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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable Benjamin H. Culbertson, Circuit Court Judge

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

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Sunset Lodge, LLC, .....Appellant,

v.

Town of Pawleys Island,.....Respondent.

and

Franklin D. Beattie, as trustee of the Franklin D. Beattie Preservation Trust, .....Appellant,

v.

Town of Pawleys Island,.....Respondent.

and

M. Baron Stanton, .....Appellant,

v.

Town of Pawleys Island,.....Respondent.

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**APPELLANTS' REPLY BRIEF**

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M. Baron Stanton
STANTON LAW OFFICES, P.A.
P. O. Box 245
Columbia, SC 29202
803-929-1484
ATTORNEY FOR APPELLANTS

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## I. Preliminary Summary

The three "Landowners" contest the confusion and gross inadequacy of the circuit court's award of attorney's fees and expenses to them after the second time the Pawleys Island town council unsuccessfully attempted to take the Landowners' property for zero compensation, based on information known by the whole council to be false.[1]

In response to the second set of condemnation suits by the Town, the Landowners filed the instant three independent actions seeking to stop the new attempts and seeking other appropriate relief. They thereafter amended and expanded their complaints. However, the Landowners did not get to finish. In February 2021, the Town unilaterally withdrew its second set of suits and the Circuit Judge, over the Landowners' objections, later dismissed the Landowners' instant Challenge II actions as moot, and halted discovery against the Town. S.C. Code Ann. §28-2-510(C) mandates an award of attorney's fees when a would-be condemnor abandons a condemnation attempt, regardless of whether the condemnor is winning or losing at the time.

The Landowners requested some, but not nearly all, of the fees they incurred in only

[1] This same council of Henry, Holliday, Green, Carter and Zimmerman has referred to knowingly basing the condemnation suits on material false information as a "procedural" defect. Yet, in its brief at 19, the Town asserts, "In any condemnation challenge action there are only a limited number of grounds for the challenge – fraud, bad faith, or abuse of discretion."

While this assertion is incorrect, the instant three actions do include such unpopular grounds. About three years before the fee ruling appealed herein, the same Circuit Judge denied the Town's motion contesting the sufficiency of the allegations of the three Challenge I complaints. Later in Challenge I, another circuit judge granted summary judgment against the Town, and set forth five pages of factual findings, which were not appealed. (4/5/21 order at 6-12, R.pp.693-699.)

The summary judgment order does not address all delicts alleged in Challenge I, nor the new and additional delicts in Challenge II.

Challenge II. They broke their fees into segments for pre-"abandonment," immediately post-"abandonment," and pursuit of recovery of fees. They submitted a low hourly rate and proposed to divide the total of all time spent by three. The Circuit Judge awarded the Landowners some, but not all, of the fees and other expenses requested, grossly shorting the Landowners, in particular, on the fees incurred in trying to recover their fees. The Town did not appeal.

The Town's Respondent's Brief is largely not responsive to the points in the Appellants' Brief. The arguments by the Town arise in varying order and often recur, but can be categorized or grouped as follows:

- Opposition to now unopposable already established rulings of fact and law:
    - The Town opposes award of any fees at all, basing its opposition on the timing of the fee application, which the Town argued was "jurisdictional."
    - The Town opposes award of any fees at all to Landowner Stanton, basing its opposition on the fact that he was also the attorney for the three Landowners.
    - The Town opposes the amount of fees awarded for the pre-"abandonment" time which was 100% awarded by the judge. The Town incorrectly contends the time was spent on work which was uncomplicated, not time-consuming, and unnecessary.[2]

- Substitution of the above pre-"abandonment" fee analysis for analysis of the requested fees incurred during other parts of the case:
    - 7.4 hours of additional "fees-for-merits" time incurred during the short, 29-day period of time immediately following the putative abandonment.
    - Substantial time devoted to pursuing recovery of fees, i.e., "fees-for-fees" time incurred during the 8 ½-month period after the Landowners' counsel began preparing the fee petition in September 2022.

- Forcing an already error-loaded fees-for-merits type of analysis onto the consideration of an award of fees for fees, which does not share the same facts and attributes, is supposed to be more automatic and straightforward, and does not ordinarily involve such an analysis.

- Infusing virtually all categories and levels of argument with a barrage of additional legal errors, misnomers, omissions of material facts, and confusions of concepts:

[2] Not all fees incurred were requested. The appeal is for shorting the Landowners on the fees requested, not on all the fees which were incurred.

- Still failing to adequately distinguish between the inapplicable statute, section 28-2-510(B) and the applicable statute, section 28-2-510(C).
- Forcing the application of the inapplicable statute and applying factors which do not apply or applying factors when none apply.
- Continuing to misapply section 28-2-510(B), Revels[3] (which discusses 510(B) and Jackson), and Jackson.
- Arguing fee award considerations from the perspective of hindsight without saying so, instead of from the legally correct perspective of looking forward with no crystal ball at the time the decision was made to incur the time and fees.
- Stating the standard of review, but not arguing in accordance with a standard which precludes affirmance of matters for which there is no support in the record, which are the product of obvious confusion, or which are guided by an erroneous conception of law.
- Arguing for support in the record from inadmissible, unreliable, and legally incorrect lawyer-affidavits.
- Continuing to present, without authority, the fallacy that production of actual bills is a requirement in all fee applications.
- Perpetuating confusion of what the submitted time was specified to have been incurred for, and masking failure to address the time for which fees were actually requested.
- Arguing, without authority, the erroneous proposition that "proportionality" is required between fees for fees and fees for merits.
- Arguing erroneously that fee applications in South Carolina should be conducted as "penalty" proceedings weighted against a disfavored applicant, based upon infinite scrutiny, picking, and selective employment of nonlegal sliding-scale concepts like the concept the Town refers to as "block billing."
- Arguing that a "burden of proof" in an attorney's fee application would justify a judge charged with making a fair award in simply knowingly making a glaringly inaccurate or even capricious award.
- Arguing that a "burden of proof" in an attorney's fee application relieves a judge charged with making a fair award from understanding the law applicable to the circumstances, from making inquiry to clear up confusion of facts, and from making inquiry to obtain additional information he or she believes is needed in order to properly consider the request and the award.
- Arguing that fees requested in the instant matter should be offset by imagined fees not charged to another similar matter, simply because the other matter was related.
- Absurdly arguing that fees awarded to the other two Landowners in their separate cases should be reduced by fees awarded to Stanton in his separate case.

- Stipulating that upon a reversal of the Circuit Judge, the place to determine additional

[3] This Reply Brief has a table of authorities, but to a large extent, continues the short citation forms from the opening Appellants' Brief. Other short forms of reference are continued as well.

fees incurred in this Court in continuing to pursue recovery of fees is not in this Court, but in the circuit court on remand.

**II. There was "jurisdiction."**

The Town argues in its brief at 23-25, that the Landowners are entitled to no fees at all, because the Circuit Judge had no subject matter jurisdiction to rule on the fee applications the Town had previously stipulated the Landowners could make.

The Town so argued in the circuit court. The issue was briefed, a separate hearing was held, the issue was presented again at the final hearing, and the argument was rejected.

