that he could impose a gigantic and disproportionate fee forfeiture as some punishment for Landowners not getting a 100% favorable ruling on one issue or small group of issues within a discovery dispute. Not only is the disproportionate deduction unlawful, but under the law of fees for fees, so is any deduction at all from fees for fees on only such a basis.

The Circuit Judge stated only vaguely that he "took into account" the disagreement of the Landowners and the Town as to which entries on private bills should be redacted and the manner

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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.

Accordingly, in Layman III Order, the S.C. Supreme Court modified the S.C. Supreme Court's prior order awarding attorney's fees, to add to the previous principal fee award of $445,226.60, another $588,872.56 in fees incurred in litigating the issue of attorney's fees. The added $588,872.56 for fees-for-fees included the same 125% enhancement of the lodestar that had been determined for the case in chief, but specifically excluded the 3% reduction in hours applied to the case in chief. The S.C. Supreme Court awarded the full amount for all hours spent on litigation concerning the fees, and further enhanced the fees-for-fees award by 125%, even though the previous award by the Supreme Court of $445,226.60 had been a substantial direct modification by the Supreme Court dramatically reducing the Circuit Judge's appealed previous award of fees of $8,660,000.

[19] An "unsuccessfulness" factor cannot be applied to a fees-for-fees determination, and even if it could, "unsuccessfulness" in one part of the fee proceedings cannot be applied to 100% of the proceedings to obliterate all recovery of fees for fees. See the previous footnote.

in which the bills should be produced. Yet, in the resolution of this "disagreement," the Town did not get everything it wanted and the Landowners were required to do some things to which they objected. The Judge did not state in what manner he "took into account" the disagreement. He did not identify the amount he determined after doing so, or how the amount was determined. This is simply not an exercise of discretion.

"Deduction" of all actual hours in excess of a faultily reconstructed 125 for all "major" aspects of the case was error, and thwarted the whole purpose of the EDPA fee award statute.

The various additional errors and sub-errors of the Circuit Judge are too numerous to fully discuss in the space allowed.[20]

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[20] The Judge committed additional errors, many of which are related, or erred in additional dimensions of some of the foregoing errors, as follows:

1. He tried to separate integrated and often inseparable activities contrary to statute, contrary to the law of the case, and contrary to the legal principles applicable to intertwined facts.
2. He ignored the significance, reasonableness and need for preparation in law practice and client representation, including study.
3. He did not understand that South Carolina law neither contemplates nor authorizes imposition of a fee penalty for cases "lacking complexity" or for such things as noncitation of the deposition of a deceived appraiser.
4. He concluded, essentially, that even at the already low hourly rate included in the request of the Landowners, a massive, additional, time-spent penalty should be imposed for an erroneously derived low score on the "nature of the case" Blumberg element.
5. He did not understand that resolution by summary judgment instead of trial does not authorize deduction of hours incurred in obtaining summary judgment, and does not authorize further deduction of hours devoted to seeking reimbursement of the fees for winning in such manner.
6. He did not understand that prevailing in a case because of the so-called "procedural" nature of the opposing party's wrongs, especially when the "procedural dishonesty" was still dishonesty, does not authorize deduction of hours incurred in prevailing in such manner, and does not authorize further deduction of hours devoted to seeking reimbursement of the fees for winning in such manner.
7. He did not understand that prevailing in a case after needing to analyze only a "handful" of meetings at which decisions "might have been made," does not authorize deduction of hours incurred in prevailing in such manner, and does not authorize further deduction of hours devoted to seeking reimbursement of the fees for winning in such manner.

