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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court Of Common Pleas
Daniel Coble, Circuit Court Judge

Appellate Case No. 2024-000065

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 ATTORNEY GENERAL

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STATEMENT OF ISSUES

1. Whether the Supreme Court limited its remand to the circuit court to the question of whether the Attorney General has the authority to enter contingency fee contracts.
2. Whether the Attorney General has the authority to enter contingency fee contracts and whether the Appellants have conceded that he has such authority.
3. Whether the circuit court judge properly found that the Attorney General has the authority to pay attorneys pursuant to contingency fee contracts without the approval of the Court, the deposit of the monies into the General Fund or a legislative appropriation.
4. Whether the legislative history supports the conclusion of the Court.
5. Whether separation of powers including the political question doctrine restricts the Court from inquiring into the matter of the fees.
6. Whether Appellants preserved the issues they raise as to S.C. Code Ann. §2-65-10, *et seq*. and Proviso 59.8, 2019 S.C. Acts 91, Part 1.B, § 59.8 (2019-2020 fiscal year), when Judge Coble did not address them and they failed to raise issues about them in their Motion to Reconsider, and whether these provisions are consistent with his decision.

STATEMENT OF THE CASE

This case challenges the authority of the Office of the Attorney General to use litigation settlement money to pay attorney's fees to two law firms pursuant to a contingency fee agreement for representation of the State in federal litigation over plutonium at the Savannah River Site. (See Record (R.) pp. * - agreement and amended agreement)

This action was commenced by a Summons and Complaint filed at 11:58 a.m. on September 25, 2020. R. p. *. The Complaint contended that the Attorney General lacked the authority to pay the fees absent authorization of the General Assembly or approval of a Court.

That pleading also contended that approval by the Executive Budget Office (EBO) was necessary. Plaintiffs filed their Motion for a Temporary Restraining Order and Temporary Injunction at 1:41 pm that day requesting that the Court enjoin the Attorney General from using any of the settlement money to pay the attorney's fees during the pendency of this action. R. p. * (Motion).

The Honorable Debra McCaslin held a virtual hearing regarding the motion on September 29, 2020.[1] R. p. * (Order of Sept. 29). At the hearing, counsel for the Attorney General informed the Court that the funds at issue had already been distributed to the law firms. Because Appellants contested that assertion, the Court issued an Order enjoining the Attorney General and the State Treasurer from distributing the disputed funds until the Court ruled on the Motion. *Id.* The parties then verified that the money had already been distributed prior to the hearing on the 29th. R. p. * (Order of McCaslin October 1).

On September 30, 2020, Appellants amended their Complaint to name the two law firms, Defendants / Respondents Willoughby & Hoefer, P.A. and Davidson, Wren & DeMasters, P.A. (Law Firms). R. p. *. On October 1, the Honorable Alison Lee issued a TRO against the Law Firms enjoining them from transferring the money wired to them until a hearing concerning the Motion for Preliminary Injunction. (R. p. *) Judge McCaslin vacated her Order on October 1, because of the confirmation that the money had been transferred prior to the hearing on September 29, and the issuance of the October 1, TRO. (R. p. *).

[1] Appellants' initial brief violates Rule 208(b)(1)(B) and (C), SCACR, by failing to include a Statement of the Issues and by inserting irrelevant, contested matter in the Statement of the Case. Rather than delaying this matter by moving to strike that brief, Respondent Attorney General inserts his own Statement of the Issues and addresses the contested matter in his Statement of Facts.

Following a hearing, Judge Lee issued an Order dated October 14, denying the Motion for Preliminary Injunction and dissolving the TRO. R. p. *. She concluded that the Plaintiffs lacked standing, but she also found as follows:

> Plaintiffs also have not shown a likelihood of success on their claim that the Attorney General lacked the authority to pay fees to W&H from the settlement proceeds. As noted above, S.C. Code Ann. §1-7-150 is unambiguous and allows the Attorney General to pay cost of litigation from the settlement proceeds. The statute does not require court approval for the payment of the fee, and the appropriate State Officers followed applicable law in disbursing the funds to meet the State's contractual obligation

R. p. * (Order at p. 13).

The Attorney General moved to dismiss the Amended Complaint (R. p. *) as did the Law Firms (R. p. *). The Attorney General's Motion was made on the grounds of lack of standing and his authority to contract with the attorneys and to pay them pursuant to State processes without judicial review of the fee, deposit into the general fund or an appropriation from the General Assembly among other defenses. R. p. *. Following a hearing, the Honorable Kirk Griffin granted the motions to dismiss. R. p. * (Order). He found Judge Lee's findings on lack of standing to be dispositive and required dismissal. Judge Griffin also found that he "concur[red] with and adopt[ed] Judge Lee's "well-reasoned analysis and findings." R. p. * (Order at p. 5).