When subject matter jurisdiction is raised to a court, ruled upon, and not appealed, the matter is concluded. Friedman v. State, 53 Misc.2d 955, 278 N.Y.S.2d 999 (Ct. Cl. 1967), and see Watkins v. Hodge, 232 S.C. 245, 247-48, 101 S.E.2d 657, 658 (1958)(refusing to consider jurisdictional matter of underlying case where issue had been ruled upon and not challenged on appeal). The Town's argument is precluded under the law of the case.[4]

[4] Determinations of law and fact in an appealable order which is not appealed are binding on the nonappealing parties in later proceedings in the same action as the law of the case. See Cannon v. Georgia Attorney General's Office, 397 S.C. 541, 725 S.E.2d 698 (2012); see generally Jones v. Lott, 387 S.C. 339, 692 S.E.2d 900 (2010)(stating an unchallenged or unappealed ruling, whether right or wrong, is the law of the case); Judy v. Martin, 381 S.C. 455, 674 S.E.2d 151 (2009); see also Bakala v. Bakala, 352 S.C. 612, 576 S.E.2d 156 (2003) (holding that a family court judge could not overrule the prior unappealed order of another family court judge because it had become law of the case). See also In re Morrison, 321 S.C. 370, 468 S.E.2d 651 (1996)(noting that an unappealed ruling becomes the law of the case and precludes further consideration of the issue on appeal); Cooper Tire & Rubber Co. v. Perry et al., 261 S.C. 538, 201 S.E.2d 245 (1973)(holding that where a ruling on a demurrer to complaint is not appealed from, it becomes the law of the case); Watkins v. Hodge, 232 S.C. 245, 247-48, 101 S.E.2d 657, 658 (1958)(refusing to consider jurisdictional matter of underlying case where issue had been ruled upon and not challenged on appeal); Hurst v. Sumter County, 189 S.C. 376, 1 S.E.2d 238 (1939)(noting the general rule in civil cases that issues must be raised at the earliest opportunity, or they will be considered waived); Salley v. McCoy, 186 S.C. 1,195 S.E. 132 (1937)(holding the conclusions announced in a prior appeal would not be disturbed in a subsequent appeal); Howard v. Roberson, 376 S.C. 143, 654 S.E.2d 877 (Ct. App. 2007)("The determination that Lawhorn was not liable is now the law of the case"); and First Union Nat'l Bank of S.C. v.

The Town's characterizations of the simplicity of the work and time spent on the fee application are sheer fabrication. The Judge's adoption of them was similarly without any basis. The Town asserts that the fee application was garden variety, "should have been straightforward" (Town brief at 7 and 16), was uncomplicated, should have been handled in a "handful of hours" (Town brief at 18), and should have been handled from start to finish in nine (9) hours (Town brief at 17).

The jurisdictional arguments alone have the obvious capacity to consume well over nine hours in running each assertion to ground.[5] It is difficult to understand how the Circuit Judge

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Soden, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998)("The unchallenged ruling, right or wrong, is the law of the case and requires affirmance").

[5] The 4/22/21 Form 4 stated that the order "does not end the case," and that "additional matters, including any attorney fee petition, may precede final dismissal of the action." The 4/22/21 formal order also stated: "At this time, discovery is limited to any claim that may be submitted for attorney fees or costs." The 6/3/21 Form 4 denying the Landowner's motion to reconsider further reiterated that the order "does not end the case," and that "the issue of litigation costs remains pending."

The Landowners cooperated in the Town's months-long effort to correct a perceived error in the 6/3/21 Form 4. Thereafter, in October 2022, they made their fee request, although the fee request did not include any of the time for cooperating in resolving the Town's appeal. The Town contends the fee request was made too late.

The cases were still on an active roster on April 3, 2023 and were noticed for hearing 4/17/23. There was no intention to end the case and there was no lack of power to award fees.

Citing Pitman v. Republic Leasing, 551 S.C. 429, 570 S.E.2d 187 (Ct. App. 2002), the Town argues that "Rule 54(d)" requires a fee application to be filed within 10 days of "final judgment."

Rule 59(e), SCRCP, the actual rule relied upon in Pitman, only starts a jurisdictional 10 days running from the date of receipt of written notice of entry of a judgment sought to be altered, and Rule 54(d), relied upon by the Town, only starts a nonjurisdictional 10 days running from the date of receipt of written notice of entry of a final judgment. Rule 54(a) defines a "judgment" as a decree or order. However, Rule 54(a) is further limited in effect and definition by Rule 54(b). The orders of dismissal of the challenge actions, however denominated, specifically stated that the matter was still open for the purpose of determination of fees, and were not judgments for purposes of any cutoff under Rule 59(e) or 54(d). Rule 54(b), SCRCP.

In its brief at 24, the Town argues that, in appealing the "mootness" dismissal, the Landowners "necessarily tak[e] the position that the judgment was final." They do not. While not disposing of all claims and not ending the case, see Rule 54(b), SCRCP, the order involved

the merits, affected a substantial right, and refused an injunction, and was appealable for any of those three reasons. S.C. Code Ann. §§14-3-330(1),(2), and (4).

All the orders and Form 4s indicated specifically that the case was not ended, except for a later erroneous Form 4 with the wrong box checked. The Circuit Judge later corrected that Form 4 as described in the Statement of the Case.

The Town argues that under Pitman, the fee request under section 28-2-510(C) was late, and that the circuit court had no power to hear it. Yet, section 510(C) states no deadline. Pitman turned on the Frivolous Civil Proceedings Sanctions Act's specific reference to a requirement that in certain listed circumstances, sanctions in the form of fines, fees or nonmonetary measures be requested, if not earlier in the case, "at conclusion of the trial." Pitman was an effort to construe the specific statute there at hand, the FCPSA, not section 28-2-510(C) or the judge's order or the Town's stipulation.

Pitman relied on Rule 59(e), not Rule 54(d), the rule argued by the Town. To construe the FCPSA's stated time limitation in a case which has ended under specifically listed circumstances, Pitman relied on the time in which a party is allowed under Rule 59(e) to move to "alter or amend" a "judgment." While Pitman appears to overlook some problems as discussed below, Pitman applies to what Pitman describes as a "post-trial motion for sanctions," not the taxing of attorney's fees and other special costs, and not a request for litigation expenses under section 28-2-510(C).

Perhaps because the concern of the FCPSA is sanctions and the statute described a time limitation for specific listed circumstances, Pitman borrows a ten-day deadline from Rule 59(e) instead of from Rule 54(d), as the "intent" of the FCPSA to say something it did not say. However, Pitman's further reasoning that the timing requirements it borrowed then also became "jurisdictional," at least outside the specific circumstances of Pitman, is questionable. Since, for several other reasons, Pitman has no application here, its reasoning is addressed only briefly.

Pitman recognized that the FCPSA specifically indicated a timing requirement but stated it incompletely and imperfectly as "at the conclusion of the trial." The statute would appear to be actually most often invoked after a successful Rule 12 or summary judgment motion without a trial, although it would not be impossible for the statute to be invoked at the conclusion of a trial if no motion for summary judgment were ever made.

In common legal parlance, motions made "at" conclusion of trial are motions for JNOV and new trial under Rules 50 and 59(b) and are referred to as "post-trial motions," and they come with specific unmovable time limits. Because motions under Rules 52, 59(e) and 60 deal with orders and have similar unmovable time limits, they are also sometimes accurately referred to as "post-trial motions" in a more generic sense, even if not following an actual trial.

In a confusing syllogism, Pitman used this same phrase in more than one way. The Town readily employs this misnomer in its arguments at 24.

In Pitman, since the Court of Appeals borrowed the 10-day deadline under Rule 59(e) as the deadline, and since the Court of Appeals regarded Rule 59(e) as a "post-trial motion," and since time limits for "post-trial motions" are "jurisdictional," and since the motion under the FCPSA could be made after trial, the Court of Appeals reasoned that the motion under the FCPSA was also a "post-trial motion" and that the time limit for it was therefore also "jurisdictional."

However, "post-trial motions" sometimes only refers to motions for JNOV and to alter or amend under Rules 50, 52 and 59, and, less commonly, to re-open under Rule 60. What makes

the deadlines for these particular motions jurisdictional is not the mere fact that they are "after a trial." The Rules of Civil Procedure themselves make those particular deadlines jurisdictional, replacing former statutes. See Rules 6(b), 50, 52 and 59, and Rule 6(b), Reporter's Note.

