RECEIVED
Apr 17 2024
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY

Daniel Cobel, Circuit Court Judge

Appellate Case No. 2024-000441

Lower Court Case No. 2020-CP-40-04063

South Carolina Public Interest Foundation, and John Crangle, Individually and on behalf of all others similarly situated, Appellants,

v.

Alan Wilson, Attorney General for the State of South Carolina, Willoughby & Hoefer, P.A., and Davidson, Wren & DeMasters, P.A., Respondents.

INITIAL BRIEF OF APPELLANTS

April 17, 2024

s/ James M. Griffin
James M. Griffin (SC Bar # 9995)
Margaret N. Fox (SC Bar # 76228)
GRIFFIN HUMPHRIES LLC
4408 Forest Drive, Suite 300
Columbia, South Carolina 29206
803-744-0800

Badge Humphries (SC Bar #72904)
GRIFFIN HUMPHRIES LLC
2113 Middle Street, Suite 305
Sullivan's Island, South Carolina 29482
843-883-7444

James G. Carpenter (SC Bar #1136)
THE CARPENTER LAW FIRM
819 East North Street
Greenville, South Carolina 29601
864-235-1269

Attorneys for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

STANDARD OF REVIEW 8

ARGUMENT 10

I. WILSON LACKED AUTHORITY TO PAY LAW FIRMS FROM THE DOE SETTLEMENT BECAUSE $75 MILLION WAS NOT AWARDED TO THE LAW FIRMS BY COURT ORDER OR SETTLEMENT. 10

A. Neither S.C. Code Ann. § 1-7-85 Nor § 1-7-150(b) Authorizes the Attorney General to Make Payment of the Attorneys' Fees at Issue. 10

B. Federal Funds Oversight Act Does Not Authorize the Payment of the Attorneys' Fees at Issue. 14

II. THE LOWER COURT IMPERMISSIBLY LIMITED ITS ANALYSIS TO AN UNCONTESTED HYPOTHETICAL ISSUE, IGNORED THE PLAIN LANGUAGE OF SECTION 1-7-150, RELIED UPON DUBIOUS LEGISLATIVE HISTORY, AND MISCONSTRUED APPELLANTS' SEPARATION OF POWERS ARGUMENT 17

A. The Lower Court Improperly Limited Its Analysis to Whether the Attorney General Has Authority to Enter into Contingency Fee Agreements. 17

B. Wilson Lacked Authority to Contract to Pay the Law Firms Unless the $75 Million in Attorneys' Fees Was Awarded by Court Order or Settlement. 20

C. Proviso 59.8 is Immaterial. 22

D. The Lower Court Misconstrues Appellants' Argument in Its Separation of Powers Analysis 23

E. The Legislative History Relied Upon in the Court's Order Does Not Support the Court's Conclusion. 26

CONCLUSION 27

TABLE OF AUTHORITIES

CASES

Benham v. City of Charlotte, North Carolina, 635 F.3d 129 (4th Cir. 2011)............................18

Brinkman v. Weston & Sampson Engineers, Inc., 435 S.C. 354, 867 S.E.2d 460 (Ct. App. 2021) 8

Capco of Summerville, Inc. v. J.H. Gayle Const. Co., 368 S.C. 137, 628 S.E.2d 38 (2006)......16

Clarke v. South Carolina Public Service Authority, 177 S.C. 427, 181 S.E. 481 (1935)...........24

DomainsNewMedia.com, LLC v. Hilton Head Island-Bluffton Chamber of Commerce, 423 S.C. 295, 814 S.E.2d 513 (2018) 11, 16

Edwards v. State, 383 S.C. 82, 678 S.E.2d 412 (2009) 24

Gilstrap v. South Carolina Budget and Control Board, 310 S.C. 210, 423 S.E.2d 101 (1992)..24

Hallums v. Bowens, 318 S.C. 1, 428 S.E.2d 894 (Ct. App. 1993)...17

Higgins v. State, 307 S.C. 446, 415 S.E.2d 799 (1992)..10

Kitchen Planners LLC v. Friedman, 440 S.C. 456, 892 S.E.2d 297 (2023)................................9

South Carolina Public Interest Foundation v. Wilson, 437 S.C. 334, 878 S.E.2d 891 (2022)...6, 17, 18, 20

State ex rel. Condon v. Hodges, 349 S.C. 232, 562 S.E.2d 623 (2002)..........................14, 23, 24

State ex rel. McLeod v. McInnis, 278 S.C. 307, 295 S.E.2d 633 (1982) 14, 24

State v. Cooper, 342 S.C. 389, 536 S.E.2d 870 24

Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 529 S.E.2d 280 (2000) 13

STATUTES

S.C. Code Ann. § 11-11-160 (Supp. 2008)...24

S.C. Code Ann. § 1-7-150...10, 18, 27

S.C. Code Ann. § 1-7-150(B) 11, 12, 13

S.C. Code Ann. § 1-7-85...10, 11

S.C. Code Ann. § 2-65-15(5) 14

S.C. Code Ann. § 2-65-15(8) 15

S.C. Code Ann. § 2-65-20 .... 14, 15

S.C. Code Ann. § 2-65-20 (2005) 24

S.C. Code Ann. § 2-65-30 15

OTHER AUTHORITIES

2019 S.C. Acts 91, Part 1.B, § 59.8 (2019-2020 fiscal year) 22

Awarded, Merriam-Webster, https://www.merriam-webster.com/dictionary/awarded (last visited Oct. 19, 2020) 12, 21

Awarded, Black's Law Dictionary (11th ed. 2019) 12, 21

Litigation Retention Agreement for Special Counsel Appointed by the S.C. Att'y Gen. as to Purdue Pharma L.P., Purdue Pharma Inc., and Purdue Frederick Company Inc. 9, May 12, 2017, (available at https://www.scag.gov/wp-content/uploads/2018/09/Opioid-Manufacturers.-Litigation-Retention-Agreement-01784660xD2C78.pdf) 19

South Carolina Dept. of Admin. Request for Other Funds Auth. Form (available at https://admin.sc.gov/budget/otherfundsauthorization) 16

Threshold, AHDictionary.com, https://ahdictionary.com/word/search.html?q=threshold (last visited Aug. 1, 2023) 20

Threshold, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/threshold (last visited Aug. 1, 2023) 20

CONSTITUTIONAL PROVISIONS

S.C. Const. art. I, § 8 .... 14, 24

S.C. Const. art. X, § 8 24

STATEMENT OF THE CASE

Former Governor James H. Hodges brokered an agreement pertaining to the storage of weapons-grade plutonium at the Savannah River Site ("SRS"). Governor Hodges's brokered settlement is codified at Title 50, United States Code, Section 2566 ("Section 2566"). Under Section 2566, the United States Department of Energy ("DOE") must pay the State of South Carolina "economic impact and assistance payments" of $100 million per year from appropriated funds starting in 2016 for each year it fails to comply with deadlines relating to the disposition of the plutonium. 50 U.S.C. § 2566. The DOE failed to comply with the terms of the agreement. The DOE has not met the deadlines set forth in Section 2566 and, as of 2020, was liable to the State of South Carolina for at least $400 million in economic impact and assistance payments (Pl. Opp'n Summ. J. 3, Aug 2, 2023).