Appellants appealed, and the Supreme Court reversed finding that "[t]here is a need for future guidance as to whether subsection 1-7-150(B) authorizes the Attorney General to enter into contingency fee agreements." *S.C. Pub. Int. Found. v. Wilson*, 437 S.C. 334, 342, 878 S.E.2d 891, 896 (2022) (R. pp. *, Opinion at pp. 1 and 6)

On remand, the Attorney General answered the Amended Complaint (R. p. *) as did the Law Firms (R. p. *). He contended that the Plaintiffs only had standing as to the issue of whether the Attorney General had the authority to enter contingency fee contracts. The Attorney General

maintained that he did have such authority and that he was not required by State law to obtain the approval of the Court or an appropriation from the legislature to pay the Law Firms the moneys they were due under the contract. He alleged that the EBO, Comptroller General, and the Treasurer all approved and processed the payment pursuant to applicable state law.

The Attorney General moved for summary judgment on (R. p. *) as did the Law Firms (R. pp. **). In his Memorandum in Support of the Motion, the Attorney General argued that Plaintiffs had conceded the Attorney General's authority to enter contingency fee contracts, which was the sole issue on remand. R. p. *. The Attorney General also asserted that, even if the Court had jurisdiction to consider other issues, he had express authority to pay the Law Firms without judicial approval, deposit into the General Funder or legislative appropriation.

Following a hearing on October 11, 2023, the Honorable Daniel Coble granted the Motions for Summary Judgement. R. p. *. He summarized his decision in the following Introduction to his Order:

> In *South Carolina Public Interest Foundation v. Alan Wilson*, the South Carolina Supreme Court remanded this case to this Court to answer the threshold question of "whether subsection 1-7-150(B) authorizes the Attorney General to enter into contingency fee agreements." 437 S.C. 334, 342 (2022). This Court answers that question in the affirmative. Based on the plain meaning of the statute, prior case law, and the Constitution, this Court holds that the Attorney General acted within his authority to enter into this fee agreement for several reasons. First, the plain meaning of the statute is clear – the Attorney General may enter into contingency fee agreements with private law firms. Second, the history, case law, and original intent and meaning of the statute decidedly hold that S.C. Code Ann. § 1-7-150 allows for these settlement agreements. Finally, and most importantly, the Constitution and the separation of powers doctrine requires this Court to exercise judicial restraint and not read into a law a judicial power which does not exist.

R. p. *. The Court denied Plaintiffs' Motion for Reconsideration. R. p. * (Order). This appeal followed.

STATEMENT OF FACTS

This case challenges the authority of the Office of the Attorney General to pay attorney's fees to the Law Firms pursuant to a lawful retainer agreement for representation of the State in federal litigation over plutonium at the Savannah River Site. R. pp. ** (Agreement and Amended Agreement). That case was settled in August 2020. The settlement agreement provided for the payment of the $600 million to the State of South Carolina with each party to pay its own costs and attorney fees. R. p. * (Settlement Agreement). The Agreement for Voluntary Dismissal filed on September 29, 2020, states that the settlement agreement required payment by the United States "to the State of South Carolina inclusive of amounts for interest, attorneys' fees and costs, which are reimbursed and awarded from payment of the settlement amount, and the State shall have no further claim against the United States for such fees and costs." R. p. * (Agreement). The statute under which settlement was reached provides for payment of funds to the State of South Carolina. 50 U.S.C. 2566. Under the retainer agreement, the funds were required by law to be paid to the Law Firms.