Rule 6(b) only excepts from the ability of the court to extend a deadline, the time for taking action under Rules 50, 52, 59, and 60. If one were proceeding under the Rules of Civil Procedure as a prevailing party, a request for fees ordinarily would be made pursuant to Rule 54(d), relied on by the Town, which is not excepted from Rule 6(b) and not "jurisdictional." The similar rule and deadline in federal court is also not jurisdictional.

Not every deadline is jurisdictional. Ordinarily, an application for attorney's fees is not governed by Rule 59 as an alteration of judgment. Taxing costs (including fees, when allowed), for example, is not "altering or amending a judgment" and the South Carolina Rules of Civil Procedure so provide. Rather, the court retains the jurisdiction to enter costs. A judgment preceding the taxation of costs is not regarded as a matter to be altered or amended, because, under the Rules, specifically, the entry of judgment is "not to be delayed for the taxing of costs," Rule 58(a).

It is doubtful that the derived deadline for a motion under the FCPSA is jurisdictional. It is clear that motions for fees are not jurisdictional. The fact that a Rule 54(d) motion and other motions are not among the enumerated motions the time for which is not extendable under Rule 6(d) likely escaped notice in Pitman because Pitman was concerned with sanctions, not attorney's fees per se.

More importantly, and independently, the subject statutory entitlement to litigation expenses does not arise originally in the instant actions and therefore would not be concluded if they were concluded. The entitlement to fees arises, rather, in the commenced, but unfiled, condemnation actions the Town abandoned, but the Town stipulated that the fees could be applied for in the instant separate challenge actions. The bulk of the expense the Landowners incurred because of the condemnation actions was indeed the legal expense for the challenge actions, but the entitlement to fees arises in the condemnation actions. This can be a little complicated and confusing.

Other conceivable avenues for recovery of fees arising under the condemnation actions might have included bringing yet another independent action in equity for the fees. Also conceivable might have been filing Rule 15(d) supplemental complaints in the challenge actions -- which the South Carolina Rules of Civil Procedure do not limit to a "challenge" -- to seek abandonment fees. A third conceivable avenue would have been for the Town, with the Landowners' consent, to file the commenced, but as yet unfiled, condemnation actions, and have the Landowners make their fee applications therein.

But the Town unilaterally volunteered a stipulation to the circuit court, which the court included in its orders, that the Landowners could seek their fees from the "abandoned" condemnation actions in the Landowners' instant independent actions.

The "notices of abandonment" which the Town's lawyer prepared were what ended the condemnation actions. In a condemnation action, however, a "notice of abandonment," is not a "judgment." After creating a procedural quagmire and stipulating that the Landowners could seek their fees in the instant cases, the Town should not be allowed to now argue that the Landowners were expected to file a separate action in equity to recover their attorney's fees.

To the extent there had been some general, tacit, unusually-reasoned deadline in all cases to apply for fees within 10 days despite orders stating that the case was not ended and was

could have read the parties' arguments and concluded that the Landowners counsel either did not do any work or did plenty and was required to do it all for free. The order vacillates between these two contradictory implications, neither of which is sound.

**III. The pro se fees were recoverable and were a bargain at a low hourly rate and one-third of the resulting total, the Town was estopped to contest them after stipulating to their recovery, and the judge's unappealed ruling allowing them to be recovered is binding on the Town as the law of the case.**

In its brief at 26, the Town argues that the Circuit Judge erred in awarding fees to Stanton because, while Stanton was one of the three Landowners, he was also the attorney of record for the Landowners. Each of the other two Landowners also was either also an attorney or had an attorney as a principal. Under an express agreement, Stanton's professional corporation, Stanton Law Offices, P.A., which employed him, billed Stanton and each other Landowner for a one-third share of the actual fees incurred[6] by the three Landowners at a low hourly rate. (4/14/23 Transcr. p.15, lines 15-20, R.p.310.)

The Town's arguments over pro se fees are similarly now irrelevant. This issue was actually first raised to the Circuit Judge in a brief by Stanton, not by the Town. Stanton raised it pursuant to Rule 3.3(a)(2), SCRPC, Rule 407, SCACR.

The Landowners' counsel brought the issue up again at oral argument since the Judge had said he would not read the submissions before hearing. (See R.p.305, line 15-p.312 line 7.) The

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continued for discovery on fees, the circuit court's main order of dismissal extended that time under the authority of Rule 6(b) to enlarge time. If there was any doubt, the Circuit Judge's 3/9/23 and 6/8/23 orders did so as well. This aspect also was presented to the Circuit Judge by the Landowners in their brief to him opposing the Town's numerous objections to the fee request.

[6] The Town argues in its brief at 26 that the fees were not "incurred," because Stanton informed the Circuit Judge that the fees had been billed to him in the same regular fashion they had been billed to the other Landowners, but that Stanton had not yet paid the bill to Stanton's professional corporation. A debt is "incurred" when it is owed, not when it is paid.

Town contended there that the pro se fees were not recoverable. (4/14/23 Transcr. p.33, lines 6-8, R.p.328.) The judge directed the lawyers to submit proposed orders, but gave no instructions as to the ruling or other desired contents. The Landowners' counsel addressed the issue in a proposed order submitted that day. (4/14/23 proposed order, R.pp.855-866.)

The Town did not include the issue in the proposed order the Town submitted to the Circuit Judge. (4/28/23 proposed order, R.pp.867-880.) Stanton brought this to the Circuit Judge's attention in an e-mail on April 28, 2023 and copied the Town's counsel. (4/28/28 e-mail, R.pp.882-884.) The Circuit Judge determined that Stanton would be awarded fees. That ruling is now the binding law and fact as against the Town under the doctrine of the law of the case.[7]

In addition to this argument being not preserved because not appealed by the Town, the argument would be without merit even if the Town had preserved the issue. The circumstances are different from those in the Calhoun case only now cited by the Town. Here, an agreement with clear terms was made in advance and actual bills were prepared and sent in the regular course. The Landowners' counsel, already working at a low hourly rate, but many hours, incurred a real and substantial actual expense, by personally assuming one-third of the charges to each of the other two Landowners. The fee statute in question has a very broad definition of litigation expenses and a different policy basis than fee shifting in family court.

The Town's argument contradicts the Town's previous arguments to the same Circuit Judge in persuading him to dismiss the Landowners' Challenge II cases as "moot." There, the Town persuaded the judge that the ability of the Landowners to obtain attorney's fees in the event of abandonment was sufficient protection of the Landowners against being subjected to

[7] See the footnote hereinabove regarding the doctrine of the law of the case.

multiple suits by the Town. See Appellants' Brief at 9, 25, 26, and 38 n.7 for more detail. The Town had thus previously argued that fees were accessible to all the Landowners, including in these three Challenge II actions, in which the Landowners had obvious substantial sunk litigation costs. The Town so argued while the Town was stating an intention to sue the Landowners for the same thing for a third time.

The Town then unilaterally stipulated in its earlier "mootness without prejudice to suing again" brief, that all Landowners could seek fees. The Circuit Judge included the stipulation in the order that he signed, granting the Town relief the Landowners objected to.[8]

Were the Town not precluded by the law of the case, the Town would also be precluded by stipulation and estoppel. It is difficult to understand how the Circuit Judge could have followed the arguments in the circuit court, reviewed the Landowners' counsel's work, and concluded that the Landowners counsel either did no work or did plenty but was required to do so for free. The order vacillates between these two contradictory implications, neither of which is sound. Any assertion by the Town that the work in the case was not, in fact, time-consuming is preposterous.[9]

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[8] Judicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation. Cothran v. Brown, 357 S.C. 210, 592 S.E.2d 629 (2004). Five circumstances are generally necessary: (1) two inconsistent positions must be taken by the same party or parties in privity with each other; (2) the positions must be taken in the same or related proceedings involving the same parties or parties in privity with each other; (3) the party taking the position must have been successful in maintaining the first position and must have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent. Id.