On August 28, 2020, Attorney General Alan Wilson ("Wilson") entered into a settlement agreement with the United States (the "Settlement Agreement") regarding the DOE's failure to abide by Governor Hodges' agreement. Wilson agreed on behalf of the citizens of this State to refrain from instituting any action to collect economic impact and assistance payments for an additional 15 years. In exchange, the DOE agreed to pay the State of South Carolina a substantially reduced economic impact and assistance payment of $600 million. The Settlement Agreement requires the DOE to make "immediate payment . . . to the State of South Carolina . . . with each party to bear its own costs, attorneys' fees and expenses." (*Id.*, Ex. A, Affidavit of Badge Humphries ("Humphries Aff."), Ex. 6, Settlement Agreement, South Carolina v. United States, Fed. Cir. No. 19-2324, August 28, 2020.)

At an August 31, 2020 press conference, Wilson announced that he intended to pay Willoughby & Hoefer, P.A. ("W&H") and Davidson, Wren & DeMasters, P.A. ("DWD")

(collectively "Law Firms") $75 million from the proceeds of the DOE settlement. Wilson stated this settlement payment was expected on or after October 1, 2020.

Upon learning of Wilson's intent, Governor Henry McMaster wrote Wilson objecting to the attorneys' fee. The Governor had "concerns regarding the payment of attorneys' fees" because the settlement resulted from "the zealous advocacy and coordination with members of [the State's] Congressional delegation." (*Id.*, Ex. 6, Governor Henry McMaster letter to Alan M. Wilson, S.C. Attorney General, Aug. 30, 2020.) Governor McMaster concluded by stating that he "cannot endorse the payment of $75 million in attorneys' fees under the circumstances." (*Id.*.) David Pascoe, First Circuit Solicitor, likewise wrote Wilson objecting to the use of these settlement proceeds for attorneys' fees on the grounds that the entire amount must be deposited into the State's General Fund. (*Id.*, Ex. 6, Solicitor David M. Pascoe letter to Alan M. Wilson, S.C. Attorney General,, Sept. 10, 2020.)

On September 25, 2020, Appellants filed this action against Wilson seeking a declaratory judgment that Wilson lacked authority to pay $75 million from a DOE settlement to private law firms as attorneys' fees absent a court order, authorization from the General Assembly, or provision in the Settlement Agreement providing that the DOE was paying the fees. (*Id.*, Ex. 6, Compl., Sept. 25, 2020.)

Appellants contend that the payment of $75 million to the Law Firms from a settlement intended solely for the benefit of the State is unconstitutional, in violation of the Separation of Powers Clause of the South Carolina Constitution. Even if the United States had agreed to pay the State's attorneys' fees, the $75 million for the work in this case seems patently unreasonable.

With the Complaint, on September 25, 2020, Appellants filed a motion for a temporary restraining order and preliminary injunction, seeking to enjoin Wilson's payment of $75,000,000

to the law firms ("Plaintiffs' Initial Motion") (*id.*, Ex. 6, Mot. for TRO and Prelim. Inj., Sept. 25, 2020). That afternoon, Appellants' counsel provided Wilson copies of Appellants' filings and asked the circuit court to schedule a hearing on Plaintiffs' Initial Motion. (*Id.*, Ex. 6, Email from J. Carpenter to Judge Lee, (Sept. 25, 2020, 16:57 EDT).)

Wilson's counsel emailed the circuit court requesting that the hearing on Plaintiffs' Initial Motion not be held until Thursday, October 1, 2020. (*Id.*, Ex. 6, Email from E. Smith to A. Nichols, law clerk to Judge Lee (Sept. 28, 2020, 10:13 EDT).) The circuit court responded that Plaintiffs' Initial Motion could be heard on Tuesday, September 29, 2020, at 3:00 p.m., over Wilson's objections. (*Id.*, Ex. 6, Email from B. Norton, law clerk to Hon. D. McCaslin, Judge to E. Smith et al. (Sept. 28, 2020, 11:53 EDT).) On the afternoon of September 28, 2020, Appellants' counsel emailed counsel for Wilson asking that Wilson agree not to disburse the disputed funds until the case could be decided on the merits. (*Id.*, Ex. 6, J. Griffin email to E. Smith (Sept. 28, 2020, 11:30 EDT).) Counsel for Wilson ultimately responded, "I am checking w/ Bob Cook and this is what I am authorized to say. I have conveyed your request to him." (*Id.*, Ex. 6, E. Smith email to J. Griffin et al. (Sept. 28, 2020 15:46 EDT).)

Unbeknownst to Appellants and the circuit court, Wilson had already received the $600 million in settlement proceeds. Moreover, Wilson expedited the $75 million transfer to the Law Firms on Tuesday morning, September 29, 2020, just hours before the scheduled hearing. Moments before the 3:00 p.m. hearing on Tuesday, September 29, 2020, the circuit court and Appellants first learned that the disputed $75 million had been disbursed to the Law Firms. (*Id.*, Ex. 6, Pls.' Opp'n Mot. Dismiss 5, Jan. 20, 2021.) In his memorandum in opposition to the Appellants' request for a temporary restraining order, circulated at 2:12 p.m., Wilson announced

that the disputed funds had been transferred to the Law Firms and contended that, therefore, Appellants' entire case was moot. (*Id.*, Ex. 6, Att'y Gen. Opp'n TRO 2-3, Sept. 29, 2020.)

Following the hearing, Appellant Crangle contacted the South Carolina Office of the State Treasurer and was informed that the funds had not been transferred to the Law Firms. Appellants' counsel informed the circuit court of this purported fact. (*Id.*, Ex. 6, Email from J. Griffin to E. Smith et al. (Sept. 29, 2020, 17:48 EDT).) The circuit court then set another hearing for 7:00 p.m. on September 29, 2020. Prior to and during that hearing, counsel for Wilson stated that his office had confirmed that the Law Firms had received the disputed funds. (*Id.*, Ex. 6, B. Norton, law clerk to D. McCaslin, Judge, to J. Griffin et al. (Sept. 29, 2020 18:13 EDT).) During the hearing, out of an abundance of caution, the circuit court announced its intent to enter a temporary restraining order preventing the State from transferring funds to the Law Firms, in the event the funds had not been transferred. Following the hearing, the Court entered such order (*id.*, Ex. 6, Order Granting Temp. Inj. Pendente Lite, Sept. 29, 2020). That order expired at 5:00 p.m. on Friday, October 2, 2020.

On the morning of September 30, 2020, the Treasurer confirmed that the proceeds had been wired to the law firm on September 29, 2020, just hours before the 3:00 p.m. hearing: "[t]he Treasurer's office received a warrant for payment from the Comptrollers' Office Monday night [September 28, 2020]." Therefore, the Treasurer's Office "processed and wired the funds on Tuesday morning [September 29, 2020] to the law firm's account." (*Id.*, Ex. 6, Email from J. Griffin to B. Norton, Law Clerk to D. McCaslin, Judge et al. (Sept. 30, 2020, 9:27 EDT).)

