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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable Benjamin H. Culbertson, Circuit Court Judge

CASE NO. 20-CP-22-00930
CASE NO. 20-CP-22-00931
CASE NO. 20-CP-22-00932

M. Baron Stanton, ...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.

and

Sunset Lodge, LLC, ...Appellant,

v.

Town of Pawleys Island,...Respondent.

INITIAL APPELLANTS' BRIEF

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STATEMENT OF ISSUES ON APPEAL

1. Did the judge misunderstand which statute was applicable, misunderstand the applicable statute, and misunderstand the discretion available to him under it?

2. Were the judge, and the Landowners who were sued twice, beset with complexity, protraction, confusion and contradiction created entirely by the Town at every turn?

3. Is “a court authorized” under S.C. Code Ann. §28-2-510(C) “to either award reasonable attorneys' fees to a prevailing landowner or deny the award in its entirety depending on the circumstances surrounding the litigation”?

4. Did the judge confuse the three EDPA fee statutes and err in assuming that he had discretion to award a fee or award no fee at all under the mandatory fee award statute which was applicable to abandonment?

5. In making a factual “finding,” rather than a legal conclusion, that the Landowners were entitled to attorney’s fees, and then giving the Landowners a haircut of 96% on the time and expense actually incurred in pursuing reimbursement of fees, was the judge guided by thinking the statute allowed him to award nothing at all and that he could likewise award as little as he wanted for any segment without giving any cogent reason for doing so?

6. With regard to the 217.7 undisputed hours spent trying to obtain reimbursement of attorney’s fees after all motions were over, did the judge err in concluding that he could reduce these hours by 96% without any support in the record for such a conclusion, by merely insinuating or reciting inapplicable and incongruent concepts such as “success,” prevailing, simplicity and duplication, from other fee-award statutes and jurisprudence?

7. Did the judge err in merely ballparking the awarded time for obtaining fees, at eight hours, instead of applying the undisputed actual 217.7 hours which were actually devoted, and

err in stating no basis for the eight hours, and no basis for disregarding the 217.7 hours of actual time?

8. When actual, sworn, undisputed time was submitted, was it error to base fees-for-fees time on a hypothetical construct of a different, abstract, case without matching facts, rather than on the actual conditions, and actual hours and fees incurred, in the actual case before the judge?

9. Was it error not to first follow the dictates of the applicable statute, and not to then, to the extent not inconsistent, follow the market-rate lodestar method described by Layman and its progeny, viz., to determine actual hours, then determine which, if any, were unreasonable and why, then apply a market rate, and then consider enhancements or other special conditions?

10. Was it error under the fee statute for abandonment, to find that the condemnor abandoned voluntarily and willingly, the errors being that abandonment is not an act in the challenge action, abandonment is neither an admission of all facts in the challenge complaint nor a consent to the relief warranted by the challenge action, the findings are irrelevant and not a factor in determining whether abandonment occurred, and abandonment is, by definition, always an act of volition?

11. Did the judge err nevertheless in finding that the Town's "abandonment" was voluntary in some generous or charitable sense, the error being that all the undisputed facts show that the abandonment was a result of pressure applied on the Town by the Landowners, that the Town believed its goose was cooked, and that the Town abandoned to serve its own interest in thwarting discovery and further exposure of frauds already alleged?

12. Aside from the error of treating §28-2-510(C) as if it was a mere extension or addendum to §28-2-510(B), was it error for the judge to try to apply the "degree of success" Jackson factor to a fee decision under §28-2-510(C), and was this factor "especially" irrelevant

to awarding fees in the case of a condemnor's abandonment when the factor is erroneously applied to fees which, out of conservatism, were not even requested?

13. Does "prevailing" or degree of success have anything to do with awarding fees under S.C. Code Ann. §28-2-510(C) after abandonment, does this applicable statute mention "prevailing" like different EDPA statutes do, or, rather, are fees recoverable simply upon abandonment, and was the statute the judge applied regarding "prevailing" simply the wrong statute?

14. Did the judge fail to apply the intent of the correct statute to reimburse all reasonable expense that the landowner was caused to incur, not only for participation in, but also for preparing to meet, the condemnation attempt (including preparation for potentially two different types of later trials), simply as reasonable steps to prepare after being sued, regardless of whether the work product associated with the time and fees incurred is embodied in filings a new opposing lawyer may gloss over, and regardless of whether such work product is the cause of the condemnor's withdrawal?

15. Did the judge also misunderstand what time was submitted for what, and base his decision on assumptions with no support in the record?

16. Did the judge err in finding that the Challenge II cases were handled "in tandem with issues, theories, pleadings, and other filings that were effectively identical with those in the Challenge I cases"?

17. Did the Landowners ever "concede[] in the affidavit of plaintiffs' counsel, that the three Challenge II cases were handled in tandem with issues, theories, pleadings, and other filings that were effectively identical with those in the three Challenge I cases"?

18. Did the judge fail to understand that no time submitted in separate earlier fee

applications in the Challenge I cases was submitted in the instant Challenge II fee applications?

19. Did the judge err in observing that some work in the Challenge II cases was made easier by the lawyer already having treated similar issues in the Challenge I cases, and by then using this as a basis for striking hours submitted in the Challenge II cases, when absolutely unequivocally only actual hours spent in the Challenge II set of cases were submitted and no hours which were counted in one set of cases were included in the other set, and any time savings afforded by work done in the Challenge I cases was already built into the actual hours submitted in the Challenge II cases?

20. Did the judge misunderstand that handling the three Challenge II cases instead of one does not require the exact same amount of difficulty, tedium and time consumption?

21. Did the judge fail to exercise any discretion at all to consider that when the Town, during a stay, unilaterally sent a notice which the Town composed from scratch, this did not impose a hard cutoff, and did not ipso facto, end the reasonableness of any further time spent in a challenge case, and that time spent to consult, review, and seek a determination of the validity, nature, extent and effect of the putative "abandonment" document was reasonable and to be expected, including the 7.4 hours of time and fees incurred shortly following the February 10 date the Town e-mailed the document?

22. Even though the judge awarded fees for all the 57.5 hours of submitted time between October 16, 2020 and the February 10, 2021 notice, did he nevertheless err and demonstrate confusion over the relevant inquiry, in finding and emphasizing that other than three things, "little else occurred" in the period, the error being that equating "occurrences" or "activity" with what shows up on a docket sheet, as opposed to actual activities of, and time spent by, counsel whose fees are sought, is contrary to reality.

23. In concluding that nothing done after February 10, 2020 could have related to anything other than fees or "unsuccessful" opposition to a motion to dismiss, and in making a formal finding that "the plaintiffs are not entitled to recovery of fees and expenses associated with opposing the Town's motion to dismiss and ensuing procedural motions arising from the dismissal," did the judge demonstrate that he understood neither the applicable fee statute, nor the fact that the things he referred to were not included in the time the Landowners submitted, which time he then slashed by 96%?

24. Did the judge err in concluding that the Landowners were not entitled to reimbursement of filing fees and mileage incurred in opposing dismissal of their action, the error being that reasonable expenses incurred, even when incurred after abandonment, are recoverable, if reasonably incurred as a result of being sued for condemnation, and it is not reasonable to stop doing everything and take the opponent's word for everything simply because the opponent who had frivolously conducted 12 lawsuits has just sent an e-mail?

25. When the opponent was explicitly threatening to sue for the same thing for a third time, was it reasonable to incur expenses for filing fees and mileage to determine whether the Town's putative abandonment of a potentially multi-million-dollar suit was with or without prejudice?

26. Did the judge err in concluding it was reasonable and customary to split a fee award three ways, simply because similar or even identical work was done in three cases, when the work was done at lower than market rate, and a draconian slashing of 76% of the submitted undisputed actual hours had already been erroneously indulged?

27. Was it punitive, callous, and capricious to do the foregoing, and was it also a contravention of the letter and legislative intent of the fee award statute to make the Landowner

reasonably whole, deter multiplicitous litigation by condemnors, and make counsel reasonably available to impecunious rural, urban and resort landowners alike when they have been sued using the government purse?

28. Did the Circuit Court err in failing to disregard the affidavit of Mr. Dillard as legally incompetent and inadmissible, demonstrably incomplete, contrary to law, and unreliable?

STATEMENT OF THE CASE

I. Short Uncontested Broad Outline

The instant appeal contests the correctness and sufficiency of the award of attorney's fees and expenses to three "Landowners," whose property the Town of Pawleys Island tried twice to take for zero compensation, based on false information.

In applying for part of the fees incurred in the six cases associated with the Town's second attempt, the Landowners asserted that the opponent urged misinterpretation and misapplication of the applicable fee award statute to the uncontested number of hours forming the basis of the Landowners' fee requests. The Landowners also asserted that the opponent urged a decision which simply ignored a vast number of those undisputed hours and did not distinguish between what they were clearly specified to have been spent on and not spent on.

Three cases were unfiled "condemnation actions" and three were filed "challenge actions." Because the Town of Pawleys Island sued the three Landowners twice in less than five months, there were six previous cases. These twelve (12) cases had staggered and interrelated background and activities.

The context of the subject fee petition was described by the Landowners as a matter in which "[u]nder pressure, the Town ditched its second set of three suits after four months," but which was "far from over," being one in which "[t]he Landowners are still being threatened to this day," in

which "the proceedings themselves and the papers filed demonstrate not only procedural complexity but legal novelty, difficulty with discovery, and a Town which goes through two sets of suits without ever admitting anything in the complaints," and as one in which "[t]he cases bristle with strategic considerations." (3/8/23 reply brf. at 22.)

The matter started in 2019-2020, when the coastal Town performed a beach "nourishment" project. Afterwards, in June 2020, the Town attempted to condemn a perpetual easement including public access on a substantial oceanfront portion of each Landowner's improved oceanfront land. In 2020, the Landowners had owned the affected properties for years and they were worth millions of dollars.

In July 2020, the Landowners brought three challenge actions[1] (the "Challenge I cases"), contesting the Town's first three condemnation attempts.[2]

The three Landowners used one lawyer. For the three different, but similar, cases, the Landowners divided the total fees and expenses by three, and agreed not to "split hairs" on additional but insubstantial attention to one case or another from time to time. The lawyer was Stanton, one of the Landowners. He charged $190 per hour in 2020.

