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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY

Daniel M. Coble, Circuit Court Judge

Appellate Court Case No. 2024-000065
Circuit 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 WILLOUGHBY & HOEFER, P.A.

John S. Simmons, S.C. Bar No. 10260
SIMMONS LAW FIRM, LLC
1711 Pickens Street
Columbia, South Carolina 29201
(803) 779-4600

Gerald Malloy, S.C. Bar No. 12033
MALLOY LAW FIRM
Post Office Box 1200
Hartsville, South Carolina 29551
(843) 339-3000

J. Todd Rutherford, S.C. Bar No. 12097
RUTHERFORD LAW FIRM, LLC
2113 Park Street
Columbia, South Carolina 29201
(803) 256-3003

Attorneys for Willoughby & Hoefer, P.A.

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INTRODUCTION

After nearly five years of litigation against the federal government across multiple federal fora, Respondent Alan Wilson, Attorney General for the State of South Carolina, executed a settlement agreement related to the State's claims against the U.S. Department of Energy (DOE) and the United States of America relating to the mixed oxide fuel fabrication facility (MOX Facility) at the Savannah River Site (SRS). That settlement was the result of the efforts of the Attorney General's litigation team, which included Willoughby & Hoefer, P.A. (W&H) and Davidson, Wren & DeMasters, P.A. ((DW&D), and together with W&H, (the Respondent Law Firms)). That $600 million settlement also secured the largest single upfront monetary recovery ever on behalf of the State in addition to significant other monetary and non-monetary binding and ongoing contractual commitments from the federal government inuring to the State's benefit.

The South Carolina Public Interest Foundation and John Crangle (collectively, the Appellants) were not involved in that litigation in any way, shape, or form. They did not challenge the Respondent Law Firms' retention agreements—which provided for a contingency fee arrangement requiring the Respondent Law Firms to bear all financial risk on behalf of the State—until success had been achieved and money flowed. Only after the Respondent Law Firms' efforts on behalf of the State succeeded in achieving an extraordinary and just result, fulfilling the terms of their contractual engagement, did Appellants then seek to insert themselves into this matter, publicly and shamelessly casting stones and disparaging the work and result in which they played no part, all for the sole purpose of attempting to hijack for themselves a portion of the fees earned by and paid to the Respondent Law Firms based upon factually meritless and legally non-justiciable contentions.

This Court should reject Appellants' ruse and affirm the order of the circuit court granting summary judgment. The attorneys' fees were paid to Respondent Law Firms pursuant to a valid and enforceable contract with the South Carolina Attorney General and in accordance with the expenditure laws enacted by the South Carolina General Assembly. The circuit court correctly considered this background and the issues in granting summary judgment in favor of the Respondent Law Firms on the basis that the Attorney General has the authority and power to enter into contingency fee agreements with private law firms; the pertinent statutory provisions provide for the payment of attorneys' fees as a cost of litigation under a contingency fee arrangement; and there is no separate and independent requirement that the Attorney General obtain judicial approval for the payment of attorneys' fees. In sum, as explained more fully below, the decision of the circuit court should be affirmed.

STATEMENT OF THE ISSUE ON APPEAL[1]

Does subsection 1-7-150(B) authorize the Attorney General of South Carolina to enter a contingency fee contract with a private law firm and then perform his duties and obligations under that contract without further action by the legislature or judiciary?

COUNTER STATEMENT OF THE CASE

Appellants instituted the underlying action against the State Attorney General on September 25, 2020. **(R. pp. ____)** (Complaint). Several days later, upon learning that the State had already paid the Respondent Law Firms the fee to which they were contractually entitled,

[1] The Appellants failed to set forth an issue on appeal, which is required under Rule 208(b)(1)(B), SCACR. For this reason alone, this Court should dismiss the appeal as the Appellants have failed to articulate an issue for review as required by the rule. *See* 16 S.C. Jur. Appeal and Error § 93 ("The initial brief **must** contain a statement of each of the issues presented for review…. Ordinarily, no point will be considered that is not set forth in the statement of the issues on appeal.") (emphasis added).

Appellants filed an amended complaint adding claims against the Respondent Law Firms in a shameless attempt to deny the law firms their rightfully earned attorney fees and to gain control of the fees for negotiating leverage. **(R. pp. ____)** (Am. Complaint). In the Amended Complaint, Appellants raised various arguments regarding the payment of attorneys' fees to the Respondent Law Firms pursuant to the litigation retention agreement entered between the Attorney General and the Respondent Law Firms. **(*Id.*)**. Appellants also filed a motion for temporary restraining order and preliminary injunction. **(R. pp. ____)**.

On October 14, 2020, Judge Lee denied the motion for preliminary injunction. **(R. pp. ____)** (Order Denying Plaintiffs' Motion for Preliminary Injunction Order (October 14 Order)). Appellants subsequently filed a motion to reconsider the October 14 Order, which Judge Lee denied on December 17, 2020. **(R. pp. ____)** (Order Denying Plaintiffs' Motion to Alter or Amend (December 17 Order)). On October 20, 2020, the Respondent Law Firms filed and served motions to dismiss. **(R. pp. ____)**. The Attorney General filed his own motion to dismiss on October 27, 2020. **(R. pp. ____)**. Following a hearing on January 26, 2021, the Honorable R. Kirk Griffin issued an order on March 5, 2021, dismissing the Amended Complaint. **(R. pp. ____)** (Order Granting Motions to Dismiss (March 5 Order)). Appellants filed a Notice of Appeal on March 29, 2021, appealing only from Judge Griffin's March 5 Order. **(R. pp. ____)**. On September 14, 2022, this Court reversed Judge Griffin's dismissal order, holding that Appellants have "public importance" standing as to the limited issue of the Attorney General's statutory authority to enter into contingency fee agreements with private law firms and remanded the case for resolution of the legal question of the "threshold issue of the Attorney General's statutory authority to enter contingency fee agreements with private law firms." *S.C. Public Interest Found. v. Wilson*, 437 S.C. 334, 342, 878 S.E.2d 891, 895 (2022).

