

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM RICHLAND COUNTY

S.C. SUPREME COURT

Daniel Coble, Circuit Court Judge

Appellate Case No. 2024-000065

Lower Court Case No. 2020-CP-40-04603

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.

**RECORD ON APPEAL
VOLUME ONE**

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September 3, 2024

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The Supreme Court of South Carolina

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

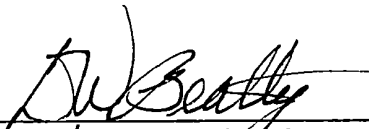
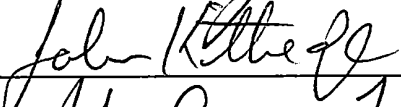
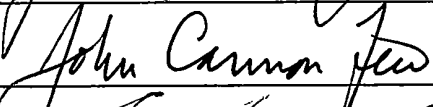
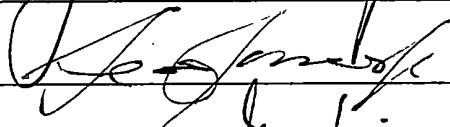
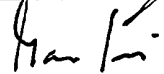
v.

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

Appellate Case No. 2024-000441

ORDER

Appellants move to certify the appeal in Appellate Case No. 2024-000065 to this
Court pursuant to Rule 204(b), SCACR. The motion to certify is granted.

	C.J.
	J.
	J.
	J.
	J.

Columbia, South Carolina
April 17, 2024

cc:

James G. Carpenter

James Mixon Griffin

Badge Humphries

William H. Davidson, II

Kenneth P. Woodington

Gerald Malloy

James Todd Rutherford

John S. Simmons

J. Emory Smith, Jr.

The Honorable Jenny Abbott Kitchings

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
	)	
South Carolina Public Interest	)	CASE NO.: 2020-CP-40-04603
Foundation and John Crangle,	)	
individually and on behalf of all others	)	
similarly situated,	)	
	)	ORDER DENYING PLAINTIFFS' MOTION
	)	FOR RECONSIDERATION PURSUANT TO
Plaintiffs,	)	RULE 59(e), SCRCP
	)	
vs.	)	
	)	
Alan Wilson, Attorney General for the	)	
State of South Carolina, Willoughby &	)	
Hoefer, P.A., and Davidson, Wren &	)	
DeMasters, P.A.,	)	
	)	
Defendants.	)	
	)	

This matter is before the Court upon Plaintiffs' Motion for Reconsideration Pursuant to Rule 59(e), SCRCP ("the Motion"). The Motion asks this Court to alter, amend, or reconsider its Order entered October 20, 2023, granting the Defendants' motion for summary judgment.

After reviewing the applicable law and considering the arguments raised in the Motion, the Court is unable to discover any material fact or principle of law that has either been overlooked or disregarded and further finds no error of law or fact not appropriately considered.

Accordingly, the Court concludes that altering, amending, or reconsidering its prior Order is unwarranted, and the issues raised in the Motion do not change the Court's reasoning or conclusions. As such, Plaintiffs' Motion for Reconsideration is hereby **DENIED**, and the Court, pursuant to the discretion afforded by Rule 59 and *Pollard v. County of Florence*, concludes that a hearing is not necessary to rule on Plaintiffs' Motion for Reconsideration. See Rule 59(f), SCRCP (stating a Rule 59(e) motion "may in the discretion of the court be determined on the briefs filed by the parties without oral argument"); see also *Pollard*, 314 S.C. 397, 401–02, 444 S.E.2d 534, 536 (Ct.

App. 1994) (holding there was “no merit in Pollard's assertion that the circuit court committed reversible error in denying her motion to alter or amend the judgment under Rule 59(e) SCRCP, without first conducting a hearing or allowing [the parties] ‘to fully brief’ the issues raised in [the] motion”).

AND IT IS SO ORDERED.

[JUDICIAL E-SIGNATURE PAGE TO FOLLOW]



Richland Common Pleas

Case Caption: South Carolina Public Interest Foundation , plaintiff, et al vs Alan Wilson , defendant, et al
Case Number: 2020CP4004603
Type: Order/Other

So Ordered

s/ Daniel Coble, 2774

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
	)	
South Carolina Public Interest Foundation	)	Civil Action No. 2020-CP-40-04603
and John Crangle, individually and on	)	
behalf of all others similarly situated,	)	
	)	
Plaintiffs,	)	
vs.	)	ORDER
	)	
Alan Wilson, Attorney General for the	)	
State of South Carolina, Willoughby &	)	
Hoefer, P.A., and Davidson, Wren &	)	
DeMasters, P.A..	)	
	)	
Defendants.	)	
	)	

Before this Court are Defendants’ Motions for Summary Judgment. Oral argument was heard virtually on October 11, 2023. After considering the arguments of both parties, this Court hereby **GRANTS** the Defendants’ Motions for Summary Judgment. In the matter before this Court, there are no genuine issues of material fact. The only disputed issue is a question of law.

Introduction

In *South Carolina Public Interest Foundation v. Alan Wilson*, the South Carolina Supreme Court remanded this case to this Court to answer the threshold question of “whether subsection 1-7-150(B) authorizes the Attorney General to enter into contingency fee agreements.” 437 S.C. 334, 342 (2022). This Court answers that question in the affirmative. Based on the plain meaning of the statute, prior case law, and the Constitution, this Court holds that the Attorney General acted within his authority to enter into this fee agreement for several reasons. First, the plain meaning of the statute is clear – the Attorney General may enter into contingency fee agreements with private law firms. Second, the history, case law, and original intent and meaning of the statute decidedly hold that S.C. Code Ann. § 1-7-150 allows for these settlement agreements. Finally,

and most importantly, the Constitution and the separation of powers doctrine requires this Court to exercise judicial restraint and not read into a law a judicial power which does not exist.

Summary Judgment Standard

The granting of a summary judgment motion “is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law. Rule 56(c), SCRCP. When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party.” *Fleming v. Rose*, 350 S.C. 488, 493–94 (2002). This Court will look to see if there is a genuine issue of material fact when considering the motion. *Kitchen Planners, LLC v. Friedman*, No. 2020-001669, 2023 WL 5420401, at *3 (S.C. Aug. 23, 2023) (“We now clarify that the ‘mere scintilla’ standard does not apply under Rule 56(c). Rather, the proper standard is the ‘genuine issue of material fact’ standard set forth in the text of the Rule.”).

This Court agrees with Defendants’ arguments that the threshold question before this Court is whether or not the Attorney General has the authority to enter into contingency fee agreements with private law firms as stated by the South Carolina Supreme Court. Based on the parties’ arguments at the hearing and written briefs, this Court holds the answer to that question is yes.

Background¹

This case challenges the authority of the Office of the Attorney General to pay attorney fees to the two law firm Defendants pursuant to a retainer agreement (*see* Comp. Ex. 7) for representation of the State in federal litigation over plutonium at the Savannah River Site. That federal case was settled in August, 2020. The settlement agreement provides for the payment of the \$600 million to the State of South Carolina with each party to pay its own costs and attorney fees. The Agreement for Voluntary Dismissal filed on September 29 states that the settlement agreement required payment by the United States which is inclusive of amounts for interest, attorney fees and costs. The statute under which the settlement was reached provides for payment of funds to the State of South Carolina.

¹ These facts have been largely adopted from *S.C. Pub. Int. Found. v. Wilson*, 437 S.C. 334, 338 (2022).

In 2002, the State brokered an agreement with the DOE concerning the storage of weapons-grade plutonium at the Savannah River Site in Aiken, South Carolina. *See* 50 U.S.C. § 2566. The agreement required the DOE to achieve a certain mixed-oxide fuel production objective by January 1, 2016. § 2566(d)(1). When the DOE failed to meet this objective, Wilson retained the Law Firms to pursue recovery of statutory damages.

Wilson's litigation retention agreement (Fee Agreement) with the Law Firms contains three provisions relevant to this case. The first provision states the Law Firms will be reimbursed for certain costs and expenses. The second provision sets forth varied contingency percentages based on the State's gross recovery, the type of representation provided, and the court in which the matter was heard. The third provision requires Wilson to seek judicial approval of attorney fees and costs “[w]hen possible[.]”

The Law Firms continued to litigate on the State's behalf for more than four years. On August 28, 2020, litigation ended with the execution of a settlement agreement (the Settlement Agreement). The Settlement Agreement required the DOE to immediately pay the State \$600 million, “inclusive of interest, with each party to bear its own costs, attorney fees, and expenses.” Three days later, Wilson announced he would pay the Law Firms \$75 million in attorney fees pursuant to the Fee Agreement. This amount included costs and expenses and represented 12.5% of the State's gross recovery.

All that is needed to be known in this case, is known. This Court believes further discovery is not needed to decide the legal issue in this case.

I. Plain Meaning

This Court will ascertain the plain meaning of the statute in question, and not attempt to expand or contract the true intent of the law. *State v. Jacobs*, 393 S.C. 584, 587 (2011) (“As such, a court must abide by the plain meaning of the words of a statute. *Id.* When interpreting the plain meaning of a statute, courts should not resort to subtle or forced construction to limit or expand the statute's operation.”). A plain reading of the statute allows for the Attorney General to collect costs or costs of litigation by court order or settlement. Further, this plain reading of the statute taken in conjunction with the authority of the Attorney General as the chief legal officer of the state, clearly shows that he has the authority to enter into these contingency fee agreements.

The Attorney General's authority to represent State interests is rooted in the Constitution, statutes, and the common law. Our 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. The Supreme Court noted in *Cooley, et al. v. South Carolina Tax Comm'n*, 28 S.E.2d 445, 450 (1943), "[t]he office of Attorney General is created by the Constitution." According to the Supreme Court, 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." *Id.* at 451. The Supreme Court, in *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.

Moreover, in *Condon v. State*, 354 S.C. 634, 641 (2003), the Supreme Court reiterated that "[t]his Court has recognized 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 (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.").

Accordingly, the Attorney General is the State's chief legal officer, and he properly exercised his authority to contract with the Law Firms to represent the State in its actions against the United States and to pay them pursuant to that contract from the settlement proceeds. As Judge Cooper stated in *Cephalon v. Wilson*, Civil Action No. 2012-CP-4007317 (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."

Judge Roger 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." *Id.* Similarly, in *Cephalon, supra*, Judge

Cooper concluded that “the costs of litigation include attorney fees, [§1-7-150(B)] expressly provides the Attorney General the authority to pay attorney fees to outside counsel and other costs of litigation from the proceeds of any judgment or settlement without those funds being first deposited in the general fund.”

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....” And S.C. Code Ann. § 1-7-170, titled, “Engaging attorney on fee basis,” provides that “[a] department or agency of state government may not engage on a fee basis an attorney at law except upon the written approval of the Attorney General and upon a fee as must be approved by him.” The authority of the Attorney General to enter into contingency fee agreements has been exercised for decades. *See Cephalon*, Civil Action No. 2012-CP-4007317; *Eli Lilly*, 2007-CP-42-1855.

II. History of the Act is Clear

When interpreting the statute in question, this Court will look to the original meaning and intent by the legislatures who drafted and passed the law. *Reese v. Talbert*, 237 S.C. 356, 358 (1960) (“When the language of a constitutional amendment is of doubtful import, the object of judicial inquiry as to its meaning is to ascertain the intent of its framers and of the people who adopted it.”); *In re Hosp. Pricing Litig.*, *King v. AnMed Health*, 377 S.C. 48, 54 (2008) (“The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute. The history of the period in which the statute was passed may be considered in interpreting the statute.”) (citations omitted).

S.C. Code Ann. § 1-7-150 was enacted in 1998 as a permanent provision (Section 18) of the Appropriations Act (Act 419 of 1998). Press coverage from the time makes it clear that the overarching purpose of the statute was to determine the disposition of the proceeds from the settlement of the Reedy River oil spill—and not to impose a restriction upon the powers of the Attorney General with respect to the payment of contingency fees. The statute sought to ensure that such proceeds would benefit the Reedy River and would not be deposited in the general fund, as would normally have occurred.

As chronicled by an editorial in *The Greenville News*, following the announcement of the settlement from the Reedy River oil spill, there was some confusion and legal uncertainty as to where the proceeds from the settlement would be sent. See “Fighting for Reedy funds,” *The Greenville News* (Apr. 22, 1998) (“This apparent good news was quickly followed by confusion over the ultimate destination of the money from the settlement. The attorney general indicated the money might go into the state’s general fund, where it likely would be distributed for legislators’ pet projects all over the state.”). To address these concerns, the General Assembly acted to ensure that the settlement funds would go towards the cleanup of the Reedy River. See *id* (“Last week the House of Representatives passed a joint resolution directing the settlement to the trust fund and tagging it for restoring the Reedy. It appears there’s also strong support in the Senate for ensuring any money recovered from Colonial Pipeline goes to the area where the environmental devastation occurred.”). The General Assembly’s efforts ultimately culminated in the enactment of S.C. Code Ann. § 1-7-150. None of this history indicates that the General Assembly intended for that section to affect the Attorney General’s authority to enter into contingency fee agreements. Indeed, the Reedy River settlement was obtained by virtue of a contingency fee agreement.

It is also important to point out that a separate proposal which would have required the Budget and Control Board to approve contingency fee agreements between the Attorney General and private law firms was considered as a part of the bill but was included in a *different section*. See Section 18, 1997–98 General Appropriations Bill 4700, as passed by the House, https://www.scstatehouse.gov/sess112_1997-1998/appropriations1998/hp2p18.htm (adding Section 1-7-85 to require written approval from the State Budget and Control Board before the Attorney General may contract on a contingent or other basis for legal representation). And even that section was ultimately removed. See Section 18, 1997–98 General Appropriations Bill 4700, as reported by the Senate Finance Committee, https://www.scstatehouse.gov/sess112_1997-1998/appropriations1998/sf2p18.htm.

The fact that the General Assembly removed a provision requiring oversight over the Attorney General’s contingency fee contracts surely is strong evidence that his existing authority remained in place unchecked. In other words, such action by the General Assembly in removing any statutory oversight over the Attorney General’s authority was a recognition that the Attorney General, as the State’s chief legal officer, must possess the power to “institute, conduct and

maintain all such suits and proceedings as he deems necessary for the enforcement of the laws of the States, the preservation of order, and the protection of public rights.” *State ex rel. Condon v. Hodges*, 349 S.C. 232, 239 (2002).

Thus, nothing 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. This Court interprets S.C. Code Ann. § 1-7-150 in light of this intent and concludes that the section in no way limits the authority of the attorney general to enter into contingency fee contracts. *See Greenville Baseball v. Bearden*, 200 S.C. 363 (1942) (“It is a familiar canon of construction that a thing which is in the intention of the makers of a statute is as much within the statute as if it were within the letter. It is also an old and well-established rule that words ought to be subservient to the intent, and not the intent to the words.”); *see also Ingram v. Bearden*, 212 S.C. 399, 410 (1948) (noting that the “paramount consideration and controlling factor in the interpretation of a statute is the intent of the Legislature, and each enactment of the Legislature is to be construed in light of its own context.”).

And as a matter of practice and custom, the Attorney General’s office has long used contingency fee contracts. A blue ribbon 1990 study described the Attorney General’s use of contingency fee contracts. The study found, “[s]ince at least the 1880’s, the State of South Carolina has used private attorneys for a portion of the State’s legal services ... and that [i]n appropriate cases, the Attorney General should consider contingent fee arrangements instead of an hourly rate.” *Report to the Attorney General of the Advisory Committee on Associate Counsel* (1990), at 3, 11. According to the study, the need for outside counsel is essential to the function of the Attorney General in protecting the public interest and that “[t]he Attorney General has authority to make such decisions as well as the obligation to monitor the cost and effectiveness of services provided by associate counsel.” *Id.* at 13.

The General Assembly has specifically not expanded the judicial authority over the settlement agreements. Judicial power is both inherent based on our Constitution, as well as delegated by statute in other circumstances. If this Court were to agree with Plaintiffs’ reading of S.C. Code Ann. § 1-7-150(B), then this Court would have to hold that its authority either came directly from the statute or by some other constitutional authority. Whether or not a statutory

granting of judicial review under S.C. Code Ann. § 1-7-150(B) would be constitutional is not before this Court. *See Bauer v. S.C. State Hous. Auth.*, 271 S.C. 219, 232 (1978) (“The doctrine, which is based on the constitutional requirement that the branches of government ‘be forever separate and distinct from each other’, South Carolina Constitution, art. I, s 8, states simply that the Legislature may not delegate its power to make laws.”).

III. Separation of Powers

But importantly, this Court believes that the most pressing issue in deciding whether or not the Attorney General possesses this authority stems from the separation of powers doctrine and the refusal of this Court to exercise powers that fall outside of its judicial purview. *See* S.C. Const. art. I, § 8 (“In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other.”). First, creating a judicial power that contravenes the plain meaning of the law would commandeer power from the other branches of government. And second, the actual application of Plaintiffs’ reading of the statute would force a judicial remedy which is likely unworkable within its constitutional authority.

A.

The separation of powers doctrine allows for checks and balances throughout our government. *State ex rel. McLeod v. McInnis*, 278 S.C. 307, 312 (1982) (“One of the prime reasons for separation of powers is the desirability of spreading out the authority for the operation of the government. It prevents the concentration of power in the hands of too few, and provides a system of checks and balances.”). The judiciary is required to exercise those powers which fall under its authority. *Id.* (“The legislative department makes the laws; the executive department carries the laws into effect; and the judicial department interprets and declares the laws.”). Obviously, it is necessary and proper for some branches to occasionally overlap in their actions, but this does not allow for usurpation of one branch by another. *Id.* at 313. (“This is true because there is tolerated in complex areas of government of necessity from time to time some overlap of authority and some encroachment to a limited degree.”).

The plain reading of S.C. Code Ann. § 1-7-150(B) mandates that all monies awarded to the State on actions brought on behalf of the Attorney General must be deposited into the general fund of the State, except for costs of litigation. S.C. Code Ann. § 1-7-150 (“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...”)(emphasis added).

Plaintiffs’ reading of S.C. Code Ann. § 1-7-150(B) would require court approval for payments of all settlement proceeds – past, present, and future. Because a settlement figure is a finite number, that would mean that this Court would have the ability to increase or decrease the monies that are rightly due to the General Assembly by statute. Thus, this Court could reject a contingency fee percentage as too low, and require the Attorney General to increase the fee paid to the private attorneys and which in turn would reduce money for the general fund. While there is no doubt that this Court has the capability of determining what a fair and reasonable settlement is, Plaintiffs provided ample examples of how courts do this on a regular basis, the stark difference is that this determination would inherently and by its nature exercise a legislative function. This Court would not be examining settlements between private actors, but would be using its discretion on general fund monies. *See State ex rel. McLeod v. McInnis*, 278 S.C. 307, 317 (1982) (“We hold that the powers assigned to JARC by the sections quoted hereinabove are executive in nature and are not reasonably incidental to the performance of any legislative duty.”); *Gregory v. Rollins*, 230 S.C. 269, 275 (1956) (“But they may not, by mandamus or otherwise, direct the appropriation of public funds, for to do so would be to trespass upon the legislative domain.”).

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

B.

Another separation of powers issue that arises is the political question doctrine. This principle, “which derives from the separation of powers doctrine, excludes from judicial review

those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of state legislatures or to the confines of the executive branch.” *S.C. Pub. Int. Found. v. Jud. Merit Selection Comm’n*, 369 S.C. 139, 142 (2006). The South Carolina Supreme Court has held many times that courts must avoid political and non-justiciable questions. *See S.C. Pub. Int. Found. v. Jud. Merit Selection Comm’n*, 369 S.C. 139, 142 (2006) (“The nonjusticiability of a political question is primarily a function of the separation of powers.”).

In determining whether or not a matter is a nonjusticiable “political question,” our Supreme Court has held, “The fundamental characteristic of a nonjusticiable ‘political question’ is that its adjudication would place a court in conflict with a coequal branch of government.” *S.C. Pub. Int. Found. v. Jud. Merit Selection Comm’n*, 369 S.C. 139, 142–43 (2006). This Court will have to ask if the question presents a bona fide legal challenge that is proper for judicial resolution. *Alexander v. Houston*, 403 S.C. 615, 619 (2013) (“This question presents a bona fide legal challenge which is proper for judicial resolution.”). The answer to the first question is yes: our Supreme Court has remanded the case to this Court to determine the legal issue of contingency fees and private law firms. This Court believes that the answer to the second question is no: the judicial remedy would likely result in a separation of powers issue. As discussed below, the judicial remedy, while it is well within the means and capability of this Court, would still result in a potential usurpation of the legislative branch’s prerogative. As held in *Bailey v. S.C. State Election Comm’n*, the judiciary will not put its own political act over that of the legislature’s:

Statutory interpretation is certainly a judicial question, but when the Legislature considers the very same question—knowing it is doing so at the very same time the Court considers the question—and answers the question with clarity, we cannot give a different answer through the judicial act of statutory interpretation. We may do so only by the political act of simply disagreeing. This Court will not do it.

Plaintiffs are left, therefore, only with their implicit argument as to what the law should be, that is, that this Court should change the law.

430 S.C. 268, 275 (2020).

The United States Supreme Court in *Baker v. Carr* explained the formulaic approach for a court to use when determining if a political question is actually nonjusticiable and should be avoided by the judiciary:

In the instance of nonjusticiability, consideration of the cause is not wholly and immediately foreclosed; rather, the Court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted **can be judicially molded**.

...

Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, **or whether the action of that branch exceeds whatever authority has been committed**, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.

369 U.S. 186-198 (1962) (emphasis added). This Court must determine if Plaintiffs' remedy is a specific and concrete resolution that can be carried out in future cases. Or if the remedy presents a quandary for the judiciary which is outside of its constitutional authority. *Alexander v. Houston*, 403 S.C. 615, 619 (2013) ("A court must conduct a limited examination of the matter when it is argued a non-justiciable political question is presented.").