8. He ignored the law of the case that the meetings of the Town Council were meetings at which decisions were, in fact, made by formal resolution, and were not meetings at which decisions merely "might have been made."
9. He did not understand that prevailing in a case without naming or presenting an expert does not authorize deduction of hours incurred in prevailing in such manner, and does not authorize further deduction of hours devoted to seeking reimbursement of the fees for winning in such manner.
10. He did not understand that prevailing in a case without citation of the deceived appraiser's deposition appearing in the dispositive order in one's favor, does not authorize deduction of hours incurred in prevailing in such manner, and does not authorize further deduction of hours devoted to seeking reimbursement of the fees for winning in such manner..
11. He did not understand that resolution by summary judgment does not make a case simple or noncomplex.
12. He did not understand that "procedural dishonesty," whether procedural or not, is dishonesty.
13. He did not understand that the Blumberg factors are not traditionally applied as a penalty.
14. He did not understand that the two Blumberg factors he applied are not traditionally applied to alter hours worked, and that the "time reasonably devoted" factor, reserved for that purpose, is generally applied by examining work on noninterwined claims that are outside the ambit of the contract or statute authorizing fees, not by examining complexity or the amount recovered.
15. He did not understand that the Blumberg factor of the "nature" of the case includes more than whether the case was complex.
16. He did not understand that the EDPA fee award statute does not contemplate only a partial award based on proportionality, complexity, or issues reached.
17. He did not understand that such things as deciding not to cite the deposition of an appraiser deceived by the Town do not dictate the complexity of a case, a motion, or an order.
18. He did not understand that he was not free to disregard the fee award statute's directive that fees reasonably incurred for "preparation" and all other fees in the overall action are to be reimbursed.
19. He did not understand that the dishonestly obtained and presented appraisal not being an appraisal of the correct interest in property was a fact common to many of the bases for challenge in the Amended Complaint.
20. He did not take into account, at all, the fact that the Town denied virtually every allegation of the Amended Complaint, that this increased Landowners' counsel's work, and this, and anticipation of efforts of the Town to evade summary judgment by claiming discovery was needed, justified as a matter of law, the pursuit of discovery including taking the deceived appraiser's deposition and seeking the deposition of the Town Administrator afterwards.
21. He failed to mention, recognize, comment in any way, or make any finding on the reprehensibility of the Town's conduct in light of the fact that the Summary Judgment Order established as the law of the case that the inappropriate appraisal followed months of persistent and outright lying by the Town to property owners about the contents and effect of the proposed easement, and that the Town Administrator and Council acted more like a dishonest used car

salesman trying to foist the easement on property owners, than as persons charged with protecting the interests of property owners.

22. He completely overlooked the fact that the very existence of a deposition on a fact submitted by a summary judgment movant as undisputed often precludes the nonmoving party from in good faith attempting to controvert the fact the movant submits through other Rule 56 materials.

23. He completely overlooked the fact that the very existence of the deposition on facts submitted by the Landowners on summary judgment was responsive to grounds the Town advanced for postponing the hearing of summary judgment and precluded and immediately undercut the Town's motion for reconsideration of the Summary Judgment Order, in which the Town argued that more discovery was needed.

24. He did not consistently apply his own mistaken methodology of ignoring actual fees, in e.g., requiring production of billing statements for actual fees, applying the low contractual hourly rate, and dividing the total time by three according to the contract.

25. He assumed and impliedly found that handling three similar cases with three different clients, relating to three different properties, with filings in triplicate, takes no more time than handing only one of the three cases; e.g., but for an inadequate ballparked "administrative allowance," in subscribing to an estimate that all 15 motions and attendant briefs (including reply briefs) in one case can be prepared in 20 hours, he also found that all motions and attendant briefs could be prepared and filed in triplicate in the same hour and a half per motion and brief set.

26. He recited inapposite case law for proposition that the Landowner had the burden of showing the number of reasonable hours worked and then never made a finding that the burden of showing the number of hours was not met.

27. He mused and recited observations about what he termed "block billing," concluding that so-called "block billing" was "permissible" and "certainly not inappropriate," and then never made a finding about the actual number of hours worked.

28. He stated that the Court found it "relevant" that the bills were not "itemized," when acknowledging to the contrary in the same paragraph that the bills set forth "all of the task descriptions for a given day" in a single paragraph.

29. He implied that the bills lacked any detail to "shed light on the massive amount of attorney time" "presented" when the Court itself recognized that the 60 pages of sample bills replete with detail and times recorded set forth "all of the task descriptions for a given day."