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[1] Under S.C. Code Ann. §28-2-470, a part of the Eminent Domain Procedure Act, if a "landowner" or "condemnee" is sued for condemnation by a "condemnor," and challenges the right of the would-be condemnor to condemn all or a part of the subject property interest, the landowner must bring, as plaintiff, a separate challenge action within 30 days of the would-be condemnor's "commencement" of the condemnation action.

The condemnation action is commenced when it is served, rather than when it is filed. If the landowner files a challenge action, the condemnation action is stayed, does not get filed with the court, and remains pending with no court file number until and unless the challenge action is unsuccessful or the landowner otherwise consents.

A condemnation action is commenced by the service of a "notice" and is governed by the EDPA, whereas a challenge action starts with a summons and complaint, is governed by the South Carolina Rules of Civil Procedure, is filed, gets a case number and a file, and creates a court record from the beginning.

While these first six suits were pending, the Town made a second set of three condemnation attempts on October 16, 2020. The Town served each Landowner with about 11 pages of condemnation papers, including notices with detailed proposed conveyancing language and plats, neither of which were prepared or approved by the Landowner.

The Landowners then commenced the instant three challenge actions ("Challenge II cases") on November 12, 2020. They filed three (3) 12-page summonses and complaints with attached incorporated 61-page amended complaints from Challenge I.

These three similar Challenge II cases proceeded separately from each other in the court below. There were individual filings in each action, with customized captions and factual specifications, and multiple notices were sent for case events. The cases were eventually consolidated on June 3, 2021 under Case 2020CP2200932.

From the time of filing of the Challenge II cases in November 2020, the cases also proceeded independently from the preceding July 2020 Challenge I cases, with different pleadings, different timelines, factual distinctions, separate filings and notices, different proceedings, largely different hearing dates, and usually different judges.

On December 14, 2020, the Town answered the complaints in the Challenge II Cases, denying 44 or more of the 50 allegation paragraphs.

On January 8, 2021, summary judgment was entered against the Town by Judge Nettles in each of the July 2020 Challenge I cases, quashing the first three condemnation actions.

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[2] The July 2020 Challenge I cases by Sunset, Beattie and Stanton were Cases 2020CP2200600, 2020CP2200601, and 02020CP2200602. They were consolidated October 15, 2021 under Georgetown County Court of Common Pleas Case 2020CP2200600.

On January 13, 2021, in each of the three (3) Challenge II cases, the Landowners filed a 375-paragraph amended complaint. Each, described in more detail hereinbelow, included six exhibits consisting of an additional 81 pages.

On February 10, 2021, the Town sent the Landowners documents entitled "Notice of Abandonment." At that time, the Challenge II cases were still pending. The Challenge I cases were also still pending, and various proceedings in Challenge I, including a fee petition, continued thereafter into January 2022, as described in a footnote hereinbelow.

In the Challenge II cases, on March 5, 2021, the Town filed motions to dismiss, asserting the challenges were moot. The Town based the motions on the assertion that the Town had "abandoned" the second set of condemnation attempts. In its March 5 motions, although the Town stated it was "abandoning" the three "condemnation actions," which were unfiled, the Town stipulated that the Landowners could apply for litigation expenses within the vehicle of the instant, filed, Challenge II cases. (3/5/21 mot. at 3; 4/22/21 Ch.II orders at 10.)

On March 31, 2021, the Landowners filed opposing briefs, stating their suits werer not moot. Among other things, they stated that the Town claimed the "abandonment" to be without prejudice, and had stated an intention to sue for a third time for the same thing. The same day, the Town then filed briefs supporting its motions, to which the Landowners replied the same day.

On April 1, 2021, the motions were heard by Judge Culbertson and the attorneys were directed to submit proposed orders, which they did. On April 22, 2021, Judge Culbertson granted the motions.

On April 28, 2021, the Landowners filed motions to reconsider the dismissal. On June 2, 2021, the Town filed briefs in opposition, stating that the availability of attorney's fees in abandoned condemnation actions and in challenge actions warded off any threat of repetitive

litigation by condemnors. (6/2/21 Ch.II brf. at 5.)

On June 3, 2021, Judge Culbertson heard the motions and denied them. On July 2, 2021, the Landowners appealed.

Between June 3, 2021 and October 20, 2022, other proceedings ensued. These included: the aforementioned appeal of the dismissal; other filings, notices, and exchanges in circuit court concerning the pendency of the appeal and discrepancies in the way various Form 4 orders were filled in; and an additional short-lived appeal concerning the language of one Form 4.

On October 21, 2022, in the instant Challenge II cases, the Landowners filed a petition for attorney's fees and expenses incurred as a result of the Town's second set of condemnation attempts and subsequent abandonment.

They did so under S.C. Code Ann. §28-2-510(C). Under that statute, the landowner "is entitled to" reasonable litigation expenses including attorney fees "if the condemnor abandons or withdraws the condemnation action."

Stating that their experience (described further hereinbelow) with a fee petition in the Challenge I cases following summary judgment made the Town's response and the course of the fee application in the Challenge II cases unpredictable, the Landowners also applied under S.C. Code Ann. §15-77-300. Under that statute, fees can be awarded to a litigant prevailing against a government entity which is found to have not advanced a "substantially justified" position.

The fee petition included a 4-page proposed order awarding $8,990.57 in attorney's fee and other expenses to each Landowner. It omitted from the total, 6.2 hours which had been listed in the submitted column of hours, which would have made the total $9,383.23 if not omitted.

The 127-page, October 21, 2022 petition would later be amended and updated twice while awaiting the decision, which would not be made until June 2023. In the October 21, 2022 petition, the Landowners each requested reimbursement of only certain specified segments of the fees charged by their lawyer, based on undisputed submitted actual time spent for only those segments or time periods.

The Landowners submitted 57.5 hours relative to the period up to the date of the February 10, 2021 notice of "abandonment," 7.4 hours for the 29 days of time immediately afterward, up to March 12, 2021, and other actual and estimated hours following September 14, 2022, all pertaining to the fee petition. The Landowners' petition specifically excluded the majority of the time for the abovedescribed motions practice related to the Town's March 5, 2021 motion to dismiss.

In his affidavit, the Landowners' lawyer clarified that the petition "presents a request only for fees and other expenses up through the point just past the February 10, 2021 statement of abandonment, along with the post-2/10/21 fees and expenses attributable only to the instant fee petition." (10/21/22 Aff. at 23, ¶62.)

He clarified that the request did not contain hours for "matters relating to discovery, the Town's motion to dismiss the Challenge II case as moot, the Landowner's opposition to such dismissal, and various communications and papers pertaining to details of Form 4 orders entered." (Id. at 22, ¶59.) He further clarified that the request did not contain hours for appeal of "the April 22, 2021 order dismissing the Challenge II case as moot," which was then "still pending in the Court of Appeals." (Id. at 22, ¶60.)

The October 21, 2021 submitted hours totaled 144.2, which, if multiplied by the rate submitted, and then divided by three, would result in a fee reimbursement (before other expenses) of $9,132.66 to each Landowner.

On December 12 and 13, 2021, the Town opposed the petition. The Town filed 54 pages of materials.

The Town contended: (i) that jurisdictional or procedural issues precluded any award at all, (ii) that under existing precedent, §15-77-300 was displaced by §28-2-510(C) because the latter was the more specific statute, and that, (iii) "[t]o the extent that any award is made," the fee reimbursement should be based on a 20-hour estimate prepared by the Town's new counsel, resulting in an attorney's fee reimbursement of $1,266.66 per Landowner. Eleven (11) hours of the Town's new counsel's 20-hour estimate were for everything in the three (3) cases up to February 10, 2020, for which the Landowners had submitted 57.5 actual hours.

In the 54 pages of materials opposing the fee petition, the Town's new counsel allowed nine (9) hours of his overall 20-hour estimate for the recovery of fees and expenses.

The Town contended that the 20 overall hours allowed by its new counsel should be multiplied by $190 per hour, and the resulting $3800.00 should then divided by three, with a third, $1,266.66, being reimbursed to each Landowner, along with a third of a reduced amount of other submitted expenses.

After other proceedings relative to the petition (described in more detail hereinbelow), the circuit judge eventually heard the October 21, 2022 petition on April 14, 2023. He requested proposed orders. The parties submitted proposed orders and the Landowners submitted a June 8, 2023 update of the fee petition.

By June 2023, the later segment of actually incurred fees requested had grown. The fees following September 14, 2022 were now based on 217.7 hours. The overall total fees were based on 282.6 hours for all three sets of cases. The Landowners' counsel swore he actually worked these hours on the specified parts or time periods. He also re-affirmed that none of the hours submitted in the petition were hours on which a fee request in the Challenge I cases was based.

The segment of the fees for the one hundred and seventeen- (117-) day period between the Town's October 16, 2020 commencement of the condemnation actions and the Town's February 10, 2021 notice of "abandonment," was still submitted to be based on 57.5 hours. For the 29 days immediately following, the submitted time was still 7.4 hours.

When the Landowners updated the fee petition on June 8, 2023, their lawyer clarified again under oath that the request was limited to "pre-'abandonment,' a few days closely following, and post-2/10/21 fee-petition-related matters." (6/8/22 amend./suppl. aff. at 2.)

He clarified again that the time submitted was "far from all time spent," and specifically that the submittal omitted "substantial time following the February 10, 2021 statement of abandonment if the time is not relative to this fee petition.'' He affirmed explicitly that "substantial time on opposing dismissal of Challenge II in the Circuit Court and vying for an opportunity to enjoin the Town from suing the Landowners again, and appealing the dismissal are not included." (Id., n.1.)

Judge Culbertson decided the October 21, 2022 fee petition on June 8, 2023. Judge Culbertson initially stated that "a court is authorized to either award reasonable attorneys' fees to a prevailing landowner or deny the award in its entirety depending on the circumstances

surrounding the litigation." (Order at 4.) He remarked that the Town "voluntarily withdrew" (order at 4) its "notices" and that the Town "willingly" withdrew (order at 5) its "notices."