All these requirements are present here, except that Appellants note the doctrine is generally confined to positions as to "facts," as opposed to legal arguments. The assertion that the fees are recoverable is a statement of the Town's willingness to allow, and not oppose, recovery, and is factual.

[9] On page 7 of the Town's brief, the Town argues that the Circuit Judge's award of fees to Stanton, a separate litigant, should be a reason to deny recovery by the other litigants of some of the fees they actually incurred. This is patently absurd.

**IV. The primary fees at issue on appeal are not the fees for the hours the Town devotes the majority of its brief to; the primary issues are the fees for the short period immediately following the putative abandonment, and the substantial fees resulting from the time later spent pursuing recovery of fees; the fees for the 57.5 hours worked before the putative abandonment were 100% awarded, are not a direct issue, and are not contestable by the Town, who did not appeal the award.**

In the majority of its brief, at 4, 7, 13, 14, 15, 16, 18, and 19, the Town merely echoes the Circuit Judge's perplexing recitations that time spent before the February 10, 2021 "abandonment" was spent on matters that were simple in concept, unsophisticated, not cumbersome to manage, not time-consuming, limited in number and duration, and facilitated by prior work.[10] They thus unfairly imply, but never state, that the hours submitted for times when

[10] To the contrary, putting aside other incidental work and activities which occurred, the record reflects that the following occurred before the putative abandonment: (i) receiving and reviewing three new sets of condemnation lawsuits presented by the Town without prior notice on the morning of commencement of a deposition, each dealing with a different owner and property, and each consisting of approximately 11 pages containing notices under arcane procedure with averments, deadlines, admonishments, unexplained backdating, dense proposed conveyancing documents in which the owner had no input, additions of legally argumentative text to passages previously averred to be unchangeable, and plats prepared without the owner's permission or input; (ii) implicitly consulting with the persons sued; (iii) noting immediate special deadlines imposed; (iv) having exchanges with the Town's counsel on acceptance of service of such papers when Challenge I was still proceeding apace and a statutory stay was in effect in the preceding condemnation attempts by the Town, and then accepting service; (v) analyzing and charting the video recording of the sham 10/12/21 council meeting of Mssrs. Henry, Holliday, Green, and Carter and Ms. Zimmerman, at which, sham materials were discussed and at which, such additional suits were required to be, but were not, publicly deliberated upon and authorized; (vi) quickly preparing three sets of challenge actions with 60-page complaints, exclusive of the exhibit; (vii) arranging for service during a pandemic after the Town would not accept service; (viii) sending three notices of deposition of the deceptive town administrator (Fabbri) then employed by the town council (but who no longer works for the town), who was never deposed because the judge dismissed the actions and barred discovery over the Landowners' objection; (ix) receiving and reviewing three inadequate answers to the complaints, in which answers, the Town frivolously denied 90% or more of the substantive allegations of the complaint; (x) composing and sending three sets of incisive interrogatories which the Town never answered because discovery was stopped; (xi) researching, fact-checking, compiling and drafting three 375-paragraph amended complaints (exclusive of exhibits) detailing in accordance with Rule 9(b), the alleged fraudulent activities and motivations of the Town; and (xii) receiving a notice unilaterally prepared by the Town in which the Town arrogated the right to withdraw its second attempts at condemnation but the right to sue for a third time later.

"little occurred" must not have been spent or were spent on something else. They both contradict these recitals, periodically remarking that the large amount of pre-"abandonment" work was unnecessary. This alternative recital is simply irrational. The purpose for which the work was done was preempted by the judge so that the court would not have to understand the depths of the case and rule on the merits. There is no statement of how effective the work was or would have been, and such a statement would have been inappropriate, because the Landowners were not allowed to proceed.

The unstated premise of the contradictory unnecessariness arguments can only be either that the Landowners were supposed to lose, not win (and might as well do the minimum), or that the Landowners knew in advance that the Town would later abandon ship (and that the Landowners might as well do the minimum). When the Landowners were ambushed October 16, 2020 with a second set of suits affecting millions of dollars' worth of properties, they did not know a February 10, 2021 putative abandonment was coming from the dogged adversary.

Despite these perplexing recitals with which the Landowners are still having to wrangle, the judge awarded all the requested fees for the 57.5 hours of time submitted for this pre-"abandonment" period.[11] The Town did not appeal the ruling. That ruling is now the binding law and fact as against the Town under the doctrine of the law of the case.[12]

It is perplexing that the Circuit Judge would devote extensive time and space to extensive arguments originated by the Town on such issues concomitantly with implying that no one else would have needed to take hardly any time to defend against the Town's fraudulent suits or to

[11] Although, as discussed hereinbelow, other than as "sauce for the goose," this "total victory" on fees for merits is legally irrelevant to the award of fees for fees, the Landowners thus 100% "prevailed" on fees for merits, and were completely "successful" in seeking fees for merits, and obtained a great "benefit."

[12] See the footnote hereinabove regarding the doctrine of the law of the case.

respond to the Town's copious aspersions and arguments against recovery of fees.

**V. The Circuit Judge erred in incongruently ruling that the aspersions he applied to the facts of the 57.5 hours of fees-for-merits time for which he made a 100% award could simply be applied to reduce the completely different submitted hours for the completely different subject matter, work and procedural phase of the fees-for-fees time; this incongruity is compounded by the facts that (i) the aspersions with respect to the fees-for-merits time were incorrect and based on errors of law to begin with, and (ii) despite the barrage of error in the fees-for-merits aspersions, the judge awarded 100% of the submitted fees-for-merits time and offered no cogent explanation for why the misplaced aspersions on the fees-for-merits work should produce a <u>different</u> result for the fees-for-fees work to which they were not addressed but to which they were erroneously applied.**

The main issues on appeal are the Circuit Judge (i) denying the Landowners reimbursement of fees associated with 7.4 hours of time also reasonably spent shortly after the Town purported to have abandoned its condemnation actions "without prejudice," and (ii) grossly shorting the Landowners on fees associated with a much larger submitted amount of time incurred during the 8 ½ months that elapsed between the time the Landowners prepared and filed the fee petition and the time it was ruled upon.[13]

As noted, the Circuit Judge recited a perplexing, illogical, incongruent and detracting <u>Jackson</u>-factors analysis of the <u>pre-"abandonment"</u> time and activities. However, he then proceeded to recognize 100% of the 57.4 hours submitted and award 100% of the fees requested for that period. Of concern is that he then irrationally used the already error-loaded, derogatory pre-"abandonment" observations to arbitrarily just slash fees in the completely different fees-for-fees segment of time in the case. It involved different facts and attributes.

It was as if to say, "This part was not difficult, so I am going to grant you all the fees for

[13] As noted in a section below, the Appellants have concluded that, only in a short section of entries in the last of two updates filed, there was a mistake. The Landowners offer a stipulation regarding the amount of the correction, which would reduce the total fees-for-fees hours to 153.1. This change of total does not affect the argument of judicial error herein, particularly the error of estimating 8 hours.

this part, but deny you reimbursement of fees for the part that was difficult," or "This part was not time-consuming, so I am going to grant you all the fees for this part, but deny you reimbursement of fees for the part that was very time-consuming."