In his dissenting opinion in *Abbeville Cnty. Sch. Dist. v. State*, Justice Kittredge examined the impact of the judiciary violating the separation of powers and the potential negative effects of one branch encroaching on the other, particularly when it comes to the legislative responsibility of funding:

I also think it important to note that the impact of today's decision is not limited to the funding of public education, for this Court's order that resources be devoted in one area necessarily diminishes the range of the General Assembly's discretion in other areas. The General Assembly deals with many matters of great public interest, and it must make difficult decisions in allocating limited resources among a wide-ranging array of needs. Those needs include infrastructure, law enforcement, social services, the yet to be determined expanse and state liability of the Affordable Care Act, and the list goes on. Such funding decisions and priorities are complex and are a function of policy decisions and choices in the Legislative Branch, which demands comity and respect from the Judicial Branch. By boldly encroaching into the constitutional prerogative of the General Assembly in the funding and policy decisions regarding public education, the Court's overreach today has a corresponding negative impact on the General Assembly's ability to make policy and funding decisions in other areas.

410 S.C. 619, 684 (2014), *amended*, 414 S.C. 166 (2015), *order superseded*, 415 S.C. 19 (2015), and *amended*, 415 S.C. 19 (2015).

It is not difficult to predict the same problem arising in this case as Justice Kittredge forewarned in *Abbeville*. Imagine a scenario in which the Attorney General, acting on behalf of the State, has secured a large settlement against an entity. As stated earlier, this Court believes that the statute is clear that the monies won by the Attorney General (minus litigation costs) are under the ownership of the general fund and thus belong to the people of this State. However, months, or even years later, a challenge could be brought claiming that the contingency fee was unreasonably high and that a trial court should reexamine the settlement structure and determine the appropriate fees based on reasonableness. While this may be a just and understandable request, Plaintiffs must also examine the flipside of what a trial court would be able to do, and frankly required to consider, as well: make a determination that the contingency fee was too low. A trial court would possibly be in the position of taking money that has already been designated to the general fund and ordering the legislature to give some of that money back. Taking this scenario even further, imagine if the money had already been appropriated in the previous year's budget. Would a trial court then be forced to order the legislature to re-appropriate additional funds in order to satisfy a contingency fee that was too low? As stated in *Edwards v. State*,

The General Assembly has the duty and authority to appropriate money as necessary for the operation of the agencies of government and has the right to specify the conditions under which the appropriated monies shall be spent. *State ex rel. Condon v. Hodges*, 349 S.C. 232, 244, 562 S.E.2d 623, 631 (2002); *Gilstrap v. S.C. Budget and Control Bd.*, 310 S.C. 210, 216, 423 S.E.2d 101, 105 (1992) (noting that the appropriation of public funds is a legislative function); *Clarke v. S.C. Pub. Serv. Auth.*, 177 S.C. 427, 437, 181 S.E. 481, 484 (1935) (noting that the General Assembly has full authority to make appropriations as it deems wise in absence of any specific constitutional prohibition against the appropriation).

383 S.C. 82, 90 (2009). It is the province of the legislature to appropriate, not the courts.

Plaintiffs state this position even better than this Court can in their reply brief:

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

State's \$600 million would amount to an appropriation of public funds by a member of the executive branch, rather than the General Assembly, in violation of the separation of powers. S.C. Const. art. I, § 8.

Plaintiffs' Response in Opposition to Motions for Summary Judgment p. 29. From the above paragraph, one could simply replace the words "executive officers" and "executive branch" with that of "judicial officers" and "judicial branch" and the point is made that there is a clear separation of powers issue. However, the key distinction is that there is a law written by the General Assembly that has allowed for the executive to control these settlements and how they are allocated. See S.C. Code Ann. § 1-7-150(B). The General Assembly has not given this authority to the courts.

This is not to say that this Court does not have the ability to review cases and controversies surrounding improper funding actions by the legislature. *Segars-Andrews v. Jud. Merit Selection Comm'n*, 387 S.C. 109, 123 (2010) (noting that the judiciary is still "duty bound to review the actions of the Legislature when it is alleged in a properly filed suit that such actions are unconstitutional[.]"). That would result in an absurd reading of this Order and allow for one branch to run freely without checks. The Attorney General is not without checks and balances of his power. The General Assembly is a party to these settlements by way of being the recipient of the funds; and thus, they have clear power, legislative authority, and incentive to ensure that the executive is acting in a proper fashion.

C.

The understandable question that then arises is what to do with these delicate situations which are fraught with political, economic, and legal issues? Is the answer to run to the courts to solve problems that Plaintiffs allege were created by the executive branch when it created a contract that is not reasonable? This Court refuses to become a "super-court" and place itself in the untenable situation of saving the executive branch from itself. See *Abbeville Cnty. Sch. Dist. v. State*, at 663 (Kittredge dissenting) ("I view the Court's decision as a policy opinion on the state of public education in South Carolina, in direct contravention of what this Court said it would not do in *Abbeville I*—act as a 'super-legislature.'"). The Attorney General is accountable to the people, and thus, as long as the Attorney General is following the statute procedurally – as it is

written on its face – and his actions are open to the public as required by law, the people will ultimately be able to determine the reasonableness of these contingency fee settlements.²

With Plaintiffs’ reading of the statute, this Court would control not just the case and controversy before it in the courtroom, but it would potentially have dominion and control over a purely legislative function going forward. Plaintiffs ask this Court to read into the law a requirement of judicial review of these settlements that the legislature has not created. The legislature has the ability to do this if it chooses as evidenced by the death and minor settlement statutes which require the courts to examine the deal, which includes attorney fees. See S.C. Code Ann. § 15-51-42 (“...the terms and provisions of the agreement with respect to attorney fees and costs.”); see also S.C. Code Ann. § 62-5-433 (“The petitioner must file with the court a verified petition setting forth all of the pertinent facts concerning the claim, payment, attorney fees, and expenses, if any, and the reasons why, in the opinion of the petitioner, the proposed settlement should be approved.”). The legislature has not done this here. *Bailey v. S.C. State Election Comm’n*, 430 S.C. 268, 276 (2020) (holding that “if the will of the people as expressed through their legislative representatives” want a law changed, then “the Legislature may change the law.”)

While Plaintiffs would ask this Court to use its own personal values and policy preferences when determining the actions of the Attorney General, this Court will not place itself in the stead of the people or the legislature. The law is the law. *Id.* at 684 (Kittredge dissenting) (“We live in a different era, where a disgruntled citizen can seek out a friendly court which shares the same values and then have those personal preferences judicially decreed into law.”); *City of Pawtucket v. Sundlun*, 662 A.2d 40, 58 (R.I. 1995) (quoting *The Federalist Papers*, No. 47 at 303 (James Madison)) (“Consequently, we refrain from scaling the walls that separate law making from

² As noted by the South Carolina Supreme Court in *South Carolina Public Interest Foundation v. Wilson* as well as Defendants during oral argument, these contracts are open to the public and available on the Attorney General’s website. *S.C. Pub. Int. Found. v. Wilson*, 437 S.C. 334, 342, 878 S.E.2d 891, 895–96 (2022) (“This issue will inevitably arise again in the future because Wilson has seven other litigation retention agreements with private attorneys. These agreements are currently listed on the Attorney General’s website, and five contain contingency fee provisions. Although the agreements differ in some respects, all contingency fee provisions persist. For example, Wilson recently announced a \$300 million settlement with opioid distributors. The litigation retention agreement in that case contains a contingency fee provision identical to the one here.”); *Litigation Retention Agreements*, S.C. Att’y Gen., <https://www.scag.gov/litigation-retention-agreements/> (last visited October 14, 2023); see also S.C. Code Ann. § 1-7-150 (“The Attorney General shall account to the State Treasurer for all fees, bills of costs, and monies received by him by virtue of his office.”).

judging, for “[w]ere the power of judging joined with the legislative *the judge* would then be *the legislator*.””).

Plaintiffs understandably fear that without judicial approval of these settlements then an unchecked governmental branch has the ability to abuse the process. However, this Court believes that these fears are unfounded for two reasons. First, the South Carolina Supreme Court has already said that Plaintiffs in this case had standing to challenge the settlement agreement. While this standing applies to a specific question (i.e., the threshold question stated previously), this standing would also likely apply to future cases that would give citizens the ability to challenge actions by the Attorney General that do not conform with the statute or case law. For example, FOIA requires the government to provide public access to these documents. Additionally, S.C. Code Ann. § 1-7-150(A) specifically requires that the Attorney General “shall account to the State Treasurer for all fees, bills of costs, and monies received by him by virtue of his office.” Secondly, because these court cases and contingency fees are public, the Attorney General, as an elected official, is still accountable for any actions that are seen as reasonable or unreasonable.

The fee agreement with the private law firms and the settlement agreement are both open to the public for their viewing. The people have given the Attorney General the authority to act on their behalf. If his actions are unreasonable or not in the best interests of the people, then they may act. *State v. Long*, 406 S.C. 511, 514 (2014) (“When this Court is called to interpret our Constitution, it is guided by the principle that both the citizenry and the General Assembly have worked to create the governing law.”).

IV. Plaintiffs’ Additional Arguments

This Court commends Plaintiffs for their well-written briefs and excellent oral argument; however, this Court simply disagrees with their interpretation of the statute in question.

A.

Additionally, Plaintiffs’ argument that many other courts have overturned perceived unreasonable attorney fees is without merit for this case. In *Layman v. State*, a case cited by Plaintiffs, the South Carolina Supreme Court looked to the reasonableness of attorney fees based on two doctrines. 376 S.C. 434 (2008). First, actual statutory creation of an award of attorney fees. And second, the common fund doctrine, which “allows a court in its equitable jurisdiction

to award reasonable attorney fees to a party who, at his own expense, successfully maintains a suit for the creation, recovery, preservation, or increase of a common fund or common property.” *Id.* at 452. However, this case is not *Layman* and neither of those issues apply in this case. The statute in question does not concern the awarding of attorney fees, but rather the authority of the Attorney General to create contingency fee agreements. The Supreme Court was clear in their remand: the trial court should look to the actions of the Attorney General and not to the actions of the attorneys.³

Similarly, Plaintiffs cited a federal case from New Jersey where the court there struck down a settlement agreement based on the unreasonableness of the attorney fees. But again, the issue before the Third Circuit Court of Appeals was not the authority of the South Carolina Attorney General, but rather a statute regulating class action lawsuits. *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 732 (3d Cir. 2001) (“Because of the possible injury to the Trust as well as other class members from the fee award in this case and, more importantly, **because of our overarching interest in class fee awards**, we therefore hold that the Trust has standing to appeal the fee award.”) (emphasis added).

B.

Plaintiffs’ argument that the Attorney General is not the executive, but rather only the Governor is the true executive is not persuasive. First, Plaintiffs points out that the Governor has objected to this settlement agreement and therefore this is not a separation of powers issue. But rather than illustrate Plaintiffs’ point, it undermines it. The Governor has not officially objected to this settlement agreement, one need only look at the caption of the case to see that. But by bringing up political statements by the Governor to his objection to the settlement, Plaintiffs make this Court’s point that this case and controversy is likely a political question that courts tend to avoid. *Plaintiffs’ Response in Opposition to Motions for Summary Judgment* p. 33 (“The Settlement Agreement **was a political resolution** brokered by elected leaders, including Governor McMaster and Senator Graham.”) (emphasis added). Furthermore, the first problem with the settlement that the Governor decries is not with the attorney fees, but rather with the terms of the settlement regarding plutonium storage. Second, our State’s form of government is not the same as the federal government. While our Constitution does make the Governor the chief executive, it

³ This is why Plaintiffs’ argument regarding the Rules of Professional Conduct also fails. The issue before this Court is not the actions of the private law firms, but the actions of the Attorney General.

also makes the Attorney General the chief legal officer of the state and a separate elected official. The Governor does not, by constitutional or statutory authority, have dominion and control over the Office of the Attorney General. Since the Office of the Attorney General was founded in 1698, with the appointment of Nicholas Trott as the state's first Attorney General, case law and statutory authority have made clear the role that this attorney plays in the legal system. While the Attorney General is the attorney for the Governor, his Office plays a dual role in protecting the rights of the citizens as well:

The Attorney General has a dual role. He is an attorney for the Governor and he is an attorney for vindicating wrongs against the collective citizens of the State.

...

Furthermore, the Attorney General, as noted above, has a dual role of serving the sovereign of the State and the general public. Thus, the Attorney General is not violating the ethical rule against conflicts of interest by bringing an action against the Governor.

While the Attorney General is required by the Constitution to "assist and represent" the Governor, the Attorney General also has other duties given to him by the General Assembly, and elaborated on by the Court,

State ex rel. Condon v. Hodges, 349 S.C. 232, 240-242 (2002).

Again, the Attorney General is not without checks and balances with the authority given to him under S.C. Code Ann. § 1-7-150(B). The law still requires procedures that must be followed and public documents that must remain open.

Conclusion

The statute is clear on its face that the Attorney General may enter into contingency fee agreements with private law firms. Further, the history and original intent and meaning of the statute show that the Attorney General was given the ultimate responsibility to handle litigation settlements of these kinds. And finally, assuming that Plaintiffs' interpretation of the statute is correct and requires court intervention, the result would create a separation of powers issue and ultimately result in this branch appropriating the power of another.

Judicial independence is key to our form of constitutional structure. Without the independence of the judiciary, the other branches can pose a threat to the liberty and the will of

the people. That independence is also a key factor to give the people confidence that the judiciary is acting as a third and separate branch as opposed to an extension of another.

The authority given to the courts must also be treated as sacrosanct. The power to overrule another branch of government that has been duly elected by the people should be a rare and restrained move. This Court believes that for it to interpret the plain reading and meaning of the statute and its history in a fashion that increases the power of the judiciary would be a violation of the Constitution. As Professor James Underwood stated, “The political world would not long tolerate a small, nonpopularly elected group of specialists who promiscuously interfered with the functions of other branches and arrogated to themselves broad policy making power.” Underwood, James L. (1986) “Judicial Review in a Legislative State: The South Carolina Experience,” *South Carolina Law Review*: Vol. 37: Iss. 2, Article 5, at 33.

Judicial restraint is the cornerstone of this State’s tripartite system of government. The General Assembly shall exercise the duties of the legislative branch; the Attorney General shall exercise the duties of the executive branch; and this Court shall exercise the duties of the judicial branch.

For the reasons set forth above, this Court **GRANTS** Defendants’ Motions for Summary Judgment.

AND IT IS SO ORDERED.

The Honorable Daniel McLeod Coble

October 20, 2023.

[ELECTRONIC SIGNATURE TO FOLLOW.]



Richland Common Pleas

Case Caption: South Carolina Public Interest Foundation , plaintiff, et al vs Alan Wilson , defendant, et al
Case Number: 2020CP4004603
Type: Order/Other

So Ordered

s/ Daniel Coble, 2774

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**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

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.

Appellate Case No. 2021-000343

Appeal from Richland County
R. Kirk Griffin, Circuit Court Judge

Opinion No. 28112
Heard April 6, 2022 – Filed September 14, 2022

REVERSED AND REMANDED

James Mixon Griffin, Badge Humphries, and Margaret
Nicole Fox, all of Griffin Humphries LLC, of Columbia,
and James G. Carpenter, of The Carpenter Law Firm, of
Greenville, for Appellants.

John S. Simmons, of Simmons Law Firm, LLC, of
Columbia, Gerald Malloy, of Malloy Law Firm, of
Hartsville, and James Todd Rutherford, of Rutherford Law
Firm, LLC, of Columbia, for Respondent Willoughby &
Hoefer, P.A.; William H. Davidson II and Kenneth P.
Woodington, both of Davidson, Wren & DeMasters, P.A.,
of Columbia, for Respondent Davidson, Wren &

DeMasters, P.A.; Attorney General Alan McCrory Wilson, Solicitor General Robert D. Cook, and Deputy Solicitor General J. Emory Smith Jr., all of Columbia, for Respondent Alan Wilson.

JUSTICE JAMES: South Carolina Attorney General Alan Wilson retained Respondents Willoughby & Hoefer, P.A., and Davidson, Wren & DeMasters, P.A., (collectively, the Law Firms) to represent the State in litigation against the United States Department of Energy (DOE). Wilson and the Law Firms executed a litigation retention agreement, which provided that the Law Firms were hired on a contingent fee basis. When the State settled its claims with the DOE for \$600 million, Wilson transferred \$75 million in attorneys' fees to the Law Firms. Appellants challenged the transfer, claiming it was unconstitutional and unreasonable. The circuit court dismissed Appellants' claims for lack of standing, and we certified the case for review of the standing issue. The merits of the underlying case are not before us.

Background

In 2002, the State brokered an agreement with the DOE concerning the storage of weapons-grade plutonium at the Savannah River Site in Aiken, South Carolina. *See* 50 U.S.C. § 2566. The agreement required the DOE to achieve a certain mixed-oxide fuel production objective by January 1, 2016. § 2566(d)(1). When the DOE failed to meet this objective, Wilson retained the Law Firms to pursue recovery of statutory damages.

Wilson's litigation retention agreement (Fee Agreement) with the Law Firms contains three provisions relevant to this appeal. The first provision states the Law Firms will be reimbursed for certain costs and expenses. The second provision sets forth varied contingency percentages based on the State's gross recovery, the type of representation provided, and the court in which the matter was heard. The third provision requires Wilson to seek judicial approval of attorneys' fees and costs "[w]hen possible[.]"

The Law Firms continued to litigate on the State's behalf for more than four years. On August 28, 2020, litigation ended with the execution of a settlement agreement (the Settlement Agreement). The Settlement Agreement required the DOE to immediately pay the State \$600 million, "inclusive of interest, with each party to bear its own costs, attorney fees, and expenses." Three days later, Wilson announced he would pay the Law Firms \$75 million in attorneys' fees pursuant to

the Fee Agreement. This amount included costs and expenses and represented 12.5% of the State's gross recovery.

Seeking to enjoin payment to the Law Firms, Appellants filed a complaint and motion for preliminary injunction against Wilson. Appellants alleged that because attorneys' fees were not awarded by court order or settlement, South Carolina Code subsection 1-7-150(B)¹ requires the entire \$600 million settlement to be deposited in the State's General Fund. Appellants also argued the attorneys' fee amount was patently unreasonable and, therefore, requires court approval. When Appellants learned Wilson had already disbursed the \$75 million,² they amended their complaint to name the Law Firms as defendants and filed another motion for preliminary injunction.

Judge Alison Lee denied Appellants' motion and found they lacked public importance standing. Specifically, Judge Lee concluded the critical element of a "need for future guidance" was absent:

Any judicial ruling on this matter would be entirely limited to the [Fee Agreement] and payment for services performed pursuant to this single contract. . . . Public importance standing is inappropriate here because there is no ruling the Court might make that would assist other courts resolving future arguments regarding outside litigation.

Judge Lee also found Appellants lacked so-called "derivative standing" because unlike Wilson, who has authority to represent the State as its chief legal officer, Appellants "have no authority to represent the State[s] interests in this proceeding."

Respondents promptly moved to dismiss Appellants' complaint for lack of standing. Judge Kirk Griffin granted the motion, ruling "Judge Lee's findings [as to standing] are dispositive and require dismissal. . . . Nonetheless and in the

¹ Subsection (B) 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[.]" (2005).

² The fact that the fee has already been paid is irrelevant to the issues on appeal. Likewise, the amount of the fee has no bearing on our analysis.

alternative, this Court . . . concurs with and adopts Judge Lee's well-reasoned analysis and findings." Appellants appealed, and we certified the case for review.

We previously declined to exercise original jurisdiction over the merits of Appellants' claims. Therefore, our review is limited to (1) whether Judge Lee's finding that Appellants lack standing constitutes the law of the case and (2) whether Appellants have standing. We express no view as to the merits of Appellants' claims.

Standard of Review

A motion to dismiss for lack of standing challenges the court's subject matter jurisdiction. *See Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009). Whether subject matter jurisdiction exists is a question of law, which this Court is free to decide with no particular deference to the circuit court. *Id.* (quoting *Chew v. Newsome Chevrolet, Inc.*, 315 S.C. 102, 104, 431 S.E.2d 631, 631 (Ct. App. 1993)); *Catawba Indian Tribe of S.C. v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007). Therefore, on appeal, we review the circuit court's findings de novo. *See Capital City*, 382 S.C. at 99, 674 S.E.2d at 528; *Catawba Indian Tribe*, 372 S.C. at 524, 642 S.E.2d at 753.

Discussion

I. Law of the Case

"The doctrine of the law of the case applies to an order or ruling which finally determines a substantial right." *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) (quoting *Weil v. Weil*, 299 S.C. 84, 89, 382 S.E.2d 471, 473 (Ct. App. 1989)). The doctrine does not, however, generally apply to "an interlocutory order which merely decides some point or matter essential to the progress of the cause, collateral to the issues in the case[.]" *Id.* (quoting *Weil*, 299 S.C. at 89, 382 S.E.2d at 473). Therefore, despite the "long-standing rule in this State that one judge of the same court cannot overrule another[.]" *Charleston Cnty. Dep't of Social Servs. v. Father*, 317 S.C. 283, 288, 454 S.E.2d 307, 310 (1995), interlocutory orders "may be reconsidered and corrected by the court before entering a final order on the merits." *Shirley's Iron Works*, 403 S.C. at 573, 743 S.E.2d at 785 (quoting *Weil*, 299 S.C. at 89, 382 S.E.2d at 473).