Appellants include an irrelevant, and very incomplete, chronology of the process for the payment of funds to the Law Firms. Emails and the affidavit of Kim Buckley, the Finance Director for the Office of the Attorney General in the Record show that the payment process was nearly complete prior to the filing of this suit at 11:58 a.m. on September 25, 2020, with approvals by the EBO and the Accounting Supervisor at the Attorney General's Office. See R. p. * Buckley affidavit and attachments). Emails also show that, contrary to Appellants' brief, counsel for the Attorney General never objected to the scheduling of the hearing on the Motion for a Temporary Restraining Order on September 29 and noted his availability then. R. p. * (emails among counsel and among them and the Court, September 28 cited in the AG's Designation). The transfer of funds by the

State Treasurer to the Willoughby & Hoefer firm was completed nearly 6 hours before the scheduled motion hearing. R. p * (Buckley affidavit and attachment). Counsel for Appellants reported that that the Treasurer's Office said that had it "was a standard transaction" and that the Treasurer's Office had "completed our ministerial duty as the statute requires." R. pp.** (Buckley affidavit and Griffin email Sept. 30, 2020, 9:27 am).

ARGUMENT

Three circuit court judges have found the arguments of Appellants lacking in merit or unlikely to succeed on the overarching issue in this case: the authority of the Attorney General to honor his contingency fee contracts and pay counsel for the State. Judge Lee found an no likelihood of success of merits on the issue, and Judge Griffin adopted her "well-reasoned findings and analysis." In a thorough opinion resting on multiple grounds, Judge Coble granted the Respondents' Motions for Summary Judgment on the merits.

Appellants' arguments defy not only the letter of the law, but common sense. When, as Appellants concede, the Attorney General has the authority to enter contingency fee contracts, he is bound to pay fees due under those contracts. Nothing in State law contradicts that authority. Indeed, until now, no one has seriously questioned the authority of the Attorney General to enter contingency fee contracts. On the contrary, the Attorney General's longstanding authority to enter into such agreements has been repeatedly recognized, and no state statute has altered, amended, or displaced that authority. The Orders of Judge Coble should be affirmed.

I

THE SUPREME COURT REMANDED THIS CASE FOR THE PURPOSE OF DETERMINING WHETHER THE ATTORNEY GENERAL HAS THE AUTHORITY TO ENTER CONTINGENCY FEE CONTRACTS AND THE CIRCUIT COURT PROPERLY FOUND THAT HE DOES

A

The Remand Was Limited to the Question of the Authority of the Attorney General to Enter Contingency Contracts

The Attorney General concurs in the briefs of the Law Firm Respondents on this issue pursuant to Rule 210(b)(6), SCACR.

B

Appellants Conceded and Judge Coble Properly Concluded That the Attorney General Has the Authority to Enter Contingency Fee Contracts

In earlier proceedings in this case, Appellants conceded the Attorney General's authority to enter contingency fee litigation contracts.. *See* also, Appellants' Brief at *. In response to a direct question from Judge Lee, counsel for Plaintiffs affirmed that the Attorney General may enter such agreements:

> THE COURT: Mr. Griffin, are you, are you, in essence, arguing that the attorney general's office didn't have the authority to enter into the fee agreement with ---
>
> MR. GRIFFIN: No, Your Honor.
>
> THE COURT: --- the defense?
>
> MR. GRIFFIN: I am not arguing that at all. I'm arguing that under this, the attorney general can enter into a fee agreement.

R. p. * (AG's MSJ Exs p. 19, l. 21 – p. 20, l. 3).

At the Supreme Court, Plaintiffs' counsel again confirmed that the Attorney General had

the authority to enter contingency agreements.

> Q 6:11 (Justice James): So Is it your position that every single contingent fee agreement that the Attorney General ever enters into with a private law firm or private attorney violates the law?
>
> A 6:23 (Carpenter): No. No.
>
> * * *
>
> Q 12:46 (Justice Kittredge): In reference to a question by Justice James, it appears to me that you do not oppose the general concept of the Attorney General retaining outside counsel in cases
>
> A 12:58 (Carpenter): Right.

R. p. * (Law Firm's MSJ Ex. 9, April Oral argument TR. 8:10-14; 14:12-16; 53: 20-25).

These concessions are binding and fatal to Plaintiffs' case. "The parties to a suit are bound by admissions, made by their attorneys of record, in open court, or elsewhere, touching matters looking to the progress of the trial."). *Pope v. Heritage Communities, Inc.,* 395 S.C. 404, 430–31, 717 S.E.2d 765, 779 (Ct. App. 2011), quoting, *Hall v. Benefit Ass'n of Ry. Emps.,* 164 S.C. 80, 83, 161 S.E. 867, 868 (1932). Accordingly, Plaintiffs are bound by their concessions as to the only issue on which the Supreme Court found standing and remanded, namely the Attorney General's authority to enter contingency fee agreements with outside counsel.