The Town uses this same unsound transference or distraction approach in its brief at 4, 7, 13, 14, 15, 16, 18, and 19. This is error on an astounding number of levels. First, a Jackson-factors analysis of the pre-"abandonment" time was not applicable under the controlling fee statute in the first place.[14] Second, in such an analysis nevertheless forced onto an

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[14] Section 28-2-510(C) applies, not (B). See Revels. Revels discusses why it is error to "require" a Jackson analysis under (B), whereas (C) is a more difficult fit for Jackson analysis. Subsection (B) requires the landowner to win in order to get fees, but allows discretion to not award fees, whereas (C) mandates fees to the landowner upon abandonment even if the condemnor abandons after the landowner loses and the condemnor wins.

In 2005, the South Carolina Court of Appeals construed the statute actually applicable, section 510(C). Litigants are directed by Rule 268(d)(2), SCACR not to cite the case. The intermediate appellate court's practice of issuing unpublished opinions, and in turn, the uncitability of such Court of Appeals opinions under Rule 268(d)(2), SCACR, were formally contested by the Landowners in a related case, Stanton et al. v. Town of Pawleys Island, Op. No. 2023-UP-055 (S.C. Ct. App. filed Feb. 8, 2023)(Ct.App. file no. 2021-000757). Those contentions are respectfully repeated, but the 2005 case, while argued here, is not yet cited.

In the 2005 case, the Court of Appeals reversed the trial court's "refusal to award attorney fees to a landowner," even though he was not the "prevailing party" at the condemnation trial.

The condemnors ("Utilities") sought to condemn both a permanent easement and a "temporary" construction easement. However, as a feature eerily reminiscent of the overreach in the instant case, the actual text of "the temporary construction easement" actually "had no set time limit on its use." The landowner's taking notice of this perpetual duration obviously portended a much greater taking and a much greater price than the Utilities were prepared to pay when they launched the condemnation against the landowner.

"Midway through the trial, the Utilities amended their pleadings to abandon the temporary construction easement." At the conclusion of the condemnation trial, the landowner ("Sanders") statutorily was not the "prevailing party" because the jury award for the permanent easement was closer to the highest price contended by the Utilities than to the highest price contended by Sanders.

Sanders then made a motion for attorney fees for that portion of work done in litigating the just compensation for the "temporary easement." The trial denied this motion "because the Utilities prevailed at trial."

Reversing, the Court of Appeals ruled:

> The Eminent Domain Procedure Act (the Act), specifically section 28-2-510(C), lies at the heart of this action. S. C. Code Ann. § 28-2-510 (1991). The Act provides that "[i]f

"abandonment" situation, certain factors were impossible to apply to an "abandonment," such "prevailing" or "success" or "benefits obtained." Third, the determinations on the factors which were inappropriately shoehorned in and applied to pre-"abandonment" time and activities were unsupported in the record.[15]

Fourth, regardless of the Jackson-factors analysis of the pre-"abandonment" fees-for-merits segment of the case, a Jackson-factors analysis of the fees-for-fees segment of any case is generally inappropriate, for example, determining the degree to which the applicant was "successful" in recovering fees for merits in order to then determine the reasonableness of the fee

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> the condemnor abandons or withdraws the condemnation action in the manner authorized by this chapter, the condemnee is entitled to reasonable attorney fees, litigation expenses, and costs as determined by the court." Id. The condemnor is not obligated to construct a public improvement on condemned property. 22 Am. Jur. Trials §743 (2004). Therefore, it may decide to abandon the condemnation rather than pay the just compensation assessed by a jury. Id.

(Citation withheld.)

The Utilities asserted "that they would have had to abandon the entire condemnation before the Act would have given any relief to Sanders." Disagreeing, the Court of Appeals opined:

> We do not read the statute so narrowly. A plain reading of the section indicates that the legislature intended to compensate a landowner who incurred monetary loss from preparation for litigating a condemnation action, only to have the condemnor withdraw at a point prior to disposition, leaving the landowner with no avenue to recover expenses. Sanders and his attorney spent time and effort planning litigation strategy that contemplated the abandoned easement as a portion of the case and but for the statute, this work would be time wasted.

(Citation withheld.) The Circuit Judge in the instant case similarly misunderstood the statute and the facts. The work Sanders' attorney did preparing for the long haul was also not made "unnecessary" because the haul was cut short.

[15] For example, bare assertions that the matter was uncomplicated and not unusual were flat unsupported. Assertions that the matter "should" not have been time-consuming, were, if they were based on anything at all, based on hindsight and were still unsupported even in hindsight. The decisions of counsel to devote time to a case are determined as of the time he or she determined to spend the time, not in hindsight. Gurrobat v. HTH Corp., 346 P.3d 197 (Hawaii 2015). The absurd premise for these factually starved assertions is that the withdrawal of the debacle by the Town could be predicted with precision and certainty at the time decisions on how to spend time were made and that it would have been "simpler" to do almost nothing.

requested for the time spent in seeking to recover those fees.[16]

Fifth, and the most glaring, the Jackson-factors analysis of the facts in the fees-for-merits segment of a case are not simply transferrable to the different facts of the fees-for-fees segment of a case.[17] Sixth, if the analysis of merits-phase facts had been transferrable to the different facts of the fees phase, the analysis should logically have resulted in no reduction, just as it resulted in no reduction of what was requested for the merits phase.

The judge was confused by the case and confused by the Town.[18]

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[16] To do so spawns the previously discussed "Kafkaesque nightmare" referred to by the Supreme Court in Jean. To do so also contradicts Layman III Order, in which the fee applicant obtained a multimillion-dollar fee award, the fee award was then reversed, a smaller fee award of under a million dollars was made on a different basis, and then the smaller fee award was modified to add fees incurred in litigating the issue of fees. This latter fees-for-fees award exceeded the reduced fee-for-merits award.

[17] For example: the "difficulty of the matter" or the "time reasonably devoted" may be dramatically different between the merits segment and the fees segment; in a given case, the lawyer or the opposing lawyer may well be different in the later segment (such as where Mr. Dillard stepped in for Mr. DuRant, but in this case both charged $250/hr.), necessitating a different assessment of "professional standing" or "difficulty" or adversity or other factors; the circumstances of the work in the later segment may be different, such as a spike in a pandemic, a different level of urgency or personal sacrifice or subjection to ignominy, or a difference in caseload and opportunity costs of the lawyer; or the rate or other basis of the fee may be different.

Then comes another difference the Town cannot explain -- whether the "benefits obtained" in the fees-for-fees segment is the "benefit" obtained in the merits portion of the case (here, forcing the outright abandonment of an elaborately planned second set of fraudulent condemnation attempts), or the "benefit" obtained in seeking merits fees, here, recovering 100% of the merits fees requested.

[18] The Circuit Judge had already gotten confused, for example, about how the Challenge I cases had ended. He stated in a Form 4 that the Town had also abandoned its first set of suits against the Landowners. That mistake resulted in an appeal by the Town and was corrected by the parties by stipulation.

The judge appeared to have forgotten again by the time of the later hearing of the instant matter:

> THE COURT: And this is the case that was voluntarily dismissed by the Town?
> MR. STANTON: No. The first set, the Town sued the three of us. We sued the Town to stop those actions. The Town moved to dismiss our cases and Your Honor denied their motion to dismiss. … Judge Nettles, heard our summary judgment motion and granted the summary judgment motion and … quashed their condemnation attempts on the basis

that … in a nutshell, they proceeded as if these easements were just to put sand on the beach when they actually wanted public access right up to the back door.

(4/14/23 Transcr. p.20, lines 6-22, R.p.315 (ellipsis not original).)

The Landowners excluded from their fee request, the time for the Town's appeal and other efforts to correct the judge's mistake on the Form 4, but the Circuit Judge also mistook the submitted time the Landowners spent trying to recover their fees as including this time which the Landowners excluded.