If a plaintiff lacks standing, he does not have the right to proceed to the merits of his claim against the defendant. Therefore, when a circuit court finds that a party lacks standing and includes that finding in an order, the order determines a substantial right. In this regard, Judge Lee's order does more than "merely decide[]" some point or matter essential to the progress of the cause, collateral to the issues in

the case[.]” *Id.* at 573, 743 S.E.2d at 785. However, because an order denying a motion for preliminary injunction is interlocutory, *see* S.C. Code Ann. § 14-3-330(4) (2017), Judge Lee’s order did not finally determine a substantial right of Appellants. *Id.*; *see* Rule 54(b), SCRCF; *cf. Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) (“[T]he findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits.”). Therefore, we decline to invoke the law of the case doctrine. *See State v. Hewins*, 409 S.C. 93, 113 n.5, 760 S.E.2d 814, 824 n.5 (2014) (stating the law of the case doctrine “is a discretionary appellate doctrine with no preclusive effect on successive trial proceedings”).

II. Standing

This Court has consistently acknowledged that even without an allegation of particularized injury, “standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance.” *Sloan v. Sanford*, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004); *see S.C. Pub. Interest Found. v. S.C. Transp. Infrastructure Bank*, 403 S.C. 640, 645, 744 S.E.2d 521, 524 (2013); *ATC S., Inc. v. Charleston Cnty.*, 380 S.C. 191, 199, 669 S.E.2d 337, 341 (2008); *Baird v. Charleston Cnty.*, 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999); *Davis v. Richland Cnty. Council*, 372 S.C. 497, 500, 642 S.E.2d 740, 741-42 (2007); *S.C. Pub. Interest Found. v. S.C. Dep’t of Transp. (SCDOT)*, 421 S.C. 110, 118-19, 804 S.E.2d 854, 859 (2017).

“The key to the public importance analysis is whether a resolution is needed for future guidance.” *ATC S.*, 380 S.C. at 199, 669 S.E.2d at 341; *see SCDOT*, 421 S.C. at 119, 804 S.E.2d at 859; *Vicary v. Town of Awendaw*, 425 S.C. 350, 359, 822 S.E.2d 600, 604 (2018). Courts must cautiously balance competing interests—the citizenry’s need to hold public officials accountable for alleged injustices and “the concomitant integrity of government action”—to determine whether the issue presented is “inextricably connected to the public need for court resolution for future guidance.” *SCDOT*, 421 S.C. at 118-19, 804 S.E.2d at 858 (quoting *Sloan v. Greenville Cnty.*, 356 S.C. 531, 551, 590 S.E.2d 338, 349 (Ct. App. 2003)); *ATC S.*, 380 S.C. at 199, 669 S.E.2d at 341; *see Sanford*, 357 S.C. at 434, 593 S.E.2d at 472. Only then can the issue “transcend[] a purely private matter and rise[] to the level of public importance.” *ATC S.*, 380 S.C. at 199, 669 S.E.2d at 341.

By claiming Wilson improperly disbursed state settlement funds, Appellants indisputably allege an issue of public importance. *See, e.g., SCDOT*, 421 S.C. at 119, 804 S.E.2d at 859; *Sloan v. Sch. Dist. of Greenville Cnty.*, 342 S.C. 515, 524,

537 S.E.2d 299, 303 (Ct. App. 2000). Therefore, the linchpin of our analysis is whether a need for future guidance exists.

Appellants' complaint presents a threshold issue of the Attorney General's statutory authority to enter contingency fee agreements with private law firms. This issue will inevitably arise again in the future because Wilson has seven other litigation retention agreements with private attorneys. These agreements are currently listed on the Attorney General's website, and five contain contingency fee provisions.³ Although the agreements differ in some respects, all contingency fee provisions persist. For example, Wilson recently announced a \$300 million settlement with opioid distributors.⁴ The litigation retention agreement in that case contains a contingency fee provision identical to the one here. There is a need for future guidance as to whether subsection 1-7-150(B) authorizes the Attorney General to enter into contingency fee agreements. We therefore hold Appellants have public importance standing.⁵

Conclusion

We reverse the circuit court's finding that Appellants lack public importance standing and remand for the circuit court to consider the merits of Appellants' claims. We reiterate that nothing in this opinion should be construed as a comment or conclusion on the merits.

REVERSED AND REMANDED.

BEATTY, C.J., KITTREDGE, HEARN and FEW, JJ., concur.

³ *Litigation Retention Agreements*, S.C. Att'y Gen., <https://www.scag.gov/litigation-retention-agreements/> (last visited July 28, 2022) (listing contingency fee agreements for Opioid Manufacturers, Pharmacy Benefit Managers, Opioid Distributors, Insulin Pricing, and Google Advertising Technology).

⁴ *See Attorney General Alan Wilson: Drug Distributors and Johnson & Johnson Commit to \$26 Billion Opioid Agreement*, S.C. Att'y Gen. (Feb. 25, 2022), <https://www.scag.gov/about-the-office/news/attorney-general-alan-wilson-drug-distributors-and-johnson-johnson-commit-to-26-billion-opioid-agreement/>.

⁵ Because we decide this appeal on public importance grounds, we need not address derivative standing. *See Futch v. McCallister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999).

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY

Debra R. McCaslin, Circuit Court Judge
Alison R. Lee, Circuit Court Judge

Case No. 2020-CP-40-04603

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

v.

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

NOTICE OF APPEAL

Willoughby & Hoefer, P.A. hereby appeals the Ex Parte Temporary Restraining Order of the Honorable Allison Renee Lee filed on October 1, 2020 (attached as Exhibit A). Appellant received written notice of entry of this order on October 1, 2020.

Attorney Signatures on Next Page

Respectfully submitted,

s/John S. Simmons

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
South Carolina Public Interest Foundation	)	CIVIL ACTION NO. 2020-CP-40-04603
and John Crangle, individually and on	)	
behalf of all others similarly situated,	)	
	)	
	)	ANSWER OF DEFENDANT
Plaintiffs,	)	ATTORNEY GENERAL
vs.	)	
	)	
Alan Wilson, Attorney General for the	)	
State of South Carolina, Willoughby &	)	
Hoefer, P.A., and Davidson, Wren &	)	
DeMasters, P.A.,	)	
	)	
Defendants.	)	
_____	)	

The Defendant Attorney General, answering the Amended Complaint (Complaint) herein subject to, and without waiving his Motions in this case including his Motion to Dismiss, alleges the following.

FOR A FIRST DEFENSE

1. The Defendant Attorney General (AG) denies each and every allegation of the Complaint not hereinafter specifically admitted.
2. He admits so much of Paragraph 1 as alleges that the South Carolina Public Interest Foundation (SCPIF) is a corporation organized and existing under the laws of the State of South Carolina. He is without knowledge or information sufficient to form a belief as to the truth of so much of Paragraph 1 as alleges that SCPIF is “a corporation, not for profit.” Further responding, he denies that SCPIF is “dedicated to the public interest including the upholding of the Constitution

and laws of the State of South Carolina,” at least in this action, as the Complaint alleges matter contrary to both the Constitution and law of this State.

3. He admits the first sentence of Paragraph 2, upon information and belief. Further responding, he denies the implicit allegation in the second sentence that the instant action is one cognizable under the provisions Rule 23 of the South Carolina Rules of Civil Procedure, including but not limited to Rule 23(a)(4), or that Plaintiff Crangle would be a suitable representative for such purposes.

4. The AG admits Paragraph 3, 4 and 5.

5. As to Paragraph 6, he craves reference to the pertinent law and the allegations inconsistent therewith are denied. Further responding, he submits that Plaintiffs have abandoned any claim of taxpayer standing by virtue of the argument of their counsel in the Supreme Court of South Carolina in Appellate Case Number 2021-000343 acknowledging that they no longer assert taxpayer standing in this matter, which argument is binding upon plaintiffs as a matter of law. Moreover, the AG submits that the public importance standing of Plaintiffs recognized in Appellate Case Number 2021-000343 is limited to a determination of a discrete legal question, *i.e.*, the authority of the Attorney General of South Carolina to enter into contingency fee agreements under S.C. Code Ann. § 1-7-150(B) and that Plaintiffs possess no standing to litigate any other issue. *S.C. Pub. Int. Found. v. Wilson*, No. 2021-000343, 2022 WL 4231250 (S.C. Sept. 14, 2022).

6. As to Paragraph 7, he acknowledges that the Supreme Court of South Carolina has held in Appellate Case No. 2021-000343 that Plaintiffs have public importance standing to challenge the Attorney General’s authority to enter contingency fee agreements under S.C. Code Ann. § 1-7-150(B). He denies the remaining allegations of Paragraph 7.

7. The Attorney General admits so much of Paragraph 8 as alleges that he executed a Settlement Agreement dated August 28, 2020, that resolved a legal action he instituted, by and through his outside counsel which are named as defendants in the instant action, on behalf of the State of South Carolina against the United States government, and specifically its Department of Energy (“DOE”), for violations of 50 U.S.C. A. § 2566. Further responding, he submits that the referenced Settlement Agreement was reached only after the State of South Carolina, acting by and through the Attorney General and retained outside legal counsel, litigated legal actions against the DOE in the United States District Court for the District of South Carolina (twice), the United States Court of Federal Claims, and the United States District Court for the District of Nevada, and prosecuted and/or defended appeals from said lower courts in the United States Courts of Appeal for the Fourth, Ninth, and Federal Circuits and the United States Supreme Court. As to the reference to the Griffin affidavit, he admits only that it is attached to the Complaint as an exhibit.

8. As to Paragraph 9, 10, 11 and 12, he craves reference to the pertinent law, and the allegations inconsistent therewith are denied.

9. He admits so much of Paragraph 13 as alleges that, prior to the institution of legal action by the Attorney General by and through outside counsel, DOE had not removed any plutonium from South Carolina as required by 50 U.S.C.A. § 2566. Further responding, he asserts that following the institution of litigation by the Attorney General against DOE, that Federal agency did remove or cause to be removed one (1) metric ton of plutonium from South Carolina as required by the December 20, 2017 order of the Honorable Michelle Childs in United States District Court Civil Action No. 1:16-cv-00391-JMC. He craves reference to the pertinent law, and the allegations inconsistent therewith are denied.

10. As to Paragraphs 14, 15 and 16, he craves reference to the Settlement Agreement and denies any allegations inconsistent therewith. Further responding, the AG submits that the terms of the referenced Settlement Agreement are reasonable given the language of 50 U.S.C.A. § 2566 making payment of penalties dependent upon Congressional appropriations which the State of South Carolina was powerless to affect. He further submits that additional terms and conditions in the Settlement Agreement reached between the State of South Carolina and the United States of America in that litigation provide for other tangible benefits to the State of South Carolina, including a contractual obligation for the United States of America to remove the remaining nine and one-half (9.5) metric tons of defense grade plutonium by December 31, 2036 or pay a penalty of up to \$1.5 Billion dollars to the State of South Carolina, with additional monies to be paid in years after until removal.

11. As to Paragraph 17, he admits that he announced the settlement at a press conference and denies any allegations inconsistent with his public comments.

12. The AG denies any allegations in Paragraphs 18 and 19 that are inconsistent with the referenced letter of the Governor. Further responding, he submits that the author of the referenced letter recognized that the Federal litigation undertaken by outside counsel was both “complicated and time consuming” for which the Attorney General “needed the assistance of outside counsel,” which statement directly contradicts that allegations of Paragraph 46 of the Complaint.

13. As to Paragraph 20, he admits that such a letter was written but denies the allegations in the letter to the extent that they are inconsistent with State law or the record regarding the litigation referenced in the letter. He also denies the characterizations in the letter regarding the fee.

14. He denies the bold-type assertion following Paragraph 20. Plaintiffs also have not contested that the Attorney General possesses the authority to enter into contingency fee contracts for the retention of outside counsel, and this assertion does not do so.

15. The AG denies the allegations contained in Paragraph 21.

16. He denies Paragraph 22 as to the attorneys' fees paid to the Attorney General's outside counsel. He craves reference to S.C. Code Ann. §1-7-150 and 2019 S.C. Acts 91, Part 1.B, § 59.8, 2020 S.C. Acts 135, §2, and 2019 S.C. Act 91 and denies any allegations inconsistent therewith. *See Answer Paragraph 21, infra.*

17. As to Paragraph 23, he craves reference to §1-7-150 and denies any allegations inconsistent therewith. *See Answer Paragraph 21, infra.* Furthermore, he alleges the provisos adopted by the General Assembly in 2019 S.C. Act 91 and 2020 S.C. Act 135 expressly provide that the settlement proceeds be deposited into the Litigation Recovery Account and not the general fund account.

18. He denies Paragraph 24.

19. As to Paragraph 25, the AG craves reference to the Agreement to Voluntary Dismissal of Appeal filed September 29, 2020, in the United States Court of Appeals for the Federal Circuit, Case No. 19-2324, incorporating the Settlement Agreement referenced therein under Rule 42(b) of the Federal Rules of Appellate Procedure ("Agreement to Voluntary Dismissal") and the Order dated October 1, 2002, and denies any allegation inconsistent therewith.

20. As to Paragraph 26, 27 and 28, he craves reference to the Settlement Agreement incorporated in the Agreement to Voluntary Dismissal and denies any allegation inconsistent therewith.

21. He denies the allegations of Paragraph 29 as to the attorneys' fees paid to the Attorney General's outside counsel. He craves reference to §1-7-150(B) and 2019 S.C. Acts 91, Part 1.B, § 59.8, 2020 S.C. Acts 135, § 2, and 2019 S.C. Act 91 and denies any allegations inconsistent therewith. Section 1-7-150(B) does not apply to or limit the authority of the Attorney General to enter contingency fee agreements for representation by private law firms nor does it require that fees payable from such arrangements, including those at issue in the instant case, be deposited into the State's General Fund. Even if, *arguendo*, §1-7-150 applies to fees from contingency fee agreements, the fees at issue in the instant case were not required to be deposited into the General Fund according to the terms of that statute and the above provisos. §1-7-150 expressly provides that certain monies, including the cost of litigation, are not required to be deposited into the general fund. §1-7-150 also expressly provides that monies received by the Attorney General are not required to be deposited in the general fund where some other disposition is required by law. Further responding, he alleges that the Executive Budget Office, Comptroller General, and the Treasurer all approved and processed the payment pursuant to applicable state law. This allegation is now moot. Moreover, the amount of money comprising the agreed contingency compensation of counsel included in any settlement sum are not the property of the client, but the property of counsel. *See Foster v. Taylor*, 210 S.C. 324, 332, 42 S.E.2d 51, 535 (1947) (constitutional provision requiring appropriation by the Legislature "applies to funds of the public, not another's....").

22. He denies Paragraphs 30, 31 and 32 to the extent that they allege that the Attorney General appropriated or improperly transferred funds. He submits that any alleged requirement that the Attorney General obtain legislative approval to retain and compensate outside counsel would itself violate S.C. Const. art. I, §8 as the Attorney General is authorized to enter into such

retention and compensation agreements pursuant to his constitutional authority and statutory and common law. Further responding, he alleges that the Executive Budget Office, Comptroller General, and the Treasurer all approved and processed the payment pursuant to applicable state law.

23. He denies the bold language between Paragraphs 32 and 33.

24. The AG denies the allegations of Paragraph 33.

25. He craves reference to the Rule cited in Paragraphs 34 and 35 and denies any allegations inconsistent therewith. He denies that this rule forms a basis for a civil action.

26. As to Paragraph 36, he craves reference to the pleadings filed on behalf of the Attorney General in the United States District Court for the District of South Carolina in C/A Nos. 1:16-00391-JMC, 1:18-cv-01431-JMC, , the United States Court of Claims in 1:18-cv-00038-MMS, and the United States District Court for the District of Nevada in C/A No. 3:18-cv-00569-MMD-CBC, with respect to the nature and content of the counts alleged therein and denies any allegation of Paragraph 36 that is inconsistent therewith.

27. The AG denies the allegations of Paragraph 37. He craves reference to the Federal government's filings in in the United States District Court for the District of South Carolina in C/A Nos. 1:16-00391-JMC, 1:18-cv-01431-JMC,the United States Court of Claims in 1:18-cv-00038-MMS, and the United States District Court for the District of Nevada in C/A No. 3:18-cv-00569-MMD-CBC, and denies any allegation inconsistent therewith.

28. He admits so much of Paragraph 38 as alleges that DOE asserted that it was not liable to the State of South Carolina for monies payable under 50 U.S.C.A. §2566 on the ground that Congress had not appropriated money for that purpose.

29. As to Paragraphs 39, 40, 41, and 42, he craves reference to the filings and orders in the referenced cases and denies any allegations inconsistent therewith.

30. He admits Paragraphs 43 and 44.

31. The AG denies Paragraph 45 to the extent it alleges that no discovery was conducted in the actions in which outside counsel represented the Attorney General of South Carolina against DOE arising out of the failure of the Federal Government to comply with its obligations under 50 U.S.C.A §2566. To the contrary, outside counsel participated in the discovery process mandated by Rule 26(a)(1-4), FRCP as implemented in the United States District Court for the District of South Carolina in its Local Rules 26.01-26.03. Further responding, he submits that additional discovery was not needed as the records of the United States government regarding the subject matter of the Attorney General's actions were publicly available and outside counsel utilized other means to obtain and review hundreds of thousands of pages of documents. Further responding, he submits that the governing law in federal Administrative Procedure Act cases preclude extensive discovery except under limited circumstances. He admits that outside counsel did draft pleadings and wrote briefs as part of their effort to prove that the DOE was required to pay money to the State of South Carolina as a result of the Federal government's failure to comply with its statutory obligation to remove plutonium from within the State of South Carolina – a requirement that DOE denied in every action and proceeding in the District Courts, Court of Federal Claims, Courts of Appeal, and the Supreme Court.

32. He denies the first sentence of Paragraph 46. As to the second sentence, he denies that the settlement agreement was a “political resolution” brokered by elected leaders and that the Governor and Senator participated in the settlement, but the Governor did approve of the terms of the Settlement Agreement after having been briefed by the Attorney General and outside counsel.

He craves reference to the language of Exhibit 2, which is cited in this Paragraph, for its meaning and purpose and denies any allegation inconsistent therewith.

33. He denies Paragraph 47 and craves reference to the language of the incorporated exhibit for its meaning and purpose and denies any allegation inconsistent therewith. Further responding, he submits that the referenced language in the exhibit incorporated into this paragraph does not apply in this instance as there has been no “award” of attorneys’ fees in this matter, but only payment of a sum contractually obligated to be paid.

34. He denies Paragraph 48. Further responding, he submits that a contract exists which requires payment of attorneys’ fees for which no judicial approval is required. Moreover, no dispute exists as between the parties to that contract in this regard such that a court could lawfully exercise jurisdiction in such a declaratory judgment action. Furthermore, Plaintiffs lack standing to challenge any matter regarding the contract other than whether §1-7-150(B) authorizes the Attorney General to enter into contingency fee agreements, but they are not entitled to relief as to that issue and did not request it in their pleadings.

35. He denies Paragraph 49.

36. He denies Paragraph 50. Further responding, he submits that the fee under the applicable fee agreements totaled over \$75 Million.

37. He admits so much of Paragraph 51 as alleges that the Attorney General entered into a fee agreement with for additional services that required additional contingent compensation.

38. He admits Paragraph 52.

39. He admits Paragraph 53.

40. As to Paragraph 54, the he craves reference to the fee agreements between the law firm and the Attorney General of South Carolina with respect to its content and meaning and denies any allegation of Paragraph 54 inconsistent therewith.

41. He admits Paragraph 55.

42. As to Paragraph 56, the Attorney General craves reference to the fee agreements between outside counsel and the Attorney General of South Carolina with respect to their content and meaning and denies any allegation of Paragraph 56 inconsistent therewith.

43. As to Paragraph 57, he denies any implicit allegation that the referenced decision of the United States Court of Appeals for the Fourth Circuit involved the decision of the United States District Court for the District of South Carolina to enjoin DOE to remove one (1) metric ton of plutonium from South Carolina. Further responding, he avers that the general agreement on fees was agreed well before the final signature.

44. As to Paragraph 58 and 59, he craves reference to the fee agreements and referenced filings and denies any allegations inconsistent therewith

45. He denies Paragraph 60. Further responding, he submits that the allegations of this paragraph are mooted by the fact that the attorneys' fee due outside counsel under the terms and conditions of the litigation retention agreement between them and the Attorney General, as amended, have been lawfully paid to outside counsel.

46. He denies the allegations of Paragraph 61 to the extent they are inconsistent with the language of the litigation retention agreement, as amended, and other South Carolina law.

47. He denies the allegations of Paragraph 62 to the extent they are inconsistent with the language of the litigation retention agreement, as amended, and other South Carolina law. Further responding, he submits that the allegations of this paragraph are mooted by the fact that

the attorneys' fee due outside counsel under the terms and conditions of the litigation retention agreement between them and the Attorney General, as amended, have been lawfully paid to outside counsel.

48. He denies the indented, bold-type assertion between Paragraphs 62 and 63 to the extent it is intended to allege that the Attorney General disbursed monies from the settlement amount paid by the DOE and that he did so improperly. Further responding, he submits that the processing of payment of the attorneys' fees was commenced on September 17, 2020, 8 days prior to the institution of this civil action, and that such payment was authorized by the Executive Budget Office, approved by the Comptroller General of South Carolina, and executed by the State Treasurer in the normal course. *See* October 1, 2020, Affidavit of Kimberly Buckley.

49. The AG admits Paragraph 63 only to the extent that it is consistent with the filings on record.

50. As to Paragraph 64, he craves reference to the email in the referenced exhibit and denies any allegations inconsistent therewith.

51. He admits Paragraph 65 and alleges that the email regarding that matter was not sent until 4:58 pm on September 25. As to the referenced affidavit, he admits only that it is attached.

52. He denies Paragraphs 66 and 67 as written. Counsel for the AG emailed Judge Lee on Monday, September 28, stating that he understood that a request would be made to have the matter heard before Judge Newman at 10:30 am on Wednesday, September 30 at the same time as the hearing referenced in Paragraph 64 of the Complaint. If not heard then, counsel requested that the matter not be heard before that Thursday afternoon due to a conflict that morning. After the matter was referred to Judge McCaslin, and emails were exchanged between her and counsel

about whether to have the matter heard by Judge Newman, who was hearing the suit or by her, counsel for the Attorney General said that he was available at 3pm on that Tuesday before Judge McCaslin. Counsel for the AG did not object to a hearing on Tuesday. As to the referenced exhibit, he admits only that it is attached, and alleges that it does not contain all emails pertinent to these Paragraphs.