On remand, the Honorable Daniel Coble conducted a hearing on the Respondents' motions for summary judgment. As directed by this Court, the circuit court evaluated the "threshold issue" and ruled that the Attorney General, as a matter of law, has the authority to enter into and perform on contingency fee contracts with outside counsel, and to inject judicial interference with the Attorney General's performance of his contracts, as Appellants were requesting, would violate the separation of powers doctrine. Judge Coble issued an order granting summary judgment on October 20, 2023. (Order, Oct. 20, 2023.)

Appellants filed a Motion to Reconsider on October 30, 2023. Judge Coble denied the Motion for Reconsideration on December 15, 2023. Appellants filed a Notice of Appeal from the October 20, 2023, order. On March 19, 2024, Appellants filed a Motion to Certify this appeal to this Court, and the Respondent Law Firms and Attorney General filed responses concurring that this matter should be certified for review. This Court certified this appeal for review on April 17, 2024.

FACTUAL BACKGROUND

It is important to consider how this lawsuit arose. In the underlying action, Appellants challenged the payment of attorneys' fees to private attorneys pursuant to the terms of a fully performed contingency fee contract. The fees were earned through the prosecution of four cases in three separate federal trial courts, three separate federal Courts of Appeal, and a petition to the United States Supreme Court, all of which contributed to and culminated in the ultimate settlement of a case filed by the State of South Carolina in the Court of Federal Claims. Only after a successful outcome had been achieved and the settlement funds were paid did Appellants, who had done nothing to generate this largest ever settlement for the State, appear on the scene asserting the outrageous claim that they were entitled to be paid a portion of the attorney fees.

Well before Appellants injected themselves, though, it should be remembered that the matter started with the State having a serious and real concern that the federal government was not going to fulfil its responsibilities and was going to shutter the MOX Facility at SRS, while not removing *any* plutonium from within the State as it was required to do if it decided to abandon the MOX program.

1. Origins of the challenge to shuttering the MOX Facility at SRS.

In March of 2014, after the Congressional delegation and then-Governor Nikki Haley asked the Attorney General to explore any legal avenues the State might have to address the pending injustice to the State through the shuttering of the MOX Facility at SRS, the Respondent Law Firms (or their predecessors) were hired to file an action in the District Court of South Carolina on behalf of the State to protect South Carolina's interests with respect to the MOX Facility. **(R. pp. ____)** (Sept. 16, 2020 Ltr. to The Honorable W. Jeffrey Young, Chief Deputy Attorney General, p.1). After the filing of a complaint on behalf of the State on March 18, 2014, followed by a motion for summary judgment on April 14, on April 30, DOE capitulated and directed the contractor to continue the MOX Facility construction, a monumental win for South Carolina and the many citizens working there. **(*Id.*)**.

However, the State understood the war was far from over. In particular, DOE had a pending statutory deadline of January 1, 2016, to remove one metric ton of defense plutonium from South Carolina. Remaining engaged and carefully following the issues associated with the MOX Facility, the Respondent Law Firms developed a comprehensive strategy focusing on litigation with DOE and briefed the Governor's Office and the Attorney General regarding that proposed and recommended strategy, which included the detailed work and diligent analysis required to prepare a draft complaint by the Respondent Law Firms to initiate the comprehensive strategy. **(*Id.*)**. This

strategy included a multi-front approach asserting claims for injunctive relief seeking the removal of the weapons-grade plutonium, while simultaneously advancing monetary claims against the federal government seeking to apply legal and financial pressure against it in an effort to incentivize either continuation of the MOX Facility or removal of the material from the State.

Political overtures by South Carolina were rebuffed, and then DOE missed the January 1, 2016, statutory deadline. Faced with the reality that DOE was ignoring its obligations to South Carolina, then-Governor Haley sent another letter to the Attorney General on January 26, 2016, transmitting a formal request that the Attorney General's office once again initiate litigation on behalf of the State of South Carolina against DOE. **(*Id.* at ____)**. The Attorney General hired the Respondent Law Firms to implement the comprehensive strategy that they had developed, including representing the State in litigation against the federal government related to the MOX Facility at SRS. The litigation retention agreement, as amended (Litigation Retention Agreement), with the Respondent Law Firms provided for a contingency fee arrangement tailored to the demands of this unique and specialized situation. The Litigation Retention Agreement provided that the Respondent Law Firms would assume 100% of the financial risk involved in the litigation, requiring them to advance all costs and work the hours necessary to execute the complex legal strategy in consideration of the contractual contingency fee, but only if successful. **(R. pp. ____)** (Litigation Retention Agreement). The State bore no risk under this arrangement; if the comprehensive strategy was successful, then the Respondent Law Firms would be paid according to the terms of the contract. If the strategy was unsuccessful, the Respondent Law Firms could not seek reimbursement of its costs or payment for anything.