In another Form 4, the Circuit Judge mistakenly marked the cases as ended, when his own previous orders on both dismissal and discovery, including his long-form order on dismissal, had made clear that the cases remained open for the purposes of fee determinations. He corrected the Form 4.

In its instant brief at 25-25, the Town now argues that because the subject fee petitions were filed at a time when the Circuit Judge had not yet corrected his mistake, the circuit court was without "jurisdiction" even after the mistake was corrected.

The Circuit Judge applied the wrong statute when ruling on the subject fee petitions. He applied the "prevailing party" statute found in S.C. Code Ann. §28-2-510(B)(applicable to trials of condemnation actions), rather than the "upon abandonment" statute found in S.C. Code Ann. §28-2-510(C)(automatically providing for fees whenever and under whatever circumstances a condemnor abandons). As a consequence, he also applied the wrong case law (e.g., Revels, interpreting and applying S.C. Code Ann. §28-2-510(B)), which the Town still argues in its brief to this court.

In ruling on the subject fee petition, the Circuit Judge was confused by two massive records and copious materials submitted by the Town. He erroneously recited that the Landowners had "conceded" in their counsel's affidavit that the Challenge I cases were essentially "identical" to the Challenge II cases.

He also based his rulings on his erroneous assumption that the Landowners had "conceded" that the Challenge I and Challenge II cases were handled "in tandem." (6-8-23 Order at 4, R.p.55.) Whatever the relevance of these imagined concessions, they did not occur.

The record contains no such concessions and there were many differences. Challenge II alleged that the Town made no disclosure of signing a giant agreement with the Corps of Engineers and continued to dishonestly represent the project as a Town-only project which has no easement requirements. Challenge II alleged that the Town knowingly repeated its frauds in the second set of condemnations after the frauds had already been explicitly pointed out in the Challenge I complaint, amended complaint, opposition to the Town's motion to dismiss, and Landowners' motion for summary judgment. Challenge II alleged that the Town engaged in substantial additional frauds, such as conducting another live-streamed sham meeting of Mssrs. Henry, Holliday, Green and Carter, and Ms. Zimmerman, creating additional sham documents, and backdating the second set of condemnation notices to match the first. The Challenge I and Challenge II cases were in different procedural phases and were often scheduled for different hearing times with different judges.

The Circuit Judge also confused, on the one hand, intent to submit time only for work done before the Town's putative abandonment, followup work done shortly afterwards and work done pursuing the recovery of fees, with, on the other hand, an intent to also include time for work opposing motions to dismiss, appealing the order of dismissal, and dealing with post-dismissal Form 4 issues.

The Town previously submitted through an unqualified affiant,[19] and continues to argue

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The Circuit Judge stated that he would not read the submissions of the parties before the hearing. (4/13/23 e-mail of Circuit Judge, R.p.85.) Due to time limitations, he conducted very little inquiry at the hearing to clarify points of confusion which are now apparent, and did not ask for or allow additional submission of any materials or information he thought to be lacking.

[19] In its brief at 22, the Town defends the catawampus Dillard affidavit. The unqualified affiant lacked personal knowledge of large portions of the case and the related litigation. He relied only on what he referred to as "filings" to opine on only part of the legitimate time a lawyer spends dealing with other lawyers and representing a client. In the end, he still did not reach a low enough figure and did not even rely on that.

He had no expertise beyond that of the factfinder, here, a judge. His opinion served no purpose other than to violate law and confuse. He had a basic law degree, with the exception of dilution of legal study by concurrent study of how to work for governments. He demonstrated lack of even general legal experience or scholarly credentials in legal ethics, attorney's fees, litigation of fraud, general civil procedure, or coastal zone matters.

He demonstrated no experience in prosecuting even one challenge action for a citizen. He adduced no evidence of ever having won a challenge case for a plaintiff, much less, ever winning one on summary judgment. He does not demonstrate that he has even drafted a complaint for a challenge action before.

Mr. Dillard did not appear on the scene until long after the pre-"abandonment" things he ultimately opined were not "necessary" were already done. His opinion is incomplete, and does not cover an essential part of the question: "Necessary" for what? To lose? He was unqualified to answer any other question. All of his estimates appear to be tacitly based only on the time required for a landowner to be unsuccessful. There is zero basis for this mere winking wishful thinking that the Landowners were supposed to lose. They won Challenge I. The town council were frauds. He presumed to create time allotments for things to be done in a "typical" challenge action by a citizen, but not an atypical challenge action specified to be successful.

As an alternate illegitimate basis for complaining of lack of necessity, Mr. Dillard also relies on the "Exhibit" letter he had been planning to use, regardless of its inapplicability and unreasonableness. After the Town had put the Landowners through the wringer, he asked for a "pause" while he, as a third lawyer for the Town, merely "considered" things in the time-sensitive matter. While he was "considering" things, the Town was proceeding apace in the Challenge I cases to oppose the Landowners in every conceivable way and maintain the cloud the Town cast on the properties. Stanton responded courteously and appropriately to Dillard's "Exhibit" letter, which response is also in the record, but not cited or presented by Mr. Dillard.

Dillard implies in his affidavit that he wrote his "Exhibit" letter before the time of the work he complains about. The Town sued the Landowners for the second time in October 2020. The Landowners' complaints in the Challenge II suits were then filed in November. The Town answered the challenge suits in December. The Landowners' interrogatories were served January 10. The Landowners' amended complaints were filed January 13. Notices of the then town administrator's deposition were served January 15. The first formal summary judgment order in Challenge I was filed January 20. Dillard wrote his "Exhibit" letter February 5, 2021, only after all of these things he complains about were done.

In a mere stew of unqualified conflicting observations without a single theme, Mr.

on appeal, the ludicrous proposition that another lawyer working at the same low rate could have definitively handled everything within the pre-"abandonment" time period[20] in no more than 11 hours. This continued argument about pre-"abandonment" time is not germane to the issue of the actual fees-for-fees time the Landowners' lawyer was required to spend.

The Town makes more irrelevant and internally erroneous arguments concerning the pre-"abandonment" fees, which were 100% awarded by the judge and were not contested by the Appellants, but these will not be addressed at length in the remaining main text.[21]

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Dillard opines on what was "not necessary," but provides zero foundation for what was necessary. At the time the Landowners' counsel was prosecuting the second set of challenge actions in Mr. Dillard's absence, it was not a foregone conclusion for the Landowners that Mr. Dillard would later show up and, realizing the predicament caused by the Landowners' counsel's hard work, determine to abandon ship.

The Amended Complaints were pled with particularity, as required by Rule 9(b), which is a basic rule of civil procedure for fraud and other dishonesty. Both Mr. Dillard's and Mr. DuRant's affidavits indicated unfamiliarity with this basic rule, as well as unfamiliarity with Rule 8(b)'s requirement that they answer complaints and amended complaints forthrightly.

The Dillard affidavit begins with a putative analysis of time actually spent on actual things in the actual case, but jumps to an estimate pulled from thin air. The initial, incomplete "actual time" analysis did not ascertain all time on all actual activities of a lawyer legitimately representing a client. The tally was restricted to items Dillard termed, in retrospect, "major case events," which, lacking first-hand knowledge, he determined by looking at "filings." These "events" would in turn only count if he also considered them to be "major" events.

These numbers still not being low enough to meet Dillard's target, the pseudo-actual-time analysis was discontinued and the "opinion" shifted to time which might be spent on an arbitrarily limited list of generic, abstract hypothetical tasks which were not the actual tasks in the actual case.

It was in this farcical manner that the unqualified affiant determined that 57.5 hours took 11 hours, and that over 150 hours over the course of 8 ½ months took 9 hours.

[20] See the footnote hereinabove setting forth some of what was entailed in the pre-"abandonment" period of work.