53. He admits Paragraph 68 as to the AG.

54. As to Paragraph 69, he craves reference to the email string in the cited affidavit and denies any allegations inconsistent therewith.

55. He admits paragraph 70 to the extent that it alleges that counsel for the Attorney General made a filing in this matter on September 29, 2020. He craves reference to that filing and denies any allegation of this paragraph inconsistent therewith.

56. As to Paragraph 71, he craves reference to the cited Exhibit and denies allegations Inconsistent with those emails to the extent that they pertain to this Paragraph.

57. The AG admits Paragraph 72.

58. As to Paragraph 73, the AG craves reference to the cited order and denies any allegations inconsistent therewith.

59. As to Paragraph 74, he craves reference to the attached Exhibit and denies any allegations inconsistent therewith to the extent that the Exhibit pertains to this Paragraph.

60. Paragraph 75 is a cumulative paragraph to which no response is necessary. To the extent any response is required, the AG incorporates the answers to the preceding paragraphs by reference.

61. As to Paragraph 76, the AG denies that Plaintiffs are entitled to seek declaratory relief under S.C. Code Ann. § 15-53-50 except as to the authority of the Attorney General to enter

into contingency fee agreements under S.C. Code Ann. § 1-7-150(B), but they are not entitled to relief as to that issue and did not request it in their pleadings.

62. As to Paragraph 77 and each of its subparts, the AG admits only that Plaintiffs seek the alleged relief, but he denies that they are entitled to seek and receive such relief. Moreover, the allegations of this paragraph are mooted by the fact that the attorneys' fee due outside counsel under the terms and conditions of the litigation retention agreement between them and the Attorney General, as amended, have been lawfully paid to outside counsel.

63. Paragraph 78 is a cumulative paragraph to which no response is necessary. To the extent any response is required, the AG incorporates the answers to the preceding paragraphs by reference.

64. As to Paragraph 79, he admits that the contractually owed attorneys' fee due outside counsel as a result of the Settlement Agreement with DOE referenced above have been received by outside counsel but denies the remainder of that Paragraph.

65. He admits Paragraph 80.

66. He admits so much of Paragraph 81 as alleges that counsel have received the contractually owed attorneys' fee due them as a result of the Settlement Agreement with DOE. He denies the allegations of Paragraph 81 insofar as they allege that the funds were received subject to any dispute between Plaintiffs and the Attorney General.

67. He denies Paragraphs 82, 83 and 84.

68. He denies that Plaintiffs are entitled to the relief requested in Paragraphs 85, 86 and 87.

69. Paragraph 88 is a cumulative paragraph to which no response is necessary. To the

extent any response is required, the AG incorporates the answers to the preceding paragraphs by reference.

70. The AG denies Paragraphs 89 and 90.

71. Paragraph 91 is a cumulative paragraph to which no response is necessary. To the extent any response is required, the AG incorporates the answers to the preceding and subsequent paragraphs by reference.

72. He denies Paragraph 92.

73. As to Paragraphs 93 and 94, Plaintiffs have abandoned their allegations of taxpayer standing. Therefore these Paragraphs are moot.

74. The AG denies that Plaintiffs are entitled to the relief that they request in Paragraphs 95 and 96, and he alleges that their requests are moot in that they have abandoned their allegations of taxpayer standing.

75. The AG denies that Plaintiffs are entitled to the relief requested in their Prayer for Relief.

FOR A SECOND DEFENSE
(Failure to State a Claim)

76. The relevant defenses contained in the preceding paragraphs are reasserted and reincorporated as fully as if set forth verbatim, insofar as they are not inconsistent with this Second Defense.

77. Pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, Plaintiffs fail to state facts sufficient to constitute causes of action against and the Complaint should be dismissed.

FOR A THIRD DEFENSE
(Lack of Standing)

78. The relevant defenses contained in the preceding paragraphs are reasserted and reincorporated as fully as if set forth verbatim, insofar as they are not inconsistent with this Third Defense.

79. Other than the limited public importance standing to ascertain whether S.C. Code Ann. § 1-7-150(B) authorizes the Attorney General to enter contingency fee agreements with outside counsel (but they are not entitled to relief as to that issue and did not request it in their pleadings), Plaintiffs lack standing to bring this action as they have not suffered, nor are they in immediate danger of suffering, a concrete and particularized injury caused by him that a favorable ruling by this Court can redress.

WHEREFORE, having fully answered the Plaintiffs' Complaint, the Attorney General prays as follows:

1. That judgment for him be entered as to the Complaint and that the relief sought by the Plaintiffs be denied.
2. For such further relief as the Court deems just and proper.

s/ J. EMORY SMITH, JR.
S.C. Bar No. 5262
Deputy Solicitor General

ALAN WILSON
Attorney General

ROBERT D. COOK
Solicitor General
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[Signature block continues next page]

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November 2, 2022

ATTORNEYS FOR DEFENDANT
ATTORNEY GENERAL

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
South Carolina Public Interest Foundation	)	CIVIL ACTION NO. 2020-CP-40-04603
and John Crangle, individually and on	)	
behalf of all others similarly situated,	)	
	)	
	)	ANSWER OF DEFENDANTS
Plaintiffs,	)	WILLOUGHBY & HOEFER, P.A. AND
vs.	)	DAVIDSON, WREN & DeMASTERS, P.A.
	)	
Alan Wilson, Attorney General for the	)	
State of South Carolina, Willoughby &	)	
Hoefer, P.A., and Davidson, Wren &	)	
DeMasters, P.A.,	)	
	)	
Defendants.	)	
	)	
_____	)	

Defendants Willoughby & Hoefer, P.A. and Davidson, Wren & DeMasters, P.A. (“Law Firms”), specifically reserving and preserving all of their rights and arguments on all issues raised by their previously filed and pending motions to dismiss in this action, or any such subsequent motion, answer the complaint as follows.

FOR A FIRST DEFENSE

Any allegation not specifically admitted is denied. Law Firms’ responses correspond to the numbered paragraphs contained in the complaint.

1. Law Firms admit so much of Paragraph 1 as alleges that the South Carolina Public Interest Foundation (“SCPIF”) is a corporation organized and existing under the laws of the State of South Carolina. Law Firms deny so much of Paragraph 1 as alleges that SCPIF is “a corporation, not for profit” as it is not organized as such under the laws of the State of South Carolina. Further responding, Law Firms deny that SCPIF is “dedicated to the public interest including the upholding

of the Constitution and laws of the State of South Carolina,” particularly in this action, as its complaint alleges matter contrary to both the Constitution and law of this State.

2. Law Firms admit, upon information and belief, that Plaintiff John Crangle has resided in the State of South Carolina but lack sufficient information to form a belief as to whether he is currently a resident, taxpayer, or registered elector of this State. Further responding, Law Firms deny the implicit allegation that the instant action is one cognizable under the provisions Rule 23 of the South Carolina Rules of Civil Procedure (“SCRCP”), including but not limited to Rule 23(a)(4), SCRCP, or that Plaintiff Crangle would be a suitable representative for such purposes.

3. Law Firms admit Paragraph 3.

4. Law Firms admit Paragraph 4. Further responding, Law Firms aver that each entity is a corporation organized and existing under S.C. Code Ann. §§ 33-2-101, *et seq.*

5. Law Firms admit, upon information and belief, the allegations of Paragraph 5.

6. The allegations contained in Paragraph 6 call for legal conclusions to which no response is required. To the extent a response is required, Law Firms crave reference to the pertinent law and the allegations inconsistent therewith are denied. Further responding, Law Firms submit that plaintiffs have abandoned any claim of taxpayer standing by virtue of the argument of their counsel in the Supreme Court of South Carolina in Appellate Case Number 2021-000343 acknowledging that they no longer assert taxpayer standing in this matter, which argument is binding upon plaintiffs as a matter of law. Moreover, Law Firms submit that the public importance standing of Plaintiffs recognized in Appellate Case Number 2021-000343 is limited to a determination of a discrete legal question, *i.e.*, the authority of the Attorney General

of South Carolina to enter into contingency fee agreements under S.C. Code Ann. § 1-7-150(B) and that Plaintiffs possess no standing to litigate any other issue.

7. The allegations contained in Paragraph 7 call for legal conclusions to which no response is required. To the extent a response is required, Law Firms acknowledge that the Supreme Court of South Carolina has held in Appellate Case No. 2021-000343 that Plaintiffs have public importance standing to challenge the Attorney General's authority to enter contingency fee agreements with private law firms under S.C. Code Ann. § 1-7-150(B). Law Firms deny the remaining allegations of Paragraph 7.

8. Law Firms admit so much of Paragraph 8 as alleges that Attorney General Alan Wilson ("Attorney General") executed a Settlement Agreement dated August 28, 2020 ("Settlement Agreement") that resolved a legal action he instituted, by and through his outside counsel which are named as defendants in the instant action, on behalf of the State of South Carolina against the United States government, and specifically its Department of Energy ("DOE"), for violations of 50 U.S.C. A. § 2566. Further responding, Law Firms submit that the referenced Settlement Agreement was reached only after the State of South Carolina, acting by and through the Attorney General and retained outside legal counsel, litigated legal actions against the DOE in the United States District Court for the District of South Carolina (twice), the United States Court of Federal Claims, and the United States District Court for the District of Nevada, and prosecuted and/or defended appeals from said lower courts in the United States Courts of Appeal for the Fourth, Ninth, and Federal Circuits and the United States Supreme Court. The remaining allegations of Paragraph 8 are denied.

9. The allegations contained in Paragraph 9 call for legal conclusions to which no response is required. To the extent a response is required, Law Firms crave reference to the

pertinent law and the allegations inconsistent therewith are denied. Further responding, Law Firms submit that no final agreement was brokered and agreed-upon between Governor Hodges and DOE, but if the “agreement brokered by Governor Hodges is codified at Title 50, United States Code, Section 2566” such agreement did not fully protect the State of South Carolina as it left an opening for the United States of America to refuse to remove weapons-grade plutonium from within the State of South Carolina without penalty based on the lack of Congressional appropriation of funds to pay such penalty. Law Firms submit that only as a result of the litigation efforts of the Attorney General of South Carolina, acting by and through outside counsel, was the United States of America (a) forced by order of the United States District Court of the District of South Carolina to remove one (1) metric ton of defense grade plutonium from within the State of South Carolina, (b) incited to enter into an agreement to immediately compensate the State of South Carolina \$600 Million dollars for the failure of the DOE to have removed defense grade plutonium from within the State of South Carolina, and (c) incited to enter into a contract to remove the remaining nine and one-half (9.5) metric tons of defense grade plutonium or pay the State of South Carolina up to another \$1.5 Billion (which payment is not contingent on any appropriation) through January 1, 2037, with additional payments due every year thereafter until 2042, in which a removal provision applies.

10. The allegations contained in Paragraph 10 call for legal conclusions to which no response is required. To the extent a response is required, Law Firms crave reference to the pertinent law and the allegations inconsistent therewith are denied.

11. The allegations contained in Paragraph 11 appear to call for legal conclusions regarding 50 U.S.C.A. § 2566, to which no response is required. To the extent a response is

required, Law Firms crave reference to the pertinent law and the allegations inconsistent therewith are denied.

12. The allegations contained in Paragraph 12 call for legal conclusions to which no response is required. To the extent a response is required, Law Firms crave reference to the pertinent law and the allegations inconsistent therewith are denied. Further responding, Law Firms submit that the referenced payments were only due if and to the extent that appropriations for that purpose were made by Congress.

13. Law Firms admit so much of Paragraph 13 as alleges that, prior to the institution of legal action by the Attorney General by and through outside counsel, DOE had not removed any plutonium from South Carolina as required by 50 U.S.C.A. § 2566. Further responding, Law Firms assert that following the institution of litigation by the Attorney General against DOE, that Federal agency did remove or cause to be removed one (1) metric ton of plutonium from South Carolina as required by the December 20, 2017 order of the Honorable Michelle Childs in United States District Court Civil Action No. 1:16-cv-00391-JMC. The remaining allegations of Paragraph 13 call for legal conclusions to which no response is required. To the extent a response is required, Law Firms crave reference to the pertinent law and the allegations inconsistent therewith are denied.

14. The allegations contained in Paragraph 14 call for legal conclusions to which no response is required. To the extent a response is required, Law Firms crave reference to the pertinent law and referenced document, any allegations inconsistent therewith being denied. Further responding, Law Firms submit that the terms of the referenced Settlement Agreement are reasonable given the language of 50 U.S.C.A. § 2566 making payment of penalties dependent upon Congressional appropriations which the State of South Carolina was powerless to affect.

15. Law Firms admit so much of Paragraph 15 as alleges that the United States of America agreed to pay the State of South Carolina \$600 Million as part of the settlement reached between those parties in the litigation brought by the Attorney General, acting by and through outside counsel, on behalf of the State of South Carolina alleging violations of 50 U.S.C.A. § 2566 by the United States of America. Further responding, Law Firms submit that additional terms and conditions in the Settlement Agreement reached between the State of South Carolina and the United States of America in said litigation provide for other tangible benefits to the State of South Carolina, including a contractual obligation for the United States of America to remove the remaining nine and one-half (9.5) metric tons of defense grade plutonium by December 31, 2036 or pay a penalty of up to \$1.5 Billion dollars to the State of South Carolina, with additional monies to be paid in years after until removal. The remaining allegations contained in Paragraph 15 call for legal conclusions to which no response is required. To the extent a response is required, Law Firms crave reference to the Settlement Agreement and the allegations inconsistent therewith are denied.

16. The allegations contained in Paragraph 16 call for legal conclusions to which no response is required. To the extent a response is required, Law Firms crave reference to the Settlement Agreement and the allegations inconsistent therewith are denied.

17. The allegations contained in Paragraph 17 do not allege any fact or matter as to Law Firms to which a response is required. To the extent a response is required, Law Firms deny the allegations to the extent that they are inconsistent with public comments of the Attorney General. Further responding, Law Firms submit that this allegation is moot.

18. The allegations contained in Paragraph 18 do not allege any fact or matter as to Law Firms to which a response is required. To the extent a response is required, Law Firms deny

the allegations to the extent that they are inconsistent with the referenced correspondence. Further responding, Law Firms submit that the author of the referenced letter recognized that the Federal litigation undertaken by outside counsel was both “complicated and time consuming” for which the Attorney General “needed the assistance of outside counsel,” which statement directly contradicts the allegations of Paragraph 46 of the complaint.

19. The allegations contained in Paragraph 19 do not allege any fact or matter as to Law Firms to which a response is required. To the extent a response is required, Law Firms deny the allegations to the extent that they are inconsistent with the referenced correspondence. Further responding, Law Firms aver that the author of the referenced exhibit had and has no authority under law with respect to the disposition of the cash settlement proceeds in the litigation brought by the Attorney General, by and through outside counsel, against the United States of America and that any withholding of an endorsement by the author of the referenced exhibit is *nullius juris*. Moreover, Law Firms submit that the form of litigation retention agreement used by the Attorney General to retain outside counsel is substantially similar to the form of such agreements adopted by the author when he served the State of South Carolina in that office.

20. The allegations contained in Paragraph 20 do not allege any fact or matter as to Law Firms to which a response is required. To the extent a response is required, Law Firms deny the allegations to the extent that they are inconsistent with State law. Further responding, Law Firms submit that budget provisos in effect in 2020 and in other budget years have excluded revenues received by the Attorney General in judgment or settlement of litigation instituted by him from any requirement that they be deposited into the State’s General Fund and that, notwithstanding such provisos, the attorneys’ fees owed to outside counsel are not required to be deposited into the State’s General Fund under the plain language of S.C. Code Ann. §1-7-150(B),

rendering the author's statement in the referenced exhibit wrong as a matter of law. Further responding, Law Firms aver that the author of the referenced exhibit had and has no authority under law with respect to the disposition of the cash settlement proceeds in the litigation brought by the Attorney General, by and through outside counsel, against the United States of America and that any objection by the author of the referenced exhibit to such disposition is *nullius juris*.

Further responding to the indented, bold-type assertion at the end of Paragraph 20, to the extent it is intended to allege that the Attorney General lacks authority to enter into contingency fee agreements with outside counsel to collect monies owed to the State of South Carolina, Law Firms deny same. To the contrary, Plaintiffs have acknowledged multiple times that the Attorney General possesses the authority to enter into contingency fee contracts for the retention of outside counsel. *See, e.g., Motion to Dismiss Hearing, Tr. at p. 20, line 21 - p. 21, line 3; p. 51, line 10-18.* Moreover, the amount of monies collected by attorneys in settlement of contingency fee litigation comprising the agreed contingency fee do not belong to the client, but to the attorney. *See Foster v. Taylor*, 210 S.C. 324, 332, 42 S.E.2d 531, 535 (1947) (constitutional provision requiring appropriation by the Legislature "applies to funds of the public, not another's....").

21. The allegations contained in Paragraph 21 call for legal conclusions to which no response is required. To the extent a response is required, Law Firms crave reference to the pertinent law and the allegations inconsistent therewith are denied. Further responding, Law Firms submit that a requirement that the Attorney General obtain legislative approval to retain and compensate outside counsel, which Law Firms dispute exists, would itself violate S.C. Const. art. I, § 8 as the Attorney General is authorized to enter into such retention and compensation agreements under S.C. Const. art. VI, § 7, S.C. Code Ann. §§ 1-7-85, 1-7-160, and 1-7-170, and South Carolina common law. Further responding, Law Firms aver that the United States of

America, acting by and through DOE, has expressly agreed that attorneys' fees may be paid from the \$600 Million settlement proceeds by virtue of its Agreement to Voluntary Dismissal of Appeal filed September 29, 2020, in the United States Court of Appeals for the Federal Circuit, Case No. 19-2324.

22. Paragraph 22 does not allege any fact or matter as to Law Firms and calls for legal conclusions to which no response is required. To the extent a response is required, Law Firms deny the allegations of this paragraph as to the attorneys' fees paid to the Attorney General's outside counsel. Further responding, Law Firms aver that (a) S.C. Code Ann. § 1-7-150 expressly provides that the Attorney General's costs of litigation, which includes attorneys' fees, are not required to be deposited in the general fund of the State, (b) S.C. Code Ann. § 1-7-150 expressly provides that monies received by the Attorney General are not required to be deposited in the general fund of the State where some other disposition is required by law, as is the case here given that the Attorney General lawfully contracted with outside counsel to pay a contingency fee pursuant to his constitutional, statutory, and common law authority, and (c) even assuming § 1-7-150 did require a deposit of the attorneys' fees that the Attorney General paid to outside counsel (which is disputed), the General Assembly has expressly exempted monies recovered by the Attorney General in settlement of actions he has brought from any requirement that they be deposited in the general fund by binding proviso set forth in 2019 S.C. Acts 91, Part 1.B, § 59.8, 2020 S.C. Acts 135, §2, and 2019 S.C. Act 91.

23. Paragraph 23 does not allege any fact or matter as to Law Firms and calls for legal conclusions to which no response is required. To the extent a response is required, Law Firms deny the allegations of this paragraph as to the attorneys' fees paid to the Attorney General's outside counsel. Further responding, Law Firms aver that the provisos adopted by the General

Assembly in 2019 S.C. Act 91 and 2020 S.C. Act 135 expressly provide that the settlement proceeds be deposited into the Litigation Recovery Account and not the general fund account.

24. Paragraph 24 does not allege any fact or matter as to Law Firms and no response is required. To the extent a response is required, Law Firms crave reference to S.C. Code Ann. §1-7-150, 2019 S.C. Act 91, and 2020 S.C. Act 135 and deny any allegation inconsistent therewith.

25. Paragraph 25 does not allege any fact or matter as to Law Firms and no response is required. To the extent a response is required, Law Firms crave reference to the Agreement to Voluntary Dismissal of Appeal filed September 29, 2020, in the United States Court of Appeals for the Federal Circuit, Case No. 19-2324, incorporating the Settlement Agreement referenced therein under Rule 42(b) of the Federal Rules of Appellate Procedure (“Agreement to Voluntary Dismissal”) and the Order dated October 1, 2002, and deny any allegation inconsistent therewith.

26. Paragraph 26 does not allege any fact or matter as to Law Firms and no response is required. To the extent a response is required, Law Firms crave reference to the Settlement Agreement incorporated in the Agreement to Voluntary Dismissal and deny any allegation inconsistent therewith.

27. Paragraph 27 does not allege any fact or matter as to Law Firms and no response is required. To the extent a response is required, Law Firms crave reference to the Settlement Agreement incorporated in the Agreement to Voluntary Dismissal and deny any allegation inconsistent therewith.

28. Paragraph 28 does not allege any fact or matter as to Law Firms and no response is required. To the extent a response is required, Law Firms crave reference to the Settlement Agreement incorporated in the Agreement to Voluntary Dismissal and deny any allegation inconsistent therewith.

29. Paragraph 29 does not allege any fact or matter as to Law Firms and calls for a legal conclusion to which no response is required. To the extent a response is required, Law Firms deny the allegations of this paragraph as to the attorneys' fees paid to the Attorney General's outside counsel. Further responding, Law Firms aver that (a) S.C. Code Ann. § 1-7-150(B) expressly provides that the Attorney General's costs of litigation, which includes attorneys' fees, are not required to be deposited in the general fund of the State, (b) S.C. Code Ann. § 1-7-150(B) expressly provides that monies received by the Attorney General are not required to be deposited in the general fund of the State where some other disposition is required by law, as is the case here given that the Attorney General lawfully contracted with outside counsel to pay a contingency fee and the United States of America, through its DOE, agreed that attorneys fees would be paid from the amount of the settlement paid in the Settlement Agreement incorporated in the Agreement to Voluntary Dismissal, and (c) even assuming § 1-7-150(B) did require a deposit of the attorneys' fees that the Attorney General paid to outside counsel into the State's General Fund (which is disputed), the General Assembly has expressly exempted monies recovered by the Attorney General in settlement of actions he has brought from any requirement that they be deposited in the general fund by binding proviso set forth in 2019 S.C. Acts 91, Part 1.B, § 59.8, 2020 S.C. Acts 135, § 2, and 2019 S.C. Act 91. Further responding, Law Firms aver that the Executive Budget Office, Comptroller General, and the Treasurer all approved and processed the payment pursuant to applicable state law. Further responding, Law Firms aver that this allegation is now moot. Moreover, the amount of money comprising the agreed contingency compensation of counsel included in any settlement sum are not the property of the client, but the property of counsel.