Relying on the affidavits of the opposing lawyers, rather than of the lawyer expending the time, he found that during "the ninety-one days" between November 12, 2020 and the time of the "Notices of Abandonment on February 10, 2021," little else "occurred" (order at 4-5) other than three things. He identified the three things which "occurred" as the complaint, the answer, and the amended complaint. The "else" that "occurred," he identified as interrogatories and a deposition notice.

He did not mention or discuss whether there was any reason to exclude from "occurrences," off-docket-sheet things, such the following examples, whether real or hypothetical: (i) multiple communications whereby Landowners agreed to accept "service" of the October 16, 2020 second-attempt notices, (ii) non-rule factual investigations through beating the pavement, review of public records, correspondence, FOIA, etc., or analysis not involving the Town's lawyers, (iii) failure of the Town's lawyer to respond to phone or e-mail questions about the second-attempt papers while not responding to Landowner requests for discovery extension in Challenge I, (iv) failure of the Town's lawyer to respond to requests to accept service of Challenge II while not responding to Landowner requests for discovery extension in Challenge I, (v) other communications involving or not involving the Town's lawyers, or (v) research not done by them.

The three (3) summonses and complaints which were researched, drafted and filed November 12, 2020 by the Landowners' counsel were each 12 pages, and each bore an attached incorporated 61-page amended complaint from the respective Challenge I case. The Town's three (3) answers which were received, reviewed and likely forwarded by the Landowners'

counsel denied 44 or more of the 50 allegation paragraphs of the respective three complaints. The three (3) amended complaints (described in more detail hereinbelow), which were researched, drafted and filed by the Landowners' counsel, were each 375 paragraphs, and each bore 81 pages of exhibits.

For the time up to February 10, 2021, in which he found the "record" of "this case" to have "little activity," Judge Culbertson awarded fees based upon all of the actual 57.5 hours which were submitted for all three cases combined. To make up the total fee award, the judge added eight (8) hours, which he designated as "for preparation and prosecution of this motion for fees and costs." He thus did not include any of the 7.4 hours submitted for February 11 to March 12, 2021, and also completely disregarded all other sworn hours.

He recognized on June 8, 2023 that, by then, the Landowners sought attorney's fees for 282.6 hours of legal services since October 16, 2020. (Order at 3 and 5.) He did not recount or discuss the Landowner's lawyer's specifications of which of these hours were for which things, and of which segments were specifically excluded.

He found that "[h]ours of legal services incurred subsequent to February 10, 2021" "could only relate to work on the motion before the Court or to matters arising from plaintiff's unsuccessful opposition to the motion to dismiss." (Order at 5.) He "noted" that on July 2, 2021, "the plaintiffs filed an appeal of the order granting the Town's Motion to Dismiss." (Id.)

The judge went on to further discuss, as if submitted, segments of work for which fee reimbursement was not requested, for which the Landowners' attorney specified he was not submitting hours. Here, Judge Culbertson made a formal finding, "that the plaintiffs are not entitled to recovery of fees and expenses associated with opposing the Town's motion to dismiss and ensuing procedural motions arising from the dismissal." (Order at 6.)

With regard to "hours relating to work on the [fee] motion before the Court," Judge Culbertson did not recount the number of hours the Landowners' lawyer had specified for that specific segment and subject matter. The judge stated no finding on what the Landowners' lawyer should not have done in trying to obtain, for the Landowners, a reimbursement of some of the attorney's fees and other expenses the Landowners actually incurred.

In estimating eight (8) hours, the judge stated no finding on how many actual hours the Landowners' lawyer devoted to, or the reasonableness of: (i) preparing an October 21, 2022, 127-page fee petition with included 4-page proposed order and Form 4, requesting a total of $8,990.57 for each Landowner; (ii) offering to consult with opposing counsel regarding the petition; (iii) receiving and analyzing the opponent's December 12-13, 2022, 54 pages of work product opposing the fee petition, opposing the award of any fee whatsoever; (iv) preparing for a December 15, 2022 hearing; (v) appearing for the December 15 hearing, which was then continued; (vi) researching and preparing 47 pages of reply to the Town's opposition to the petition; (vii) preparing a March 8, 2022 6-page update of the petition; (viii) preparing for a March 9, 2022 hearing; (ix) standing by for, and arguing at the March 9 hearing; (x) receiving notices at various times regarding the petition; (xi) receiving and sending e-mails or other correspondence regarding the petition; (xii) receiving and making phone calls regarding the petition; (xii) consulting with two other clients regarding the petition; (xiii) preparing for an April 14, 2022 hearing; (xiv) standing by for and arguing at the April 14 hearing; (xv) preparing a 6-page proposed order and Form 4 at the direction of the presiding judge; (xvi) reviewing the Town's 11-page proposed order and Form 4; (xvii) engaging in correspondence with the court stating objections to the Town's proposed order; and (xviii) preparing a 7-page update of the petition.

The judge did not state the manner of calculation or source of information for the finding that eight (8) hours was the time reasonably expended in prosecuting this particular petition for attorney's fees in this particular case. He multiplied the 65.5 total hours he did allow by $190, and added no enhancement to the $190 hourly rate. He then divided the product by three. He awarded each Landowner one-third, $4,148.33, approximately, twenty-three (23%) percent of the attorney's fees affirmed to have been actually incurred on the limited segments for which fees were requested.

The judge also disregarded certain mileage and filing fees, and, of what was not disregarded, awarded each Landowner a third, $190.90.

The judge denied a timely motion of the Landowners to reconsider the amount of the award on June 28, 2023. The Landowners timely filed this appeal of the amount and rationale of the Circuit Court's award.

II. Additional Uncontested Context, Events, Work, and Time Consumed

A. What Was at Stake, What Was the Problem and What Complicated It

The "nourishment" of approximately 2.7 miles of beach, which the Town completed between October 2019 and early March, 2020 without prior petition or referendum, did not distinguish between 1.2 miles on the south end and 1.5 miles to the north.

The Town added 1.1 million cubic yards of sand. It was pumped from offshore at a cost of over 14 million dollars, pursuant to project design and engineering contracted for by the Town. The Town used a contractor engaged by the Town, without any aid, financing or work from the U.S. Army Corps of Engineers. The project design had called for as little as 750,000 cubic yards, but allowed for more.

Before proceeding, the Town estimated that, barring an unforeseen event, it would be over 22 years before the added sand diminished to being 400,000 cubic yards more than existed before the nourishment project.

After completing the nourishment, the Town resumed seeking easements only from owners on the southernmost 1.2 miles, indicating that the Town sought a relationship with the Corps of Engineers pursuant to prior discussions for that 1.2 miles only. Most of the remaining owners in the 1.2 miles "signed."

At a May 18, 2020 regular public meeting, the town council stated a determination to sue the Landowners for "renourishment easements" to put sand on the beach.

Each Landowner's differing property included improvements, including dissimilar and differently situated houses which had been present since the 1960s or before. Each Landowner resided elsewhere, and the three Landowners and their families resided in different parts of the state from each other.

The EDPA required appraisals. The Town obtained appraisals of easements across oceanfront portions of the Landowners' properties. The Town did not furnish the appraisals to the Landowners. The Town then sued.

The Town sought perpetual unlimited public access throughout the easement area on the oceanfront portion of each lot. The easements were within a few feet of the bases of the Landowners' houses on the ocean side, and occupied a third to over half of the size of the primary lot.

In addition to granting perpetual public access, the easements granted perpetual rights to restrict landowner activities and improvements in the easement area, perpetual rights to destroy things in the easement area, and perpetual rights to operate a public beach throughout the

easement area. (4/5/21 Ch.I order at 6-9 [attached as Exh.D to 10/21/22 Ch.II fee petition].) The easements were assignable without restriction. The condemnation papers proposed to pay zero.

The Landowners then obtained copies of the appraisals. The Landowners then filed the three Challenge I cases in July 2020.

Before the Town commenced the instant three additional October 16, 2020 condemnation attempts ("the second attempts"), the Town had filed August 3, 2020, motions to dismiss the Challenge I cases. The motions were fully briefed by the parties. In those motions, the Town also sought its attorney's fees from the Landowners. Accompanying those motions, the Town had also filed motions contending that the whole beach might wash away in one year, and requesting that each Landowner be required to post a ten million ($10,000,000) dollar bond to cover alleged liability for contesting the easement request.

Before the second attempts, the Landowners filed August 21, 2020 motions for summary judgment and associated sworn materials against the Town in the Challenge I cases.

On September 11, 2020, also before the second attempts, Judge Culbertson held oral argument in the Challenge I cases on the Town's motions, denied the motion to dismiss, and denied the motion for bond.

Before the second attempts, the Landowners sent three notices that they would take a deposition of the Town's appraiser. It eventually got scheduled for October 16, 2020.

Before the second attempts, the town council held an October 12, 2020 regular public meeting. Thereat, the council passed a resolution concerning the meaning or wording of easements, and directed the Town Attorney compose the contents of the resolution after the meeting.

On October 16, 2020 the Town then commenced the three second attempts. The condemnations were for essentially the same perpetual interests in oceanfront land as before, relied on the same three appraisals as before, and offered to pay nothing.

On Friday, October 16, 2020, the day the Town started the additional condemnation actions, the Landowners' lawyer, Stanton, moved forward with the aforementioned deposition of the Town's appraiser. The Landowners' lawyer completed the deposition October 21, 2020.

B. First Period Covering Time Submitted in Fee Petition

November 11, 2020 marked the beginning of the first period in which certain hours were devoted, the fees for which the Landowners would seek reimbursement in the subject October 21, 2022 fee petition. This period would run to March 12, 2021, and would include 64.9 (57.5+7.4) of the hours submitted in the petition.

On November 12, 2020, before the Town "voluntarily" and "willingly" withdrew the second attempts, the Landowners, having now also deposed the appraiser, filed the three Challenge II summonses and complaints.

On December 4, 2020, before the Town "voluntarily" and "willingly" withdrew the second attempts, Judge Nettles heard the Landowners' August 21, 2020 summary judgment motions in the Challenge I cases.