Later in the morning of September 30, 2020, Appellants filed their amended complaint (*id.*, Ex. 6, Am. Compl., Sept. 30, 2020) naming the Law Firms as additional defendants. At the same time, Appellants filed their second Motion for Temporary Restraining Order and Preliminary

Injunction, (*id.*, Ex. 6, Pls.' Mot. for TRO and Prelim. Inj., Sept. 30, 2020). Thereafter, the circuit court, Honorable Alison R. Lee, entered an Ex Parte Temporary Restraining Order (TRO) restraining Law Firms from dispersing the proceeds (*id.*, Ex. 6, Ex Parte TRO, Oct. 1, 2020).

On October 2, 2020, W&H filed a Notice of Appeal of Judge Lee's TRO and filed Petition for Writ of Supersedeas with the South Carolina Court of Appeals seeking to vacate Judge Lee's TRO. On October 5, 2020, DWD also filed Notice of Appeal and a Petition for Writ of Supersedeas adopting and incorporating W&H's petition. Appellants filed their response to the Petition on October 5, 2020. Appellants also filed a Petition for Original Jurisdiction in the South Carolina Supreme Court on October 5, 2020. On October 6, 2020, W&H filed a Reply in Support of its Petition for Writ of Supersedeas with the South Carolina Court of Appeals. Also, on October 6, 2020, the Court of Appeals entered an order denying the Law Firms' Petitions. On October 16, 2020, the Law Firms withdrew their appeals. On November 18, 2020, the Supreme Court entered an Order denying Appellants' Petition for Original Jurisdiction. On October 26, 2020, the Law Firms' appeals from the entry of a TRO were dismissed by the Court of Appeals as withdrawn.

On October 7, 2020, Judge Lee conducted a hearing on Appellants' Motion for Preliminary Injunction. On October 9, 2020, Judge Lee entered an order extending the Ex Parte TRO through October 14, 2020 pending an order on the Motion for Preliminary Injunction. (*Id.*, Ex. 6, Order, Oct. 9, 2020.) On October 14, 2020, Judge Lee denied Appellants' motion. (*Id.*, Ex. 6, Order Denying Pls.' Mot. for Prelim. Inj., Oct. 14, 2020.) On October 23, 2020, Appellants filed a motion to alter or amend Judge Lee's order denying the motion for preliminary injunction (*id.*, Ex. 6, Pls.' Mot. Alter or Amend Order, Oct. 23, 2020). The Law Firms filed their oppositions to the motion to alter or amend on November 20, 2020 and November 23, 2020 (*id.*, Ex. 6, W&H Opp'n Pls.' Mot. Alter or Amend, Nov. 20, 2020; DWD Opp'n Pls.' Mot. Alter or Amend, Nov. 20, 2020).

Wilson also filed an opposition on November 23, 2020 (*id.*, Ex. 6, Return of Atty. Gen. Mot. Alter or Amend, Nov. 23, 2020). On December 17, 2020, Judge Lee denied the motion to alter or amend (*id.*, Ex. 6, Order Denying Pls.' Mot. Alter or Amend, Dec. 17, 2020).

The Law Firms filed separate motions to dismiss the Amended Complaint on October 20, 2020. (*Id.*, Ex. 6, DWD Mot. Dismiss, Oct. 20, 2020; W&H Mot. Dismiss, Oct. 20, 2020.) Wilson filed a Motion to Dismiss the Amended Complaint on October 27, 2020 (*id.*, Ex. 6, Att'y Gen. Mot. Dismiss, Oct. 27, 2020). Appellants filed a memorandum in opposition to the motions to dismiss on January 20, 2021 (*id.*, Ex. 6, Pls.' Opp'n Mot. Dismiss, Jan. 20, 2021). The Honorable R. Kirk Griffin conducted a hearing on the motions to dismiss on January 27, 2021. (*Id.*, Ex. 6, Hr'g Tr., Jan. 26, 2021.) Judge Griffin granted the Motions to Dismiss on March 5, 2021, ruling that the Appellants lacked standing and declining to rule on the merits (*id.*, Ex. 6, Order Granting Mot. Dismiss, Mar. 5, 2021).

Appellants filed a Notice of Appeal on March 29, 2021. (*Id.*, Ex. 6, Notice of Appeal, Mar. 29, 2021.) On July 6, 2021, the South Carolina Supreme Court certified the appeal for review. (*Id.*, Ex. 6, Order, July 6, 2021.) On September 14, 2022, the South Carolina Supreme Court filed an opinion reversing the Circuit Court's order dismissing Appellants' Amended Complaint, concluding that Appellants have public importance standing to pursue the claims alleged. The Supreme Court remanded this case "for the circuit court to consider the merits of [Appellants'] claims." *S.C. Pub. Interest Found. v. Wilson*, 437 S.C. 334, 343, 878 S.E.2d 891, 896 (2022).

Appellants have alleged the following claims in the Amended Complaint:

a. Declaratory Judgment that:

i. Section 1-7-150(B) SC Code requires the Attorney General to deposit all of the $600 million in settlement proceeds from the DOE settlement into the State's General Fund;

ii. The General Assembly has exclusive authority to appropriate moneys from the General Fund and that the Attorney General has no such authority;

iii. The Attorney General's payment of $75 million of public funds violates the South Carolina Constitution, Art. I, § 8, the Separation of Powers Clause; and

iv. In the alternative, that the Attorney General is prohibited from paying any fee from the DOE settlement unless and until the amount is approved by a court of competent jurisdiction as being reasonable.

b. Imposition of a Constructive Trust over the $75 million transferred to W&H and/or DWD;

c. Return of the $75 million to the State by W&H and DWD; and

d. Injunctive Relief requiring that the funds not be further disbursed until this dispute is resolved on its merits.

(Humphries Aff., Ex. 6, Am. Compl. 17-18, Sept. 30, 2020.)

On November 18, 2022, Appellants served interrogatories and requests for documents upon Defendants W&H and DWD. Pls.' Opp'n Summ. J., Ex. B., Affidavit of James Griffin ¶ 6 ("J. Griffin Aff."), Aug. 2, 2023. On December 16, 2022, Defendants W&H and DWD each filed motions for a protective order and to stay discovery. *Id.* at ¶ 7. Defendants have not responded to any Appellants' discovery requests since filing the motions on December 16, 2022. *Id.* at ¶ 8.

Appellants have been denied any opportunity to conduct discovery on the claims alleged in the Amended Complaint. *Id.* at ¶ 9.