[21] The Town fails to state whether, if the Town's 11-hour estimate was not for engaging in the same activities the Landowners' lawyer actually engaged in, what result could have been expected from expending only the 11 hours.

In reality, the Landowners had to prepare to stay the course all the way through a second set of challenge actions, and to win partially, to win completely (before or after appeals), or to emerge prepared for a condemnation trial on the issue of the price to be paid for the easement actually being condemned. No determination or explanation of what was necessary for that was made by the judge, or any affiant other than the Landowners' counsel.

**VI. The fees for the post-"abandonment" followup time were incurred as a reasonable part of the conclusion of litigation in the circuit court which was 100% necessitated by the condemnations and it was error to conclude that these fees were unrecoverable as a matter of law as a result of the "abandonment."**

In its brief at 20, the Town states that no reason was provided in the 10/21/22 initial fee

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The decisions of counsel to devote time to a case are determined as of the time he or she determined to spend the time, not in hindsight. Gurrobat v. HTH Corp., 346 P.3d 197 (Hawaii 2015).

In its brief at 19, the Town, like the Circuit Judge, bizarrely argues that the pre-"abandonment" time should be reduced because the Landowners did not "prevail" in post-"abandonment motions of the Town to dismiss the Challenge II cases as moot. The Town implies that the Landowners requested, but were not awarded, post-"abandonment" fees for this work, and asserts that "a party is not entitled to fees associated with motions on which it was not successful." No substantial fees for this motion work were even requested, and they are not requested in this appeal. Further, the Town incorrectly states the law.

A "prevailing party" analysis or "beneficial results" or "degree of success" analysis is not applicable under section 28-2-510(C) in the first place. It is also beyond absurd to apply this inapposite analysis to a segment of time for which fees are not even requested, and then impose the result on time and work that is not even the subject of the "analysis." The proposition itself is also erroneous. Even under an "overall prevailing party" statute, it is generally error to apply "prevailing party" analysis to select motions and phases within litigation other than in specific circumstances. See, e.g., Hensley.

The Town, like the Circuit Judge, also makes the illogical assertion that the pre-"abandonment" work done in the Challenge II case should have been made easier in light of work done in the related Challenge I cases and that, therefore, the work should have required less time. The time saved, if any, was already reflected in the actual Challenge II time submitted, which did not duplicate any Challenge I time. (See 10/21/22 Stanton aff. ¶¶45, 152 and "170", R.pp.610, 642,and 646 (recounting that the first 54.9 hours of Challenge II were excised from Challenge I records and kept separately with other exclusively allocated time).)

In its brief at 4, the Town also complains that the Landowners did not produce "fee agreements, legal invoices, or itemized time descriptions" in support of the fee petition. The Town cites no legal authority that the Landowners were required to do so. These arguments have been previously addressed, were addressed below, and were addressed in advance in the fee petition. The 67-page, 223-paragraph fee affidavit adequately explains the basis and justification for the requested fees. As to the pre-"abandonment" time, the Town also does not disclose that it already possessed the additional data for 54.9 hours of the pre-"abandonment" Challenge II time which was excised from the Challenge I records. (See 10/21/22 fee aff. ¶179 and immediately following paragraph misnumbered 170, R.p.646, and 6/8/23 update at 1, n.2, R.p.887.)

affidavit for the 7.4 hours immediately subsequent to "abandonment." The Town claims that "there is absolutely nothing" in the record that a court could rely on to award fees "associated with this timeframe," and that the Landowners "never attempted to explain this claimed 7.4 post-abandonment hours." The Town also recites, "This issue was not preserved."

This is an appeal of failure to award fees requested, including the specific 7.4 hours. The issue is preserved. The affidavit tabulates the hours at ¶190, p.54, in entries for "2/11/21," "2/12/21," "2/15/21," and "3/12/21," R.p.650. The fee affidavit explains at ¶¶35, 39-42 (R.pp.608-609), and 58-62, R.pp.617-619:

> With regard to the time after February 10, 2021…the [described at length] activities were necessary in my professional judgment in light of the … Town's stated intention, not to truly quit, but to start a third action … However, it is the Landowner's desire at this time to simplify the matter. The Landowner therefore presents a request only for … just past the February 10, 2021 statement of abandonment along with … fees and expenses attributable to the fee petition.

By suing the Landowners again, the Town caused the Landowners to file three more independent challenge lawsuits, in which their counsel had to enter appearance. The Town served "notices of abandonment" of the Town's second set of offending suits on February 10, filed motions to stop discovery in Challenge II on March 3, filed answers to the amended complaints on March 3, and filed motions asking the judge to dismiss the Landowners' independent actions on March 5. The Landowners made efforts to ascertain, or to get the Town or court to declare, the scope, nature, and effect of the Town's putative withdrawal. The Landowners objected to the Town's proposed course. This was a reasonable thing to do in the course of the challenge suits to which the Landowners were committed as a result of the Town's condemnation attempts.

This was especially so in light of the fact that the same Town lawyer, Mr. Dillard, who professed "abandonment," was simultaneously still opposing summary judgment and opposing

fees in the previous similar cases brought by the Town. He eventually acknowledged on the record, an intent to sue for a third time if ultimately unsuccessful in the first of the two attempts.

The Town's arguments over the 7.4 hours are thus without any merit. The Judge abused his discretion in thinking that he could not even consider these fees incurred.

**VII. The fees for fees were straightforward and reasonable.**

The hours for fees for fees should be 153.1,[22] rather than 8. The fees incurred in pursuing fees amount to $29,089.00, which should be divided by three. A third should be awarded to each Landowner. Eight hours, divided by 3, is an abuse of discretion.

The fees-for-fees time was incurred in the eight and a half (8 ½) months between September 15, 2022 and June 2, 2023.[23]

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[22] In its brief at 17, the Town addresses the entries for the 36-day period from March 9, 2023 to April 14, 2023 as contained only in the 6/8/23 last update of the hours expended, which was submitted after the hearing and proposed orders. In this supplemental filing, the entries for that period total 72.8 hours, which was submitted as actual time to be substituted for a smaller amount of time which had been estimated in advance in the previous update. The Town contends there are insufficient materials or other references in the record of the fee proceedings from March 9, 2023 to April 14, 2023 to explain the 72.8 hours.

There were: a March 9, 2023 hearing; a March 9 order (bearing on the Town's then pending "jurisdictional" objections to the award of fees); electronic hearing notices on March 17, March 31, and April 3; correspondence with the chief judge for administrative purposes; an April 14, 2023 hearing; presumed e-mails, notes or other "materials" generated; and an April 14, 2023 proposed order submitted at the direction of the judge.

Absent other explanation, owing to work already done in earlier periods, the things which are apparent in the existing record for the fee recovery during this narrow 36-day time would be assumed to not require more than about ten (10) to fifteen (15) hours of attorney time.

The Town has a point about the remaining time. For this one, narrow, late period, the remaining part of the 72.8 hours submitted in the last update is not explained satisfactorily by the affidavit, other papers, proceedings, or events of record, or the Statement of the Case.

One might surmise that, after the April 14, 2023 hearing, in preparing the last affidavit update, there must have simply been a mistake in flagging and restating entries of fee-only time from bills which tracked that time and other Challenge II time still being incurred.

Based on the 10-15 hours of work explainable from the record, the Landowners would stipulate that 64.6 of the 72.8 hours should be removed from the fee-for-fee claim during March 9 to April 14, 2023 as presently presented. This would revise the fee-for-fee time to 153.1 hours.