2. Initiation of the litigation seeking removal of plutonium from South Carolina.

The Respondent Law Firms filed a complaint on behalf of the State against the federal government in the United States District Court for the District of South Carolina seeking the removal of one metric ton of weapons-grade plutonium from South Carolina and payment of the economic and impact assistance monies pursuant to 50 U.S.C.A. § 2566. **(R. p. ___)** (Sept. 16, 2020 Ltr. to The Honorable W. Jeffrey Young, Chief Deputy Attorney General, p.2). After substantial briefing and argument on multiple issues and motions, the District Court issued several orders (1) dismissing the economic and impact assistance payment (monetary) claim for lack of jurisdiction and directing that claim be made in the United States Court of Federal Claims as the proper forum, and (2) granting the State's injunctive relief claim and ordering the federal government to remove one metric ton of weapons-grade plutonium from the State. **(*Id.*)**. On February 2, 2018, the federal government appealed the judgment to the Court of Appeals for the Fourth Circuit. ***(Id.)***. After briefing and argument, on October 26, 2018, the Fourth Circuit affirmed the order requiring removal within two years (*i.e*., by December 31, 2019). **(*Id.*)**.

On November 30, 2018, the State of Nevada filed a lawsuit in the United States District Court for the District of Nevada against the federal government seeking to prevent the relocation of weapons-grade plutonium from South Carolina to Nevada. **(*Id.*)**. This was a significant issue, as there are less than a handful of sites in the United States capable of storing weapons-grade plutonium, and if Nevada was successful, the federal government could attempt to use that as the basis for an "impossibility" defense or other tactic to delay the removal of the one metric ton from South Carolina and to avoid future removal obligations. It was imperative that South Carolina protect its interest in the removal, and W&H—at the Attorney General's direction—represented the State in intervening in the Nevada case. **(*Id.*)**. The State of Nevada opposed South Carolina's participation in the case, and after further briefing by W&H, the court granted the State's motion.

(*Id.*). Nevada then sought a preliminary injunction to halt the shipment of the plutonium to Nevada from SRS and indicated that if the weapons-grade plutonium had left SRS, it could be returned. **(*Id.*)**. The court held an evidentiary hearing on January 30, 2019, and thereafter denied the motion for a preliminary injunction to stop the defense plutonium shipment, another win for South Carolina. **(*Id.*)**. Nevada then appealed to the Ninth Circuit Court of Appeals on February 4, 2019.[2] **(*Id.*)**. After briefing at the Ninth Circuit, the court dismissed the appeal as moot on August 13, 2019.[3] In December 2019, South Carolina's participation in the case ended with certain concessions, and the entire case was resolved in a settlement between Nevada and DOE shortly thereafter in 2020. **(*Id.* at 2-3)**.

Further, South Carolina learned in mid-2018 that the federal government was taking active steps to halt construction of the MOX Facility and planned to terminate the program. **(*Id.*)**. Once the construction was halted, there would be no turning back. In consultation with South Carolina's Congressional delegation and Governor, the strategy was developed for South Carolina to seek and obtain a preliminary injunction in order to defend South Carolina's position regarding the continuation of construction of the MOX Facility and maintenance of the status quo, which would provide the Governor an opportunity to zealously advocate to the Trump Administration for the MOX Facility to remain open. **(*Id.*)**. W&H again moved expeditiously on behalf of South Carolina, filing a complaint and requesting a preliminary injunction on May 25, 2018, in federal court in South Carolina. **(*Id.*)**. On June 7, 2018, the court granted the preliminary injunction and ordered the federal government to continue constructing the MOX Facility. **(*Id.*)**.

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[2] While the appeal was pending, Nevada said that the trial of this matter would take 14 days and sought unrestricted discovery. **(*Id.*)**. It also stated it had 15 witnesses to present. **(*Id.*)**. Accordingly, W&H, on behalf of South Carolina, prepared to litigate this matter in a full trial.

[3] On August 7, 2019, DOE notified the court that the one metric ton of plutonium had been removed from SRS. One-half metric ton was placed in Nevada and the other half in Texas.

The federal government then appealed the injunction regarding the continuation of the MOX Facility construction to the Court of Appeals for the Fourth Circuit. **(*Id.*)**. During this time, unsuccessful political efforts were made to negotiate a solution and then, on October 26, 2018, the Fourth Circuit ruled against South Carolina. **(*Id.*)**. The federal government quickly terminated the MOX Facility construction, justifying South Carolina's efforts to try and maintain the status quo, which had achieved temporary success by continuing the employment of hundreds of workers in the State.[4]

Continuing the effort to obtain the economic and impact assistance payments, South Carolina filed its first complaint in the Court of Federal Claims on August 7, 2017, seeking to recover $100 million, and amended the complaint in 2018 seeking an additional $100 million. **(R. p. ___)** (Sept. 16, 2020 Ltr. to The Honorable W. Jeffrey Young, Chief Deputy Attorney General, p.3). These claims were consolidated and briefing ensued. After unsuccessful settlement discussions, on August 20, 2019, the Court of Federal Claims ruled against the State, finding the lack of an appropriation by Congress to be fatal to South Carolina's claims for the economic and impact assistance payments. **(*Id.*)**. The Respondent Law Firms, on behalf of South Carolina, appealed that decision to the Court of Appeals for the Federal Circuit. **(*Id.*)**.

3. Settlement discussions finally bear fruit.

Beginning in January 2020, additional discussions were held between the respective counsel for DOE and the State, which were more promising and over months developed into a workable framework for possible resolution. While the political representatives of South Carolina

[4] It is worth reiterating that none of the foregoing lawsuits seeking injunctive relief had a monetary or damages component, meaning that, although W&H agreed to take on these actions on behalf of the State under the Litigation Retention Agreement, as amended, those actions did not provide an avenue for a corresponding increase in attorneys' fees but were of immense benefit for the State.

were updated on the progress of these discussions, these talks were led by South Carolina's legal counsel, including the Attorney General and W&H. **(*Id.*)**. Oral argument was held on May 5, 2020, in the Federal Circuit, following which settlement discussions recommenced in earnest. **(*Id.*)**. Accordingly, the case was stayed pending additional settlement discussions. After several more meetings, settlement discussions culminated in an agreement in principle on July 1, 2020, subject to further approvals and consultation with stakeholders including, on South Carolina's side, its political representatives. Governor McMaster, Senator Graham, and Congressman Wilson each indicated approval and acceptance of the agreement in principle. **(*Id.* at ____)**.