In particular, Appellants do not challenge the validity of the contingency fee agreement that the Attorney General entered with the law firms. See R. p. * Amended Complaint, Prayer for Relief. Given that the contract itself is unchallenged, it is binding and payments under it were required to be made.

II

THE CIRCUIT COURT PROPERLY FOUND THAT THE ATTORNEY GENERAL HAS THE AUTHORITY TO PAY ATTORNEYS PURSUANT TO CONTINGENCY FEE CONTRACTS WITHOUT THE APPROVAL OF THE COURT, THE DEPOSIT OF THE MONIES INTO THE GENERAL FUND OR A LEGISLATIVE APPROPRIATION

Although Appellants do not challenge the contract, itself, they in effect argue that its terms should be ignored and that the payments should be subject either to the approval of a Court or appropriation by the legislature. These arguments come close to being nonsensical because they would result in the breach of the unchallenged contract if the amounts authorized by the Court or the legislature were inconsistent with amounts due under the agreement. Fortunately, breach is not in the offing because South Carolina statutes do not require judicial approval or an appropriation as discussed below.

A

Statutes Support Judge Coble's Conclusion

Appellants erroneously claim that Judge Coble limited his analysis to whether the Attorney General has the authority to enter contingency fee agreements. Instead, he addressed the pertinent statutes and other authority head on as to payments. He properly found that, as "the State's chief legal officer, . . . [the Attorney General] properly exercised his authority to contract with the Law Firms to represent the State in its actions against the United States and to pay them pursuant to that contract from the settlement proceeds." R. p. * (Order at p. 4). In making this ruling, he relied on cases such as *Condon v. State,* 354 S.C. 634, 641, 583 S.E.2d 430, 434 (2003) ("the Attorney General has broad statutory and common law authority in his capacity as the chief legal officer of the State to institute actions involving the welfare of the State and its citizens, including vindication of wrongs committed collectively against the citizens of the State."). He also quoted from *Cooley v. S.C. Tax Comm'n*, 204 S.C. 10, 28 S.E.2d 445, 451 (1943) (recognizing "the wide scope of the

authority and duties of the Attorney General as the legal representative of the state and of its several administrative departments," including the authority to contract on a contingent basis in certain circumstances).

Having addressed the broad authority of the Attorney General at common law, Judge Coble addressed whether S.C. Code Ann. §1-7-150 limited his payment authority.[2] That statute provides as follows:

> 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.

§1-7-150(B).

He cited orders of two other circuit court judges who addressed the scope of this statute, *Cephalon v. Wilson*, Civil Action No. 2012-CP-400737 (June 6, 2014, Hon. G. Thomas Cooper – R. p. *) and *State v. Eli Lilly*, 2007-CP-42-1855 (Sept. 22, 2009, Hon. Roger L. Couch, R. p.) . R. p. * . As Judge Coble observed:

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[2] Judge Coble also referenced §1-7-85 but focused on §1-7-150. Section 1-7-85 provides

as follows:

> 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,

This statute does not lead to a different conclusion in this case. See also, *infra,* for legislative history.

> Judge Roger Couch, in *State v. Eli Lilly, . . .* also concluded S.C. Code § 1-7-150 "expressly authorizes payment of 'the costs of litigation' out of litigation proceeds and a 'cost of litigation' is certainly what legal fees are." He added, "Section 1-7-150 gives the Attorney General the right to withhold certain funds (investigative costs and costs of litigation) from the proceeds of litigation such as this." *Id*. Similarly, in *Cephalon, supra*, Judge Cooper concluded that "the costs of litigation include attorney fees, [§1-7-150(B)] expressly provides the Attorney General the authority to pay attorney fees to outside counsel and other costs of litigation from the proceeds of any judgment or settlement without those funds being first deposited in the general fund."

R. p. * (Order at p. *).

Appellants contend that §1-7-150(B) requires the litigation costs to be "awarded by court order or settlement" or deposited into the General Fund. Judge Coble rejected both limitations under the legislative history of the section and on grounds of separation of powers as discussed *infra.* Instead, the Attorney General may pay attorney's fees due under contingency fee contracts from settlement proceeds under his Executive powers without judicial approval or legislative appropriation.