30. Paragraph 30 does not allege any fact or matter as to Law Firms and calls for a legal conclusion to which no response is required. To the extent a response is required, Law Firms deny

the allegations of this paragraph and aver that no funds have been appropriated by either the legislative or executive branch of the State of South Carolina. To the contrary, the funds which are the subject of the Voluntary Dismissal have been paid by the United States of America in accordance with the terms of the Settlement Agreement incorporated therein, which requires that the attorneys' fees be paid from the settlement amount, and that no part of the settlement amount was required to be deposited into the State's general fund upon its receipt pursuant to S.C. Code Ann. § 1-7-150, the provisos cited hereinabove, and common law entitling counsel to possess and retain the portion of any settlement fund comprising a contingent fee. Further responding, Law Firms aver that the Executive Budget Office, Comptroller General, and the Treasurer all approved and processed the payment pursuant to applicable state law.

31. Paragraph 31 does not allege any fact or matter as to Law Firms and calls for a legal conclusion to which no response is required. To the extent a response is required, Law Firms deny the allegations of this paragraph and aver that no funds have been expended by either the "administration" or executive branch of the State of South Carolina. To the contrary, the funds which are the subject of the Voluntary Dismissal have been paid by the United States of America in accordance with the terms of the Settlement Agreement incorporated therein, which requires that the attorneys' fees be paid from the settlement amount, and that no part of the settlement amount was required to be deposited into the State's general fund upon its receipt pursuant to S.C. Code Ann. § 1-7-150, the provisos cited hereinabove, and common law entitling counsel to possess and retain the portion of any settlement fund comprising a contingent fee.

32. Paragraph 32 does not allege any fact or matter as to Law Firms and calls for a legal conclusion to which no response is required. To the extent a response is required, Law Firms deny the allegations of this paragraph as to the attorneys' fees paid to the Attorney General's outside

counsel. Further responding, Law Firms aver that (a) S.C. Code Ann. § 1-7-150 expressly provides that the Attorney General's costs of litigation, which includes attorneys' fees, are not required to be deposited in the general fund of the State, (b) S.C. Code Ann. § 1-7-150 expressly provides that monies received by the Attorney General are not required to be deposited in the general fund of the State where some other disposition is required by law, as is the case here given that the Attorney General contracted with outside counsel to pay a contingency fee and the United States of America, through its DOE, agreed that attorneys' fees would be paid from the amount of the settlement paid in the Settlement Agreement incorporated in the Agreement to Voluntary Dismissal, and (c) even assuming § 1-7-150 did require a deposit of the attorneys' fees that the Attorney General paid to outside counsel (which is disputed), the General Assembly has expressly exempted monies recovered by the Attorney General in settlement of actions he has brought from any requirement that they be deposited in the general fund by binding proviso set forth in 2019 S.C. Acts 91, Part 1.B, § 59.8, 2020 S.C. Acts 135, § 2, and 2019 S.C. Act 91. Further responding, Law Firms aver that this allegation is moot.

Responding to the indented, bold-type assertion at the end of Paragraph 32, to the extent it is intended to allege that the contractually-determined contingency fee is subject to judicial review for reasonableness, and that such fee is unreasonable, such allegation is denied. Further responding, Law Firms submit that the Supreme Court has found that the amount of the fee under the Attorney General's agreement with outside counsel "represented 12.5% of the State's gross recovery" of \$600 Million. Notwithstanding the fact that judicial review is not required as a matter of law or contract, Law Firms submit that this percentage fee is patently reasonable in comparison to the 15% fee paid in recent litigation involving the abandoned nuclear facility of South Carolina Electric & Gas Company and the South Carolina Public Service Authority and the successful

enjoining of the DOE to remove (and the actual removal of) one (1) metric ton of weapons grade plutonium. Law Firms further submit that 12.5% does not take into account the value accruing to the State of South Carolina from (a) having a contractually enforceable right to recover additional payments from DOE of up to \$1.5 Billion through 2036, (b) having a contractually-enforceable right to have up to nine and one-half (9.5) **additional** metric tons of weapons grade plutonium removed from within the State of South Carolina, or (c) some combination of both additional payments and plutonium removal.

33. The allegations of Paragraph 33 are denied. Further responding, Law Firms aver that the United States of America, acting by and through its DOE, did agree to pay the State of South Carolina's litigation costs, including attorneys' fees, in the Agreement to Voluntary Dismissal which incorporates the Settlement Agreement and expressly provides that attorneys' fees are to be paid from the cash settlement amount of \$600 Million. Further responding, Law Firms aver that the attorneys' fees paid to outside counsel retained by the Attorney General are patently reasonable given that, as a result of the litigation brought by outside counsel, on claims that they alone identified, resulted not only in the largest lump sum settlement ever achieved by the State of South Carolina, but also a *contractual* right to have 9.5 metric tons of plutonium removed from South Carolina by the United States of America by 2037 or the United States of America must pay to the State of South Carolina another \$1.5 Billion. In view of these indisputable facts, a contingency fee of only 12.5% of the \$600 Million settlement amount, which constitutes a common fund created for the benefit of the citizens State of South Carolina, is patently reasonable.

34. Paragraph 34 does not allege any fact or matter as to Law Firms and calls for a legal conclusion to which no response is required. To the extent a response is required, Law Firms crave reference to the language of the cited rule and comment. Further responding, Law Firms deny the

implicit allegation that a violation of the South Carolina Rules of Professional Conduct (“SCRPC”) may form the basis for a civil action.

35. Paragraph 35 does not allege any fact or matter as to Law Firms and calls for a legal conclusion to which no response is required. To the extent a response is required, Law Firms crave reference to the language of the cited rule. Further responding, Law Firms deny the implicit allegations that a violation of the South Carolina Rules of Professional Conduct (“SCRPC”) may form the basis for a civil action and that Florida law applies in this action.

36. Law Firms admit the allegations of Paragraph 36 insofar as they allege that outside counsel brought an action on behalf of the Attorney General of the State of South Carolina to enforce the State’s rights under Federal law with respect to the mixed oxide (“MOX”) facility in Aiken and Barnwell counties, which included claims for statutory penalties. W&H craves reference to the pleadings filed on behalf of the Attorney General in the United States District Court for the District of South Carolina in C/A Nos. 1:16-00391-JMC, 1:18-cv-01431-JMC, , the United States Court of Claims in 1:18-cv-00038-MMS, and the United States District Court for the District of Nevada in C/A No. 3:18-cv-00569-MMD-CBC, with respect to the nature and content of the counts alleged therein and denies any allegation of Paragraph 36 that is inconsistent therewith.

37. Law Firms deny the allegation of Paragraph 37. Further responding, Law Firms crave reference to the Federal government’s filings in in the United States District Court for the District of South Carolina in C/A Nos. 1:16-00391-JMC, 1:18-cv-01431-JMC, , the United States Court of Claims in 1:18-cv-00038-MMS, and the United States District Court for the District of Nevada in C/A No. 3:18-cv-00569-MMD-CBC, and deny any allegation inconsistent therewith.

38. Law Firms admit so much of Paragraph 38 as alleges that DOE asserted that it was not liable to the State of South Carolina for monies payable under 50 U.S.C.A. §2566 on the ground that Congress had not appropriated money for that purpose.

39. Law Firms admit Paragraph 39. Further responding, Law Firms submit that the 2016 action referenced in this paragraph was just one of four actions brought by outside counsel on behalf of the Attorney General of South Carolina against DOE arising out of the failure of the United States of America to comply with its legal obligations with respect to the MOX facility.

40. Law Firms admit so much of Paragraph 40 as alleges that the United States District Court for the District of South Carolina issued an order ruling that the Attorney General was required to pursue monetary claims against the United States of America with respect to the MOX facility in the United States Court of Claims. Further responding, Law Firms submit that this civil action also resulted in a December 20, 2017 Order of the Honorable Michelle Childs enjoining DOE to remove one (1) metric ton of defense grade plutonium from the MOX facility in Aiken and Barnwell counties.

41. Law Firms admit so much of Paragraph 41 as alleges that outside counsel filed an action against DOE on behalf of the Attorney General of South Carolina alleging the failure of the United States of America to comply with its legal obligations with respect to the MOX facility and seeking additional payments from the United States of America. Law Firms deny the remainder of Paragraph 41.

42. Law Firms deny the allegations of Paragraph 42 in that no “case” filed by outside counsel had been “lost” as an adverse trial court ruling does not end a civil action when an appeal is brought. Further responding, Law Firm submit that the adverse trial court order in the action filed by outside counsel in the Court of Claims was appealed to the United States Court of Appeals

for the Federal Circuit and that the DOE decided to settle the claims filed by outside counsel on behalf of the Attorney General of South Carolina after briefing and oral argument had been conducted on that appeal before that Court of Appeal.

43. Law Firms admit Paragraph 43.

44. Law Firms admit Paragraph 44.

45. Law Firms deny Paragraph 45 to the extent it alleges that no discovery was conducted in the actions in which outside counsel represented the Attorney General of South Carolina against DOE arising out of the failure of the Federal Government to comply with its obligations under 50 U.S.C.A §2566. To the contrary, outside counsel participated in the discovery process mandated by Rule 26(a)(1-4), FRCP as implemented in the United States District Court for the District of South Carolina in its Local Rules 26.01-26.03. Further responding, Law Firms submit that additional discovery was not needed as the records of the United States government regarding the subject matter of the Attorney General's actions were publicly available and outside counsel utilized other means to obtain and review hundreds of thousands of pages of documents. Further responding, Law Firms submit that the governing law in federal Administrative Procedure Act cases preclude extensive discovery except under limited circumstances. Law Firms admit that outside counsel did draft pleadings and wrote briefs as part of their effort to prove that the DOE was required to pay money to the State of South Carolina as a result of the Federal government's failure to comply with its statutory obligation to remove plutonium from within the State of South Carolina – a requirement that DOE denied in every action and proceeding in the District Courts, Court of Federal Claims, Courts of Appeal, and the Supreme Court.

46. Law Firms deny Paragraph 46. Further responding, Law Firms submit that counsel identified to the Attorney General of South Carolina the nature, factual basis, and legal grounds

for the claims ultimately brought against the Federal government, litigated those and necessarily related claims in two (2) different United States District Courts (South Carolina and Nevada) and the United States Court of Federal Claims, obtained injunctive relief against DOE requiring the removal of one (1) metric ton of plutonium from within the State of South Carolina and its transportation to a facility within the State of Nevada, and negotiated a settlement requiring the payment of \$600 Million to the State of South Carolina, a contractual obligation to remove an additional 9.5 metric tons of plutonium from within the State of South Carolina, and a contractual obligation to pay the State of South Carolina an additional sum of up to \$1.5 Billion dollars if more plutonium is not removed from within the State of South Carolina within a certain time period with a removal requirement. Law Firms further submit that no “political resolution” to address these claims was reached with the assistance of Federal office holders as no legislation was either introduced or enacted by the United States Congress with respect to the claims brought by the Attorney General on behalf of the State of South Carolina. Law Firms further submit that no “political resolution” to address these claims was reached with the assistance of Governor McMaster, as he played no active role in the negotiations and discussions but did approve of the terms of the Settlement Agreement after having been briefed by the Attorney General and outside counsel. Moreover, the exhibit incorporated in Paragraph 46 establishes that the Attorney General “needed the assistance of outside counsel” in that “complicated and time-consuming litigation.” Finally, this exhibit makes it clear that the Governor of South Carolina did not participate in but opposed the negotiated resolution of the claims brought by the Attorney General on behalf of the State of South Carolina. Law Firms crave reference to the language of the incorporated exhibit for its meaning and purpose and deny any allegation inconsistent therewith.

47. Law Firms deny Paragraph 47 and craves reference to the language of the incorporated exhibit for its meaning and purpose and deny any allegation inconsistent therewith. Further responding, Law Firms submit that the referenced language in the exhibit incorporated into this paragraph does not apply in this instance as there has been no “award” of attorneys’ fees in this matter, but only payment of a sum contractually obligated to be paid.

48. Law Firms deny Paragraph 48. Further responding, Law Firms submit that a contract exists which requires payment of attorneys’ fees for which no judicial approval is required. Moreover, no dispute exists as between the parties to that contract in this regard such that a court could lawfully exercise jurisdiction in such a declaratory judgment action. Moreover, Plaintiffs lack standing to challenge any matter regarding the contract other than the Attorney General’s authority to enter into contingency fee agreements in view of S.C. Code Ann. §1-7-150(B).

49. Law Firms deny Paragraph 49.

50. Law Firms deny Paragraph 50. Further responding, Law Firms submit that the fee under the applicable fee agreements totaled over \$75 Million.

51. Law Firms admit so much of Paragraph 51 as alleges that the Attorney General entered into a fee agreement with Law Firms for additional services that required additional contingent compensation. Further responding, Law Firms submits that two (2) separate injunctions were sought on behalf of the Attorney General of South Carolina in the United States District Court for the District of South Carolina in actions brought against the Federal government, one of which (requiring removal of one (1) metric ton of weapons grade plutonium) was awarded by the District Court and was unsuccessfully appealed by the Federal government to the United States Court of Appeals for the Fourth Circuit. The second was obtained in the United States

District Court for the District of South Carolina to prevent closure of the MOX facility. Law Firms further submit that the elected officials for South Carolina, including Governor McMaster, indicated they would stop the closing of the MOX facility if a preliminary injunction was obtained. The preliminary injunction was obtained, but a political resolution did not appear.

52. Law Firms admit so much of Paragraph 52 as alleges that the United States District Court for the District of South Carolina awarded the State of South Carolina an injunction requiring the United States of America to refrain from terminating the mixed-oxide fuel nuclear processing facility located in Aiken and Barnwell counties, which injunction was vacated by the United States Court of Appeals for the Fourth Circuit. Law Firms crave reference to the exhibit incorporated in this paragraph for the content and meaning thereof and deny any allegation inconsistent therewith.

53. Law Firms admit Paragraph 53.

54. Paragraph 54 calls for a conclusion of law to which no response is required. To the extent a response is required, Law Firms crave reference to the fee agreements between it and the Attorney General of South Carolina with respect to its content and meaning and deny any allegation of Paragraph 54 inconsistent therewith.

55. Law Firms admit Paragraph 55.

56. Paragraph 56 calls for a conclusion of law to which no response is required. To the extent a response is required, Law Firms crave reference to the fee agreements between it and the Attorney General of South Carolina with respect to its content and meaning and deny any allegation of Paragraph 56 inconsistent therewith.

57. Paragraph 57 does not allege any fact or matter as to Law Firms to which a response is required. To the extent a response is required, Law Firms deny the implicit allegation that the referenced decision of the United States Court of Appeals for the Fourth Circuit involved the

decision of the United States District Court for the District of South Carolina to enjoin DOE to remove one (1) metric ton of plutonium from South Carolina. Further responding, Law Firms aver that the general agreement on fees was agreed-upon well before the final signature.

58. Law Firms deny paragraph 58. Further responding, Law Firms submit that the allegations of this paragraph are mooted by the fact that the attorneys' fee due outside counsel under the terms and conditions of the litigation retention agreement between them and the Attorney General, as amended, have been lawfully paid to outside counsel

59. Law Firms deny Paragraph 59. Further responding, Law Firms submit that the compensation due under the terms and conditions of the litigation retention agreement between it and the Attorney General is not based upon the page length of any paper prepared by Law Firms.

60. Law Firms deny Paragraph 60. Further responding, Law Firms submit that the allegations of this paragraph are mooted by the fact that the attorneys' fee due outside counsel under the terms and conditions of the litigation retention agreement between them and the Attorney General, as amended, have been lawfully paid to outside counsel.

61. Paragraph 61 does not allege any fact or matter as to Law Firms which requires a response. Moreover, this paragraph contains legal conclusions to which no response is required. To the extent a response is required, Law Firms deny the allegations to the extent they are inconsistent with the language of the litigation retention agreement, as amended, and other South Carolina law.

62. Paragraph 62 does not allege any fact or matter as to Law Firms which requires a response. Moreover, this paragraph contains legal conclusions to which no response is required. To the extent a response is required, Law Firms deny the allegations to the extent they are inconsistent with the language of the litigation retention agreement, as amended, and other South

Carolina law. Further responding, Law Firms submit that the allegations of this paragraph are mooted by the fact that the attorneys' fee due outside counsel under the terms and conditions of the litigation retention agreement between them and the Attorney General, as amended, have been lawfully paid to outside counsel.

Responding to the indented, bold-type assertion at the end of Paragraph 62, to the extent it is intended to allege that the Attorney General disbursed monies from the settlement amount paid by the DOE and that he did so improperly, Law Firms deny same. Further responding, Law Firms submit that the processing of payment of the attorneys' fees was commenced on September 17, 2020, eight (8) days prior to the institution of this civil action, and that such payment was authorized by the Executive Budget Office, approved by the Comptroller General of South Carolina, and executed by the State Treasurer in the normal course. See October 1, 2020, Affidavit of Kimberly Buckley. In addition to having a contractual right to payment, Law Firms were not named defendants in the instant action until after the payment had been made.

63. Paragraph 63 does not allege any fact or matter as to Law Firms which requires a response. Moreover, this paragraph contains legal conclusions to which no response is required. To the extent a response is required, Law Firms deny the allegations to the extent they are inconsistent with the pleadings, motions, and affidavits on file.

64. Law Firms deny Paragraph 64 to the extent that it purports to allege the time the exhibit referenced therein was received by Law Firms and that the exhibit reflects notice of any hearing. Law Firms admit that they were aware, prior to it being held, that a hearing was scheduled in another litigation matter not involving Law Firms or plaintiffs brought by Bradley Hutto, Esquire, pertaining to the distribution of funds from the immediate \$600 Million settlement proceeds. However, on information and belief, that matter did not and would challenge the

attorneys' fees calculation. *See* Aff. of C. Bradley Hutto, dated Oct. 5, 2020 (recounting September 22 and 27 discussions with counsel). Upon information and belief, this other litigation matter was resolved by the General Assembly's acceptance and distribution of the \$525 Million paid to the State of South Carolina from said proceeds in accordance with the terms and conditions of the Settlement Agreement between the State of South Carolina and DOE, the Agreement to Voluntary Dismissal of Appeal, the litigation retention agreement (as amended), and other South Carolina law.

65. Paragraph 65 does not allege any fact or matter as to Law Firms to which a response is required. To the extent a response is required, Law Firms deny any allegation inconsistent with the content of the referenced exhibit and lack sufficient information to form a belief as to whether the referenced exhibit was sent or received either on the date and time alleged or otherwise.

66. Paragraph 66 does not allege any fact or matter as to Law Firms to which a response is required. To the extent a response is required, Law Firms deny any allegation inconsistent with the content of the referenced exhibit and lacks sufficient information to form a belief as to whether the referenced exhibit was sent or received either on the date and time alleged or otherwise.

67. Paragraph 67 does not allege any fact or matter as to Law Firms to which a response is required. To the extent a response is required, Law Firms deny any allegation inconsistent with the content of the referenced exhibit and lack sufficient information to form a belief as to whether the referenced exhibit was sent or received either on the date and time alleged or otherwise.

68. Paragraph 68 does not allege any fact or matter as to Law Firms to which a response is required. To the extent a response is required, Law Firms deny any allegation inconsistent with the content of the referenced exhibit and lack sufficient information to form a belief as to whether the referenced exhibit was sent or received either on the date and time alleged or otherwise.

69. Paragraph 69 does not allege any fact or matter as to Law Firms to which a response is required. To the extent a response is required, Law Firms deny any allegation inconsistent with the content of the referenced exhibit and lack sufficient information to form a belief as to whether the referenced exhibit was sent or received either on the date and time alleged or otherwise.

70. Law Firms admit paragraph 70 to the extent that it alleges that counsel for the Attorney General made a filing in this matter on September 29, 2020. Law Firms crave reference to that filing and deny any allegation of this paragraph inconsistent therewith.

71. Paragraph 71 does not allege any fact or matter as to Law Firms to which a response is required. To the extent a response is required Law Firms are without sufficient information to form a belief to the allegations of this Paragraph and demand strict proof thereof.

72. Paragraph 72 does not allege any fact or matter as to Law Firms to which a response is required. Law Firms are without sufficient information to form a belief to the allegations of this Paragraph regarding statements made by counsel for the Attorney General and demand strict proof thereof.

73. Paragraph 73 does not allege any fact or matter as to Law Firms to which a response is required. To the extent a response is required, Law Firms crave reference to the order identified in this paragraph and deny any allegation inconsistent therewith. Law Firms are without sufficient information to form a belief to the allegations of this Paragraph regarding statements made by the court during the referenced hearing and demand strict proof thereof. Further responding, Law Firms submit that the matter alleged in this paragraph is moot as the referenced order has been dissolved by subsequent order of the circuit court which was not appealed by plaintiffs.