On October 11, 2023, the Honorable Daniel Coble conducted a virtual hearing on the Respondents motions for summary judgment and issued an order granting summary judgment on October 20, 2023. (Hr'g Tr., Oct. 11, 2023; Order granting summary judgment, Oct. 20, 2023.) Appellants filed a Motion to Reconsider on October 30, 2023. (Pls.' Mot. to Recons., Oct. 30, 2023.) Judge Coble denied the Motion for Reconsideration on December 15, 2023. (Order Denying Pls.' Mot for Recons., Dec. 15, 2023.) Appellants filed a Notice of Appeal from the October 20, 2023 Order granting Summary Judgment and the December 15, 2023 Order Denying the Motion for Reconsideration on January 12, 2024. (Notice of Appeal, Jan. 12, 2024.)

On March 19, 2024, Appellants filed a Motion to Certify this appeal to the South Carolina Supreme Court. (Mot. to Certify.) W&H and DWD filed a joint Return on March 26, 2024. (W&H and DWD Return to Mot. to Certify.) Wilson filed a Return on March 27, 2024. (Wilson Return to Mot. to Certify). In the returns, Respondents agree that this appeal should be certified for review by the Supreme Court. The Supreme Court certified this appeal for review on April 17, 2024.

STANDARD OF REVIEW

Appellate courts apply the same standard as the trial court when reviewing an order granting summary judgment. *Brinkman v. Weston & Sampson Eng'rs, Inc.*, 435 S.C. 354, 867 S.E.2d 460 (Ct. App. 2021). Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Id.* The evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party. *Id.* In cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to show that the evidence is

susceptible to more than one reasonable inference to withstand a motion for summary judgment. *Kitchen Planners LLC v. Friedman*, 440 S.C. 456, 463, 892 S.E.2d 297, 301 (2023). The court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony. *Id.*

ARGUMENT

I. WILSON LACKED AUTHORITY TO PAY LAW FIRMS FROM THE DOE SETTLEMENT BECAUSE $75 MILLION WAS NOT AWARDED TO THE LAW FIRMS BY COURT ORDER OR SETTLEMENT.

A. Neither S.C. Code Ann. § 1-7-85 Nor § 1-7-150(b) Authorizes the Attorney General to Make Payment of the Attorneys' Fees at Issue.

Respondents assert that Sections 1-7-85 and 1-7-150(B) of the South Carolina Code of Laws provide the Attorney General with authority to pay special counsel $75 million of the $600 million in settlement proceeds. Respondents' contention is not well founded.

Section 1-7-150 of the South Carolina Code of Laws requires that all funds received by judgment or settlement be deposited into the State's General Fund, **except for investigative costs and litigation costs awarded by court order or settlement.** *Id*. (emphasis added). The Law Firms were not awarded attorneys' fees by court order. Furthermore, the DOE Settlement Agreement expressly disclaims any obligation by the DOE to pay the Law Firms attorneys' fees. (Humphries Aff., Ex. 6, Settlement Agreement 2.)

Respondents erroneously rely upon Section 1-7-85, which has the same language as Section 1-7-150(B) limiting reimbursement to "attorney fees or investigative costs or costs of litigation **awarded by court order or settlement**":

> Notwithstanding any other provision of law, the Office of the Attorney General may obtain reimbursement for its costs in representing the State in criminal proceedings and in representing the State and its officers and agencies in civil and administrative proceedings. These costs may include, but are not limited to, attorney fees or investigative costs or costs of litigation **awarded by court order or settlement**, travel expenditures, depositions, printing, transcripts, and personnel costs. **Reimbursement of these costs may be obtained by the Office of the Attorney General from the budget of an agency or officer that it is representing or from funds generally appropriated for legal expenses, with the approval of the State Budget and Control Board.**

S.C. Code Ann. § 1-7-85 (emphasis added); *see also Higgins v. State*, 307 S.C. 446, 449, 415 S.E.2d 799, 801 (1992) ("In construing statutory language, the statute must be read as a whole,

and sections which are part of the same general statutory law must be construed together and each one given effect, if it can be done by any reasonable construction.”).

These costs may be reimbursed from the “the budget of an agency or officer that it is representing or from funds generally appropriated for legal expenses.” S.C. Code Ann. § 1-7-85. This statute does not contemplate that the Attorney General can rely upon Section 1-7-85 to ignore the more particular statutory provision in Section 1-7-150(B) addressing how the Attorney General must handle recoveries awarded to the State by judgment or settlement. To the extent these statutory provisions are inconsistent, Section 1-7-150(B) should control because it is more specific in addressing proceeds of a settlement or judgment. *DomainsNewMedia.com, LLC v. Hilton Head Island-Bluffton Chamber of Commerce*, 423 S.C. 295, 304, 814 S.E.2d 513, 518 (2018) (“Where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect” (internal quotation marks omitted)).

Section 1-7-150 of the South Carolina Code of Laws requires that all funds received by judgment or settlement be deposited into the State’s General Fund*, except for investigative costs and litigation costs awarded by court order or settlement*. S.C. Code Ann. § 1-7-150(B). The operative word in Section 1-7-150(B) is the term “awarded.”

> All monies, except investigative costs or costs of litigation ***awarded*** **by court order or settlement**, awarded the State of South Carolina by judgment or settlement in actions or claims brought by the Attorney General on behalf of the State or one of its agencies or departments **must be deposited in the general fund of the State**, except for monies recovered for losses or damages to natural resources, which must be deposited in the Mitigation Trust Fund, or where some other disposition is required by law.

Id. § 1-7-150(B) (emphasis added).

In this matter, neither exception applies because there was not an order awarding attorneys' fees and the Settlement Agreement does not allocate any portion of the $600 million to attorneys' fees. Rather, Section 5(a) the Settlement Agreement provides for the following: "Immediate **payment by the United States to the State of South Carolina** in the amount of $600 Million (Six Hundred Million), inclusive of interest, **with each party to bear its own costs, attorneys fees and expenses**." (Humphries Aff., Ex. 6, Settlement Agreement 2 (emphasis added).) Accordingly, Section 5(a) clearly requires that payment of the entire $600 million be made directly to the State of South Carolina. Nevertheless, Respondent Wilson paid private lawyers $75 million out of the $600 million, which was required to be deposited into the State's General Fund pursuant to Section 1-7-150 of the South Carolina Code.

The General Assembly used the verb "awarded" when describing the circumstances in which the Attorney General may use funds recovered in a civil action to pay costs of litigation. Black's Law Dictionary defines awarded as "to grant by formal process or by judicial decree (the company **awarded** the contract to the low bidder) (the jury **awarded** punitive damages)" Black's Law Dictionary (11th ed. 2019) (emphasis added). Merriam-Webster likewise defines awarded "to give by judicial decree or after careful consideration // The jury *awarded* damages to the defendant. // *award* a contract." *Awarded*, Merriam-Webster, https://www.merriam-webster.com/dictionary/awarded (last visited Oct. 19, 2020) (emphasis added).