B

The History and Application of §1-7-150 Supports the Court's Conclusion

The history surrounding §1-7-150 supports Judge Coble's conclusion. This history is relevant to any textual analysis of §1-7-150 for at least three reasons. First, "the cardinal rule of statutory interpretation is to ascertain and effectuate the legislative intent whenever possible." *Mitchell v. City of Greenville*, 411 S.C. 632, 634, 770 S.E.2d 391, 392 (2015). To effectuate this rule, courts must generally give statutes a "practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." *Id*. In doing so, courts may consider the "history of the period in which the statute was passed." *In re Hosp. Pricing Litig., King v. AnMed Health*, 377 S.C. 48, 54, 659 S.E.2d 131, 134 (2008).

Second, in applying the ordinary and popular meaning of a statute, courts must apply the ordinary and popular meaning of the statute as used by those who "framed and adopted" the statute. *See City of Charleston v. Oliver*, 16 S.C. 47, 52 (1881). Stated differently, this Court must consider the historical meaning of the statute, namely what the General Assembly thought the statute's words meant at the time it was enacted.

Third, if this Court concludes that the statute is somehow ambiguous, it may also look to legislative intent. *See Smith v. Tiffany*, 419 S.C. 548, 555, 799 S.E.2d 479, 483 (2017); *see also Reese v. Talbert*, 237 S.C. 356, 358 (1960) ("When the language of a constitutional amendment is of doubtful import, the object of judicial inquiry as to its meaning is to ascertain the intent of its framers and of the people who adopted it.").

The historical context surrounding the passage of §1-7-150 plainly demonstrates that the statute did not affect or alter the Attorney General's longstanding authority to enter into contingency fee agreements. At the time §1-7-150 was enacted, the Attorney General's authority to enter into contingency fee agreements was well established.

Just several years prior to §1-7-150's enactment, a blue-ribbon committee, led by Dean John Montgomery of the University of South Carolina Law School and prominent Columbia attorney I.S. Leevy Johnson, completed a study of the Attorney General's use of contingency fee contracts. The study found that "[s]ince at least the 1880's, the State of South Carolina has used private attorneys for a portion of the State's legal services . . ." and "[i]n appropriate cases, the Attorney General should consider contingent fee arrangements instead of an hourly rate." Report to the Attorney General of the Advisory Committee on Associate Counsel (1990), at 3, 11. According to the study, the need for outside counsel is essential to the function of the Attorney General in protecting the public interest and that "[t]he Attorney General has authority to make

such decisions as well as the obligation to monitor the cost and effectiveness of services provided by associate counsel." *Id*. at 13.

And just a few years after the enactment of §1-7-150, this Court recognized that the Attorney General, as the State's chief legal officer, must possess the power to "institute, conduct and maintain all such suits and proceedings as he deems necessary for the enforcement of the laws of the States, the preservation of order, and the protection of public rights." *State ex rel. Condon v. Hodges*, 349 S.C. 232, 239, 562 S.E.2d 623, 627 (2002).

Nothing in the historical record suggests that §1-7-150 was meant to alter, affect, or displace this authority. In fact, a separate proposal that would have required the state Budget and Control board to approve contingency fee agreements between the Attorney General and private law firms was considered as a part of the same appropriations bill but was included in a different section. *See* Section 18, 1997–98 General Appropriations Bill 4700, as passed by the House, https://www.scstatehouse.gov/sess112_1997-1998/appropriations1998/hp2p18.htm (adding §1-7-85 to require written approval from the State Budget and Control Board before the Attorney General may contract on a contingent or other basis for legal representation). And even that section was ultimately removed. *See* Section 18, 1997–98 General Appropriations Bill 4700, as reported by the Senate Finance Committee, https://www.scstatehouse.gov/sess112_1997-1998/appropriations1998/sf2p18.htm.

Instead, the historical record suggests that the overarching purpose of the statute was to determine the disposition of the proceeds from the settlement of the Reedy River oil spill—and not to impose a restriction upon the powers of the Attorney General with respect to the payment of contingency fees. The statute sought to ensure that such proceeds would benefit the Reedy River and would not be deposited in the General Fund, as would normally have occurred.