74. Paragraph 74 does not allege any fact or matter as to Law Firms to which a response is required. To the extent a response is required, Law Firms lack sufficient information to form a

belief as to the accuracy of the statements attributed to the State Treasurer alleged to have been made to two state senators and demand strict proof. Further responding, Law Firms submit that the transfer of attorneys' fees from the Litigation Recovery Account fully complied with the requirements of S.C. Code Ann. § 1-7-150(B) and any other applicable provisions of law. Further responding, Law Firms submit that the allegations of this paragraph are mooted by the fact that the attorneys' fee due outside counsel under the terms and conditions of the litigation retention agreement between them and the Attorney General, as amended, have been lawfully paid to outside counsel.

AS TO THE FIRST CAUSE OF ACTION
(Declaratory Judgment)

75. Paragraph 75 does not allege any fact or matter as to Law Firms to which a response is required. To the extent any response is required, Law Firms incorporate the answers to the preceding and subsequent paragraphs by reference.

76. Paragraph 76 does not allege any fact or matter as to Law Firms to which a response is required. To the extent a response is required, Law Firms deny that Plaintiffs are entitled to seek declaratory relief under S.C. Code Ann. § 15-53-50 except as to the authority of the Attorney General to enter into contingency fee agreements under S.C. Code Ann. § 1-7-150(B).

77. Law Firms deny the allegations of Paragraph 77 asserting that Plaintiffs are entitled to seek or receive a declaratory order except as to whether the Attorney General has the authority to enter into contingency fee agreements under S.C. Code Ann. § 1-7-150(B). Moreover, the allegations of this paragraph are mooted by the fact that the attorneys' fee due outside counsel under the terms and conditions of the litigation retention agreement between them and the Attorney

General, as amended, have been lawfully paid to outside counsel. Further responding to the specific subparagraphs of Paragraph 77, Law Firms

(a) deny that S.C. Code Ann. § 1-7-150 requires the Attorney General to deposit any proceeds from the referenced settlement into the State's General Fund;

(b) deny that this action involves any appropriation of moneys from the State's General Fund;

(c) deny that a payment of fees earned by outside counsel pursuant to a litigation retention agreement violates any provision of the Constitution of South Carolina, and

(d) deny that the Attorney General is required to obtain approval by any court for the payment of the contractually owed attorneys' fee due outside counsel as a result of the Settlement Agreement with DOE referenced above.

AS TO THE SECOND CAUSE OF ACTION
(Constructive Trust)

78. Paragraph 78 requires no response by Law Firms. To the extent any response is required, Law Firms incorporate the answers to the preceding and subsequent paragraphs by reference.

79. Law Firms admit that the contractually owed attorneys' fee due outside counsel as a result of the Settlement Agreement with DOE referenced above have been received by outside counsel but deny the remainder of Paragraph 79.

80. Law Firms admit Paragraph 80.

81. Law Firms admit so much of Paragraph 81 as alleges that they have received the contractually owed attorneys' fee due outside counsel as a result of the Settlement Agreement with DOE. Law Firms deny the allegations of Paragraph 81 insofar as they allege that the funds were received subject to any dispute between Plaintiffs and the Attorney General.

82. Law Firms deny Paragraph 82.

83. Law Firms deny Paragraph 83.

84. Law Firms deny Paragraph 84.

85. Law Firms deny Paragraph 85 and aver that Plaintiffs are not entitled to the relief requested therein.

86. Law Firms deny Paragraph 86 and aver that Plaintiffs are not entitled to the relief requested therein.

87. Law Firms deny Paragraph 87 and aver that Plaintiffs are not entitled to the relief requested therein.

AS TO THE THIRD CAUSE OF ACTION
(Receipt of Unauthorized Payment/Restitution/Money Had and Received)

88. Paragraph 88 requires no response by Law Firms. To the extent any response is required, Law Firms incorporate the answers to the preceding and subsequent paragraphs by reference. Further responding, Law Firm deny that Plaintiff Crangle is entitled to any relief either individually or in a representative capacity. Law Firms not only deny that Plaintiff Crangle may bring the claim alleged in this cause of action in a representative capacity, but further deny that he would be a suitable representative if such a claim could be brought.

89. Law Firms deny Paragraph 89.

90. Law Firms deny Paragraph 90.

AS TO THE FOURTH CAUSE OF ACTION
(Injunctive Relief)

91. Paragraph 91 requires no response by Law Firms. To the extent any response is required, Law Firms incorporate the answers to the preceding and subsequent paragraphs by reference. Further responding, Law Firms deny that Plaintiff Crangle is entitled to any relief either

individually or in a representative capacity. Law Firms not only deny that Plaintiff Crangle may bring the claim alleged in this cause of action in a representative capacity, but further deny that he would be a suitable representative if such a claim could be brought.

92. Law Firms deny Paragraph 92.

93. Paragraph 93 does not allege any fact or matter as to Law Firms and contains conclusions of law to which no response is required. To the extent a response is required, Law Firms deny the allegations to the extent that they are inconsistent with the referenced decisional law. Further responding, Law Firms aver that counsel for Plaintiffs have expressly represented to the Supreme Court in this matter that they do not assert taxpayer standing as a basis of pursuing relief. Plaintiffs are bound by their counsel's statements in this regard and, accordingly, this cause of action may not be pursued by Plaintiff Crangle individually or in a representative capacity.

94. Paragraph 94 does not allege any fact or matter as to Law Firms and contains conclusions of law to which no response is required. To the extent a response is required, Law Firms deny the allegations to the extent that they are inconsistent with the referenced decisional law. Further responding, Law Firms aver that counsel for Plaintiffs have expressly represented to the Supreme Court in this matter that they do not assert taxpayer standing as a basis of pursuing relief. Plaintiffs are bound by their counsel's statements in this regard and, accordingly, this cause of action may not be pursued by Plaintiff Crangle individually or in a representative capacity.

95. Paragraph 95 contains conclusions of law to which no response is required. To the extent a response is required, Law Firms deny the allegations to the extent that they are inconsistent with the referenced decisional law. Further responding, Law Firms aver that this Court has already ruled that Plaintiffs have failed to demonstrate that they will succeed on the merits of this case in

an order issued October 14, 2020, which has not been (and now cannot be) appealed and is therefore the law of the case. Law Firms deny the remaining allegations of this paragraph.

96. Paragraph 96 contains conclusions of law to which no response is required. To the extent a response is required, Law Firms deny the allegations to the extent that they are inconsistent with the referenced decisional law. Further responding, Law Firms aver that this Court has already ruled that Plaintiffs have failed to demonstrate that they lack an adequate remedy at law in an order issued October 14, 2020, which has not been (and now cannot be) appealed and is therefore the law of the case. Law Firms deny the remaining allegations of this paragraph.

FOR A SECOND DEFENSE
(Failure to State a Claim)

97. The relevant defenses contained in the preceding and subsequent paragraphs are reasserted and reincorporated as fully as if set forth verbatim, insofar as they are not inconsistent with the defenses of this Second Defense.

98. Pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, Plaintiffs fail to state facts sufficient to constitute causes of action against Law Firms and the complaint should be dismissed.

FOR A THIRD DEFENSE
(Lack of Standing)

99. The relevant defenses contained in the preceding and subsequent paragraphs are reasserted and reincorporated as fully as if set forth verbatim, insofar as they are not inconsistent with the defenses of this Third Defense.

100. Other than the limited public importance standing to ascertain the meaning of S.C. Code Ann. § 1-7-150(B) vis-à-vis the authority of the Attorney General to enter contingency fee agreements with outside counsel, Plaintiffs lack standing to bring this action as they have not

suffered, nor are they in immediate danger of suffering, a concrete and particularized injury caused by Law Firms that a favorable ruling by this Court can redress.

WHEREFORE, reserving all defenses heretofore or hereafter asserted under Rule 12(b), SCRCF, and having fully answered, Law Firms deny that Plaintiffs are entitled to the relief prayed for in Paragraphs 1-7, including the various subparagraphs thereto, appearing under the heading of the Amended Complaint entitled "Prayer for Relief," or to any relief whatsoever, and request that this action be dismissed with prejudice, for judgment to be entered for Law Firms, for the Court to grant Law Firms their costs, and for such other and further relief as the Court may allow to Law Firms.

Signature Page To Follow

Respectfully submitted,

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*Counsel for Appellant Davidson, Wren &
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Columbia, South Carolina
November 4, 2022

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

South Carolina Public Interest
Foundation and John Crangle,
individually and on Behalf of all others
similarly situated,

Plaintiffs,

v.

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

Defendants.

IN THE COURT OF COMMON PLEAS

Case No. 2020-CP-40-04603

MOTION FOR SUMMARY JUDGMENT

TO: South Carolina Public Interest Foundation and John Crangle, individually and on behalf of all others similarly situated, Plaintiffs, and their counsel

You will please take notice that on the tenth (10th) day after service hereof, or as soon thereafter as may be scheduled, the undersigned will move before the presiding judge of the Richland County Court of Common Pleas for an Order granting Summary Judgment in favor of Defendant Davidson, Wren & DeMasters, P.A., and/or its successor, Davidson & Wren, P.A., in the above-captioned action. The basis for this Motion is that there is no genuine issue as to any material fact in the case and that this Defendant is entitled to judgment as a matter of law on the ground that the South Carolina Supreme Court Opinion No. 28112, issued on appeal from this Court's prior order of dismissal in this action, found public interest standing *only* as to the question of the Attorney General's statutory authority to enter contingency fee agreements with

private law firms under S.C. Code Ann. §1-7-150(B), and nothing else. That legal question of statutory authority is the only question required to be answered by this Court for disposition.

This Motion will be based upon the pleadings in this matter, affidavits submitted, and such other materials as may be presented to the Court.

DAVIDSON, WREN & DEMASTERS, P.A.

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Columbia, South Carolina

December 14, 2022

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
	)	
South Carolina Public Interest Foundation	)	CIVIL ACTION NO. 2020-CP-40-04603
and John Crangle, individually and on	)	
behalf of all others similarly situated,	)	
	)	
Plaintiffs,	)	
	)	<u>MOTION FOR SUMMARY JUDGMENT</u>
vs.	)	
	)	
Alan Wilson, Attorney General for the	)	
State of South Carolina, Willoughby &	)	
Hoefer, P.A., and Davidson, Wren &	)	
DeMasters, P.A.,	)	
	)	
Defendants.	)	
	)	

TO: South Carolina Public Interest Foundation and John Crangle, individually and on behalf of all others similarly situated, Plaintiffs, and their counsel

You will please take notice that on the tenth (10th) day after service hereof, or as soon thereafter as may be scheduled, the undersigned will move before the presiding judge of the Richland County Court of Common Pleas for an Order granting Summary Judgment in favor of Defendant Willoughby & Hoefer, P.A. in the above-captioned action. The basis for this Motion is that there is no genuine issue as to any material fact in the case and that the Defendant is entitled to judgment as a matter of law on the ground that the South Carolina Supreme Court Opinion No. 28112, issued on appeal from this Court's prior order of dismissal in this action, found public interest standing *only* as to the question of the Attorney General's statutory authority to enter contingency fee agreements with private law firms under S.C. Code Ann. §1-7-150(B), and nothing else. That legal question of statutory authority is the only question required to be answered by this Court for disposition.

This Motion will be based upon the pleadings in this matter, affidavits submitted, and such other materials as may be presented to the Court.

Respectfully submitted,

s/ J. Todd Rutherford, S.C. Bar No. 12097

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Columbia, South Carolina
December 14, 2022

**Attorneys for Defendant
Willoughby & Hoefer, P.A.**

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
South Carolina Public Interest Foundation	)	CIVIL ACTION NO. 2020CP4004603
and John Crangle, individually and on	)	
behalf of all others similarly situated,	)	
	)	
	)	MOTION OF ATTORNEY GENERAL
Plaintiffs,	)	FOR SUMMARY JUDGMENT
vs.	)	
	)	
Alan Wilson, Attorney General for the	)	
State of South Carolina, Willoughby &	)	
Hoefer, P.A., and Davidson, Wren &	)	
DeMasters, P.A.,	)	
	)	
Defendants.	)	

The Defendant Attorney General hereby moves for summary judgment pursuant to Rule 56, SCRCF, in that the pleadings and any exhibits now or hereinafter submitted, including any memoranda, show that there is no genuine issue as to any material fact as to the defenses herein and that the Attorney General is entitled to judgment as a matter of law. The grounds for this motion include, but are not limited to, that the South Carolina Supreme Court Opinion issued on appeal from this Court's prior order of dismissal in this action, found public interest standing only as to the question of the Attorney General's statutory authority to enter contingency fee agreements with private law firms under S.C. Code Ann. §1-7-150(B), and nothing else. *S.C. Pub. Int. Found. v. Wilson*, 437 S.C. 334, 878 S.E.2d 891 (2022). That legal question of statutory authority is the only question required to be answered by this Court for disposition.

[Signature block on next page]

Respectfully submitted,

s/ J. EMORY SMITH, JR.

S.C. Bar No. 5262
Deputy Solicitor General
ALAN WILSON
Attorney General

ROBERT D. COOK
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December 15, 2022

ATTORNEYS FOR DEFENDANT
ATTORNEY GENERAL

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

South Carolina Public Interest
Foundation and John Crangle,
individually and on Behalf of all others
similarly situated,)

Plaintiffs,)

v.)

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

Defendants.)

IN THE COURT OF COMMON PLEAS

Case No. 2020-CP-40-04603

**MOTION OF DEFENDANT DAVIDSON,
WREN & DEMASTERS, P.A, FOR
PROTECTIVE ORDER AND TO STAY
DISCOVERY****TO: South Carolina Public Interest Foundation and John Crangle, individually and on behalf of all others similarly situated, Plaintiffs, and their counsel**

You will please take notice that on the tenth (10th) day after service hereof, or as soon thereafter as may be scheduled, Defendant Davidson, Wren & DeMasters, P.A., and/or its successor, Davidson & Wren, P.A.,¹ through undersigned counsel, will move before the presiding judge of the Richland County Court of Common Pleas for an Order granting protection from discovery pursuant to Rule 26(c), SCRCP and staying discovery in the above-referenced matter. This motion is based upon the prior order of this Court staying discovery, pleadings, applicable law, South Carolina Supreme Court Opinion No. 28112 and any additional

¹ All references herein to the currently-named Defendant, Davidson, Wren & DeMasters, P.A., apply equally to its successor, Davidson & Wren, P.A. A motion to reflect this name change will be filed shortly.

memorandum of law or other supporting material that may be submitted to this Court prior to the hearing on the instant motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs initiated this action against the South Carolina Attorney General, seeking declaratory relief related to the Attorney General's contract with private law firms in various litigation that resulted in a minimum \$600 million award to the state. Plaintiffs later amended their complaint to add Willoughby & Hoefer, P.A. and the law firm of Davidson, Wren & DeMasters, P.A. as defendants. All defendants filed, pursuant to Rule 12(b), SCRCP, motions to dismiss the action, including, but not limited to, contentions that Plaintiffs lacked standing.

In denying Plaintiffs' motion for preliminary injunction, the Honorable Alison Lee concluded that Plaintiffs did not possess standing to pursue any of their claims. Judge Lee reiterated this holding in denying Plaintiffs' Motion to Amend or Alter.

Subsequently, the Honorable Kirk Griffin granted Defendants' motion to dismiss for lack of standing. Plaintiffs appealed from this Order and the South Carolina Supreme Court issued an Order certifying the matter for review.

In addressing the appeal, the Supreme Court limited its review to the narrow issue of whether Plaintiffs possessed standing to bring the action. In reversing on this singular issue based upon public importance standing, the Supreme Court expressed that the "complaint presents a threshold issue of the Attorney General's statutory authority to enter contingency fee agreements with private law firms." Finding that this issue would arise in the future, the Court held that this limited issue supported public importance standing and that this narrow legal question should be addressed for future guidance.

Defendants' other grounds supporting dismissal of this action have not been addressed by the Courts. Moreover, by order dated January 26, 2021, the Court granted a motion to stay discovery in this action pending resolution of all motions to dismiss.

Defendants Davidson, Wren & DeMasters, P.A., and Willoughby & Hoefer, P.A. filed on December 14, 2022 motions for summary judgment, noting that, pursuant to the direction of the Supreme Court, the legal question of statutory authority remains the only question required to be addressed by this Court for disposition.

II. ARGUMENT AND AUTHORITIES

Rule 26(c), SCRCP, provides this Court authority to stay discovery, stating in part:

Upon motion by a party ... and for good cause show, the court ... may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense, including ...(1) that the discovery not be had...

Rule 26(c), SCRCP. Further, Rule 26(d), SCRCP specifically grants this court discretion over the sequence and timing of any discovery.

Where, as here, few applicable decisions exist from our state courts addressing a particular issue, the court should look to comparable federal decisions interpreting the federal rules. *Maybank v. BB&T Corp.*, 416 S.C. 541,565, 787 S.E.2d 498, 510 (2016); *Gardner v. Newsome Chevrolet-Buick, Inc.*, 304 S.C. 328, 330, 404 SE.2d 200, 201 (1991).

Courts across the country consistently grant motions for protective order and stay discovery in less compelling circumstances. *See, e.g. Vivid Tech, Inc. v. Am. Sci & Eng'g, Inc.*, 200 F.3d 795, 804 (Fed. Cir. 1999)(recognizing stay of discovery proper where particular issue dispositive); *Tilley v. United States*, 270 F. Supp.2d 731, 734 (M.D.N.C. 2003), *aff'd* 85 F. App'x 333 (4th Cir. 2004)(court may exercise its discretion to stay discovery pending ruling on dispositive motions); *Thigpen v. United States*, 800 F.2d 393, 396-97 (4th Cir. 1986)(“Nor did

the court err by granting the government's motion under Fed. R. Civ. P. 26(c) to stay discovery pending disposition of the 12(b)(1) motion."

Good cause exists to enter a stay order in the instant matter where it will conserve valuable judicial resources and by avoiding costly discovery and unnecessary and unwarranted discovery and expense. Further, none of the discovery is relevant to the instant matter, particularly where the Supreme Court expressly limited Plaintiffs' standing to the narrow legal issue of the authority of the Attorney General to enter contingency fee agreements with private law firms.²

A. The January 21, 2021 Order Staying All Discovery Until All Pending Motion to Dismiss Have Been Resolved Continues to Apply.

This action remains under a court order prohibiting discovery pending resolution of all outstanding motions to dismiss. Currently, the sole contention addressed by the circuit court and the Supreme Court involved standing. Therefore, Defendants assert that Defendants continue to be protected from serving responses to Plaintiffs' November 18, 2022 discovery requests based upon the prior order of this Court.

B. Independent of the January 21, 2021 Order, A Stay of Discovery Pending Determination of the Motions to Dismiss is Appropriate.

In an abundance of caution, Defendant Davidson, Wren & DeMasters, P.A., files the instant motion for protective order relating to Plaintiffs' propounded discovery dated November 18, 2022. Defendant Davidson, Wren & DeMasters, P.A., asserts that notwithstanding the existence of this prior order, a stay of discovery is appropriate until such time as this Court addresses the remaining threshold issue.

² Defendants reserve the right to object further to specific discovery requests should this court decline to grant protection pursuant to the instant motion.

C. Further, this Court Should Enter an Order Protecting Defendant Davidson, Wren & DeMasters, P.A., from Responding to Any Discovery Requests Since the Supreme Court's Decision in this Matter Expressly Limited the Scope of this Litigation to the Legal Question of the Attorney General's Authority to Enter into Contingency Fee Contracts with Outside Counsel.

Moreover, the remand from the Supreme Court has narrowed the issue in this lawsuit to a single, dispositive legal issue. The Supreme Court decision succinctly stated the issue: the “complaint presents a threshold issue of the Attorney General’s statutory authority to enter contingency fee agreements with provide law firms.” Defendant Davidson, Wren & DeMasters, P.A., filed a motion for summary judgment on this sole threshold legal question now before the court.

III. CONCLUSION

Defendant Davidson, Wren & DeMasters, P.A., respectfully asserts that the January 21, 2021 Order staying discovery remains in effect following remand of this matter. However, in an abundance of caution, Defendant Davidson, Wren & DeMasters, P.A., files the instant motion seeking Rule 26(c) protection from responding to the propounded discovery. Furthermore, following appeal and pursuant to the direction of the Supreme Court, this litigation is now reduced to a single threshold legal question: whether the Attorney General’s statutory authority to enter contingency fee agreements with private law firms. Therefore, an order protecting Defendant Davidson, Wren & DeMasters, P.A., from responding to the served discovery and an order staying discovery is appropriate and is hereby respectfully requested, along with such other and further relief as may be appropriate.

[Signature Block of Counsel is on the following page]

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Columbia, South Carolina

December 16, 2022

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND) FOR THE FIFTH JUDICIAL CIRCUIT

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

Plaintiffs,

vs.

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

Defendants.

)
)
) CIVIL ACTION NO. 2020-CP-40-04603
)
)
)
)
)
) **DEFENDANT WILLOUGHBY &**
) **HOEFER, P.A. MOTION FOR**
) **PROTECTIVE ORDER AND TO STAY**
) **DISCOVERY**
)
)
)
)
)

TO: South Carolina Public Interest Foundation and John Crangle, individually and on behalf of all others similarly situated, Plaintiffs, and their counsel

You will please take notice that on the tenth (10th) day after service hereof, or as soon thereafter as may be scheduled, Defendant Willoughby & Hoefer, P.A., through undersigned counsel, will move before the presiding judge of the Richland County Court of Common Pleas for an Order granting protection from discovery pursuant to Rule 26(c), SCRCF and staying discovery in the above-referenced matter. This motion is based upon the prior order of this Court staying discovery, pleadings, applicable law, South Carolina Supreme Court Opinion No. 28112 and any

additional memorandum of law or other supporting material that may be submitted to this Court prior to the hearing on the instant motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs initiated this action against the South Carolina Attorney General, seeking declaratory relief related to the Attorney General's contract with private law firms in various litigation that resulted in a minimum \$600 million award to the state. Plaintiffs later amended their complaint to add Willoughby & Hoefer, P.A. and the law firm of Davidson, Wren & DeMasters, P.A. as defendants. All defendants filed, pursuant to Rule 12(b), SCRCF, motions to dismiss the action, including, but not limited to, contentions that Plaintiffs lacked standing.