Before the Town "willingly" withdrew its second attempts, the Town filed December 14, 2020 answers to the three complaints in the Challenge II cases. The Town denied 44 or more of the 50 allegation paragraphs, and prayed for attorney's fees from the Landowners.

Before the Town "willingly" withdrew its second attempts, Judge Nettles entered a January 8, 2021 short Form 4 order granting summary judgment against the Town in the Challenge I cases. He quashed the first three condemnation notices.

Before the Town "willingly" withdrew its second attempts, the Landowners served January 10, 2021 interrogatories in each of the three Challenge II cases. Among the questions were seven regarding the nature and intended status of the second set of condemnation suits, which were served during the stay imposed by Challenge I. The questions included requests for explanation of the purpose of the second attempts, and why the October 16 unfiled condemnation notices were backdated to the same June 9, 2020 date as the first three attempts.

Three question also sought the basis in law or fact of the 9-line footnote added to the proposed easement in the second attempts. The interrogatories would never be answered.

Before the Town "willingly" withdrew its second attempts, the Landowners also filed the aforementioned three January 13, 2021 375-paragraph amended complaints, one in each of the three Challenge II cases. Each included six exhibits consisting of an additional 81 pages.

Each pleading continued to incorporate the respective Challenge I Amended Complaint by reference and set forth the particularized factual background common to all allegations and theories asserted. Each also detailed the allegations pertaining to the Landowner in that case, as well as the allegations pertaining to the other two Landowners (generally allowing one pleading in one of the three cases to be read once to review the allegations of all three cases).

Each also made particularized allegations about the version of the resolution and attachments the town council passed on October 12, 2020 and the version the Town Attorney prepared after the meeting was over. Among other matters differing from the Challenge I cases, the Amended Complaint devoted 127 paragraphs, ¶¶224-351, to the statements made at the October 12, 2020 meeting, the documents slated for discussion at the meeting, and the documents prepared after the meeting was over.

The Amended Complaint included particulars of the various misrepresentations asserted to have been made by the Town. It also included particulars regarding the effect of the condemnation notices not being required to be filed with the court, the effect of the EDPA's automatic stay, the Town's backdating of the October 16 condemnation notices to June 9, the false recitations in the Town Council's October 12 public resolution concerning things being previously proposed to and sent to the Landowners, and identification and authentication of precisely what was served or sent by the Town (or not) in which instances and at what actual times.

Before the Town "willingly" withdrew its second attempts, the Town, without prior consultation, filed January 14, 2021 motions in the Challenge I cases to disqualify Sunset's and Beattie's lawyer Stanton from acting for them in any way in the Challenge I cases. The Town asserted that Stanton, like the Town Attorney, had knowledge or observations about matters covered in the pleadings. The Landowner's lawyer responded the same night.

Before the Town "willingly" withdrew its second attempts, the Landowners served six January 15, 2021 notices that the Landowners would take a deposition in all six cases (Challenge I and Challenge II) of the then-Town Administrator, Mr. Fabbri, on February 19, 2021. According to the Landowners' lawyer's affirmation in the fee petition, the time for this was either allocated, or attributed to one set of challenge actions or the other, rather than double counted.

Before the Town "willingly" withdrew its second attempts, Judge Nettles entered three January 20, 2021, 24-page formal orders of summary judgment against the Town in the Challenge I cases. Among other determinations, he concluded that the town council's May 18,

2020 meeting recited false information, that the appraisals were based on false information, and that the condemnation notices contained false information.

Judge Nettles identified and described various bases the Landowners had advanced for granting summary judgment. He determined about 50 facts as to which there was no genuine dispute. (See 4/5/21 Ch.I order at 6-12, restating 1/20/21 Ch.I order.) Among other things, he determined that the easements the Town was trying to condemn did grant perpetual public access and other rights to which the Landowners objected. He quashed the condemnation attempts which were the subject of the Challenge I cases, "without prejudice to another attempt and attendant defenses if applicable."

Before the Town "willingly" withdrew its second attempts, the Landowners filed January 25, 2021 fee petitions in the Challenge I cases under S.C. Code Ann. §28-2-510(A). Section 28-2-510(A) pertains to fees when the Landowner prevails under a challenge action. Section 28-2-510(A) is distinct from §28-2-510(B), which pertains to fees when prevailing in a trial of a condemnation action, and §28-2-510(C), which pertains to fees payable by a condemnor who voluntarily or willingly abandons or withdraws a condemnation action.

Before the Town "willingly" withdrew its second attempts, the Landowners' lawyer filed a January 26, 2021 brief in the Challenge I cases, more fully responding to the Towns' motion to disqualify him as counsel, and renewing his request that the Town's motion be stricken for failure to consult.

Before the Town "willingly" withdrew its second attempts, the Town filed January 29, 2021 motions to reconsider summary judgment in the Challenge I cases. The motions also contained a motion to delay and extend the fee-request proceedings in the Challenge I cases by

120 days. The Town sought to engage in fee discovery and have a full evidentiary hearing with live witnesses on the Landowners' Challenge I fee petitions.[3]

Seven days before the Town "willingly" withdrew its second attempts, a new lawyer for the Town, Mr. Dillard, entered February 3, 2021 notices of appearance in the Challenge I and Challenge II cases. Phone calls and e-mails which do not appear on a docket sheet preceded and followed his appearances.

When on February 10, 2021, in the Challenge II cases, without consent or order, the Town did send the Landowners the aforementioned document entitled, "Notice of Abandonment," it contained no statement that withdrawal of the Town's second three condemnation attempts was with prejudice. At or after the time of the notice, the Town confirmed in public announcements and on the record that it intended to sue the Landowners for a third time.

On March 3, 2021, in the Challenge II cases, the Town filed motions for protection from then pending and future discovery sought by the Landowners, including the aforedescribed interrogatories and the pending deposition of the then-Town Administrator (Fabbri). The deposition and deadlines in the case had been continued at the Town's new lawyer's request after consultation and consent, without prejudice to the right of the Town to object.

When on March 5, 2021, the Town filed the aforementioned motion to dismiss in each of the three Challenge II cases, the stated grounds were that the Town's withdrawal of its

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[3] After January 29, 2021, filings (in triplicate) or hearings in the Challenge I cases occurred on Feb. 3, 4, 5, and 9, Mar. 1, 2, 17 (2), 18, and 19 (hearing), Apr. 5 (orders (2)) and 22, May 19, Jun. 30 (order), Sept. 10, 13, 20, and 24, Oct. 4 (7), 5 (5), 6 (hearing), and 22, Nov. 23 (order), Dec. 2, and Jan. 28, 2022 (order).

In the parts of the foregoing related in whole or in part to opposing Challenge I attorney's fees, the Town filed approximately 144 pages of materials (in triplicate) over the course of about

condemnation notices without prejudice rendered the challenges to those notices moot. The status of the Town's stated "abandonment" remained unresolved at this point, as did the Town's motion to dismiss, the Landowners' fee petitions in the Challenge I cases, the Town's opposition to those fee petitions in Challenge I, the Town's motions to reconsider summary judgment in Challenge I, and the Town's motions to engage in fee discovery in Challenge I.

In its March 5, 2021 motion, without request by the Landowners, the Town made a stipulation to the court that a Landowner "may assert any claim it may have herein to reasonable attorney fees, litigation expenses, and costs as part of this action." (3/5/21 mot. at 3; 4/22/21 Ch.II orders at 10.)

March 12, 2021 marked the end of the first of two periods in which certain hours were devoted, for which the Landowners would seek reimbursement.

C. Period Covering Time Not Submitted in Fee Petition

In the subject October 21, 2022 fee petition, the Landowners' lawyer specified that the time he devoted to the Challenge II cases following March 12, 2021 and preceding September 15, 2022 was not included in the segments of actual attorney's fees for which the Landowners sought reimbursement.

When on March 31, 2021, the Landowners opposed the Town's March 5, 2021 motions to dismiss the Landowners' Challenge II cases as moot, they stated, among other reasons, that the Town refused to withdraw the second set of condemnation attempts with prejudice, and that the Town stated an intention to sue a third time for the same thing.

In its March 31, 2021 memoranda supporting its motions to dismiss the Challenge II cases as moot, the Town argued, "Town has no interest in and absolutely nothing to gain by

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eight months. These included the affidavit of a hired witness among approximately 104 pages

repeatedly initiating condemnation actions and then ‘evading review.’ *See*, *e.g.*, S.C. Code Ann. § 28-2-510(A) and (C) (providing for landowner recovery of attorney fees in challenge actions and withdrawn condemnation actions).” (3/31/21 Town Ch.II brf. at 5.)

On April 5, 2021, in the Challenge I cases, Judge Nettles denied the Town’s January 29, 2021 motions to reconsider. With the exception of adding a footnote on page 9, he re-entered the January 20, 2021 orders of summary judgment in identical form. (4/5/21 Ch.I Form 4; 4/5/21 Ch.I order.) The Town did not appeal the April 5, 2021 orders.

On April 22, 2021, the Landowners updated the Challenge I fee petitions. Among other things, they stated that they were backing out 54.9 hours that their counsel allocated to work which had been done on Challenge II. He now designated those hours for separate submission relative to the Town’s second set of condemnation attempts which were the subject of the disputed “abandonment.” In the Challenge I fee petition updates, the Landowners also ceased to include subsequent time allocated to the second set of attempts and the Challenge II cases.

When on April 22, 2021, in the Challenge II cases, Judge Culbertson granted the Town’s March 3 motions to stop general discovery and March 5 motions to dismiss the Challenge II cases as moot, he recited the Town’s March 5 stipulation that Landowners’ fees could be sought as part of the action. He also stated: “At this time, discovery is limited to any claim that may be submitted for attorney fees or costs.” The April 22, 2021 Form 4’s, “Form of Judgment,” granting the Town’s motions to dismiss stated: “[“X” in box] does not end the case”, and “[A]dditional matters, including any attorney fee petition, may precede final dismissal of the action.”

(in triplicate) filed in the weeks just preceding the October 6, 2021 attorney’s fee hearing.