On August 28, 2020, a settlement agreement was executed providing for a payment of $600 million from the federal government's litigation "Judgment Fund,"[5] representing four years of accrued payments owed to the State, along with prepayment of two additional years according to the terms and conditions of the agreement. **(R. pp. ____)** (Settlement Agreement). On information and belief, it is the largest single upfront recovery ever by the State. The settlement further provided the federal government with a grace period to comply with an obligation to remove additional weapons-grade plutonium from the State while still maintaining the ability of the State

[5] The Judgment Fund is a permanent, indefinite appropriation of the federal government which is available to pay judicially and administratively ordered monetary awards against the United States, including amounts owed under compromise agreements negotiated by the DOJ in settlement of claims arising under actual or imminent litigation under appropriate circumstances. 31 C.F.R. § 256.1. Respondent Law Firms' idea to seek payment out of the Judgment Fund allowed payment to the State without reducing the operating budget for SRS, *see* discussion *infra* n.6, and without the need for a specific appropriation from Congress.

to force removal[6] and receive additional payments[7] should the federal government not comply.[8] **(*Id.*)**. The federal government submitted the settlement payment to the State, and the agreement for voluntary dismissal was jointly filed by the State and the federal government with the Federal Circuit on September 29, 2020. **(R. pp. ____)** (Agreement to Voluntary Dismissal of Appeal [wherein DOJ agreed and stipulated as a condition of dismissal that "[t]he settlement agreement dated August 28, 2020, incorporated herein by reference, required, amongst other terms, the United States to make an immediate payment to the State of South Carolina, *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*, and the State shall have no further claim against the United States for such fees and costs."] (emphasis added)).

4. Payment of Attorneys' Fees for the work done on behalf of the State.

For the fees in the litigation against the federal government, the Litigation Retention Agreement between the Attorney General and the Respondent Law Firms—which was first

[6] The 15-year removal period for the remaining 9.5 metric tons of weapons-grade plutonium–an amount that was declassified because of the litigation–was calculated by multiplying 9.5 times the 19 months it took to remove the one metric ton DOE was ordered to remove.

[7] The rationale for the grace period on payment was that the source of funds for the economic and impact assistance payments changed in 2022 from "available appropriations" to "funds available to the Secretary," which likely meant that any payments to the State would have to be made from the appropriated operating budget for SRS, which would be detrimental to SRS's operations and contrary to the State's desire to improve, rather than impair, missions at SRS.

[8] The 12.5% contingency is calculated against the immediate cash settlement payment and does not allocate any of the fees to the additional benefits the Respondent Law Firms secured on behalf of the State for the removal of one metric ton of plutonium and the agreement to remove 9.5 additional metric tons or pay the State the additional sum of $1.5 billion. In other words, should the State receive additional payments from the federal government under the terms of the settlement, the Respondent Law Firms will receive no additional compensation under the Litigation Retention Agreement; nevertheless, these benefits are significant, real, and measurable. Notably, based on recent briefings from DOE to the State regarding the current schedule for removal, the State may be entitled to approximately an additional $750 million in penalties and payments as DOE currently is only on pace to remove half of the plutonium by the 2037 deadline.

entered into in 2016 and was later amended to account for the additional litigation matters that were requested of W&H to be brought on behalf of the State—utilizes a decreasing percentage scale based on the amount of the recovery for two cases and flat percentages of recovery for two other cases. Based on the amount of the settlement negotiated with DOE, the attorneys' fees under the agreement, including costs and expenses, are $75,000,000. These fees represent 12.5% of the upfront settlement amount recovered on behalf of the State by the Respondent Law Firms.[9]

Following receipt of the settlement amount from the federal government, the State Attorney General approved payment of the attorneys' fees owed to the Respondent Law Firms pursuant to the Litigation Retention Agreement. **(R. pp. ____)** (Oct. 1, 2020 Affidavit of Kimberly Buckley, Finance Director for the Office of Attorney General (filed with the circuit court on Oct. 6, 2020)). The payment was approved by the Executive Budget Office (EBO) of the Department of

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[8] Belying any claim that such arrangement is "unreasonable" or "unconscionable," 12.5% is on the low end of standard contingency fee recovery percentages, and certainly less than an innumerable amount of recovery percentages approved by Court orders of this state including, for instances, the attorneys' fee percentages approved by South Carolina courts in the two recent settlements involving the V.C. Summer nuclear plant litigation, including one *against* the South Carolina Public Service Authority. *See also Condon v. State*, 354 S.C. 634, 643, 583 S.E.2d 430, 435 (2003) (finding competent evidence to support an award of attorneys' fees on a common fund created *against* the State in the amount of 28% of the fund in a "case that took 10 months to settle [and] achieved a good result … including securing prospective enforcement of a tax exemption" in circumstances where counsel "took the risk of not earning any fee at all").