A proper construction of Section 1-7-150(B) becomes even clearer when the statute's treatment of litigation costs is examined where litigation concludes with a judgment, instead of a settlement. According to Section 1-7-150(B), all monies "awarded the State of South Carolina by judgment" must be deposited into the General Fund. S.C. Code Ann. § 1-7-150(B). In that case, the Attorney General is only permitted to use monies to pay litigation costs that are "awarded by

court order." *Id.* Absent a "court order" awarding litigation costs, the entire amount "awarded the State of South Carolina by judgment" must be deposited into the General Fund. *Id.*

Obviously, a court order is significantly different from, and narrower than, a judgment. There can be a judgment for the State without a court order awarding attorneys' fees. By the phrase "awarded by court order," the General Assembly clearly did not grant the Attorney General authority to obtain reimbursement for litigation costs from the proceeds of every judgment awarded to the State. Instead, the Attorney General's authority is limited to the payment of "litigation costs awarded by court order." *Id.*

There is nothing in Section 1-7-150(B) that distinguishes an award by court order from an award by settlement. To interpret this statute to allow the Attorney General to use proceeds from a settlement agreement that lacks any specific provision awarding litigation costs when the Attorney General is clearly prohibited from using proceeds from a judgment to pay litigation costs would lead to an impermissible, absurd result. *Unisun Ins. Co. v. Schmidt*, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000) ("We will reject a statutory interpretation when to accept it would lead to a result so plainly absurd that it could not have been intended by the legislature . . ."). The Court must consider the meaning of Section 1-7-150(B) in light of its full terms and how those terms evidence the General Assembly's intent for costs of litigation to actually be awarded by a court order or settlement.

The plain meaning of the verb "awarded" evidences the General Assembly's intent that there be a grant or decree that specifically provides for the payment of litigation costs in a court order or settlement. Absent an award of attorneys' fees through settlement or court order, Wilson lacks authority to pay fees from the settlement proceeds to the Law Firms.

Executive officers possess no authority to appropriate funds. Such authority lies exclusively with the General Assembly, which has directed that all such funds be deposited in the State's general fund. *See State ex rel. Condon v. Hodges*, 349 S.C. 232, 245, 562 S.E.2d 623, 630 (2002) ("[T]here is no provision in the South Carolina Code or Constitution which provides that members of the executive branch have the ability to transfer funds from those to whom the General Assembly has appropriated money"). Expenditures of public funds cannot be controlled "by administration rather than by legislation." *State ex rel. McLeod v. McInnis*, 278 S.C. 307, 317, 295 S.E.2d 633, 638 (1982). Doing so would give the executive branch a "veto" over the General Assembly. *Id.* Wilson's payment of $75 million from the State's $600 million would amount to an appropriation of public funds by a member of the executive branch, rather than the General Assembly, in violation of the separation of powers. S.C. Const. art. I, § 8.

B. Federal Funds Oversight Act Does Not Authorize the Payment of the Attorneys' Fees at Issue.

In an attempt to circumvent Section 1-7-150's requirement that the full $600 million be deposited in the General Fund, Wilson purportedly relied on the South Carolina Federal Funds Oversight Act, S.C. Code § 2-65-10 *et seq.* However, a careful reading of this statute further supports the Appellants' position that, absent an award of attorneys' fees, only the General Assembly can appropriate funds to pay the Law Firms from these settlement proceeds.

Section 2-65-20 provides that "the General Assembly shall appropriate all anticipated *federal funds* and *other funds*." S.C. Code Ann. § 2-65-20 (emphasis added). Federal funds "means financial assistance made to a state agency by the United States Government in any form." S.C. Code Ann. § 2-65-15(5). Examples of federal funds include "a grant, loan, subsidy, reimbursement, contract, donation, or shared federal revenues, or noncash federal assistance in the form of equipment, buildings, and land." *Id.* The settlement proceeds, although provided by the

federal government, do not fall within this definition. Respondent's reliance upon the South Carolina Federal Funds Oversight Act, S.C. Code § 2-65-10 *et seq.* is misplaced. The DOE settlement proceeds were not intended as financial assistance for the South Carolina Attorney General's Office or any other State agency and thus not within the purview of the South Carolina Federal Funds Oversight Act.

The settlement proceeds are payable to the "State of South Carolina" and thus may possibly qualify as "other funds." The term "other funds" means "any revenues received by an agency which are not federal funds and are not general funds appropriated by the General Assembly in the appropriations act." S.C. Code Ann. § 2-65-15(8).

Section 2-65-30 addresses the receipt and expenditure of unanticipated funds received after the passage of the Appropriations Act. S.C. Code Ann. § 2-65-30. This section provides a mechanism by which an agency can apply to the Executive Budge Office ("EBO") for approval to spend unanticipated funds. *Id.* Under Section 2-65-30, the EBO's authorization to approve expenditures of "other funds" is limited to "funds from private foundations or industries which are not included in the appropriations act." *Id.* Thus, the EBO lacked authority to approve the expenditure of the settlement proceeds because these are not funds received from private foundations or industries. *Id.* Under Section 2-65-20, only the General Assembly can appropriate these settlement funds. S.C. Code Ann. § 2-65-20.

In addition, the EBO did not provide the fee request for review by the Joint Other Funds Oversight Committee as required. The EBO instructions for an application for an increase in other funds expenditures state that "the [EBO] will coordinate requests with the Other Funds Oversight Committee, who will review and make a recommendation relative to the request to the EBO." *See* South Carolina Dept. of Admin. Request for Other Funds Auth. Form (available at

https://admin.sc.gov/budget/otherfundsauthorization). The EBO Request submitted on behalf of Wilson requesting authorization for the $75 million fee also provides that approval is subject to review of the Joint Other Funds Oversight Committee. *See* Humphries Aff., Ex. 6, S.C. Dep't Admin. Form BD-100, Sept. 17, 2020. Although the application depicts approval by the Director of the EBO, there is no such approval on the portion of the decision made by the Joint Other Funds Oversight Committee. Senator Nikki Setzler, who is Co-Chair of the Joint Other Funds Oversight Committee, has provided an affidavit stating that the Committee has not considered an application for the payment of fees to the Law Firms, nor has the Committee been requested to review any application. (*Id.*, Ex. 6, Affidavit of Hon. Nikki G. Setzler ¶ 4, Oct. 5, 2020.) In short, the EBO Director by-passed the approval process, eliminating any oversight by the General Assembly, to authorize the payment of the $75 million fee from funds that the Director lacks authority to appropriate.

More importantly, the statute dealing with litigation costs from settlements is specific and controls over the general "other funds" provisions. "Where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect." *DomainsNewMedia.com, LLC v. Hilton Head Island-Bluffton Chamber of Com.*, 423 S.C. at 304, 814 S.E.2d at 518 (quoting *Capco of Summerville, Inc. v. J.H. Gayle Const. Co.*, 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006) (citation omitted).). The EBO has no authority to authorize the payment of attorneys' fees from this settlement unless and until the conditions in Section 1-7-150 are satisfied.

II. THE LOWER COURT IMPERMISSIBLY LIMITED ITS ANALYSIS TO AN UNCONTESTED HYPOTHETICAL ISSUE, IGNORED THE PLAIN LANGUAGE OF SECTION 1-7-150, RELIED UPON DUBIOUS LEGISLATIVE HISTORY, AND MISCONSTRUED APPELLANTS' SEPARATION OF POWERS ARGUMENT

A. The Lower Court Improperly Limited Its Analysis to Whether the Attorney General Has Authority to Enter into Contingency Fee Agreements.