On April 28, 2021, the three Landowners each filed a motion to reconsider Judge Culbertson's aforementioned orders granting the Town's March 3 and March 5 motions. The Landowners contended that the putative abandonment without prejudice was invalid and not allowed, and that if it was allowed at all without prejudice, it was not a true abandonment. They contended that, especially in light of the Town's expressed intention on the record to sue the Landowners a third time for the same thing, the Challenge II cases were not moot and that the validity, nature and extent of the "abandonment" needed to be judicially determined as part of any ruling on the matter.

The Landowners contended that, among other things, the Challenge II amended complaint stated a nonmoot cause of action, or could be amended to state a nonmoot cause of action, for equitable relief to prospectively prohibit multiplicitous litigation. The Landowners also contended they should not be denied the opportunity to timely obtain the deposition of the then-Town Administrator (Fabbri) and other discovery for this and other purposes.

In its aforementioned June 2, 2021 brief opposing reconsideration, the Town responded:

> 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.

(Town 6/2/21 Ch.II memoranda at 5.)

When Judge Culbertson denied the motions to reconsider on June 3, 2021 in a Form 4, he explained his reasoning that both the first and second condemnation attempts had been abandoned by the Town.

The fact being that summary judgment had been entered against the Town in Challenge I, the Town contended that Judge Culbertson's statement in the Form 4 was incorrect. The

Landowners did not disagree with the Town. Thus began a period dealing with Form 4's, scheduling, and institution of appeals which was also specified to not be one of the segments of actual attorney's fees for which the Landowners sought reimbursement.

The June 3, 2021 Form 4 stated: "[check in box] does not end the case", and "[T]he issue of litigation costs remains pending". However, the June 3, 2021 Form 4 also contained the aforementioned incorrect statement. On June 14, 2021, after initial communications by the parties and the court, the Town filed a motion that the Court correct the statement.

On July 2, 2021, the deadline arrived for the Landowners to serve notice of appeal of Judge Culbertson's April 22, 2021 orders granting the Town's March 3 and March 5 motions in the Challenge II cases and June 3, 2021 denial of reconsideration. They did so.

In May 2022, the then-Town Administrator, Mr. Fabbri, whose deposition had been put off and then prohibited, resigned.

On July 12, 2022, Judge Culbertson issued a Form 4 denying the Town's motion to reconsider the language in the June 3, <u>2021</u> Form 4. However, in this July 12, 2022 Form 4, he stated: "["✓" in box] ends the case." At this point, on July 22, 2022, the Landowners moved to amend the July 12, 2022 Form 4. They moved to change the box checked in the July 12, 2022 Form 4 from "ends" to "does not end". This event, too, was covered by a segment of the Landowners' actually incurred attorney's fees which was not the subject of a request for reimbursement.

On August 12, 2022, the deadline arrived for the Town to appeal the June 3, 2021 Form 4 of Judge Culbertson and the July 12, 2022 Form 4 declining to correct the former. The Town did so.

On September 7, 2022, the Town filed a stipulation by the Landowners that the first round of condemnation attempts had not been abandoned (having been resolved against the Town on summary judgment). On September 14, 2022, the Court of Appeals dismissed the Town's Form 4 appeal based on stipulation of the parties.

D. Second Period Covering Time Submitted in Fee Petition

September 15, 2022 marked the beginning of the second period in which certain hours were devoted, the fees for which the Landowners would seek reimbursement. This period would run to June 2, 2023 and, by June 2, 2023 would finally include 217.7 of the 282.6 hours submitted in the updated petition.

On October 7, 2022, the remittitur of the Town's Form 4 appeal was filed by the Court of Appeals in the Circuit Court.

On October 21, 2022, Sunset, Beattie and Stanton applied for reimbursement of attorney's fees and other expenses pursuant to Section 28-2-510(C) of the EDPA. Based on an estimated conclusion by November 15, 2022, they requested $8,990.57 for each Landowner.

The 127-page application was comprised of: (i) a motion comprised of two pages; (ii) an affidavit comprised of 67 pages of main text, stating background and time expended in tenths of hours, with four exhibits comprised of 50 additional pages; and (iii) a 4-page proposed order and proposed Form 4 together comprised of eight pages. For the three cases overall, request was made for fees based a reduced account of specified segments of the total time sworn to have been spent for all three cases at $190 per hour.

The Landowners' fee petitions would go on to be amended and supplemented while awaiting hearing and decision, which ultimately did not occur until June 8, 2023, about eight months later.

At the time of filing the motion on October 21, 2022, the affidavit stated that it included time only for the following segments of the two years from the October 16, 2020 commencement of the three second attempts to a November 15, 2022 estimated date of determination of the fee award, in the following amounts:

Period	Hours
10/16/20 (time of commencement of second attempts) to 11/10/20:	None
11/11/20 to 2/10/21 (date of abandonment notice):	57.5 hours
2/11/21 (after date of abandonment notice) to 3/12/21 (nominal end of 29 days for review of notice, inquiry about scope and details, discussion of possible agreements about final disposal of condemnation attempts, and realization that Town intended to sue again – all before extensive motion practice on Town's 3/3/21 and 3/5/2 motions and before later Form 4 clarifications):	7.4 hours
3/13/21 to 9/14/22 (period of extensive motion practice on Town's 3/3/21 and 3/5/2 motions and ensuing Form 4 clarifications):	None
9/15/22 (day following dismissal of Town's Form 4 appeal by Ct. of App. to 9/26/22 (then-limit of data for fee-petition-related time entered in Landowners' lawyer's billing system):	37.1 hours
9/27/22 to 11/15/22 (Landowners' lawyer's then-estimated date of determination of the fee award):	42.2 hours
TOTAL 11/15/22	144.2 hours[4]

In the initial petition and each update, the Landowners' lawyer swore he actually worked (or would work) the stated hours on the specified parts of the Town's second attempts and the Landowners' Challenge II cases, and swore the submitted hours were not hours on which a fee request in the related Challenge I cases was based.

On November 21, 2022, the parties received notice that the Landowners' July 22, 2022 motion to correct Form 4 and October 21, 2022 fee petition would be heard December 15, 2022.

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[4] The affidavit understated this total by 6.2 hours, as 138 hours.

On December12 and 13, in advance of the December 15 hearing, the Town filed 54 pages of opposition materials, consisting of a memorandum and two affidavits, each with exhibits. The papers included procedural and jurisdictional arguments involving the Form 4's and the timing of the fee petition. The Town argued that no fees should be awarded. The Town argued that time was submitted which was not submitted. The Town argued that fees were sought for things that fees were not sought for. The Town argued against the award of fees that were not yet sought.

The Town also argued that if any fees were awarded, it was not reasonable for the Landowner's lawyer to have spent more than 20 hours total during the periods 10/16/20 to 2/10/21 (from the Town's start of second attempts to the Town's abandonment) and 9/15/22 to the conclusion of the fee application, without respect to when that conclusion would be, the nature and extent of the opposition, or the case events.

The Town argued that the time allowable for fee application was a fixed nine (9) hours, without regard to how much time or money the opposition spent opposing the award of fees or how long it took to get the fees. The Town contended that, during the submitted periods in the cases (10/16/20-3/12/21 and 9/15/22-11/15/21), at the times the Landowners' lawyer decided whether to devote time to the cases and to his clients, 86% of the time he decided to spend was not reasonable for him to decide to spend at that time, and only 14% should be the fee basis.

The Town argued that, in the judgment and opinion of the new lawyer hired to represent the Town, it was not reasonable for the Landowners' lawyer to have engaged in any other activities, or spent any time, other than the following activities and time, and that once these limits were reached, the Landowners' lawyer should have stopped, without regard to any uncertainty existing at that time as to the result or other consequences: 4 hours researching or

drafting one “complaint”; 3 hours “drafting interrogatories”; 4 hours engaging in “miscellaneous” review or communication; and 9 hours preparing a fee petition and having it heard. (12/13/22 brf. at 8; 12/12/22 Dillard aff. ¶¶ 32-33.)

In these 54 pages of opposition materials, the Town did not argue how much its own lawyers billed or the time it took the Town’s lawyers to: (i) prepare 54 pages of materials opposing the fee petition; (ii) receive notices regarding the petition; (iii) receive and send e-mails or other correspondence regarding the petition; (iv) receive and make phone calls regarding the petition; (v) talk to each other and consult with one client regarding the petition; (vi) prepare for and appear for three hearings regarding the petition; (vii) argue in two hearings regarding the petition; and (viii) prepare an 11-page proposed order and Form 4.

On December 15, 2022, the parties appeared for a Webex hearing, prepared to argue before Judge DeBerry. However, the judge was unable to attend. On December 22, 2022, Judge DeBerry entered a Form 4 stating that the Landowners’ July 22, 2022 motion to alter the July 12, 2022 Form 4 and October 21, 2022 motion for attorney’s fees were continued until the next available term. Scheduling communications ensued.

On January 11, 2023, the Challenge II cases were on an active roster and had been noticed for trial. Correspondence ensued. In continuing the cases to April 17, 2023, Judge Seals (then chief judge for administrative purposes) issued a Form 4 stating: “Case Continued to 4-17-23 Non Jury Term of Court”, and “[‘X’ in box] does not end the case”.

On March 8, 2023, the Landowners filed an update and amendment of the fee petition, and a reply to the December 13, 2022 opposition materials of the Town with respect to the Challenge II fee petition. The 53 pages filed by the Landowners included the 6-page update and amendment, and a reply brief with three exhibits, part of which was devoted to the Town’s

procedural and jurisdictional arguments in which the Town contended no fees should be awarded.

On March 9, 2023, following a partial hearing, Judge Culbertson granted the Landowners' July 22, 2022 motion to amend the July 12, 2022 Form 4, and set the remainder of the fee petition arguments for April 14, 2023.

On April 14, 2023, Judge Culbertson heard the fee petition. The Town continued to assert jurisdictional objections and contend that no fees at all should be awarded. (4/14/23 Tr. p.24, line 22 to p.25, line 6.)