As part of the proceedings before Judge Lee, W&H introduced the affidavits of Professor Nathan Crystal, Professor John Freeman, Professor Michael Virzi, and Peter Protopapas, Esquire, all recognized experts in the field of legal ethics and all of whom testified that the 12.5% fee paid is reasonable. **(R. pp. ____)**. In contrast, Appellants did not submit any expert testimony or any other evidence in support of their contention that the fee is unreasonable. The inability of Appellants to produce any contrary opinion is hardly surprising given the results obtained, which went beyond simple enforcement of 50 U.S.C. Section 2566; rather, these results obtained immediate payment of $600 million from a Federal funding source not provided for in that statute and created new, contractual obligations on the part of the Federal government with respect to the removal of weapons grade plutonium from South Carolina and payment of additional penalties of up to $1.5 billion for its failure to do so – all without further recompense to the Law Firms. Rather than "seem[ing] patently unreasonable" as Appellants contend without any support (Br. App at 2), the 12.5% is patently reasonable as demonstrated by the testimony of noted experts.

Administration and was thereafter authorized by the Comptroller General and Treasurer in the normal course. **(*Id.*)**. The State then made a wire transfer to W&H for $75 million for the attorneys' fees and costs owed under the Litigation Retention Agreement and as contemplated by the dismissal filed in the Federal Circuit. **(*Id.*)**.

STANDARD OF REVIEW

In reviewing a motion for summary judgment, this Court applies the same standard of review as the trial court. In other words, for purely legal matters, the appellate court may make its own interpretation and ruling, and for matters requiring a factual determination, there must be a genuine issue of material fact proven. *Kitchen Planners, LLC v. Friedman,* 440 S.C. 456, 892 S.E.2d 297 (2023). Inferences asserted by a party that are not reasonable or are offered to create an issue of fact that is not genuine are insufficient to defeat a motion for summary judgment. *Id.*

ARGUMENT

I. The circuit court correctly determined that the Attorney General has the constitutional, statutory, and common law authority to enter into contingency fee agreements.

As this Court stated in its Opinion finding that Plaintiffs had limited "public importance" standing: "Plaintiffs' complaint presents a *threshold issue of the Attorney General's statutory authority to enter contingency fee agreements with private law firms*." *S.C. Public Interest Found. v. Wilson*, 437 S.C. 334, 342, 878 S.E.2d 891, 895 (2022) (emphasis added). The circuit court answered that question **in the affirmative,** noting that the Attorney General's authority to represent State interests originates in the Constitution, statutes, and the common law. South Carolina courts have repeatedly emphasized that the Attorney General of South Carolina is the State's chief legal officer with broad authority to direct and control the State's legal affairs. This Court noted in *Cooley v. South Carolina Tax Comm'n*, 204 S.C. 10, 28 S.E.2d 445, 450 (1943),

that "[t]he office of Attorney General is created by the Constitution." The various statutes relating to the Office of the Attorney General demonstrate the "wide scope of authority and duties of the Attorney General as the legal representative of the state and of its several administrative departments." 28 S.E.2d at 451. *Cooley*, recognizing the creation of the Office of Attorney General by the state Constitution, as well as the broad powers of the Office, concluded the Attorney General had the authority to settle that case.

In *State ex rel. Condon v. Hodges*, 349 SC. 232, 562 S.E.2d 623 (2002), this Court again addressed the question of the Attorney General's statutory and inherent common law authority as the State's chief legal officer. In *Condon*, the Court confronted the issue of the Attorney General's power to enforce the Constitution and laws of the State in the context of the improper or illegal expenditure of public funds. There, the Court stated that "[a]s the chief law officer of the State, [the Attorney General] may, in the absence of some express legislative restriction to the contrary, exercise all such *power* and *authority*, as public interests may from time to time require, and may institute, conduct, and maintain all such suits and *proceedings* as *he deems necessary for the enforcement of the laws of the State,* the *preservation of order,* and the *protection* of *public rights." Id.,* 349 S.C. at 239, 240 (emphasis added) (internal citations omitted). And in *Condon v. State*, 354 S.C. 634, 641, 583 S.E.2d 430, 434 (2003), this Court reiterated that "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." *See also State v. Southern Ry. Co.*, 82 S.C. 12, 62 S.E. 1116 (1908) (the Supreme Court expressing disbelief that it was the

Legislature's intent to deny the Attorney General "the power and responsibility of conducting the litigation according to his judgment").[10]

Notably, Appellants have not disputed that the Attorney General has the authority to enter into contingency fee agreements with private law firms. In particular, at the oral argument before this Court, Appellants' counsel made the following admission:

> JUSTICE JAMES: So, is it your position that every single contingent fee agreement the Attorney General enters into with a private law firm or private attorney violates that law?
>
> MR. CARPENTER: No, no.
>
> ---
>
> JUSTICE KITTREDGE: In reference to a question from Justice James, it appeared to me that you do not oppose the general concept of the Attorney General retaining outside counsel in cases ---
>
> MR. CARPENTER: Right.
>
> ---
>
> MR. CARPENTER: We're not – we're not attacking contingency fees….

(R. pp. ____) (April Oral Arg. Tr. 8:10-14; 14:12-16; 53:20-25).