In denying Plaintiffs' motion for preliminary injunction, the Honorable Alison Lee concluded that Plaintiffs did not possess standing to pursue any of their claims. Judge Lee reiterated this holding in denying Plaintiffs' Motion to Amend or Alter.

Subsequently, the Honorable Kirk Griffin granted Defendants' motion to dismiss for lack of standing. Plaintiffs appealed from this Order and the South Carolina Supreme Court issued an Order certifying the matter for review.

In addressing the appeal, the Supreme Court limited its review to the narrow issue of whether Plaintiffs possessed standing to bring the action. In reversing on this singular issue based upon public importance standing, the Supreme Court expressed that the "complaint presents a threshold issue of the Attorney General's statutory authority to enter contingency fee agreements with private law firms." Finding that this issue would arise in the future, the Court held that this limited issue supported public importance standing and that this narrow legal question should be addressed for future guidance.

Defendants' other grounds supporting dismissal of this action have not been addressed by the Courts. Moreover, by order dated January 26, 2021, the Court granted a motion to stay discovery in this action pending resolution of all motions to dismiss.

Defendant Willoughby & Hoefer, P.A. filed on December 14, 2022 a motion for summary judgment, noting that, pursuant to the direction of the Supreme Court, the legal question of statutory authority remains the only question required to be addressed by this Court for disposition.

II. ARGUMENT AND AUTHORITIES

Rule 26(c), SCRPC, provides this Court authority to stay discovery, stating in part:

Upon motion by a party ... and for good cause show, the court ... may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense, including ... (1) that the discovery not be had...

Rule 26(c), SCRPC. Further, Rule 26(d), SCRPC specifically grants this court discretion over the sequence and timing of any discovery.

Where, as here, few applicable decisions exist from our state courts addressing a particular issue, the court should look to comparable federal decisions interpreting the federal rules. *Maybank v. BB&T Corp.*, 416 S.C. 541,565, 787 S.E.2d 498, 510 (2016); *Gardner v. Newsome Chevrolet-Buick, Inc.*, 304 S.C. 328, 330, 404 SE.2d 200, 201 (1991).

Courts across the country consistently grant motions for protective order and stay discovery in less compelling circumstances. *See, e.g. Vivid Tech, Inc. v. Am. Sci & Eng'g, Inc.*, 200 F.3d 795, 804 (Fed. Cir. 1999)(recognizing stay of discovery proper where particular issue dispositive); *Tilley v. United States*, 270 F. Supp.2d 731, 734 (M.D.N.C. 2003), *aff'd* 85 F. App'x 333 (4th Cir. 2004)(court may exercise its discretion to stay discovery pending ruling on dispositive motions); *Thigpen v. United States*, 800 F.2d 393, 396-97 (4th Cir. 1986)(“Nor did the court err by granting

the government's motion under Fed. R. Civ. P. 26(c) to stay discovery pending disposition of the 12(b)(1) motion."

Good cause exists to enter a stay order in the instant matter where it will conserve valuable judicial resources and by avoiding costly discovery and unnecessary and unwarranted discovery and expense. Further, none of the discovery is relevant to the instant matter, particularly where the Supreme Court expressly limited Plaintiffs' standing to the narrow legal issue of the authority of the Attorney General to enter contingency fee agreements with private law firms.¹

A. The January 21, 2021 Order Staying All Discovery Until All Pending Motion to Dismiss Have Been Resolved Continues to Apply.

This action remains under a court order prohibiting discovery pending resolution of all outstanding motions to dismiss. Currently, the sole contention addressed by the circuit court and the Supreme Court involved standing. Therefore, Defendants assert that Defendants continue to be protected from serving responses to Plaintiffs' November 18, 2022 discovery requests based upon the prior order of this Court.

B. Independent of the January 21, 2021 Order, A Stay of Discovery Pending Determination of the Motions to Dismiss is Appropriate.

In an abundance of caution, Defendant Willoughby & Hoefer, P.A. files the instant motion for protective order relating to Plaintiffs' propounded discovery dated November 18, 2022. Defendant Willoughby & Hoefer, P.A. asserts that notwithstanding the existence of this prior order, a stay of discovery is appropriate until such time as this Court addresses the remaining threshold issue.

¹ Defendants reserve the right to object further to specific discovery requests should this court decline to grant protection pursuant to the instant motion.

C. Further, this Court Should Enter an Order Protecting Defendant Willoughby & Hoefer, P.A. from Responding to Any Discovery Requests Since the Supreme Court's Decision in this Matter Expressly Limited the Scope of this Litigation to the Legal Question of the Attorney General's Authority to Enter into Contingency Fee Contracts with Outside Counsel.

Moreover, the remand from the Supreme Court has narrowed the issue in this lawsuit to a single, dispositive legal issue. The Supreme Court decision succinctly stated the issue: the “complaint presents a threshold issue of the Attorney General’s statutory authority to enter contingency fee agreements with provide law firms.” Defendant Willoughby & Hoefer, P.A. filed a motion for summary judgment on this sole threshold legal question now before the court.

III. CONCLUSION

Defendant Willoughby & Hoefer, P.A. respectfully asserts that the January 21, 2021 Order staying discovery remains in effect following remand of this matter. However, in an abundance of caution, Defendant Willoughby & Hoefer, P.A. files the instant motion seeking Rule 26(c) protection from responding to the propounded discovery. Furthermore, following appeal and pursuant to the direction of the Supreme Court, this litigation is now reduced to a single threshold legal question: whether the Attorney General’s statutory authority to enter contingency fee agreements with private law firms. Therefore, an order protecting Defendant Willoughby & Hoefer, P.A. from responding to the served discovery and an order staying discovery is appropriate and is hereby respectfully requested, along with such other and further relief as may be appropriate.

[Signature Block of Counsel in on the following page]

Respectfully submitted,

s/ J. Todd Rutherford, S.C. Bar No. 12097

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Columbia, South Carolina

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
South Carolina Public Interest	)	
Foundation and John Crangle,	)	Case No. 2020-CP-40-04603
individually and on behalf of all	)	
others similarly situated,	)	
	)	
Plaintiffs,	)	MEMORANDUM IN SUPPORT
	)	OF DEFENDANT LAW FIRMS'
v.	)	MOTION FOR SUMMARY JUDGMENT¹
	)	
Alan Wilson, Attorney General for	)	
the State of South Carolina,	)	
Willoughby & Hoefer, P.A., and	)	
Davidson, Wren & DeMasters, P.A.,	)	
	)	
Defendants.	)	
	)	

This matter is before the Court on the motions of Defendants Willoughby & Hoefer, P.A. ("W&H") and Davidson & Wren, P.A. ("D&W," formerly Davidson, Wren & DeMasters), (together, the "Law Firms"), each for an order granting judgment as a matter of law in favor of the Law Firms.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs challenge the payment of attorneys' fees to private attorneys engaged by the South Carolina Attorney General ("Attorney General") pursuant to a contingency fee contract. Fully performing under the terms of the contract, one or both of the law firms prosecuted four

¹ Defendant Law Firms also have motions pending to stay discovery. Those motions are supported by this memorandum as the issue remanded by the Supreme Court is a purely legal one to which discovery is not required. Moreover, there is already an Order of the Court staying discovery which remains in force. *See* Form 4 Order dated January 26, 2021 ("Motion from Discovery filed on December 16, 2020 is GRANTED. All discovery and motions are stayed until pending motions to dismiss are decided."). Defendants' motions to dismiss are still pending and have not yet been decided.

cases in three separate Federal trial courts, three separate Federal Courts of Appeal, and a petition to the United States Supreme Court, culminating in the successful settlement of a closed case filed by the State of South Carolina in the Court of Federal Claims, achieving what is believed to be the largest single-payment cash recovery for the State of South Carolina in its history, before even adding the value of the non-cash components of the settlement.

This herculean effort which culminated in this historic recovery began in March of 2014 (prior to the period covered by the fee contract in the present case), when the Law Firms 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 mixed oxide fuel fabrication facility (MOX Facility) at the Savannah River Site (SRS). Ex. 1, Ltr. to The Honorable W Jeffrey Young, Chief Deputy Attorney General, dated Sept. 16, 2020 at 1. At that time, DOE (through the National Nuclear Security Administration) was seeking to place the MOX Facility into "cold standby" status, which would have effectively terminated the project. *Id.* Seeking to avoid that result, the South Carolina Congressional delegation wrote to then-Governor Haley to ask that she work with the Attorney General to explore any legal avenues the State may have to address the pending injustice to the State. *Id.* After being briefed on a legal strategy to achieve that result, the State retained the Law Firms to represent it, and they filed a complaint on behalf of the State on March 18, 2014, followed by a motion for summary judgment on April 14. *Id.* Speed was of the essence given other factors at play in Congress. Through this rapid mobilization and concerted legal effort, on April 30, 2014, DOE was forced to capitulate and directed the contractor to continue the MOX Facility construction, a terrific win for South Carolina. *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 analyzing information about the issues associated with the MOX Facility, the Law Firms identified and 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 a draft complaint prepared by the Law Firms. This strategy included a multi-front approach that would assert 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 continuation of the MOX Facility or removal of the nuclear material from the State.

With political overtures by South Carolina having been rebuffed, and DOE missing the January 1, 2016 statutory deadline, 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 1-2. The Attorney General hired the Law Firms to implement the comprehensive strategy that they had developed and to pursue the claims they had identified, including representing the State in litigation against the Federal Government related to the MOX Facility. The litigation retention agreement, as amended (Litigation Retention Agreement), with the Law Firms was a contingency fee contract tailored to the demands of this unique and specialized situation. Ex. 2, Litigation Retention Agreement. The Litigation Retention Agreement provided that the Law Firms would assume 100% of the financial risk involved in the litigation and required them to advance all costs and work the hours necessary to execute the complex legal strategy in consideration of the contractual contingency fee to be paid only if successful. The State bore no risk under this arrangement; if the comprehensive strategy was successful, then the Law Firms would be paid

according to the terms of the contract. If the strategy was unsuccessful, the Law Firms could not seek reimbursement or payment for either their costs or the time worked on behalf of the State.

The Law Firms filed a complaint on behalf of the State against the Federal Government in Federal District Court in 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. *See* Ex. 2 at 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 the claim to 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, in a major victory for South Carolina, 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 Federal District Court in 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 (with local counsel). *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 major victory for South Carolina. *Id.* Nevada then appealed to the Ninth Circuit Court of Appeals on February 4, 2019. *Id.* During the pendency of the appeal, Nevada indicated that it believed the trial of this matter would take 14 days and sought unrestricted discovery rights. *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. The district court ultimately stayed the case pending the appeal. *Id.* After briefing at the Ninth Circuit, including an appearance and briefing by W&H on behalf of the State, the court dismissed the appeal as moot on August 13, 2019.² *Id.* The stay at the district court was lifted, and additional motions were filed and briefing began anew. *Id.* 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.

While the Nevada case was being litigated, on August 7, 2019, approximately 19 months after the Federal District Court in South Carolina ordered its removal, the Federal Government filed a declaration with the court that it had completed the removal of the one metric ton of defense

² 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 was placed in Texas.

plutonium from SRS, another major victory for the State. *Id.* at 3. During this time, South Carolina learned 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 and hundreds of South Carolina jobs would be lost. 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 was again directed by the Attorney General to move expeditiously on behalf of South Carolina, by filing a complaint and requesting a preliminary injunction on May 25, 2018, in the Federal District Court in South Carolina, along with a request for an expedited hearing given the exigencies involved. *Id.* On June 7, 2018, the court granted the preliminary injunction and ordered the Federal Government to continue constructing the MOX Facility. *Id.*

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, political efforts were made to obtain a solution that, unfortunately, never materialized and, on October 26, 2018, the Fourth Circuit ruled against South Carolina. *Id.* The Federal Government quickly terminated the MOX Facility construction, which confirmed the wisdom of South Carolina's efforts to try and maintain the status quo, which had achieved temporary success by extending the project and thereby benefiting hundreds of workers in the State in the interim.

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. *Id.* at 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 Law Firms, on behalf of South Carolina, appealed that decision to the Court of Appeals for the Federal Circuit. *Id.* Continuing to stay engaged and constantly working to develop strategies to promote a positive resolution for South Carolina, beginning in January 2020, additional discussions were held between the respective counsel for DOE and the State. These discussions were more promising and over months developed into a workable framework for possible resolution. While the political representatives of South Carolina 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 on South Carolina's appeal from the Court of Claims' adverse decision 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 additional productive meetings, settlement discussions culminated in an agreement in principle reached 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 3-4.

On August 28, 2020, a settlement agreement was executed providing for a payment of \$600 million from the Federal Government's litigation "Judgment Fund,"³ 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. Ex. 3, Settlement Agreement, dated August 28, 2020. 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 to force removal⁴ and receive additional payments⁵ should the Federal Government not comply.⁶ *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. Ex. 4, Agreement to Voluntary

³ 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. The Law Firms' idea to seek payment out of the Judgment Fund allowed payment to the State without reducing the operating budget for SRS, *see n. 6 infra*, and without the need for a specific appropriation from Congress.

⁴ The 15-year removal period for the remaining 9.5 metric tons of weapons-grade plutonium—an amount that is now known and was declassified as a result 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.

⁵ 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.

⁶ 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 Law Firms secured on behalf of the State for the removal of one metric ton of plutonium and the agreement to remove nine 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 Law Firms will receive no additional compensation under the Litigation Retention Agreement; nevertheless, these benefits are significant, real, and measurable.

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)).

For the fees in the litigation against the Federal Government, the Litigation Retention Agreement between the Attorney General and the Law Firms—which was first 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 cash settlement amount recovered on behalf of the State by the Law Firms.⁷

Following receipt of the settlement amount from the Federal Government, the State Attorney General approved payment of the attorneys’ fees owed to the Law Firms pursuant to the Litigation Retention Agreement. Ex. 5, Affidavit of Kimberly Buckley, Finance Director for the

⁷ 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 recently 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.”).

Office of Attorney General, dated Oct. 1, 2020 (filed with the circuit court on Oct. 6, 2020). The payment was approved by the Executive Budget Office (EBO) of the Department of 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.*

Plaintiffs instituted this action in the Richland County Court of Commons Pleas on September 25, 2020, against the State Attorney General, and on September 30, 2020, filed an amended complaint adding claims against the Law Firms. In their amended complaint, Appellants raised various arguments regarding the payment of attorneys' fees to the Law Firms pursuant to the Litigation Retention Agreement entered into between the Attorney General and the Law Firms. Appellants also filed a motion for temporary restraining order and preliminary injunction.

On October 1, 2020, the Honorable Alison Renee Lee issued an *Ex Parte* Temporary Restraining Order, but scheduled and then conducted a hearing on the motion for preliminary injunction on October 7, 2020. At the close of the hearing, Judge Lee extended the Temporary Restraining Order an additional seven days while she considered the arguments and information advanced by the parties. On October 14, 2020, Judge Lee denied the motion for preliminary injunction and dissolved the extended Temporary Restraining Order, based on her determination that Appellants lacked standing to bring this action and also her determination that Plaintiffs had not demonstrated that they met the legal standards for the issuance of a preliminary injunction. *See* Ex. 6, Order Denying Plaintiffs' Motion for Preliminary Injunction Order. Plaintiffs subsequently filed a motion to reconsider the October 14 Order, which Judge Lee denied on December 17, 2020. *See* Ex. 7, Order Denying Plaintiffs' Motion to Alter or Amend.

On October 20, 2020, W&H and D&W filed and served motions to dismiss seeking dismissal pursuant to Rules 12(b)(1) and 12(b)(6), SCRCP, on the grounds that Plaintiffs lacked standing and failed to state facts sufficient to constitute a cause of action against the Respondents. The State Attorney General filed his own motion to dismiss on October 27, 2020, seeking dismissal on similar grounds. On March 5, 2021, the Honorable R. Kirk Griffin issued a formal order dismissing the amended complaint on the basis that Judge Lee's prior findings that Plaintiffs lacked standing were dispositive. See Ex. 8, Order Granting Motions to Dismiss.⁸

Plaintiffs filed their Notice of Appeal with the Court of Appeals on March 29, 2021, appealing from Judge Griffin's dismissal order. By order dated July 6, 2021, the appeal was certified for review by the Supreme Court, which heard oral argument on April 6, 2022. On September 14, 2022, the Supreme Court issued its Opinion reversing Judge Griffin's dismissal order. Opinion No. 28112, Sept. 14, 2022 (S.C. Supr. Ct.). The Supreme Court held that Plaintiffs had "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 to this Court for resolution of this legal question. *S.C. Pub. Int. Found. v. Wilson*, 437, S.C. 334, 342-43, 878 S.E.2d 891, 896 (2022).

ARGUMENT

1. **The Supreme Court remanded this case to the Circuit Court for a limited determination of whether the Attorney General has the legal authority to enter into contingency fee agreements. Decades of precedent show that the Attorney General has such authority and power.**

- A. The Constitution and applicable statutory framework vest the Attorney General with the authority and power to enter into contingency fee agreements with private law

⁸ As the standing issue was dispositive, Judge Griffin did not address the other grounds for dismissal set forth in the Defendants' motions to dismiss, which are currently pending and have not yet been addressed.

firms, which authority has been exercised for the benefit of the State by multiple Attorney Generals and has been acquiesced to by the General Assembly for decades.

As the Supreme 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.**

437, S.C. at 342, 878 S.E.2d at 896 (emphasis added). This purely legal question has only one valid answer and that is yes he does.

The Attorney General’s authority to represent State interests is rooted in the Constitution, statutes, and the common law. Our 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. The Supreme Court noted in *Cooley, et al. v. South Carolina Tax Comm’n*, 204 S.C. 10, 28 S.E.2d 445, 450 (1943), “[t]he office of Attorney General is created by the Constitution.” According to the Supreme Court, 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. The Supreme Court, in *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), the Supreme Court 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:

[T]he General Assembly has elaborated on the Attorney General's duties in several statutes. First, pursuant to S.C. Code Ann. § 1-7-40 (Supp. 2001), the Attorney General must

appear for the State in the Supreme Court and the court of appeals in the trial and argument of all causes, criminal and civil, in which the State is a party or interested, and in these causes when required by the Governor or either branch of the General Assembly.

. . . The General Assembly has also provided that the Attorney General, upon written request of a state officer has a duty to appear and defend that officer when the officer is being prosecuted in a civil or criminal action or other special proceeding, due to an act done or omitted in good faith in the course of employment. S.C. Code Ann. § 1-7-50 (1986) [footnote omitted]. The Attorney General also must 'give his opinion upon questions of law submitted to him by either branch' of the General Assembly or by the Governor. S.C. Code Ann § 1-7-90 (1986).... Further,

'[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*.

State ex rel. Condon v. Hodges, 349 S.C. at 239, 240 (Emphasis added) (internal citations omitted).

In *State ex rel. McLeod v. v. McInnis*, 278 S.C. 307, 311, 295 S.E.2d 633, 635 (1982), the Supreme Court explained that the Attorney General, by bringing this action in the name of the State, speaks for all its citizens, and may, on their behalf, bring to the Court's attention for adjudication charges that there is an infringement in the separation-of-powers area.

Moreover, in *Condon v. State*, 354 S.C. 634, 641, 583 S.E.2d 430, 434 (2003), the Supreme Court reiterated that "[t]his Court has recognized 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." *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.").

Accordingly, the Attorney General is the State's chief legal officer, and he properly exercised his authority to contract with the Law Firms to represent the State in its actions against the United States and to pay them pursuant to that contract from the settlement proceeds. As Judge Cooper stated 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."

Judge Roger 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."

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...." And S.C. Code Ann. § 1-7-170, titled, "Engaging attorney on fee basis," provides that "[a] department or agency of state

government may not engage on a fee basis an attorney at law except upon the written approval of the Attorney General and upon a fee as must be approved by him.”

The authority of the Attorney General to enter into contingency fee agreements also has been exercised for decades. *See Cephalon*, Civil Action No. 2012-CP-400737; *Eli Lilly*, 2007-CP-42-1855. Not once has the General Assembly done anything to reject or dispute this power of the Attorney General to enter contingency fee contracts, demonstrating that the General Assembly agrees that the Attorney General has this authority. Indeed, several lawyers that have entered into contingency fee agreements with the Attorney General’s office are current or former members of the General Assembly. *See* Litigation Attention Agreements found at <https://www.scag.gov/litigation-retention-agreements/>.

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 into and fulfill contingency fee agreements with private law firms.

B. Plaintiffs do not dispute the Attorney General’s authority to enter into contingency fee agreements.

Notably, Plaintiffs agree that the Attorney General has the authority to enter into contingency fee agreements with private law firms. In particular, at the oral argument before the Supreme Court, Plaintiffs’ counsel made the following representations:

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 ---

Ex. 9, April Oral Argument Tr. 8:10-14; 14:12-16; 53:20-25.

Therefore, as they must, Plaintiffs acknowledge the Attorney General's authority to enter into contingency fee agreements with private law firms. This, of course, necessarily means that the Plaintiffs do not—and cannot—dispute that the Attorney General had the authority to enter into the Litigation Retention Agreement with the Law Firms and that the Litigation Retention Agreement is a legally binding contract enforceable against the State. ~~This also means that the only issue for which the Supreme Court found Plaintiffs had standing to litigate must be resolved in favor of the Defendants, and this Court, having answered the limited legal questions for which this case was remanded, should grant summary judgments to Defendants, conclude its inquiry, and dismiss the case.~~

2. ~~If this Court nevertheless should look beyond the issue of the Attorney General's authority to enter into contingency fee agreements with private law firms—which it should not given Plaintiffs' limited standing in this matter—the only possible issues that could remain present pure legal questions, the answers to which are all in favor of the Defendants.~~

C. Plaintiffs' argument that Section 1-7-150(B) precluded the payment of the contingency fee earned by the Law Firms pursuant to the binding Litigation Retention Agreement and the negotiated settlement with Federal Government lacks any legal merit.