The Town did not dispute that the hours the Landowners' lawyer swore to have been worked were worked, stating that the Town was "not taking the position that Mr. Stanton did not actually work that time." (4/14/23 Tr. p.34, lines 18-19.)

Judge Culbertson directed the parties to prepare proposed orders. The Landowners submitted a 6-page proposed order and Form 4 on that day.

The Town submitted an 11-page proposed order on April 28, 2023. In its proposed order, the Town omitted any finding as to hours actually devoted, and referred ten (10) times to the hours actually spent as the time "claimed" to have been spent. (4/28/23 prop. ord. at 6-8.)

The Landowners wrote to the judge the same day to express objections to matters in the Town's proposed order, and to provide notice of an ensuing update of hours expended. On June 8, 2023, the Landowners' lawyer adduced an updated affidavit of 282.6 hours spent on specified segments of the three cases through June 2, 2023. He substituted actual hours for any periods which had been previously estimated, and added actual hours beyond the cutoff date of the previous affidavit. He did not otherwise change the hours for any previous segments.

As previously stated hereinabove, he clarified again, in footnotes and text, that the fees were for "pre-'abandonment,' a few days closely following, and post-2/10/21 fee-petition-related matters) for the approximately two years and seven months from 10/16/20 to 6/2/23." He explained that 7.4 hours during the 29 days closely following the 2/10/21 abandonment were included because they were incurred "in reasonable followup to the putative 'abandonment,'" and that the Challenge II cases in which the hours were incurred "were necessarily commenced because of the matters which were abandoned, exposing the Landowners to expense incident to their conclusion."

The product of 282.6 hours multiplied by $190 per hour was $53,694.00 for all three cases. Of this product, the Landowners each requested award of approximately $17,898.00, being one-third. They also each requested a third of $751.71 in specified filing fees and mileage.

They requested a total of $18,148.57 per Landowner, as opposed to the zero dollars argued by the Town at the hearing, and as opposed to the alternative of a $1,266.67 attorney fee and $190.90 in other expenses which were argued, without change, by the Town in its December 13, 2022 papers, at the April 14, 2023 hearing, and in the Town's April 28, 2023 proposed order.

On June 8, 2023, Judge Culbertson issued the order aforedescribed, awarding $4,148.33 in fees and $190.90 in other expenses to each Landowner. He based the fees on the submitted 57.5 hours before February 10, 2020, plus eight (8) hours, and disallowed all submitted time after February 10 other than the eight hours.

He held that, of the 225.1 submitted hours actually incurred between February 10, 2021 and June 2, 2023, only eight of them were properly taken into account in determining the fee reimbursement, and all other hours in that period were disregarded without identification of what they were for or why they were disregarded.

Each Landowner served a motion to reconsider the June 8 order on June 16, 2023. On June 28, 2023, Judge Culbertson denied the motion and on July 28, 2023, the Landowners 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 and application of the operative fee award statute, the issue is a question of law, which the reviewing court reviews de novo. S.C. Dep't Transp. v. Revels, 411 S.C. 1, 761 S.E. 2d 700 (2014); 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 would be 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."[5] State v. Gregory, 171 S.C. 535, 548, 171

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5 No matter the scope 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). If there are one or more legal errors guiding the decision of which facts to consider, not only could review of factual error be infinite or circular, but a search for evidence to support a factual finding which was guided by legal error in the first place or which was made for the purposes of applying erroneous perceptions of law would serve no purpose.

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, __S.C.__, 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,

S.E. 692, ___ (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).

Absent statute to the contrary, 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.[6] Revels; Layman v. State.

ARGUMENT

I. The judge applied inapposite principles from the wrong statute, misunderstood the application of the applicable statute, and broadly overassumed the discretion legally

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390, 709, S.E.2d. 650, ___ (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 ___ (1987)(reversing because trial judge's belief he could not permit additional testimony was erroneous). "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).

The reciprocal principle – that exercise of discretion where no discretion is vested in the judge – is found in the rule that a decision controlled by error of law as to how much discretion the judge has constitutes an abuse of discretion.

"[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).

[6] 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 the operative fee award statute, the issue is a question of law, which the reviewing court reviews de novo. Layman v. State.

available to him. (Issues 1-6)

Part of the problem was that the judge, the Landowners, and the Town had to deal with complexity, protraction, confusion and contradiction created entirely by the Town, which started before the Town sued the Landowners the second time, and only got worse after the Town did so.[7] This problem continues for this Court in this appeal. Yet, a proper resolution can be

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[7] Because the instant appeal requires a careful sorting out of actual undisputed facts, anomalous procedures, and actual applicable legal principles, a detailed statement of uncontested facts is set forth in the Statement of the Case, above.

Six of the twelve cases are not governed by the South Carolina Rules of Civil Procedure. A different fee statute applies in Challenge II from the statute in Challenge I.

Just a reading of the undisputable facts in the Statement of the Case shows that all of the Town's acts, including both of the Town's condemnation attempts, were based on persistently pretending that the facts known to the Town were not the facts. At different times, the Town's pretenses were either undertaken in order to induce trusting owners to grant easements, or maintained in order to avoid these owners' realizing what they had signed.

The summary judgment order against the Town in Challenge I, described in the Statement of the Case, had to straighten out about 50 facts which are still not owned by the Town. The order recounts the Town's inability to deny true facts, but a continuing refusal to admit them. The order was not the end of the Town's making every attempt to avoid stating or admitting the true base facts.

The Statement of the Case details a second action which proceeded on the same fiction as the first attempt, and the Town's failure in the second challenge action to meet the substance of the complaint in answering it.

The record shows an avoidance of discovery, and, in motions practice and all other phases, shows the Town's persistence in not describing what both sets of cases were really about. The Town cursorily proceeds as if the cases were low stakes, generic condemnation attempts with scrivener's errors.

The Town persisted in all phases, to all judges, in referring to what went wrong for the Town only vaguely as "procedural" defects in trying to condemn "renourishment easements." The Town has also deemphasized the Town's intention to do the same thing a third time, at even further expense to the Landowners.

The second condemnation attempt had the same untruths about the easements and values. However, the second attempt had the added complications of additional confusing Town resolutions, backdating of notices, the adding of footnotes to an easement the Town had claimed it was powerless to change, confusion of facts and documents, activities undertaken during a stay with never an explanation, and the Landowners' lawyer having to manage two sets of six cases on two different timelines.

The Challenge II Amended Complaint described in the Statement of the Case was not just a conclusory complaint. It gave video minute counts of verbatim statements at a town council meeting in which the council showcased its Town Attorney to give public reassurances having

the intention and effect of portraying the Landlowners' objections as imaginary.

He and council members offered live-streamed insistences to an onlooking unfamiliar public, that the instant easements are only for "use," when that is what all easements are for. Onlooking uninitiated owners were also publicly assured that the Town's controverted attempt to take the easements from its citizens through eminent domain was not a "taking" of the subject property interest, when that is what every condemnation is. Similarly, he assured the disingenuously "relieved" council, in the presence of all onlookers, that the public access provided in the easements was subject to the limitations in the easements, when he and the council knew or should have known that there were no limitations at all in the easements and any privately suggested limitations had been refused. These are uncontested but unusual facts.

The record demonstrates a refusal of the Town to ever answer even the most direct and irrefutable allegations of any complaint or amended complaint, including those provable with public records, direct quotes, and plain English. The record shows avoidance of answering interrogatories or allowing the Town Administrator, now gone, to be interrogated under oath.

The record shows a previous effort to engage the Landowners' attorney in compelled testimony under the guise of "fee discovery," disqualify him as counsel, and pursue detailed putative "fee discovery" to discover work product while two cases were still pending, and while a third was contemplated by the Town.

These things, and the stakes in the cases, are things a reasonable lawyer would take into account in deciding how to manage his case and in deciding to devote time to quelling the Town's attempts and trying to recover fees for his clients.

The Town unilaterally offered stipulations about attorney's fees being available to be pursued in the Challenge II cases as an inducement to the court to grant the Town's opposed motion to dismiss. As an argument to support its putative ability to sue again and again, ad infinitum, the Town asserted that attorney's fees were readily available if the Town lost or temporarily gave up.

The Town sued the Landowners twice, lost once, and temporarily gave up once. The Town opposed requests for fees twice, driving up the cost. In Challenge I, it took eighteen months to get fees, and all the fees incurred were not recovered. In Challenge II, it took eight months to get fees and not all fees incurred were recovered.

The Town then not only opposed the Challenge II petition for attorney's fees, but argued that no fees at all were recoverable. With regard to the amount of fees, the Town persistently offered distraction from and confusion regarding the true levels of activity and time consumption in the complicated cases. The Town slyly suggested, if not argued, that the matter was "simple" and generic. The Town suggested that the matter was barely adversarial. The Town estimated that all a lawyer had to do to oppose the Town was "draft a complaint," set his watch, and wait for a voluntary dismissal.

The Town suggested that the requested fees were stated to be for subjects other than what the fees were for. The Town further complicated and protracted the fee application proceedings by shoehorning an elaborate analysis into the proceedings, in which the Town's inexperienced affiant both tacitly and explicitly decided what was "major" or not, excluded time for actual work that did not occur to him, and applied inapplicable principles to either a demonstrably incomplete set of activities and hours or to a completely hypothetical account of hours that might have been spent in the case if it had been a completely different case with a different adversary and lower stakes.

effected by carefully following the facts, observing that only hours that were actually spent are the basis of the fee request, that not all the hours spent are even submitted, and that the requested hourly rate is below market rate.

The judge erred in basing his entire fee decision upon the initial proposition that "a court is authorized" under S.C. Code Ann. §28-2-510(C) "to either award reasonable attorneys' fees to a prevailing landowner or deny the award in its entirety depending on the circumstances surrounding the litigation." Section 28-2-510(C) has nothing to do with a landowner "prevailing" and does not allow denial of a fee award. The judge based his decisions on the wrong statute. Section 28-2-510(B) contains such provisions, but is inapplicable.

The judge's error ruined the integrity of the whole order. Section 28-2-510(C) provides that, upon the condemnor abandoning, the landowner gets incurred fees reimbursed. This court should reverse, apply the correct analysis, and state the correct award based on the undisputed hours submitted and the rate the judge concluded was reasonable.