Entirely independent, however, from Appellants admission to this Court that they do not challenge the legal authority of the Attorney General to hire private lawyers, there is simply no credible question but that the Attorney General has the authority to enter into contingency fee agreements and that this authority has been exercised for decades. Not once has the General Assembly done anything to reject or dispute this power of the Attorney General to enter

[10] South Carolina Circuit Judges have recognized this legal framework and ruled accordingly. Thus, as Judge Cooper found in *Cephalon v. Wilson*, Civil Action No. 2012-CP-400737 (June 6, 2014), "[t]he Attorney General possesses the authority to associate outside attorneys to assist with enforcement actions … and to pay those outside attorneys on a contingency fee basis with money received in any settlement or judgment obtained in the case."

contingency fee contracts, demonstrating that the General Assembly agrees that the Attorney General has this authority. The General Assembly is fully aware of this lawsuit and is fully aware that it received for appropriation the sum of $600 million less the payment of attorney fees in the amount of $75 million or a net amount of $525 million. With that knowledge the General Assembly has taken no action to intervene in this lawsuit or to make any change in the application of subsection 1-17-150(B) by the Attorney General. Why? Simply because the Attorney General's application of his authority under subsection 1-17-150(B) is consistent with the General Assembly's legislative intent and as Judge Coble so found. ("[N]othing surrounding the history of S.C. Code Ann. § 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 to limit his authority to pay attorney fees under those agreements.). Accordingly, the circuit court ruled correctly that the Attorney General, as the State's chief legal officer, properly exercised his authority to contract with the Respondent Law Firms to represent the State against the United States and to pay the contractually required attorneys' fees from the settlement proceeds.

II. The circuit court correctly determined that S.C. Code Ann. § 1-7-150 provides for the payment of attorneys' fees as a cost of litigation under a contingency fee arrangement.

Although there is no real dispute that the Attorney General can enter into contingency fee agreements with attorneys representing the State and that the contingency fee agreement at issue here required payment of the Attorneys' Fees to the Respondent Law Firms, Appellants nevertheless claim that Respondent Law Firms are not entitled to any of their contractual fee. Appellants' primary contention is that S.C. Code Ann. § 1-7-150 precluded the Attorney General from paying the fee earned by the Respondent Law Firms pursuant to the Litigation Retention Agreement and instead required the Attorney General to deposit the entirety of the MOX settlement funds, including the Respondent Law Firms' fees, into the General Fund.

This contention is wrong as a matter of law. Appellants' reading of § 1-7-150 is not consistent with the statutory language. Further, even assuming without conceding that Plaintiffs' reading is correct, ***none*** of the MOX settlement funds were required to be—nor were they—deposited into the General Fund because § 1-7-150 was superseded by a proviso in the State budget, which directed any litigation recovery funds that "otherwise" would go to the General Fund be deposited in a separate account.

A. Section 1-7-150 provides that the costs of litigation, which in this instance includes attorneys' fees, are available to be paid under a settlement.

Section 1-7-150 provides: "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 ... where some other disposition is required by law*." (Emphasis added). The Attorney General's actions comply with § 1-7-150 and the funds representing the attorneys' fees were not required to be deposited in the General Fund.

Simply put, attorneys' fees are a cost of litigation contemplated by § 1-7-150. Because the Attorney General retained outside counsel to prosecute these cases, as he was authorized by law to do, the contractual legal fees are a "cost[ ] of litigation" that the Attorney General is authorized to pay. It also cannot be disputed that the fees paid to the Respondent Law Firms were "awarded by settlement." The "Agreement to Voluntary Dismissal of Appeal" filed with the Court of Appeals for the Federal Circuit and executed by all parties to the federal litigation specifically states that the settlement payment 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*

and the State shall have no further claim against the United States for such fees and costs ...." (**R. pp. ____**) (Agr. to Voluntary Dismissal of Appeal (emphasis added)).

In matters involving attorneys' fees, "other costs" is not a statutorily defined phrase, nor is there specific case law that defines what it means or includes.[11] In the absence of a definition, it is appropriate to consider the usual and customary meaning of the words. As an adjective, "other" can be defined as "additional."[12] In interpreting "State's attorneys' fees and other costs" to discern its meaning, it is clear that the "state's attorneys' fees" and "other" are adjectives modifying "costs." State's attorneys' fees are not a separate and distinct type of "expense incurred in a judicial process,"[13] but rather one type of cost incurred when considering additional litigation expenses.[14] The use of "and" instead of "or" is also indicative that "state's attorneys' fees" are to be included

[11] Judge Couch, in *State v. Eli Lilly*, 2007-CP-42-1855 (Sept. 22, 2009), 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." Similarly, in *Cephalon, supra*, Judge Cooper concluded that "the costs of litigation include attorneys' fees, [§1-7-150(B)] expressly provides the Attorney General the authority to pay attorneys' 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."

[12] *Other,* Merriam-Webster, https://www.merriam-webster.com/dictionary/other (last visited June 6, 2024).

[13] *Cost*, Merriam-Webster, https://www.merriam-webster.com/dictionary/cost (last visited June 6, 2024).

[14] The South Carolina "Eminent Domain Procedure Act", § 28-2-30(14) defines "litigation expenses" as the "reasonable fees, charges, disbursements, and expenses necessarily incurred from and after service of the Condemnation Notice, *including, but not limited to, reasonable attorney's fees*, appraisal fees, engineering fees, deposition costs, and other expert witness fees necessary for preparation or participation in condemnation actions and the actual cost of transporting the court and jury to view the premises." (Emphasis added). While the issue before the Court is not related to a condemnation action, it is instructive that that General Assembly included attorneys' fees in a list of types of litigation expenses.

as a cost and not a separate type of expense. In other words, the attorneys' fees are a cost of the litigation under the settlement agreement that was the basis for the stipulated dismissal.

Furthermore, § 1-7-150(B) exempts from its coverage monies "where some other disposition is required by law." The fulfillment of valid and binding contracts entered by the State's Chief Legal Officer and approved by the EBO is a disposition "required by law." Further, S.C. Code Ann. § 1-7-85 expressly provides that "the Attorney General may obtain reimbursement for its costs in representing the State in … civil and administrative proceedings. These costs may include, but are not limited to, *attorney fees*…." (Emphasis added.)