As chronicled by an editorial in *The Greenville News*, following the announcement of the settlement from the Reedy River oil spill, there was some confusion and legal uncertainty as to where the proceeds from the settlement would be sent. *See* “Fighting for Reedy funds,” *The Greenville News* (Apr. 22, 1998). R. p * (article)(“This apparent good news was quickly followed by confusion over the ultimate destination of the money from the settlement. The attorney general indicated the money might go into the state’s general fund, where it likely would be distributed for legislators’ pet projects all over the state.”). To address these concerns, the General Assembly acted to ensure that the settlement funds would go towards the cleanup of the Ready River. *See id* (“Last week the House of Representatives passed a joint resolution directing the settlement to the trust fund and tagging it for restoring the Reedy. It appears there’s also strong support in the Senate for ensuring any money recovered from Colonial Pipeline goes to the area where the environmental devastation occurred.”). The General Assembly’s efforts ultimately culminated in the enactment of § 1-7-150, which expressly carves out a requirement that “monies recovered for losses or damages to natural resources” be deposited into the Mitigation Trust Fund. S.C. Code Ann. § §1-7-150(B).

Thus, nothing surrounding the history of §1-7-150 suggests that the General Assembly intended for that section to constrain the Attorney General’s authority to enter into contingency fee agreements or pay attorney’s fees under those agreements. This Court should interpret §1-7-150 in light of this intent and conclude that the section in no way limits the authority of the attorney general as such. *See Greenville Baseball v. Bearden*, 200 S.C. 363, 20 S.E.2d 813, 816 (1942) (“It is a familiar canon of construction that a thing which is in the intention of the makers of a statute is as much within the statute as if it were within the letter. It is also an old and well-established rule that words ought to be subservient to the intent, and not the intent to the words.”); *see also*

Ingram v. Bearden, 212 S.C. 399, 410, 47 S.E.2d 833, 837 (1948) (noting that the "paramount consideration and controlling factor in the interpretation of a statute is the intent of the Legislature, and each enactment of the Legislature is to be construed in light of its own context.").

In the face of the longstanding authority of the Attorney General to enter into contingency agreements for the performance of legal work, it is worth emphasizing that §1-7-150 was enacted with no mention whatsoever of contingency contracts. Such complete silence will not be deemed to alter the continuous and longstanding authority of the Attorney General to contract with attorneys on a contingency fee basis. *See Antonio v. SSA Sec., Inc.*, 749 F.3d 227, 237 (4th Cir. 2014), *certified question answered*, 110 A.3d 654 (Md. 2015) (noting that the common law is not to be overturned "except by clear and unambiguous language"); *Town of Hilton Head Island v. Fine Liquors, Ltd.*, 302 S.C. 550, 553, 397 S.E.2d 662, 664 (1990) (noting that statutory silence does not create a conflict with prior law).

But even if this Court concludes that §1-7-150 was intended to address the Attorney General's authority to enter into contingency fee agreements, the section's plain language nevertheless allows for the payment of fees under those agreements. *See* S.C. Code Ann. §1-7-150(B) ("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.").

First, and as discussed in Judge Couch and Judge Cooper's prior orders referenced above, the section "expressly authorizes payment of 'the costs of litigation' out of litigation proceeds." R.

pp. * (Orders at pp. *); *see also* S.C. Code Ann. §1-7-150(B) (creating an exception for "investigative costs or costs of litigation awarded by court order or settlement"). As Judge Couch and Judge Cooper reasonably concluded, attorney's fees paid pursuant to a contingency fee agreement are considered costs of litigation and therefore, do not need to be deposited in the general fund.[3]

Additionally, §1-7-150 provides that if "some other disposition [of monies] is required by law," those funds need not be deposited into either the general fund of the State or the Mitigation Trust Fund. In this case, "some other disposition" was "required by law" because the contingency fee contract required the Attorney General to pay the attorney's fees directly to the private firm. A contrary construction could well raise constitutional concerns because legislative bodies generally lack the authority to appropriate private funds. *See Bd. Of Regents of Higher Ed. Judge*, 168 Mont. 433, 446–47, 543 P.2d 1323, 1331 (1975) ("However we emphasize that the power to appropriate does not extend to private funds received by state government which are restrict by law, trust agreement or contract."); *see also Com. ex rel. Armstrong v. Collins, 709 S.W.2d 437, 446–47* (Ky. 1986) ("[T]he General Assembly has no authority to transfer private funds to the