Respondents argued that the only issue on remand was whether the Attorney General has *any* authority *at all* to enter into contingency fee agreements with private law firms *under any circumstances*. That abstract question was not an issue on appeal and is not presented by the record before the lower court. The appeal dealt with the authority of the Attorney General to enter into contingency fee agreements with private law *as governed by the law*.

A necessary corollary of Respondents' argument is that Appellants' *lack standing* to argue issues other than whether the Attorney General has *any* authority *at all* to enter into contingency fee agreements with private law firms *under any circumstances*. Respondents' argument lacks merit and flies in the face of this Court's ruling that Appellants have public interest standing. *S.C. Pub. Int. Found.*, 437 S.C. at 343, 878 S.E.2d at 896. Determining the statutory limitations and conditions on the Attorney's General authority to enter into contingency fee agreements with private law firms were essential to the threshold questions before the lower court on remand, as acknowledged by the Supreme Court in holding that Appellants have standing. Nowhere was the Attorney General's authority contested *in the abstract*. The records make that fact clear.

Indeed, the primary issue before the Supreme Court was "whether [Appellants] have standing." *Id.*, 437 S.C. at 340, 878 S.E.2d at 894. To the extent this Court found that Appellants lacked standing in any respect, it would have dismissed the case with respect to those issues or instructed the circuit court to do so, rather than simply reversing and remanding it. *See Hallums v. Bowens*, 318 S.C. 1, 3, 428 S.E.2d 894, 895 (Ct. App. 1993) (dismissing the case on appeal based

on lack of jurisdiction because "[a] court, lacking subject matter jurisdiction, cannot enforce its own decrees"); *see also Benham v. City of Charlotte, N.C.*, 635 F.3d 129, 134 (4th Cir. 2011) ("If an appellate court determines that the district court lacked jurisdiction, vacatur of the district court's ruling, along with a remand with instructions to dismiss, is the appropriate disposition."). The Supreme Court did no such thing. The justices did not affirm in part and reverse in part the trial court's finding that Appellants lacked standing; it reversed that ruling and remanded the case "for the circuit court to consider the merits of [Appellants'] claims." *S.C. Pub. Int. Found.*, 437 S.C. at 343, 878 S.E.2d at 896.

In so holding, the Supreme Court was well aware of Appellants' contentions as shown by its explanation of Appellants' complaint:

> Appellants alleged that because attorneys' fees were not awarded by court order or settlement, South Carolina Code subsection 1-7-150(B)[1] requires the entire $600 million settlement to be deposited in the State's General Fund. Appellants also argued the attorneys' fee amount was patently unreasonable and, therefore, requires court approval.

Id. , 437 S.C. at 339, 878 S.E.2d at 893-94 (footnote omitted).

Other language in the opinion makes clear that this Court did not intend to limit Appellants' standing in any way. In holding that Appellants "have public importance standing," the Supreme Court explained that "[b]ecause we decide this appeal on public importance grounds, we need not address derivative standing." *Id.*, 437 S.C. at 343 n.5, 878 S.E.2d at 896 n.5. Appellants pled derivative standing to assert all claims and issues, and accordingly, the Supreme Court's ruling that it need not consider derivative standing makes clear that its holding that Appellants have

[1] Section 1-7-150(B) provides that "[a]ll monies, except investigative costs or costs of litigation awarded by court order or settlement, awarded the State of South Carolina by judgment or settlement in actions or claims brought by the Attorney General on behalf of the State or one of its agencies or departments must be deposited in the general fund of the State[.]" S.C. Code Ann. § 1-7-150.

public importance standing extends to all claims and issues in the case. If the Supreme Court intended to limit Appellants' standing to argue only particular issues, that decision would not have obviated the need to discuss Appellants' derivative standing to assert all claims and litigate all attendant issues. If the Supreme Court had intended for Appellants' public interest standing to extend only to a single abstract issue as argued by Respondents, it would have been necessary for the Supreme Court to address Appellants' derivative standing to assert all claims and argue all issues.

Additionally, it is clear from the record before the Supreme Court and the context of its statements about the Attorney General's authority that the Supreme Court was not asking this Court to consider that authority in the abstract. The question of the Attorney General's authority must be read in the context of the relevant statutes and contingency-fee agreements. The similar contingency fee agreements referenced by the Supreme Court speak in terms of the need to obtain court approval of attorneys' fees "[w]hen appropriate," which the Supreme Court noted was "identical to the one here for purposes of its analysis." Litigation Retention Agreement for Special Counsel Appointed by the S.C. Att'y Gen. as to Purdue Pharma L.P., Purdue Pharma Inc., and Purdue Frederick Company Inc. 9, May 12, 2017, https://www.scag.gov/wp-content/uploads/2018/09/Opioid-Manufacturers.-Litigation-Retention-Agreement-01784660xD2C78.pdf; Litigation Retention Agreement for Special Counsel Appointed by the S.C. Att'y Gen. as to Economic and Impact Assistance for the Violations of 50 U.S.C.A. § 2566 Related to the Mixed Oxide (MOX) Facility 9, Feb. 8, 2016. In that context, the Supreme Court framed the "threshold" question as follows:

> [Appellants'] complaint presents a threshold issue of the Attorney General's statutory authority to enter contingency fee agreements with private law firms. This issue will inevitably arise again in the future because Wilson has seven other litigation retention agreements with private attorneys. These agreements are

> currently listed on the Attorney General's website, and five contain contingency fee provisions. ***Although the agreements differ in some respects, <u>all contingency fee provisions persist</u>. <u>For example, Wilson recently announced a $300 million settlement with opioid distributors. The litigation retention agreement in that case contains a contingency fee provision identical to the one here.</u> There is a need for future guidance as to whether subsection 1-7-150(B) authorizes the Attorney General to enter into contingency fee agreements.*** We therefore hold Appellants have public importance standing.

S.C. Pub. Int. Found., 437 S.C. at 342-43, 878 S.E.2d at 895-96 (emphasis added, footnotes omitted). Clearly, the threshold question is not to be considered in a vacuum as urged by Respondents.

Moreover, the Supreme Court's use of the word "threshold" indicates that it did not intend to limit Appellants' standing to only that issue. According to Merriam-Webster, a threshold is "the place or point of entering or beginning." *Threshold*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/threshold (last visited Aug. 1, 2023). Similarly, according to the American Heritage Dictionary, threshold means "[t]he place or point of beginning; the outset." *Threshold*, AHDictionary.com, https://ahdictionary.com/word/search.html?q=threshold (last visited Aug. 1, 2023). Accordingly, the word threshold means the beginning and not the extent of Appellants' standing.

B. Wilson Lacked Authority to Contract to Pay the Law Firms Unless the $75 Million in Attorneys' Fees Was Awarded by Court Order or Settlement.