30. He cited inapposite case law to the effect that a court may reduce an award for "excessive or duplicitous work" or "unreasonable duplication of efforts," and yet never identified or made a single finding that any work was "duplicitous" or was "an unreasonable duplication of efforts," as on the Landowners' side of the case, one lawyer worked on three cases and divided the fee by three instead of, as with the Town, three lawyers working on one case.

31. He did not understand that consideration of the "the beneficial results obtained" Blumberg factor is not the place to discuss the amount of time spent or the reasonableness of the amount of time spent.

32. He did not understand that no proportionality is required by law.

II. The Circuit Judge misunderstood or forgot the intertwined nature of the facts, which was established as the law of the case in his Summary Judgment Order months earlier, the Judge misapprehended the significance and proper legal treatment of intertwined facts pertaining to fraud, bad faith and lack of necessity of the easement, which were integral to the relief ordered and were also alternate grounds, and the Judge erred in numerous ways in treating the never-dismissed theories of fraud, bad faith and lack-of-necessity, and the fee proceedings themselves, as if they were "claims" determined completely adversely to the Landowners.
(Issues 1, 2, 3, and 4-17, with additional focus on 3, 8, 10-12, and 14-17)

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33. He did not understand that surgery to disallow time to a prevailing party in a matter as not reasonably devoted to the matter is generally unauthorized except for truly unrelated claims for which no fee recovery is separately authorized by statute or contract, for truly separate claims on nonintertwined facts which are subject to fee recovery, but which are determined adversely to the fee seeker, or for substantial motions or issues determined wholly adversely to the fee seeker and determined to have been wholly and abjectly unnecessary and unjustified to the point of being frivolous; not understanding the law on this point, he further failed to make the appropriate finding that there was not a single such claim, motion or issue in this case.
34. He did not understand that the "significant amount of time" on fraud, bad faith and lack of necessity therefore could not be and should not have been excised.
35. He did not understand that the benefit obtained in a case is seldom used as a penalty instead of an enhancement.
36. He misunderstood the nature of, rationale for, and limits on, the legal principles applicable to intertwined and noninterwined claims.
37. He misapplied the Hensley case.
38. He fundamentally failed to understand that in South Carolina, a fee petition does not require that detailed billing records be kept, and if kept, submitted.
39. He failed to understand that the Landowners were not unsuccessful on the fee dispute.
40. He failed to understand that success or justification or other factors are not independently applied to a fee dispute to determine the fee incurred in the fee dispute.
41. He determined that the Landowners were unsuccessful in some portion of the fee dispute but never identified or made a single finding of anything that was unreasonable about the time spent by Landowners' counsel in this process, anything that was unreasonable about the positions taken, or anything even suggesting that the Landowners were "unsuccessful."
42. He never once even took into account the efficiency gained by three different landowners in three separate suits using the same lawyer, instead of using three lawyers, with duplicated or triplicated efforts, and three unrelated bills.
43. Despite being requested to do so (e.g., Transcr. p. 4 line 17-p. 6 line 16, R. pp. 287-289), he never once exercised any discretion to consider the effectual additional one-third (1/3) discount to the Town as a result of waiver of one of the three bills.)

The Circuit Court never ruled against the Landowners on any fact or legal theory pertaining to fraud, bad faith,[21] or lack of necessity of the easement.

The Judge's Fee Order is truly perplexing, as no judge of the Court ever ruled against the Landowner in a single motion or other matter in the entire case, including the fee proceedings, other than, at worst, to choose some middle ground on the discovery dispute between the parties on the extent and manner of production of the Landowners' confidential billing statements in the fee proceedings.[22]