[3] Any potential argument that §1-7-150 requires the settlement document itself to award the payment of a certain fee should be rejected as leading to an absurd result. *See Ray Bell Constr. Co. v. School Dist. of Greenville Co.*, 331 S.C. 19, 26, 501 S.E.2d 725, 729 (1998) ("However plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention."). Such a construction would effectively make the Attorney General's authority to pay a contingency fee subject to the approval of defense counsel via the settlement agreement. Such a construction would not only be absurd but may very well be unconstitutional. *See State v. Long*, 406 S.C.511, 515, 753 S.E.2d 425,427 (2014) (rejecting attempt to interfere with power of the Attorney General). In any event, the "Agreement to Voluntary Dismissal of Appeal" filed with the Court of Appeals for the Federal Circuit constitutes such an award because it expressly states that the settlement agreement is "inclusive of amounts for interest and the State's attorneys' fees and other costs, which are reimbursed and awarded from payment of the settlement amount . . . ." R. p. * (Agreement for Voluntary Dismissal).

general fund . . . ."); *see also Gilstrap v. S.C. Budget & Control Bd.*, 310 S.C. 210, 216, 423 S.E.2d 101, 105 (1992) (describing the appropriation of "public funds" as a legislative function).

Here, the attorney's fees were the private funds or property of the law firm. *See Button's Estate v. Anderson,* 112 Vt. 531, 28 A.2d 404, 410 (1942) (noting that the attorney's fee "never legally and equitably belonged to the State as part of its public funds . . . ."); *see also Ex Parte Brown v. Howard*, 393 S.C. 214, 221, 11 S.E.2d 899, 902 (2011) (an attorney's services "constitute property" for purposes of the Fifth Amendment Takings Clause); *Foster v. Taylor*, 210 S.C. 324, 332, 42 S.E.2d 531, 535 (1947) (citing Button's Estate for the proposition that a constitutional provision applies to the funds of the public but "not another's"). As such, the General Assembly lacks any authority to appropriate those funds, and §1-7-150 should be construed to not require the deposit of those funds into the general fund of the State.

In short, both the text and history of §1-7-150 demonstrate that the section was not intended to impose any kind of limitation upon the Attorney General's authority to enter contingency fee agreements. Until now, no one has ever questioned the authority of the Attorney General to enter into such agreements. Indeed, the General Assembly has continued to appropriate hundreds of millions of dollars recovered by the Attorney General through the use of contingency agreements. This longstanding practice evinces a clear legislative intent to leave the authority of the Attorney General undisturbed.

C

Separation of Powers and the Political Question Doctrine Limit the Court's Authority to Inquire into the Subject of Attorney's Fees

As Judge Coble found:

The statute's history and plain meaning clearly place the authority of settlement contracts

> and litigation strategies with the executive branch, the Attorney General specifically. The General Assembly has given the Attorney General limited authority over handling of the money collected, not the judiciary. Twisting the reading of the statute to create a judicial power that does not exist would violate the basic tenants of separation of powers.

R. p. * (Order at page 9). The Court concluded that the General Assembly had given the authority to control settlements to the Executive and not to the courts.

Appellants fail in their attempt to turn separation of powers on its head by claiming that the payment of money to the firms amounts to an appropriation of public funds by the executive branch. This payment is most certainly not an appropriation because the Attorney General has the longstanding authority to enter contingency fee contracts, and under such contracts, pay the fees belonging to the Law Firms. As explained above, the General Assembly has never purported to alter, amend, or displace that authority. Indeed, proposals to limit that authority have been rejected.

Judge Coble rejected Appellants' interpretation of §1-7-150 because it would give the Court the power to adjust the contingency fee and thereby affect the monies going into the General Fund in contravention of the legislature's appropriation powers.