Appellants' contentions, therefore, have no support in the plain language of the statute. The payment of the fees to the Respondent Law Firms by the Attorney General required by the Litigation Retention Agreement and confirmed in the settlement with the federal government therefore fits squarely within the plain language of § 1-7-150(B). And Appellants have provided nothing to refute this. They simply disregard it and hope this Court does too as their goal is to be paid for doing nothing and the interest they seek to advance is their own.

B. A budget proviso provides that all monies should be deposited into a litigation account and NOT the general fund.

Even assuming without at all conceding that Appellants' interpretation of § 1-7-150(B) is somehow correct, that interpretation is irrelevant because Proviso 59.8 precluded the Attorney General from transferring ***any*** funds to the General Fund and instead directed him to deposit those funds in a separate account:

> (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).[15] This proviso was in effect at the time of the Attorney General's receipt of the settlement funds and payment to the Respondent Law Firms of the fees owed pursuant to the Litigation Retention Agreement. (**R. pp. ____**) (Attachment to Buckley Affidavit, September 25, 2020 EBO Email ("It has been approved. Per proviso 59.8 the balance should be deposited in the Litigation Recovery Account.")); 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* 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."); *see Beaufort Cty. v. S.C. State Election Comm'n*, 395 S.C. 366, 374, 718 S.E.2d 432, 436 (2011) (holding that a budget proviso that conflicts with a permanent statute suspends the statute for the period during which the proviso is effective). Because Proviso 59.8 suspended the requirements of § 1-7-150(B) with respect to funds that "otherwise" would go to the General Fund, Appellants' argument is simply wrong and the circuit court should be affirmed.

C. Complying with the contract is a legal prescription.

The Attorney General's compliance with a lawful contractual obligation to pay the attorneys' fees constituted a "disposition required by law" and an "expend[iture] … prescribed by law" because the Attorney General complied with all prerequisites to authorize a distribution of money. Specifically, the EBO approved the payment of the contract fees as it was expressly authorized to do by the General Assembly. 2020 S.C. Acts 135, § 7 ("The Executive Budget Office is authorized to approve agency requests for federal and other fund authorization adjustments.");

[15] Furthermore, showing the clear intent of the General Assembly that the Attorney General correctly followed its mandate with the deposit of the litigation settlement and payment of attorneys' fees in this case, this same proviso was continued in 2021, 2022 and 2023. *See* 2021 S.C. Acts 94, § 59.8; 2022 S.C. Acts 239, § 59.8; 2023 S.C. Acts 84, § 59.8.

see S.C. Code Ann. §§ 2-65-10, *et seq*. Moreover, the Treasurer's Office processed the payment for the attorneys' fees pursuant to a warrant from the Comptroller General, as the law requires. (**R. pp. ____**) (Am. Compl., ¶ 74 & Exs. 18, 19.).

Indeed, because both the Attorney General—who is the Chief Legal Officer of the State and is specifically charged with administering § 1-7-150—and the EBO—who is responsible for overseeing the expenditure of funds in this State—approved and authorized the payment of the attorneys' fees, the agencies charged with administering this statute determined that the payment of the fees was authorized pursuant to the statute. *See Kiawah Development Partners, II v. S.C. Dep't of Health & Envtl. Control*, 766 S.E.2d 707, 718, 411 S.C. 16, 34 (2014) ("[O]ur deference doctrine provides that courts defer to an administrative agency's interpretations with respect to the statutes entrusted to its administration"). Because both the plain language and the reasonable interpretation of the applicable statutes support the Attorney General's payment of the fees, Appellants' claims fail as a matter of law.

Appellants claim that the EBO did not have authority to approve the payment of the contract fees and that an additional approval by the Joint Other Funds Oversight Committee of the General Assembly was required. Br. of Appellant at 14-16. Appellants rely on an affidavit from one member of the General Assembly, Senator Nikki Setzler, in purported support of these contentions. However, the simple fact is that Appellants are wrong. The General Assembly expressly provided the EBO with complete authority to approve requests like the Attorney General's payment request ***without*** seeking any additional approvals. *See* 2020 S.C. Acts 135, § 7 ("The Executive Budget Office is authorized to approve agency requests for federal and other fund authorization adjustments."). But another member of the Oversight Committee, more familiar with its workings, affirmed that the EBO had full and complete authority to approve any request on

behalf of the Committee. (**R. pp. ____**) (Rep. Leon Stavrinakis Aff. ¶6 ("[T]he Executive Budget Office has full and complete authority to approve agency requests for other fund authorization adjustments without any action or review by the Joint Other Funds Oversight Committee…. [A]ny authority of the Joint Other Funds Oversight Committee has been delegated to the [EBO]."). This explains why Senator Setzler could only state that no application for payment of the fees was submitted to the Joint Other Funds Oversight Committee. By law, it was not required.[16]

And in this case and as stated supra, it is noteworthy that the General Assembly appropriated the $525 million from the settlement, with no objections or concerns about the $75 million paid in attorneys' fees. *See* 2022 S.C. Acts 239, § 118.19 (72). If the General Assembly had a concern with the fees, it would have taken action to address the concern. But it has taken no action whatsoever other than to appropriate for use the net amount of $525 million.

In short, consistent with the exercise of authority by the current Attorney General and many of his predecessors, the Attorney General has the statutory authority to enter and fulfill contingency fee agreements with private law firms. The Attorney General entered a valid contract, and no additional approval from the General Assembly is necessary to fulfill the terms of the contract.[17]

[16] Moreover, it is notable that the Appellants included allegations that of a violation of the oversight statute in the original complaint, but in the subsequently amended complaint removed all these allegations. In effect, the Appellants understood this argument was specious, but then lobbed it into the fray again later just to see if they could shake some money loose from Respondent Law Firms.