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[21] See Bookhart v. Central Elec. Power Co-op., 222 S.C. 289, 72 S.E.2d 576 (1952)(noting the readiness of the court to remedy attempted takings of excessive scope or inappropriate location for a stated project, but requiring fraud, bad faith or abuse of discretion when challenging the overall necessity of the project itself.); Timmons v. S.C. Tricentennial Comm'n, 254 S.C. 378, 388-89, 175 S.E.2d 805, 810 (1970)(discussing the bearing of fraud or bad faith on deference to condemning authority's determination of necessity); Southern Dev. and Golf Co. v. South Carolina Pub. Serv. Auth., 305 S.C. 507, 409 S.E.2d 428, 514 (Ct.App. 1991), aff'd as modified, 311 S.C. 29, 426 S.E.2d 748 (1993)(discussing effect of condemnor's failure to exercise discretion by rational decision-making process); Sanders v. Luther, 164 S.C. 105, 109,161 S.E. 70, __ (1932)(examining whether complaint had allegations "pointing to any element of illegality, oppression, abuse of discretion, or bad faith"); City of Marietta v. Summerour, 302 Ga. 645, 807 S.E.2d 324 (2017)(considering and superseding, but not rejecting, Georgia Court of Appeals' holding that city's failure to follow procedure of providing the appraisal summary before negotiating was itself "bad faith," vitiating condemnation attempt); Sease v. City of Spartanburg, 242 S.C. 250, 131 S.E.2d 683 (1963); and Cameron v. City of Chester, 253 S.C. 574, 172 S.E.2d 306 (1970).

[22] The Landowners were actually substantially successful even on the outcome of the "discovery dispute," making the Judge's rulings on fees even more of an enigma. Here, the record and the law absolutely contradict the Circuit Judge's extraordinarily vague assertion that the Landowners were "unsuccessful" in the "production and redaction issues" relative to actual bills produced. He withheld both the basis and the amount of his finding.

First and more importantly, however, it was error to even consider whether the Landowners were "successful" in the fee proceedings. See the earlier footnote under Argument I regarding standards for fees for fees. "Success," "justification" and other factors applied to determination of attorney's fees for the principal case are generally not applied to the determination of fees incurred in trying to obtain reimbursement of fees; rather, the award is automatic. Commissioner, Immigration and Naturalization Service v. Jean. See also Layman Order III (modifying Supreme Court's prior order awarding attorney's fees, to add to the previous fee award of $445,226.60, $588,872.56 in fees incurred when the previous award by the Supreme Court of $445,226.60 had been a direct modification by the Supreme Court dramatically reducing the Circuit Judge's appealed previous award of fees of $8,660,000).

Secondly, even if this were not the law, generally, before a Court may make an isolated deduction of fees or hours for a mere motion or segment within the larger litigation, the motion or segment must be (i) distinctly identifiable, and (ii) must depend on facts which do not overlap or intertwine with those of the other parts of the case, and (iii) the fee applicant must have been wholly and abjectly unsuccessful and unjustified in pursuing the whole motion or segment, not merely less than wholly victorious on one or more sub-issues, within the motion or segment. Compare Rice v. Multimedia, Inc., 318 S.C. 95, 456 S.E.2d 381 (1995)(involving denial of a portion of fees to the otherwise prevailing party where the denied fees were attributable only to three adversely determined wholly distinct claims out of seven distinct claims in a full merits jury trial of a multi-claim case, in which claims for commissions were each based on being the effective cause of procurement of a different contract and each claim turned on a different set of facts).

On the other hand, as here, "[l]itigants 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). The Circuit Court's ruling based on a mere position taken in a subissue is erroneous.

Third, as to the fee application overall, the Landowners were not unsuccessful. They got an award.

There was very little that was unsuccessful within the overall application for fees, other than the amount of the fee award, which is what is being appealed herein as erroneous.

The Record shows that the so-called "dispute" over production and redaction arose from inclusion in the Town's motion to reconsider, of a request for a full-blown, live, evidentiary bench trial on the attorney's fees requested by the Landowner, along with at least a four-month delay in considering the matter, and discovery, presumably involving attorney-client matters in cases and controversies in which there was still pending and explicitly threatened litigation.

After the Landowners had already taken time to apply for fees, the Town asked for a fee trial, for delay, and discovery. Impliedly this included a requested delay in determining the Town's own motion to reconsider Summary Judgment. The Landowners opposed the request as expensive, delaying and unnecessary and expressed concerns over confidentiality and tactical use and privilege.

The Landowners' counsel formally opposed this request by the Town, especially since the request for delay was not a separate motion, but was inserted in a motion to reconsider Summary Judgment. The opposition was in writing.

The Circuit Court made no finding whatsoever at the time about whether it was unreasonable or unnecessary for Landlowners' counsel to oppose this request and since that time, there has been zero explanation of anything being unreasonable about the opposition.