Judge Coble also found that the political question doctrine restrained the Court from reviewing the fee. As he stated,

> Another separation of powers issue that arises is the political question doctrine. This principle, "which derives from the separation of powers doctrine, excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of state legislatures or to the confines of the executive branch." *S.C. Pub. Int. Found. v. Jud. Merit Selection Comm'n,* 369 S.C. 139, 142 (2006). The South Carolina Supreme Court has held many times that courts must avoid political and nonjusticiable questions. *See S.C. Pub. Int. Found. v. Jud. Merit Selection Comm'n,* 369 S.C. 139, 142 (2006) ("The nonjusticiability of a political question is primarily a function of the separation of powers."). In determining whether or not a matter is a nonjusticiable "political question," our Supreme Court has held, "The fundamental characteristic of a nonjusticiable 'political question' is that its adjudication would place a court in conflict with a coequal branch of government." *S.C. Pub. Int. Found. v. Jud. Merit Selection Comm'n,* 369 S.C. 139, 142–43 (2006).

R. p. * (Order at p. 9). As to this matter, he found that "there is a law written by the General Assembly that has allowed for the executive to control these settlements and how they are allocated. See S.C. Code Ann. § 1-7-150(B). The General Assembly has not given this authority to the courts." R. p. * (Order at p. 13).

III

APPELLANTS FAILED TO PRESERVE ISSUES AS TO §2-65-10, *et seq.* AND PROVISO 59.8

Appellants challenge the relevance of §2-65-10,*et seq.,* and Proviso 59.8, 2019 S.C. Acts 91, Part 1.B, § 59.8 (2019-2020 fiscal year). Judge Coble did not rely on either statute, but they are consistent with his decision.

As noted above, prior to the filing of this action, the State EBO approved the withdrawal of attorney's fees from the settlement proceeds under S.C. Code Ann. §2-65-10 which states: "[a] state agency may receive and spend unanticipated federal funds, and funds from private foundations or industries, which are not included in the appropriations act, but state agencies must submit expenditure proposals to the board [the EBO (§2-65-15(4)] and receive authorization from the board before expenditure of funds." R. p. * (Buckley affidavit, at, p. 6). On appeal, Appellants take the position that this statute does not apply[4], but Judge Coble did not address it. Because Appellants did not raise that issue in their Motion to Reconsider, they have not preserved this issue for appeal. *Elam v. S.C. Dep't of Transp*., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004)(A party *must*

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[4] This position is a reversal from their original complaint in which they said "Defendant Wilson is prohibited from paying attorneys or otherwise spending these federal funds unless and until he receives authorization from the [EBO." R. p. * (Complaint at ¶28). When they learned that the Attorney General had obtained that authorization, they changed their position and contested the applicability of the statute.

file such a motion [to reconsider] when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review."(emphasis as in original)).

They also contend that the EBO approval was subject to review by the Joint Other Funds Oversight Committee, but Judge Coble did not address that question and it is not in their Motion to Reconsider so that issue is also not before the Court.

Appellants argue that Proviso 59.8 is immaterial, but this Court does not have jurisdiction to consider that issue because Judge Coble did not address the applicability of this proviso and Appellants did not preserve it in their Motion to Reconsider. Proviso 59.8 directed the Attorney General to deposit any funds that "otherwise" would go to the General Fund into a Litigation Recovery Account, as follows:

> (AG: Litigation Recovery Account) During the current fiscal year, when there is a recovery or an award in any litigation managed by the Attorney General, any funds received that would have otherwise been credited to the General Fund shall be deposited to the credit of a special account created in the Office of State Treasurer entitled "Litigation Recovery Account." The funds deposited in this account must be expended only as prescribed by law.

2019 S.C. Acts 91, Part 1.B, § 59.8 (2019-2020 fiscal year). The effect of this proviso was extended into the 2020-2021 fiscal year. 2020 S.C. Acts 135, § 2 (extending the effective dates of 2019 Act 91, Part 1.B. "until the effective date for appropriations made in a general appropriations act for Fiscal Year 2020-2021"); see also 2019 S.C. Acts 91 ("All acts or parts of acts inconsistent with any of the provisions of … Part 1B of this act are suspended for Fiscal Year 2019-20.").

Although issues regarding §2-65-10, et seq. and the above proviso are not properly before the Court, should this Court wish to address them, the Attorney General concurs in the legal arguments in the Law Firms' briefs on these provisions pursuant to Rule 210(b)(6), SCACR.

CONCLUSION

Case law, statutes and the South Carolina Constitution support the conclusion of Judge Coble that the Attorney General has the authority to enter contingency fee contracts and to use the proceeds of settlement to pay counsel without the necessity of the approval of the Courts or an appropriation by the General Assembly.

Respectfully submitted,

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