[23] When it comes to time and charges incurred in pursuing recovery of fees, the main

Compared to its arguments about pre-"abandonment" time, the Town spends less time arguing that the work on the distinctly different fee-request proceedings was of "limited scope, duration or complexity." At page 7, the Town proffers the opinion of the attorney who brought the six condemnation actions. His superficial opinion is not backed with any facts, he did not handle the fee-request portion of the case, and his opinion should be disregarded.[24]

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guide is reasonableness, at the time and in foresight, not hindsight. It is reasonable when receiving a response from an adversary opposing one's earlier submission, to submit a response; it is reasonable when an adversary asks for something unreasonable, to respond; it is reasonable when the phone rings, to pick it up; it is reasonable when notices are received, to read them; it is reasonable when called to court, to go; and it is reasonable when directed to submit a proposed order, to submit one.

It was also reasonable to bear the following things in mind in deciding how thorough and how cautious to be in pursuing fees: (i) This was the second time the Landowners were sued by the same adversary, who was funding its litigation with the government purse; (ii) The adversary had tried to wreck millions of dollars' worth of coastal real estate by employing artifices shown to have been fraudulent and dishonest; (iii) The adversary had conducted a campaign publicizing private facts and engaging in public, defamatory shaming of the Landowners and their lawyer to try to coerce capitulation with its illegal objective; (iv) The adversary had already made the Landowners' fee request in previous related litigation into a protracted ordeal; (v) The adversary had, in public and private settings, in counsel's estimation, persistently and purposefully obscured the salient features of the controversy, the procedural history, and previous rulings in order to garner judicial and public sympathy, or "civic" or political support; (vi) The adversary had already employed numerous other devices to intimidate against or disable or discourage further legal opposition, such as by (A) threatening <u>each</u> Landowner with ten million ($10,000,000) dollars in liability which was reported in the newspaper, plus a claim for the adversary's own attorney's fees which were at $250 per hour rather than $190 and (B) seeking "fee discovery" and a fee trial in the other proceedings while trying to disqualify the Landowners' lawyer from representing two of the Landowners; (vii) The adversary previously tried to conduct discovery into the lawyer's work product and confidential communications with his clients; (viii) The adversary had threatened in public meetings and in mass communications and on the record in court to sue the Landowners for the same thing for a third time; and (ix) Other litigation with the adversary was still pending.

It was eminently reasonable to put a little extra effort and a little extra caution into the preparation of the fee petition. It was reasonable to then to pursue it diligently and carefully.

[24] In general, he opined about the portion of the case he knew least about and Mr. Dillard opined about the portion of the case Dillard knew least about. Only summarily, Mr. DuRant opines that the fee request "should have been relatively straightforward." The Town made it otherwise, and in both Challenge I and Challenge II, drove up the fees incurred to far beyond the initial request. This continues in the instant appeal.

The Circuit Judge made zero findings addressing why it was not reasonable to be thorough and careful, or addressing any of the actual considerations which were involved in determining how to go about the fee application or how to respond to the Town's immediate and continued opposition. He discussed, instead, other time periods and things which were completely irrelevant to fees for fees. This was an abuse of discretion as defined by our courts.[25]

The Town asserts that the amount of time consumed in pursuing fees is "impossible" to explain. The record shows the duration, complexity and volume of work, and time in tenths of hours. Included are the initial 125-page fee petition (67 pages of which is affidavit, exclusive of four exhibits), briefs, affidavits, proposed orders, other papers, roster notices, updates, orders, motions, and three scheduled hearings. If there was something else that needed to be explained, the thing for the Circuit Judge to do was ask for it, not award eight hours.[26] A blow-by-blow account of the entire fee recovery phase of the case was not included in the initial fee petition

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In response to the straightforward Challenge I fee request, Mr. DuRant himself started the opposition by requesting a delay, fee discovery, and a live fee trial. (See, e.g., 10/21/22 aff. ¶157, R.p.643.) This was shortly after the time he filed a motion to disqualify Landowners counsel. The Town subsequently filed vast, numerous and voluminous papers related to picking at and opposing the fee requests. The Town's affiant offers no reason why the Landowners should have expected, in foresight, any different treatment in Challenge II.

[25] In its brief at 7, the Town argues without citation of any authority, that the fees-for-fees time and charges are "grossly disproportionate" to the time and charges for the principal merits portion of the case. The fees-for-fees hours for all three cases submitted with the 10/21/22 fee petition were 79.3 hours (of which 6.2 were inadvertently omitted in totaling) but after the Town's "opposition," by June 2, 2023 exceeded 150 hours.

There is no proportionality required between the damages or other recovery in a case and the fee awarded, Medenica, and there is no proportionality required between fees-for-fees and fees-for-merits. See, e.g., Layman III Order (awarding fees for fees in excess of fees for merits).

Avoiding such a rule avoids the danger that a party upon whom a contract or statute places the responsibility for fees can make the pursuit of fees so expensive that the pursuit will not survive the time, expense, insult, and "burden" required in order to recover the fees.

[26] In virtually any fee award proceedings considered in trial court or appellate court, if information is found to be lacking or if additional information is needed or of interest to the court, the circuit court simply requests it or the appellate court remands for consideration of it. See, e.g., Revels.

because it had not occurred yet, and would not have if the Town had simply agreed to pay.[27]

## VIII. Conclusion

The Circuit Judge should be reversed. This Court should award Stanton, Beattie, and Sunset each fees and other expenses of at least $14,057.23 (formerly $18,148.57) as of June 2, 2023.[28] This Court should direct that all reasonable actual fees and expenses from June 2, 2023 to the conclusion of this appeal be awarded pursuant to the EDPA by this Court and be determined from a bill of costs and fees incurred in the Circuit Court and this Court, adapted to the procedure of Rule 222, SCACR.[29] In the alternative, this Court should direct that remaining fees, including those incurred on appeal, may be submitted in a subsequent application to the Circuit Court in this action.

Respectfully submitted,

s/M. Baron Stanton
M. Baron Stanton (S.C. Bar No. 7970)
STANTON LAW OFFICES, P.A.
1230 Richland Street
P. O. Box 245
Columbia, SC 29202
803-929-1484
bstanton@stantonlaw.com
ATTORNEY FOR APPELLANTS SUNSET LODGE, LLC, FRANKLIN D. BEATTIE, AS TRUSTEE, AND M. BARON STANTON

Date: June 24, 2024

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[27] In its brief at 17, the Town also argues that the "record" is "silent" on 6.2 hours between April 14, 2023 and June 2, 2023. The record includes: an April 14, 2023 hearing; the Landowners' proposed order submitted April 14 as requested by the Circuit Judge; the Town's proposed order submitted April 28, 2023 (and examined by the Landowners' counsel); the Landowners' counsel's April 28 e-mail to the judge outlining objections and notifying the judge of the need to submit an update of time incurred; and a supplement to the affidavit by the Landowners' counsel submitted June 8, 2023.

[28] (((57.5 hrs. + 7.4 hrs. + 153.1 hrs.) x $190/hr.) + $751.71 expns.) ÷ 3 = $14,057.23

[29] In its brief at 26, the Town stipulates that in the event of a reversal of the Circuit Judge, the place to determine additional fees incurred pursuing recovery of fees in this appeal and after June 2, 2023 in the circuit court is not in this Court, but in the circuit court on remand.

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable Benjamin H. Culbertson, Circuit Court Judge

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

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Sunset Lodge, LLC, .....Appellant,

v.

Town of Pawleys Island,.....Respondent.

and

Franklin D. Beattie, as trustee of the Franklin D. Beattie Preservation Trust, .....Appellant,

v.

Town of Pawleys Island,.....Respondent.

and

M. Baron Stanton, .....Appellant,

v.

Town of Pawleys Island,.....Respondent.

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CERTIFICATE OF SERVICE

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

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

s/M. Baron Stanton
M. Baron Stanton

Date: June 24, 2024