In confusing the three distinctly different EDPA fee statutes, the judge erred in assuming that he had much broader discretion than he had. Under §28-2-510(C), an award is mandatory.

The judge's error was immediately apparent. He made a factual "finding" (order at 4 ("The Court finds….")), rather than a legal conclusion, that the Landowners were entitled to attorney's fees. He obviously viewed this as being a "finding" within his discretion and as a generosity or beneficence which he could weigh in then determining the "principal" fees and the "fees for fees" to award to the Landowners. He went on to deprive the Landowners of 96% of the requested reimbursement of the fees they had to spend in order to get fees.

The fee application, involved, rather, a specific undisputed account of hours worked on limited, specifically identified subject matter, at a low rate.

He was not vested with this discretion. A statute requiring that the court award a 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).

For example, a statute mandating an award of attorney's fees mandates an award of trial-level fees, subsequent appellate fees, and subsequent fees in the trial court, which may be sought in post-appellate trial-court proceedings. See Austin v. Stokes-Craven Holding Corp., 406 S.C.187, 750 S.E.2d 78 (2013)(holding that statute mandated an award of trial-level fees, appellate fees, and subsequent fees in the trial court, in which the fees incurred in earlier stages were sought).

Despite the size or extent of the fee award for the principal part of the case, fee for fees are recoverable, usually without reduction. See 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 incurred applying 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, ___, 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 the fees-for-fees rule as reflecting "longstanding precedent in Oregon").

The Town then poked fun at, or complained about, the length of papers necessary to

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 party determined to be entitled to reimbursement of fees may recover attorney's fees for services rendered in seeking a fee award without being required to satisfy again, the threshold requirements or factors that were required in order to be entitled to fees in the first place.

That is in Jean, the EAJA required the fee applicant, in order to get a principal fee award, to show that the position of the United States in the case was not substantially justified. However, in order to obtain fees for fees, the fee applicant was not required to show that the position of the United States on the issue of the fee award was not substantially justified.

Namely, if a party is entitled to fees in the main action, then he is automatically entitled to fees for the time spent seeking fees. To hold otherwise could "spawn a 'Kafkaesque judicial nightmare' of infinite litigation for the last round of litigation over fees." Jean at 163.

Similarly, in Layman III Order, the S.C. Supreme Court modified the S.C. Supreme Court's previous, principal, fee award of $445,226.60 by adding $588,872.56 in fees incurred in litigating the issue of attorney's fees.

The added $588,872.56 in 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 on which the principal fees were based, which had been applied in an abundance of caution to account for time in the principal case which might not have been

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straighten out what the Town should never have folded so many times.

recoverable under the fee statute.

The S.C. Supreme Court included all hours spent on litigation concerning the fees, and further enhanced the fees-for-fees award by the same 125% enhancement factor which had been applied in determining principal fees. The Court did so, even though the previous fee award by the Supreme Court of $445,226.60 had resulted from a substantial direct modification by the Supreme Court, which had not been favorable to the fee applicant. The previous modification dramatically reduced the Circuit Judge's fee award of $8,660,000, which had been appealed.

In the instant case, the judge was guided by his error of thinking the statute allowed him to award nothing at all. In that, of the activities covered by the submitted 217.7 fee-for-fee hours, he identified none that were unreasonable (other than incorrectly assuming the hours were for something else), he was misguided in determining he could award as little as he wanted without giving any cogent reason for doing so. He reduced the undisputed hours spent trying to obtain reimbursement of attorney's fees by 96% without stating any facts or reasoning with any support in the record or in law. His ruling should be reversed, and the appropriate award, entered.

II. None of the 2022 time submitted was for the 2021 motions practice. (Issue 6, 10, 11, 12, 13, and 23)

The judge went to lengths to examine time spent on certain "unsuccessful" motions practice which was not time on which the fee request was based. He indicated this time must have been included, unless the time was all for fees for fees. He never acknowledged what time was indeed for what. None of the 2022 time submitted to him was for the subject 2021 motions practice.

Nevertheless, proceeding as if it was, he considered, with respect to the 2021 motion practice, concepts not applicable under §28-2-510(C) anyway, such as a concept more apposite

in only special instances[8] under the explicit “prevailing party” provisions of §28-2-510(B), if even then.

He remarked that the Landowners were not “successful” in getting the court to deny the Town’s motion to dismiss the Challenge II cases, which the Town based on “mootness” after the Town temporarily gave up on its second condemnation attempts. Rather, §28-2-510(C) mandates an award upon abandonment, not upon “success.”[9]

He made a formal finding that “the plaintiffs are not entitled to recovery of fees and expenses associated with opposing the Town’s motion to dismiss and ensuing procedural motions arising from the dismissal.” (6/8/23 order at 6.) Here, the judge demonstrated conclusively that he understood neither the applicable fee statute, nor the fact that the things he referred to were not included in the time the Landowners submitted and did need to be reimbursed for, which time he then slashed by 96%.

III. The judge also misunderstood other aspects of what time was submitted for what subject matter, further preventing him from exercising actual discretion over the right set of facts and applying the correct principles to them. (Issues 15-20, and 22)

The judge erred in finding that the Landowners “conceded in the affidavit of plaintiffs’

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[8] Because the judge was operating under the wrong facts and the wrong statute, the limits on these inapplicable special circumstances will not be discussed unless such a red herring appears. Some of the principles involved in this tertiary error are treated in Hensley v. Eckerhart, 461 U.S. 424 at 435–36 (1983)(reducing fees to prevailing party in three week trial, against whom merits determination was made on distinct staffing claim which did not provide overlapping grounds for the successful claims).

[9] As another example of the judge deploying a misconception of the statute as a “prevailing party” statute in order disregard time for things for which the Landowners had not requested fees, he considered and emphasized the voluntariness of the Town in withdrawing its notices. He did not understand that under the fee statute applicable to abandonment, §28-2-510(C), the voluntariness or willingness of the condemnor in deciding to abandon is irrelevant.

Voluntariness or willingness of the condemnor is not a factor; abandonment is, by definition, always an act of volition. In any event, the record is clear that abandonment was a result of pressure applied on the reckless Town by the Landowners and that the Town believed its goose was cooked,

counsel, that the three Challenge II cases were handled in tandem with issues, theories, pleadings, and other filings that were effectively identical with those in the three Challenge I cases." (Id. at 4.) Easily confused concerning 12 cases then spanning three years, the judge was simply mistaken. He did not have a working knowledge of both sets of cases and misread something. There is absolutely no such concession or stipulation in the record or anything resembling it. His whole decision is skewed by this error.

It is undisputed that the Challenge II cases were neither effectively identical with, nor handled in tandem with, the Challenge I cases.

In this vein, the judge also failed to understand that no time submitted in separate earlier fee applications in the Challenge I cases was submitted in the instant Challenge II fee applications.

The judge engaged in a fairly natural and neutral supposition that some work in the Challenge II cases was made easier by the lawyer already having treated similar issues in the Challenge I cases. However, the judge commited legal error by engaging in the completely illogical incongruity of then using this as a basis for striking hours submitted in the Challenge II cases. Only actual hours spent in the Challenge II set of cases were submitted.

None of the hours counted in one set of cases were included in the other set, no matter how difficult or easy, and any time savings afforded by work done in the Challenge I cases was already built into the actual hours submitted in the Challenge II cases. As carefully outlined step by step in the Statement of the Case, above, the record was absolutely unequivocally clear on this

point. The judge made a logical mistake and a factual mistake with no support in the record.[10]

Even though the judge awarded fees for all the 57.5 hours of submitted time between October 16, 2020 and the February 10, 2021 notice, he nevertheless demonstrated his confusion over the relevant inquiry, his error as to facts he determined in the irrelevant inquiry, and his error factoring these facts into his dismissive decision disregarding 217.7 hours earnestly incurred seeking fees.

He irrelevantly found that, other than three things, "little else occurred" and there was "little activity" in the period leading up to February 10. Limiting "occurrences" and "activity" to what shows up on a docket sheet, as opposed to actual activities of, and time spent by, counsel whose fees are sought, is contrary to reality and is legal error in determining hours reasonably devoted by counsel. Including all 57.5 hours submitted for the subject period after going to the trouble of making the erroneously stingy finding does not cure the error. Armed with this error, the judge then went on to dock a massive number of hours from the fees-for-fees segment, as if he had been generous elsewhere, when he had in fact only been conservative. He did not understand.

IV. Whether the judge realized what the 217.7 hours was for or not, he erred in merely ballparking the time devoted to obtaining fees at eight (8) hours. (Issues 7, 8, and 28)

Ballparking the fees-for-fees hours at eight (8) instead of 217.7 was also a method

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[10] The bias created by these ubiquitous factual and legal errors is additionally apparent in that the judge never once considered selecting a higher rate in the Challenge II cases to reflect the efficiencies and expertise gained by counsel from handling the novel Challenge I cases.

The judge also did not understand that, although he only had to read one of each set of papers in 2023, handling the three Challenge II cases instead of one involves more difficulty, tedium and time consumption. The increased time is more than merely marginal. While the judge included most of the submitted time that was not incurred trying to get a fee reimbursement, the judge's mistake in slashing 96% of the hours incurred in trying to get a fee reimbursement seems almost pointed when one realizes that he estimated "eight hours" as what

contrary to law, in that the judge stated no basis for the eight hours, and no legitimate basis for disregarding the 217.7 hours of actual time.

It was illegitimate to do so on the basis of a hypothetical construct. Unless he selected an arbitrary number in some other way,[11] the judge could only have based his estimate on a different, abstract, case without matching facts, rather than on the basis of the actual conditions

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would be spent in just one (1) hypothetical case, rather than three (3). Then he divided by three, instead of multiplying.

[11] The judge's eight hours are different from, but reminiscent of, Mr. Dillard's nine. There are enough errors of law on the face of the judge's order, but, lest the Town argue that Mr. Dillard's affidavit is support for the gross fee slashing of the judge or is otherwise evidence contradicting the uncontradictable, the affidavit was inadmissible.