The Town's request was not granted. The Town then retracted its request for a full-blown trial. The Circuit Court made no finding at the time that the Landowners were unsuccessful in opposing the request and there is no evidence that they were.

The next step in the dispute was the Town's request, merely made in a brief, without propounding formal discovery or making a motion, for copies of the Landowners' bills, which contained privileged and other confidential information shared between attorney and client.

At this point, nothing had changed about the Town's use of mass communication or the existence of the Challenge II cases. Following public shaming of the Landowners by the Town over the easements by various means described in the pleadings, the Town had also furnished to the newspaper, the results of the false appraisals and made live-streamed comments about discovery in the litigation. In the Challenge II cases, there was still pending and explicitly threatened litigation. Additionally, the Town still had a pending motion for reconsideration in the instant case, which could involve legal issues reflected in the Landowners' legal bills. The Circuit Court made no factual finding in the fee proceedings or later that any apprehension or precaution on the part of Landowners' counsel concerning release of personal and litigation-sensitive information was unreasonable.

Without involving the Court, the Landowners took the initiative and time to offer the bills to the Town. However, the Landowners' counsel proposed that the bills be provided in redacted form (i.e., with sensitive portions blacked out) in order to show at least methodical and accurate tracking and tabulation of time spent in the litigation. He requested that the bills be provided subject to a protective order. Without involving the Court, the Landowners' counsel then spent the time to draft and propose the terms of a protective order.

The Circuit Court made no finding then or later that it was unreasonable for the Landowners' counsel to proceed in this manner. In conflict with Mr. Pagliarini's completely unidentified, undocumented, nonexpert "experience" (see P.Aff. ¶34, R. p. 1217), the Circuit Court did not determine that there was anything in its experience that was wrong with the Landowners' counsel's concern for protecting confidences between attorney and client and the client's other personal and confidential information. It is in fact remarkable that the Circuit Court did not enhance the Landowners' counsel's rate or overall fee for doing so.

The Town wanted more disclosure, less redaction, less protection, a redaction-by-redaction statement of grounds for a strict privilege, wide-open in camera review, etc. The Landowners opposed and argued that under a proper Rule 26 order, the bills did not need to be produced at all.

The Judge made a determination. In camera review was done. Neither party got exactly what it asked for. More redactions were allowed than the Town wanted. Reasons were not required to be provided with each redaction. The vast majority, but not all, of the redactions the Landowners proposed were left intact. Both the redacted and unredacted bills, if filed, were required to be under seal. The Town requested, contrary to the protective order, that final billing amounts on the last pages of the bills be unredacted. The Court declined. There was nothing excessive about assuring such a result.

The argument over redaction-and-production issues was thus only a part of the time-consuming overall fee application proceedings. The Landowners still had to prepare and prosecute the fee petition which was many pages, oppose a request for a full-blown fee trial, draft the prototype that was ultimately used for the protective order, actually redact and produce bills once the arguments were determined, respond to the Town's voluminous filings just before the final fee hearing in October, prepare for, drive to, and show up for hearing, etc.

As discussed in Argument I, the Court erroneously apparently awarded nothing or next to nothing for this time, despite the time being required in order for the Landowners to get any fees back while protecting their interests.

The conclusion by the Circuit Court that an unspecified amount of actual attorney time should be deducted because a mere discovery sub-issue in the fee application proceedings, i.e.,

Yet, the Fee Order erroneously indulges in unspecified radical deductions of time, justifying the massive penalty nebula only by stating that the nebula contains time for things other than "procedural claims on which the plaintiffs prevailed" (R. p. 106). Here, by negative implication, the Judge echoes "nonprevailing claims," a pat phrase Mr. Dillard simply used with neither definition nor relevant supporting authority.

"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, 461 U.S. at 435–36. The Circuit Judge's ruling to the contrary is error.[23]

The issues of fraud and bad faith were in fact directly involved in the Summary Judgment Order's specific discussion of why the condemnation was not properly authorized. The Town Council or the then Town Administrator (Fabbri), or both, deliberately omitted all mention of the acutely known offensive easement features in the May 18 Town Council meeting.