As noted by the Supreme Court, Appellants' complaint presents a "threshold issue of the Attorney General's statutory authority to enter contingency fee agreements with private law firms." *S.C. Pub. Int. Found.*, 437 S.C. at 342, 878 S.E.2d at 895. Here, the Attorney General lacks authority to qualify the statutory requirement that attorneys' fees paid pursuant to those contracts be awarded by court order or settlement. The Attorney General has been qualifying that requirement so that court approval is only required "when possible" or "when appropriate." In so doing, the Attorney General is exceeding his statutory authority pursuant to Sections 1-7-150(B)

and § 1-7-85 of the South Carolina Code of Laws. If not awarded by settlement or court order, the General Assembly—not the Attorney General—would have to allocate funds received to the payment of attorneys' fees and litigation-related costs and expenses.

The lower Court's reliance upon S.C. Code § 1-7-85 ("Section 1-7-85"), which has the same language as Section 1-7-150(B) limiting reimbursement to "attorney fees or investigative costs or costs of litigation **awarded by court order or settlement**," is misplaced. *See* discussion *infra* at pp. 10-12.

The lower Court's Order contains a section titled "Plain Meaning" and concludes that "[a] plain reading of the statute allows the Attorney General to *collect costs* or costs of litigation by court order or settlement." Order 3 (emphasis added). Yet, the Order fails to quote the exact language used in Section 1-7-150(B). Instead, the Order rewrites Section 1-7-150(B) by inserting language that is not present—"*collect costs*"—and deleting the actual language used—"*awarded* by court order or settlement." *Id*. The General Assembly used the verb "awarded" when describing the circumstances in which the Attorney General may use funds recovered in a civil action to pay costs of litigation. Black's Law Dictionary defines awarded as "to grant by formal process or by judicial decree (the company **awarded** the contract to the low bidder) (the jury **awarded** punitive damages)" Black's Law Dictionary (11th ed. 2019) (emphasis added). Merriam-Webster likewise defines awarded "to give by judicial decree or after careful consideration // The jury *awarded* damages to the defendant. // *award* a contract." Merriam-Webster, https://www.merriam-webster.com/dictionary/awarded (last visited Oct. 19, 2020) (emphasis added). The Circuit Court's Order simply deletes the requirement under Section 1-7-150(B) that the attorneys' fees in this case be awarded by settlement.

The plain meaning of the verb "awarded" evidences the General Assembly's intent that there be a grant or decree that specifically provides for the payment of litigation costs in a court order or settlement. Absent an award of attorneys' fees through settlement or court order, Attorney General Wilson lacks authority to pay fees from the settlement proceeds to the Law Firms. The Circuit Court's Order completely disregards the verb "awarded" in its analysis of the plain meaning of Section 150(B).

C. Proviso 59.8 is Immaterial.

Respondents also rely upon Proviso 59.8 of the State's 2020 budget and argue that Appellants' entire argument "is therefore inapplicable." Proviso 59.8 simply states that, for the current fiscal year, any funds received by the Attorney General that would otherwise have been credited to the General Fund shall be deposited first in a special account entitled the "Litigation Recovery Account" and that then those funds "must be expended only as prescribed by law." 2019 S.C. Acts 91, Part 1.B, § 59.8 (2019-2020 fiscal year). It does not otherwise suspend or contradict Section 1-7-150(B). Rather, Section 1-7-150(B) and Proviso 59.8 should be read consistently with one another. Accordingly, Proviso 59.8's requirement that the funds "must be expended only as prescribed by law" should be read in conjunction with Section 1-7-150(B) and not as an exception to Section 1-7-150(B)'s requirements. Accordingly, Proviso 59.8 is immaterial.

When money under a settlement agreement is payable directly to the State, as in the case with the DOE Settlement Agreement, the proceeds must be deposited in the General Fund, and only the General Assembly controls its appropriation.

The Circuit Court concluded that the Attorney General has authority to enter into contingency fee agreements with private law firms without addressing the meaning of the language in Section 1-7-150 stating that "all monies, except investigative costs or costs of litigation awarded by court order of settlement, awarded the State of South Carolina by judgment or settlement in

actions brought by the Attorney General on behalf of the State . . . must be deposited in the general fund." Furthermore, the Circuit Court's conclusion that Appellants' interpretation of Section 1-7-150(B) requires judicial intervention and would therefore create a separation of powers issue is based upon a misunderstanding of Appellants' arguments. In this regard, the Circuit Court also granted summary judgment on an issue not raised by Defendants in their respective motions. Finally, the legislative Section 1-7-85 and Section 1-7-150 in no way supports the Court's conclusion.

D. The Lower Court Misconstrues Appellants' Argument in Its Separation of Powers Analysis

The lower court concludes that "assuming that Plaintiffs' interpretation of the statute is correct and requires court intervention, the result would create a separation of powers issue and ultimately result in this branch appropriating the power of another." Order 17. The court misconstrues Appellants' argument. Appellants do not argue that Section 1-7-150(B) requires court intervention. Rather, Section 1-7-150(B) requires all proceeds from a judgment or settlement be deposited in the State's General Fund, except for litigation costs awarded by court order or settlement. Proceeds from a judgment or settlement are in fact State funds subject to the control of the Legislature. By enacting Section 1-7-150(b), the Legislature placed restrictions on the Attorney General's use of funds awarded to the State by judgment or settlement.

Executive officers possess no authority to appropriate funds. Such authority lies exclusively with the General Assembly, which has directed that all such funds be deposited in the State's General Fund. *See State ex rel. Condon*, 349 S.C. at 245, 562 S.E.2d at 630 ("[T]here is no provision in the South Carolina Code or Constitution which provides that members of the executive branch have the ability to transfer funds from those to whom the General Assembly has appropriated money"). Expenditures of public funds cannot be controlled "by administration rather

than by legislation." *State ex rel. McLeod*, 278 S.C. at 317, 295 S.E.2d at 638. Doing so would give the executive branch a "veto" over the General Assembly. *Id.* Wilson's payment of $75 million from the State's $600 million would amount to an appropriation of public funds by a member of the executive branch, rather than the General Assembly, in violation of the separation of powers. S.C. Const. art. I, § 8.

In litigation over the allocation of the $600 million in settlement proceeds, Wilson acknowledged that, as the Attorney General, **he has no authority** to appropriate money that is payable to the State of South Carolina:

> **The Attorney General has no authority to appropriate money**. The money in the settlement was **payable to the State of South Carolina** pursuant to the suit and by federal statute. As such, the General Assembly has the control of the appropriation of those funds, not the Attorney General or this Court. *State ex rel. Condon v. Hodges*, 349 S.C. 232, 246, 562 S.E.2d 623, 631 (2002).
>
>> The General Assembly has the duty and authority to appropriate money as necessary for the operation of the agencies of government and has the right to specify the conditions under which the appropriated monies shall be spent. *State ex rel. Condon v. Hodges*, 349 S.C. 232, 244, 562 S.E.2d 623, 631 (2002); *Gilstrap v. S.C. Budget and Control Bd.*, 310 S.C. 210, 216, 423 S.E.2d 101, 105 (1992) (noting that the appropriation of public funds is a legislative function); *Clarke v. S.C. Pub. Serv. Auth.*, 177 S.C. 427, 437, 181 S.E. 481, 484 (1935) (noting that the General Assembly has full authority to make appropriations as it deems wise in absence of any specific constitutional prohibition against the appropriation). This includes the duty to authorize and/or appropriate the use of all federal funds. S.C. Code Ann. § 11-11-160 (Supp. 2008). In the annual appropriations act, the General Assembly must appropriate all anticipated federal funds and must include any conditions on the expenditure of those funds, consistent with federal laws and regulations. S.C. Code Ann. § 2-65-20 (2005). Money may be drawn from the treasury only pursuant to appropriations made by law. S.C. CONST. art. X, § 8. An appropriation may be made by the General Assembly in the annual appropriations act or in a permanent continuing statute. *State v. Cooper*, 342 S.C. 389, 401, 536 S.E.2d 870, 877 (2000).
>
> *Edwards v. State*, 383 S.C. 82, 90-91, 678 S.E.2d 412, 416-17 (2009).