The affidavit of Mr. Dillard should have been disregarded. An affiant giving fact testimony must demonstrate personal knowledge. An affiant giving opinion testimony generally must demonstrate more training, experience or education on the subject than the fact finder, and must rely only on things customarily relied upon in the relevant field to form opinions. Regardless of expertise, an affiant must not give an opinion on the law to a judge or other fact finder on an ultimate issue, particularly on matters on which the affiant does not demonstrate paramount scholarship and credentials.

It is the province of the court to apply the law, not an affiant. See Dawkins v. Fields, 354 S.C. 58, 66, 580 S.E.2d 433, 437 (2003)(holding affidavit by the late Professor Freeman, a nearly legendary emeritus law professor with actual extensive law practice background, inadmissible) and see Vortex Sports Entertainment Inc v. Ware, 378 S.C. 197, 662 S.E.2d 444 (Ct. App. 2008)(holding Professor Freeman's opinion on existence of breach of fiduciary duty inadmissible, but opinion on acts fitting court's ruling admissible).

Mr. Dillard demonstrated absence of direct personal knowledge of, or any participation in, the Challenge I cases from inception up through and following the grant of summary judgment and ignorance of many events and activities therein. He demonstrated the same lack of personal knowledge of, and absence from, the Challenge II cases from inception through about 107 of the 117 days to February 10, 2021. He demonstrated zero experience or heightened expertise or experience in fee award matters, and negligible, uncertain or complete absence of experience in conducting a successful challenge action for a landowner, conducting an unsuccessful one, or even opposing one.

He exhibited tacit and explicit application of erroneous principles of the law of fees, including determining hours expended by only counting things he, himself, deemed significant. He determined reasonable actual "hours devoted" based only upon what he deemed to be a "case event" which he himself considered "major," excluding compensation for anything not an event or major. He decided that all cases only have a complaint, with no later amendment, decided that all complaints take four hours to draft, and assumed that the opponent can be expected to give a faithful and nonevasive answer, which can be followed up on conclusively with one set of interrogatories, which only need be sent.

and actual hours and fees incurred in the actual case before the judge.

His reasoning was effectually that there is a generic, pre-determined budget for applying for attorney's fees for all "such" cases. Under this improbable proposition, both attorneys probably should have avoided phone calls, refused to appear for certain hearings, not responded to notices or e-mails, declined to send requested proposed orders, or stopped talking mid-hearing in order to stay within budget, informing the judge and others that time was up.

The judge had before him, the actual time. It was submitted by a responsible attorney actually devoted to ensuring recovery of principal fees actually incurred, under the actual circumstances of the actual case. The judge did not consider or follow up on any legitimate questions about any of these hours and make an appropriate adjustment. The judge completely disregarded the undisputed hours devoted, if he even knew how many.

V. The judge erred in not following the letter and intent of the applicable statute, §28-2-510(C), and not then, to the extent not inconsistent, straightforwardly following the lodestar method described by Layman and its progeny. (Issues 9, 14, 21, 24, 25, 26 and 27)

The Layman approach applies unless the specific methodology, language and intent of the statute, which is paramount, specifies otherwise. Revels.[12] Under Layman, the procedure is

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[12] The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Revels. Revels was a case under §28-2-510(B)(addressing prevailing in condemnation trial), which is not the applicable statute in the instant case. Revels rejected primary reliance on the Layman procedure when §28-2-510(B) set forth the procedure, and also held, "Petitioners misconstrue the import of Jackson."

Revels dictated that the court first comply with the statute, and any procedure it may substitute for Layman, and only then progress to the Jackson v. Speed factors, at the court's option. Revels held that although the Jackson factors were instructive in determining an award of reasonable attorneys' fees, the court was not statutorily required to conduct this evaluation, as §28–2–510(B) makes no reference to these factors. Given the statute's silence, Revels emphasized that a Jackson evaluation was neither required nor forbidden under section §28–2–510(B).

The legislature has specifically amended the statutory condemnation procedures to protect landowners. 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. Savannah River. The EDPA has since expressly changed the attorney's-fees point decided in the case, to provide compensation upon pre-award abandonment occurring during a challenge.

The EDPA fee provisions were intended as a deliberate improvement in landowner protection. "Is entitled" to litigation expenses means what is stated. The EDPA mandates award to the condemnee of "reasonable attorney fees, litigation expenses, and costs as determined by the court" upon abandonment by the condemnor. S.C. Code Ann. §28-2-510(C).

"Litigation expenses" is defined as "the reasonable fees, charges, disbursements, and expenses necessarily incurred from and after service of the Condemnation Notice, including, but not limited to, reasonable attorney's fees, appraisal fees, engineering fees, deposition costs, and other expert witness fees necessary for preparation or participation in condemnation actions and the actual cost of transporting the court and jury to view the premises." S.C. Code Ann. §28-2-30(14)(emphasis added).

"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" and "necessarily" obviously only authorize exclusion of fees which are not necessary at the time the Landowner incurred them, as opposed to earlier incurred fees rendered unnecessary in hindsight as a result of later occurring events.

Under the statute, preparation is per se a reasonable expense, regardless of whether the work product associated with the time and fees incurred is actually embodied in filings or causes the condemnor's withdrawal, and regardless of whether the preparation would have led to victory in some later stage of proceedings. If a condemnee incurs his own appraisal in anticipation of a valuation dispute which never gets heard because of the condemnor's withdrawal, the inquiry in awarding the condemnee his fees "incurred" is not whether his appraisal would have won the day. He was getting ready and it cost him.

The judge failed to apprehend that the statute is based on caused fees, not causative fees. The statute does not direct that, to be recoverable, the fees spent must cause the abandonment. The statute explicitly includes all saddling up and preparation for future aspects of the case, regardless of whether they eventuate, including prosecution of the later trial of a challenge action and the contingency of later going forward with a trial of the underlying condemnation action.

In this vein, the judge misunderstood, and consequently erred, in putting a hard stop at February 10, 2021, and docking the Landowners for another 7.4 hours. He did not exercise any discretion at all to consider that the Town's unilaterally, during a stay, sending a notice which the Town composed from scratch did not impose a hard cutoff, and did not ipso facto, and as a matter of law, end the reasonableness of any further time spent in a challenge case.

The challenge cases were instituted as a result of the action the Town putatively abandoned. The time spent to challenge and seek a judicial determination of the validity, nature, extent and effect of the putative "abandonment" document was reasonable, and to be expected, including the 7.4 hours of time and fees incurred shortly following the date the Town e-mailed the document. The judge erred in shorting the Landowners by at least 7.4 hours.

In the same respect, the judge erred in denying reimbursement of one post-February 10 filing fee and one-way mileage for one event post-February 10. Reasonable expenses incurred, even post abandonment, are recoverable, if reasonably incurred as a result of being sued for

to try to ascertain actual time, then make reasonableness adjustments, if any, then determine a fair hourly rate, then determine the guiding, or lodestar, fee, and then make enhancements or other adjustments under factors set forth in Jackson v. Speed, 326 S.C. 289, 486 S.E.2d 750 (1997), Blumberg v Nealco, and the related line of cases.

The judge never made a finding on actual hours, which were undisputed. He made no reasonableness adjustments. He instead made up his own estimate of hours, without stating the basis. Although his estimate constituted a draconian disregard of the time actually incurred, he never considered offsetting his slashing of hours by selecting a higher rate than the modest rate actually charged. Although the results, time savings, and efficiencies in the cases before him were enhanced by the lawyer's work, learning, and experience in the other set of cases, the judge also applied no enhancement factor to the overall fee.

The judge adopted every single conservative aspect the Landowners had already built into their fee request, including not presenting all hours and fees, applying a below-market rate, and dividing the fee by three. The judge cut the hours further without any legitimate basis, as if he were making a gift to the Town and imposing a penalty on the Landowners.[13]

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condemnation, and it is not reasonable to stop doing everything and take the opponent's word for everything simply because the opponent who had frivolously conducted 12 lawsuits has just sent an e-mail.

When the opponent was explicitly threatening to sue for the same thing for a third time, it is reasonable to incur expenses for filing fees and mileage for matters necessary to determine whether the Town's putative abandonment of a potentially multi-million-dollar suit was with or without prejudice.

[13] The judge also erred in concluding it was automatically reasonable and customary to split a fee award three ways, simply because similar or even identical work was done in three cases. 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").

It was punitive, callous, and capricious to do the foregoing, as well as a contravention of the letter and legislative intent of the fee award statute to make the Landowner reasonably whole, deter multiplicitous litigation by condemnors (as argued by the Town), and make counsel reasonably available to impecunious rural, urban and resort landowners alike when they are faced with being sued by an opponent wielding the government purse.

CONCLUSION

The Circuit Judge should be reversed. This Court should award Stanton, Beattie, and Sunset each the appropriate fees and other expenses of at least $18,148.57 as of June 2, 2023. This Court should direct that all reasonable actual fees and expenses subsequent to June 2, 2023 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. In the alternative, this Court should direct that remaining fees, including those incurred on appeal, may be submitted in a subsequent application to the Circuit Court in this action.

Respectfully submitted,

s/M. Baron Stanton
M. Baron Stanton (S.C. Bar No. 7970)
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Date: November 15, 2023

Here, the work was done at lower than market rate, and a draconian slashing of 76% of the submitted undisputed actual hours had already been indulged. It is not customary to divide that by three.

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Nov 15 2023
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable Benjamin H. Culbertson, Circuit Court Judge

CASE NO. 20-CP-22-00930
CASE NO. 20-CP-22-00931
CASE NO. 20-CP-22-00932

M. Baron Stanton, ... 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.

and

Sunset Lodge, LLC, ... Appellant,

v.

Town of Pawleys Island, ... Respondent.

CERTIFICATE OF SERVICE

I, M. Baron Stanton, do hereby certify that I have, on this date, served the foregoing initial Appellants' Brief upon the Respondent by causing a copy to be e-mailed in accordance with current rules to will@belserpa.com. The postal mailing address of the above addressee is:

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

s/M. Baron Stanton
M. Baron Stanton

Date: November 15, 2023