Not only was what the Town Council authorized not the same as what the Town then immediately sued for, but the dishonest failure to fully consider the actual needs of the Town in relation to the true burdens on the landowner doomed the validity of the authorization in any event, as ruled by the Circuit Judge.

Likewise, under the Summary Judgment Order, the condemnation notice itself was incurably defective because, despite prior acute knowledge of the features to which the

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"dispute with the Town over production and redaction of attorney fee statements," was "unsuccessful," was itself unfounded.

[23] Generally, actual time is deducted only for time devoted to a completely separate cause of action not covered by the fee award statute. See Sauders. However, even as to truly separate whole causes of action not covered by the fee statute, little or no deduction of time is made when the attorney time is for legal services factually or legally "intertwined" with the work on the covered cause of action. Sauders, and see Layman (adopting time with only slight deduction for nonintertwined time spent on noncovered otherwise intertwined outside whole claims).

Landowners objected, the Town Council or the then Town Administrator, or both, obtained a false appraisal by deliberately omitting the offensive easement features in the description given to the Town's appraiser. Then the Town delayed providing the false appraisal to the Landowners while suing them, and made unequivocally false certifications regarding the providing of the appraisal in the condemnation papers themselves. "Procedural" or not, this was dishonest.[24]

Even if the Town's dishonest behavior had been a completely independent and alternative basis for challenging the condemnation attempt, to be presented later, it was error to dock the Landowners for preparing to further present these grounds. It was per se reasonable for them to do so.[25]

The lack of necessity of the easement also appeared in the common facts. It appeared on at least two levels: (i) inclusion of more features in the easement than were necessary, thus seeking an unnecessary easement because it was unnecessary in scope, and (ii) seeking any easement at all when no easement at all was necessary.

The Circuit Judge established as undisputed fact on Summary Judgment, (i) that all three Landowners had offered an easement with all the features stated to be necessary in the Town's summary judgment brief, but that the Town's condemnation attempt sought features far in excess, and (ii) that the Town completed the renourishment without any easement at all from the Landowners, after "publicly determining that the easements were 'not necessary.'"

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[24] Failure to a provide a summary of appraisal, as required by statute, before negotiating, has been held to be "bad faith," invalidating condemnation. Cf. City of Marietta (superseding, but not rejecting, determination of Court of Appeals that failure to provide summary of appraisal, as required by statute, before negotiating, was "bad faith," invalidating condemnation).

[25] The Circuit Judge erred in not just disregarding preparation, but also in illogically concluding that preparation is not preparation unless the thing prepared for fully happens. For example, he did so in the Fee Order at pp. 5 and 7, R. pp. 106 and 108 (stating that although deposition of appraiser was taken, deposition testimony was not referenced in Summary Judgment Order).

III. The Circuit Judge ordered only consolidation, and did not order merger, and the Landowners did not ask for or consent to merger. (Issue 18)

The Circuit Court erred in stating that the cases "were once three separate cases." They still are. Although not a finding or conclusion, this statement of merger should be corrected on appeal. Consolidation was pursuant to Rule 42(a), SCRCP. When consolidated under the rule, the cases retain their independent separate identities. Rule 42(a), SCRCP, Official Note.

CONCLUSION

The Circuit Judge should be reversed. This Court should award Sunset and Beattie each the appropriate fee of at least $60,198.33 as of October 6, 2021. This Court should direct that all reasonable actual fees and expenses subsequent to October 6, 2021 will be awarded pursuant to the EDPA by this Court and will be determined from a bill of actual costs and fees incurred in the Circuit Court and this Court, adapted to the procedure of Rule 222, SCACR.

Respectfully submitted,

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Sunset Lodge, LLC and Franklin D. Beattie as trustee

Date: September 14, 2023

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 AND 211(b) COMPLIANCE

I, M. Baron Stanton, do hereby certify that I have, on this date, served the foregoing final **Appellants' Brief** upon the Respondent by causing a copy to be e-mailed in accordance with current rules to will@belserpa.com and do further certify that the brief complies with Rule 211(b). 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: September 14, 2023