[17] Indeed, legislative interference, and there has been none, with the contract would create claims by the Respondent Law Firms for breach of contract and unjust enrichment, among other claims, that could result in the payment of the contractually obligated fees and perhaps other damages as well

III. The circuit court correctly determined that the Attorney General is not required to obtain judicial approval of the Litigation Retention Agreement or the fees paid.

Contrary to Appellants' contention that the Attorney General should be required to obtain judicial approval of the attorneys' fees payments, there is no contractual or statutory provision or any other mechanism that imposes a requirement or establishes a process for the Attorney General to obtain judicial approval of his own contract or the fees paid thereunder. Although the Litigation Retention Agreement contains a general and discretionary provision regarding judicial approval of the fees when possible, that provision is optional for the Attorney General and does not constitute a requirement that he obtain judicial approval. **(R. p. ____)** (Litigation Retention Agreement at p.9 (stating only that "[w]hen possible, the attorneys' fees and costs awarded to Special Counsel shall be approved by a Court of competent jurisdiction.")). Thus, Appellants' argument that approval is mandatory by contract is directly contradicted using the prefatory condition "when possible" and renders such argument inapposite.

More to the point, given that the parties to the Litigation Retention Agreement—the Attorney General and the Respondent Law Firms—agree on the payment of the fee, a declaratory judgment would not be available because there would be no live controversy affording jurisdiction to a trial court, and Appellants' attempts to stand in the shoes of the Attorney General to create a claim where none otherwise exists is unavailing. The settlement reached between the State and the federal government also did not require court approval,[18] and there is no common law requirement that the Attorney General seek judicial approval of his contracts. In short, as a matter of statutory and common law, there is nothing requiring the Attorney General to seek judicial approval of the fees earned by the Respondent Law Firms under the Litigation Retention Agreement. Thus, in this

[18] However, the stipulated filing, adopted by the Federal Circuit, acknowledged the attorneys' fees were a cost of litigation and obligation of the State.

instance, approval of the attorneys' fees is not possible under the existing constitutional and statutory framework.

Appellants not only ask the Judiciary to usurp the statutory powers of the Attorney General, but also seek to force the State to breach its contract with the Respondent Law Firms after the contract has been fully performed by all parties. Appellants cite to no authority—because there is none—that would allow the Judiciary to take such drastic action and create additional litigation against, and potential liability to, the State.

IV. The circuit court correctly determined that, based on the constitution and applicable statutory law, the Attorney General, as an Executive of the State, can enter into a contingency fee contract and fulfill its terms, and reading extra-statutory requirements into the process by which the Attorney General handles the litigation on behalf of the State violates the separation of powers doctrine.

As discussed above, the actions taken to fulfill the contract fall squarely within the prescriptive measures of the legislature and any additional actions by the legislature to interfere with the contract would create claims. The judiciary may certainly review matters to ensure compliance with applicable law, but it lacks the authority to rewrite contracts entered into by the executive or interfere with determining whether the contract has been performed to the satisfaction of the executive, which is, however, exactly what the Appellants seek to have the court do here. The Appellants transparent ruse was to disparage the results obtained by and the efforts, diligence, and creativity of the Law Firms in a self-serving attempt through subterfuge to gain unwarranted leverage against the Respondent Law Firms to accede to a resolution creating monetary benefits for Appellants for doing absolutely nothing. This Court should not countenance this greenmail ploy. The Attorney General as an executive of the State, *see* S.C. Code Ann. § 1-1-110, has authority to enter contracts. He did so. Inherent in this authority is the ability as well as the good faith obligation to fulfill the terms of the contract and, when fully performed to his satisfaction, to

pay the consideration required under the contract. In this case the Attorney General did just that, and in doing so, secured the approval of the Executive Budget Office (Governor), State Treasurer, and Comptroller General (all members of the executive branch). While the Attorney General has the sole legal obligation to ensure the terms of his contract are faithfully fulfilled, in doing so in this case, he carefully checked all of the administrative boxes within the executive branch, to compensate the Law Firms for the undeniably outstanding results achieved in accordance with the terms of the Fee Retention Agreement. So if the question is did the Attorney General follow appropriately the internal administrative procedures within the executive department to process the payment to the Law Firms, then the indisputable answer to that question is "yes."

As Judge Coble held, if an affirmative answer to the Appellants' argument is not found in the constitution or the statute or common law, then the judiciary lacks the ability to rewrite the law as a legislature to create the result in the executive that the Appellants want. That is the hallmark of the separation of powers doctrine.

CONCLUSION

For the reasons explained above and those determined by the circuit court, this Court should affirm the decision of the circuit court.

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,

John S. Simmons, S.C. Bar No. 10260
SIMMONS LAW FIRM, LLC
1711 Pickens Street
Columbia, South Carolina 29201
(803) 779-4600
jsimmons@simmonslawfirm.com

s/ J. Todd Rutherford
J. Todd Rutherford, S.C. Bar No. 12097
RUTHERFORD LAW FIRM, LLC
2113 Park Street
Columbia, South Carolina 29201
(803) 256-3003
todd@therutherfordlawfirm.com

Gerald Malloy, S.C. Bar No. 12033
MALLOY LAW FIRM
Post Office Box 1200
Hartsville, South Carolina 29551
(843) 339-3000
gmalloy@bellsouth.net

Attorneys for Respondent Willoughby & Hoefer, P.A.

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