(Humphries Aff., Ex. 6, Att'y Gen. Opp'n TRO or Temp. Inj., Oct. 6, 2020 (emphasis added, citation to exhibit omitted)).

Moreover, Wilson stated the General Assembly is the proper body to determine how the $600 million is allocated, not the Attorney General:

> The State of South Carolina is the only Plaintiff in that case and the agreement provides for the payment of the $600 million in settlement money **to the State of South Carolina**. The statute under which settlement was reached provides for payment of funds **to the State of South Carolina** and not any counties. 50 U.S.C. 2566. None of the Plaintiffs to the instant suit are parties to the Court of Claims suit nor are they mentioned as recipients of these funds. The Attorney General does not oppose a share of the settlement proceeds at issue being allocated to Barnwell, Allendale and Aiken Counties, but **the General Assembly is the proper body to determine how the funds at issue in this action should be allocated**, rather than him or this Court.

(*Id.*).

The Legislature has clearly spoken through Section 1-7-150(B) that all proceeds from this settlement must be deposited into the State's general fund, except for litigation costs awarded by court order or settlement. Because there was not an award of litigation costs in this settlement or by court order, then all $600 million must be deposited in the general fund as directed by the Legislature.

Additionally, Judge Cooper's decision in *Cephalon*, which the lower court relies upon, clearly recognizes the Court's role in approving the attorneys' fees calculated under a contingency fee agreement. Humphries Aff., Ex. 6, Order, *Cephalon Inc. v. Wilson*, C/A No. 2012-CP-40-07317, p. 14 (June 6, 2014) ("*The Litigation Retention Agreement simply puts the Attorney General's intention to seek those funds in writing, serves to notify outside counsel of the manner in which the Attorney General will calculate the attorneys' fees* ***he will ultimately seek the court approve****, and provides notice that any fees approved by the court will be paid from outside counsel's contingent fee rather than the State's recovery.*" (emphasis added)). There is simply no

separation of powers issue created by the proper interpretation Section 1-7-150(B). Instead, a separation of powers issue is created by the Attorney General's use of State funds in contravention of the plain language of Section 150(B).

E. The Legislative History Relied Upon in the Court's Order Does Not Support the Court's Conclusion.

The lower court's analysis of the legislative history is off base, reaching a conclusion not supported by press coverage of the Reedy River Colonial Pipeline settlement or the legislative record. The Order fails to consider the obvious alternative intention of the legislature in passing Section 1-7-150. Indeed, the legislative history is far from "clear," much less "strong evidence" that the Attorney General's "authority remained in place unchecked" after the passage of Section 1-7-150. Order 5, 6.

The Court somehow concludes that "[p]ress coverage from the time makes it clear that the overarching purpose of the [Section 1-7-150] was to determine the disposition of proceeds from the settlement of the Reedy River oil spill—and not to impose a restriction on the on the powers of the Attorney General with respect to the payment of attorneys' fees." Order 5. Nothing about the press coverage suggests that the legislature intended anything other than the plain meaning of the statute.[2]

The legislative history of Section 1-7-85 that the Court cites as somehow supporting the Court's conclusion, in fact, supports Appellants' reading of Section 1-7-150. Pursuant to the proposed amendment to Section 1-7-85 that was not adopted, the State Budget and Control Board

---

[2] The copy of *The Greenville News* editorial submitted by the Attorney General was illegible as scanned and submitted to the Court. Attached hereto as **Exhibit A** is a legible copy of that editorial, which shows that the editorial spoke nothing at all about the provision in Section 1-7-150 requiring attorneys' fees to be awarded by court order or settlement. *See* Ex. A, Editorial, *Fighting for Reedy funds*, The Greenville News, Apr. 22, 1998, at 10A.

would have to approve any contract the Attorney General sought to enter for legal representation whether "on a contingent or other basis." That proposed amendment shows that the legislature was obviously concerned by the ability of the Attorney General to agree to contingency fee agreements on behalf of the State. The proposed amendment to Section 1-7-85 would have merely added another check on the Attorney General's ability to pay attorneys' fees to outside counsel—one in addition to that provided by the requirement that "costs of litigation [be] awarded by court order or settlement." S.C. Code Ann. § 1-7-150B).

That the legislature ultimately decided not to pass this additional check on the Attorney General's authority does not suggest that this Court should read out the other check on the Attorney General's authority to pay legal fees only when "awarded by court order or settlement." That simply makes no sense. The contrary conclusion makes far more sense—that the legislature was satisfied by the check on the Attorney General's ability to pay fees by requiring such payment be awarded by Court order or be paid directly by the defendants by settlement.[3] The Court did not consider or analyze this issue and instead merely incorporated this section of the Attorney General's brief in the Order.

CONCLUSION

Appellants respectfully request that this Court reverse the decision of the Circuit Court and remand the case with instructions to enter judgment as a matter of law for Appellants.

[3] The Law Firms argue in a footnote that the language in Section 1-7-150 requiring an award "by settlement" as an alternative to an award by court order means that the plain language of the statute is absurd. Accordingly, they argue that the Court should read out both provisions because otherwise they would "require the Attorney General . . . to obtain the approval of a settling defendant prior to . . . making payment pursuant to a binding fee agreement." What Respondents ignore is that in many cases brought pursuant to statutes with a fee-shifting provision, attorneys' fees are paid directly by the defendants. In those instances, it would make perfect sense for a settlement to award the Attorney General reasonable attorneys' fees paid directly by the defendants separate and apart from the recovery of the State.

Respectfully submitted,

s/James M. Griffin

James M. Griffin, S.C. Bar No. 9995
Badge Humphries, S.C. Bar No. 72904
GRIFFIN HUMPHRIES LLC
4408 Forest Drive, Suite 300
Columbia, South Carolina 29206
PO Box 999 (29202)
(803) 744-0800

James G. Carpenter, S.C. Bar No. 1136
THE CARPENTER LAW FIRM, PC
819 East North Street
Greenville, South Carolina 29601
(864) 235-1269

Attorneys for Appellants

Columbia, South Carolina
April 17, 2024