Notwithstanding Plaintiffs' acknowledgment that the Attorney General had the authority to enter into the contingency fee agreement with the Law Firms and the undisputed fact that the

multi-year litigation against the Federal Government was resolved via a settlement resulting in one of the largest ever financial recoveries by the State, Plaintiffs claim the Law Firms are not entitled to any of their contractual fee. Plaintiffs' primary contention in support of this claim is that S.C. Code Ann. § 1-7-150 precluded the Attorney General's payment of the fee earned by the 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 Law Firms' fees, into the General Fund.

This contention is wrong as a matter of law. There are two primary reasons that this is true. First, Plaintiffs' reading of § 1-7-150 is not consistent with the statute. Second, 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.

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). There are several reasons 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.

As an initial matter, 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

Law Firms were “awarded by settlement.” Indeed, 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” See Ex. 4, Agreement to Voluntary Dismissal of Appeal (Emphasis added). The payment of the fees to the Law Firms by the Attorney General required by the Litigation Retention Agreement and the settlement with the Federal Government therefore fits squarely within the plain language of § 1-7-150(B).⁹ And Plaintiffs have provided nothing—because there is nothing—to refute this. They simply disregard it and hope this Court does too.

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 into by the State’s Chief Legal Officer and approved by the EBO is a disposition “required by law.” Indeed, the State’s failure to pay the fees pursuant to the binding Litigation Retention Agreement would be a *violation* of the law and deprivation of the Law Firms’ private property. See *Button’s Estate*

⁹ To the extent Plaintiffs contend that the statute required some further or different approval (or any approval at all) from the Federal Government (i.e., the defendant) in the MOX litigation, that is an absurd reading of the statute. Simply put, § 1-7-150(B) does not require the Attorney General of the State of South Carolina to obtain the approval of a settling defendant prior to the Attorney General making payment pursuant to a binding fee agreement. The references in § 1-7-150(B) to litigation costs “awarded by court order or settlement” are simply meant to ensure that litigation recoveries, minus litigation costs, are generally deposited as set forth in the statute, regardless of whether the recovery came as a result of a judgment or a settlement. If the General Assembly wished to impose a requirement that the Attorney General obtain approval of its fee agreements or prior to paying any attorney’s fees or other litigation costs pursuant to such agreements, it would have explicitly stated as much. Also, as evidenced by its title (i.e., “Accounting to Treasurer; deposit of funds”), Section 1-7-150 is a statutory accounting provision, it is not a restriction on the Attorney General’s contracting authority, as Plaintiffs apparently suggest.

v. Anderson, 112 Vt. 531, 28 A.2d 404, 410 (1942) (noting that the attorney’s fee “never legally and equitably belonged to the State as part of its public funds”); *see also Ex Parte Brown v. Howard*, 393 S.C. 214, 221, 11 S.E.2d 899, 902 (2011) (an attorney’s services “constitute property” for purposes of the Fifth Amendment Takings Clause). 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.) Plaintiffs’ contentions, therefore, have no support in the plain language of the statute.

Moreover, even if you assume *arguendo* that Plaintiffs’ interpretation of § 1-7-150(B) was somehow correct—which it is not—their interpretation is irrelevant to this case 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).¹⁰ This proviso was in effect at the time of the Attorney General’s receipt of the settlement funds and payment to the Law Firms of the fees owed pursuant to the Litigation Retention Agreement. Ex. 5, 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

¹⁰ 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 attorney’s fees in this case, this same Proviso was continued in 2021, 2022 and 2023.

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, even if Plaintiffs were correct that the portion of the settlement awarded for attorneys’ fees generally would have to be deposited in the General Fund, they legally could not have been so deposited—and were not—in this case. Ex. 5, 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.”). The argument articulated by Plaintiffs is therefore inapplicable. But even if it was applicable, the question then becomes: Doesn’t the Attorney General’s compliance with his lawful contractual obligation fulfill the requirement that expenditures from the Litigation Recovery Account must be “prescribed by law.” In sum, fulfilling a contractual obligation is a duty “prescribed by law” for the Attorney General.

The payment of the contractual attorneys’ fees also 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.”);¹¹ 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. Ex. 11, 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 necessarily have 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, Plaintiffs’ claims fail as a matter of law.

¹¹ Plaintiffs have claimed 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. Plaintiffs 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 Plaintiffs are completely wrong factually and legally.*** 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. 2020 S.C. Acts 135, § 7 (“The Executive Budget Office is authorized to approve agency requests for federal and other fund authorization adjustments.”); Ex. 10, 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 is, of course, the reason that, as Senator Setzler reports, there was no application for payment of the fees submitted to the Joint Other Funds Oversight Committee—by law, it was not required. It is also worthy to note that Senator Setzler did not offer the opinion that approval of the Joint Other Funds Oversight Committee was required; only that no application was submitted. The EBO Director therefore did not by-pass the requisite approval process, and Plaintiffs’ contentions are baseless.

A. The Attorney General is not required to obtain judicial approval of the Litigation Retention Agreement or the fees paid.

Plaintiffs also ask this Court to **require** the Attorney General to obtain judicial approval of the amount of fees paid to the Law Firms for services performed and costs incurred pursuant to their contract. However, Plaintiffs do not have a valid claim and this Court does not have authority to even entertain Plaintiffs' claim because there is no contractual or statutory provision or any other mechanism that imposes a requirement on the Attorney General to obtain judicial approval of the contract or the fees paid. Plaintiffs note in the Amended Complaint that the Litigation Retention Agreement contains a provision regarding judicial approval of the fees **when possible**, but that provision is optional and discretionary and does not constitute a requirement that he obtain judicial approval. *See* 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, Plaintiffs' argument that approval is mandatory is directly contradicted by the use of the prefatory condition "when possible" and renders such argument inapposite. Moreover, given that the parties to the Litigation Retention Agreement—the Attorney General and the Law Firms—agree on the payment of the fee and the amount pursuant to the terms of their valid contract, there is no live controversy affording jurisdiction to a trial court, and thus no declaratory relief is available, and Plaintiffs' attempts to stand in the shoes of the Attorney General to create a claim where none otherwise exists is unavailing. Further, the settlement reached between the State and the Federal Government did not require court approval, and there is no common law requirement that the Attorney General seek judicial approval of his contracts. In

short, as a matter of law, there is nothing that would have required the Attorney General to seek judicial approval of the fees earned by the Law Firms under the Litigation Retention Agreement.

It all boils down to a simple proposition. The Attorney General had the power to engage private lawyers pursuant to the terms of a contingency fee agreement. He did so. The Law Firms fully performed to the satisfaction of the Attorney General, and he fully performed by paying them as agreed. That is exactly how contracts are supposed to work.

Plaintiffs' (unfounded) allegation that the Litigation Retention Agreement—which provides for an effective contingency fee rate of 12.5% for services performed over several years and in multiple lawsuits—violates the South Carolina Rules of Professional Conduct does not somehow confer upon this Court authority to review the Litigation Retention Agreement. *See Spence v. Wingate*, 395 S.C. 148, 161, 716 S.E.2d 920, 927 (2011) (“the Rules of Professional Conduct do not, in themselves, create a cause of action . . . the rules are intended for guidance and disciplinary purposes, not to form the basis for civil litigation.”). A mere allegation of a violation of the South Carolina Rules of Professional Conduct also does not change the simple and indisputable fact that there is no requirement—statutory or otherwise—that the Attorney General seek judicial approval of its contracts with outside counsel. This is especially so because the actual party to the contract in this case—the Attorney General—has already approved the fee amount, and three other State officials or agencies—the State Treasurer, the State Comptroller General, and EBO—have authorized the payment of the fee. Accordingly, Plaintiffs' claims seeking to require the Attorney General to seek judicial approval of the Litigation Retention Agreement or the fees paid pursuant to such contract fail as a matter of law and judgment should be entered in favor of the Defendants.

CONCLUSION

For the foregoing reasons, summary judgment should be granted to Defendants, and the case dismissed with prejudice.

Respectfully submitted,

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Columbia, South Carolina
August 2, 2023

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	
	)	
South Carolina Public Interest Foundation	)	C/A No. 2020CP4004603
and John Crangle, individually and on	)	
behalf of all others similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	MEMORANDUM IN SUPPORT OF
	)	ATTORNEY GENERAL'S MOTION
	)	FOR SUMMARY JUDGMENT
Alan Wilson, Attorney General for the	)	
State of South Carolina, Willoughby &	)	
Hoefer, P.A., and Davidson, Wren &	)	
DeMasters, P.A.,	)	
	)	
Defendants.	)	
	)	

Summary judgment should be granted to the Attorney General in that Plaintiffs have conceded the sole issue on which the Supreme Court found standing which is whether the Attorney General has statutory authority to enter contingency fee agreements with private law firms under S.C. Code Ann. §1-7-150(B), and nothing else. *S.C. Pub. Int. Found. v. Wilson*, 437 S.C. 334, 878 S.E.2d 891 (2022). That legal question of authority is the only question required to be answered by this Court for disposition. As discussed below, because Plaintiffs have conceded that the Attorney General does have such authority to enter contingency fee agreements, nothing further remains to be decided on remand and judgment must be granted to the State. Moreover, as will be seen, § 1-7-150(B) not only poses no obstacle to the Attorney General's longstanding authority, as the State's chief legal officer, to enter into contingency agreements with private counsel, but the history of its enactment in 1998 supports such authority. Plaintiff lacks standing to raise other issues, and this Court lacks subject matter jurisdiction to consider them.

In the event that, *arguendo*, this Court should determine that it may address other issues,

the Attorney General demonstrates below that judgment should be granted to him as to those questions. No statute limited the Attorney General's authority to pay attorney's fees to his outside counsel pursuant to the contingency fee contract.

INTRODUCTION AND BACKGROUND

This case challenges the authority of the Office of the Attorney General to pay attorney's fees to the two law firm Defendants pursuant to a retainer agreement (*see* exhibit 7 to Complaint) for representation of the State in federal litigation over plutonium at the Savannah River Site. That federal case was settled in August, 2020. The settlement agreement provides for the payment of the \$600 million to the State of South Carolina with each party to pay its own costs and attorney fees. Complaint Ex. 1, p. 2, ¶5a. The Agreement for Voluntary Dismissal filed on September 29 states that the settlement agreement required payment by the United States which is inclusive of amounts for interest, attorneys' fees and costs. Exhibits filed herewith, p. 1. The statute under which settlement was reached provides for payment of funds to the State of South Carolina. 50 U.S.C. 2566.

Prior to the filing of this action, the State Executive Budget Office approved the withdrawal of attorney's fees from the settlement proceeds under S.C. Code Ann. §2-65-10 which states as follows: "[a] state agency may receive and spend unanticipated federal funds, and funds from private foundations or industries, which are not included in the appropriations act, but state agencies must submit expenditure proposals to the board [the Executive Budget Office (§2-65-15(4))] and receive authorization from the board before expenditure of funds." See Buckley affidavit, Exhibits, p. 6. Following receipt of the above approval of the payment from EOB and prior to the filing of this suit, the Accounting Supervisor of the Attorney General's Office approved the payment. *Id.* The Finance Director of the AG's Office approved payment soon afterward and

sent it to the Comptroller General through the State Financial System. The Treasurer's Office wired the funds to the law firm four days later. *Id.*

In her Order of October 14, 2020, denying a temporary injunction as to the defendant law firms in this case¹, Judge Lee, found that Plaintiffs lacked standing and had not shown a likelihood of success on the merits as follows:

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

Judge Lee denied Plaintiffs' Motion to Alter or Amend by Order dated December 17, 2020, concluding that the October 14 Order properly considered all arguments, that Plaintiffs lack standing and that the "Court appropriately applied and considered the language of S. C. Code Ann. §1-7-150(B) and S.C. Code Ann. §1-7-85." Plaintiffs have not appealed these Orders denying their Temporary Injunction Motions.

In considering the Motions to Dismiss filed by the Defendants, Circuit Court Judge R. Kirk Griffin found that he lacked authority to modify Judge Lee's findings and that such findings required dismissal, but he also agreed with Judge Lee's orders and concurred that Plaintiffs lacked standing to maintain their claims against the Defendants. Order, March 5, 2021. On appeal, the South Carolina Supreme Court ruled as follows:

Appellants' complaint presents a threshold issue of the Attorney General's statutory authority to enter contingency fee agreements with private law firms. This issue will inevitably arise again in the future . . . There is a need for future guidance as to whether subsection 1-7-150(B) authorizes the Attorney General to enter into contingency fee agreements. We therefore hold Appellants have public importance standing. . . . We reverse the circuit court's finding that Appellants lack public importance standing and remand for

¹ In a Form 4 Order, filed October 1, the Honorable Debra R. McCaslin denied the Petitioners' Motion for a Temporary Injunction as to the Attorney General as moot.

the circuit court to consider the merits of Appellants' claims.

S.C. Pub. Int. Found. v. Wilson, 437 S.C. 334, 342–43, 878 S.E.2d 891, 895–96 (2022).

Accordingly, this case has now been remanded as directed by the Supreme Court to the Circuit Court for the determination of the sole issue of whether S.C. Code Ann. §1-7-150(B) “authorizes the Attorney General to enter into contingency fee agreements.” Following remand, the Attorney General answered the Amended Complaint.

ARGUMENT

I

The Attorney General Has the Authority to Enter Contingency Fee Agreements for Outside Counsel Under Section 1-7-150(B)

The above threshold issue is the sole question for which the Court found a “need for future guidance” so as to warrant public importance standing. Therefore, the Plaintiffs lack standing to raise any other issue. On this question of the Attorney General’s authority to enter contingency litigation contracts, Plaintiffs’ suit fails.

A

Plaintiffs Conceded that the Attorney General Is Authorized to Enter Contingency Fee Agreements

Plaintiffs never challenged the Attorney General’s authority to enter a contingency agreement for outside counsel to bring litigation on his behalf. In fact, Plaintiffs conceded both in Circuit Court and at the Supreme Court that the Attorney General possesses the authority to enter such agreements. At an early hearing in this case before the Honorable Alison Lee, counsel for Plaintiffs conceded that the Attorney General has the authority to hire outside counsel under a contingency agreement: Tr. October 6, 2020, p. 11, ll. 14-16 (“the attorney general has authority to hire lawyers pursuant to a contingency fee agreement.”). (Exhibits, p. 19). In response to a

direct question from Judge Lee, counsel for Plaintiffs again affirmed that the Attorney General may enter such agreements:

THE COURT: Mr. Griffin, are you, are you, in essence, arguing that the attorney general's office didn't have the authority to enter into the fee agreement with ---

MR. GRIFFIN: No, Your Honor.

THE COURT: --- the defense?

MR. GRIFFIN: I am not arguing that at all. I'm arguing that under this, the attorney general can enter into a fee agreement.

Exhibits p. 19, l. 21 – p. 20, l. 3.

At the Supreme Court, Plaintiffs' counsel again confirmed that the Attorney General had the authority to enter contingency agreements.

Q 6:11 (Justice James): So Is it your position that every single contingent fee agreement that the Attorney General ever enters into with a private law firm or private attorney violates the law?

A 6:23 (Carpenter): No. No.

* * *

Q 12:46 (Justice Kittredge): In reference to a question by Justice James, it appears to me that you do not oppose the general concept of the Attorney General retaining outside counsel in cases

A 12:58 (Carpenter): Right.

Oral argument, South Carolina Supreme Court, April 6, 2022, <https://media.sccourts.org/videos/2021-000343.mp4>.

These concessions are binding and fatal to Plaintiffs' case. "The parties to a suit are bound by admissions, made by their attorneys of record, in open court, or elsewhere, touching matters looking to the progress of the trial."). *Pope v. Heritage Communities, Inc.*, 395 S.C. 404, 430–31, 717 S.E.2d 765, 779 (Ct. App. 2011), quoting, *Hall v. Benefit Ass'n of Ry. Emps.*, 164 S.C. 80, 83,

161 S.E. 867, 868 (1932). Accordingly, Plaintiffs are bound by their concessions as to the only issue on which the Supreme Court found standing and remanded, the Attorney General's authority to enter contingency agreements with outside counsel. These concessions are dispositive. Because the Attorney General does have this authority to enter such agreements, this case is controlled by the Agreement at issue, and judgment must be granted for him.

B

The Attorney General's Authority Is Also Supported By Case Law

Although the above concessions are dispositive, they are also consistent with case law and the relevant statutes. The Supreme Court found that the standing issue regarding the Attorney General's authority to contract for outside counsel on a contingency basis arose under §1-7-150(B) which states as follows.

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

In denying the Motion for a Temporary Injunction in this case, Judge Lee found that a different statute §1-7-170 grants the Attorney General the authority to enter into an agreement or to hire private counsel on a contingency basis. Order at page 5. ("A department or agency of state government may not engage on a fee basis an attorney at law except upon the written approval of the Attorney General and upon a fee as must be approved by him. . . ."). Although §1-7-170 is not the same as to the one cited by the Supreme Court, it does make clear that the Attorney General has the authority to enter contingency agreements with outside counsel.

At pages 11 and 12 of her Order, Judge Lee quoted Orders specifically finding that §1-7-170 authorizes contingency fee agreements: "As Judge [G. Thomas] Cooper stated 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 judgement obtained in the case.” Citing p. 9 of *Cephalon* Order, Exhibits, p. 29[morandum]. She also cited the Order of the Honorable Roger L. Couch on a different issue, but that Order also expressly found that the Attorney General had authority to enter contracts with private counsel on a contingency basis. *State v. Eli Lilly*, 2007-CP-42-1855 (Sept. 22, 2009) Exhibits, p. 39. As Judge Couch stated, “[s]ection 1-7-170 gives virtually unlimited discretion to the Attorney General to approve private counsel and the fee arrangement for such counsel's services. Such would, of course, include a contingency fee arrangement with the Attorney General’s own designated attorneys to act as special counsel on his behalf.” Exhibits, p. 72

These rulings are consistent with the Supreme Court’s broad view of the Attorney General’s authority. “Th[at] Court has recognized 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.” *Condon v. State*, 354 S.C. 634, 641, 583 S.E.2d 430, 434 (2003); *see also State v. Long*, 406 S.C. 511, 516, 753 S.E.2d 425, 427 (2014) (“Furthermore, this Court has always regarded the Attorney General as the State’s chief prosecuting officer with broad common law and statutory authority to prosecute any case on behalf of the State.”); *Cooley v. S.C. Tax Comm’n*, 204 S.C. 10, 28 S.E.2d 445, 451 (1943) (recognizing “the wide scope of the authority and duties of the Attorney General as the legal representative of the state and of its several administrative departments,” including the authority to contract on a contingent basis in certain circumstances). Further, Judge Couch observed that “Courts have almost universally recognized

that Attorneys General possess broad authority to appoint private attorneys as special counsel on a contingent fee basis to assist in the representation of the public interest.” Exhibits, p. 46, (*Lilly* Order at page 8).

Other jurisdictions have recognized that this authority extends to entering contingency agreements with outside counsel. *Cephalon*, Exhibits, p. 29, cited the following authority:

[T]he Supreme Court of Rhode Island held that,

[T]here is nothing unconstitutional or illegal or inappropriate in a contractual relationship whereby the Attorney General hires outside attorneys on a contingent fee basis to assist in the litigation of certain non-criminal matters. Indeed, it is our view that the ability of the Attorney General to enter into such relationships may well, in some circumstances, lead to results that will be beneficial to society—results which otherwise might not have been attainable.

Rhode Island v. Lead Indus. Ass'n, Inc., 951 A.2d 428, 475 (R.I. 2008) (internal quotes and citations omitted). The Supreme Court of Missouri reached the same conclusion in *Missouri ex rel. Nixon v. Am. Tobacco Co., Inc.*, 34 S.W.3d 122, 136 (Mo. 2000). holding that, “[i]n the absence of a statute to the contrary, we conclude that the attorney general does have the power to enter into this type of fee arrangement with his special assistant attorneys general.” Order, *Cephalon*, Exhibits, p. 29. Other jurisdictions have reached a similar conclusion. *See, e.g., Pickering v. Hood*, 95 So.3d 611, 616 (Miss. 2012) (“We agree with the Attorney General that he has common-law ‘authority to negotiate and enter into contingency fee agreements with retained counsel for civil litigation on behalf of the State.’”).

And as a matter of practice and custom, the Attorney General’s office has long used contingency fee contracts. A blue ribbon 1990 study, led by Dean John Montgomery of the USC Law School and I.S. Leevy Johnson, prominent Columbia attorney, described the Attorney General’s use of contingency fee contracts. The study found, “[s]ince at least the 1880’s, the State of South Carolina has used private attorneys for a portion of the State’s legal services ... ” and that

"[i]n appropriate cases, the Attorney General should consider contingent fee arrangements instead of an hourly rate." Report to the Attorney General of the Advisory Committee on Associate Counsel (1990), at 3, 11. According to the study, the need for outside counsel is essential to the function of the Attorney General in protecting the public interest and that "[t]he Attorney General has authority to make such decisions as well as the obligation to monitor the cost and effectiveness of services provided by associate counsel." *Id.* at 13.

Therefore, the authority of the Attorney General to enter contingency fee agreements is settled by the above concessions and by the above authority. Accordingly, Judgment must be granted to the Attorney General as the Court found that Plaintiffs have standing only as to this issue.

II

THIS COURT LACKS SUBJECT MATTER JURISDICTION TO CONSIDER ISSUES OTHER THAN THE ATTORNEY GENERAL'S AUTHORITY TO ENTER CONTINGENCY AGREEMENTS FOR OUTSIDE COUNSEL

Because the sole issue on which the Supreme Court found standing was on the question of whether the Attorney General had the authority to enter contingency agreements for representation by outside counsel, standing is lacking as to other issues, and this Court lacks subject matter jurisdiction to consider them. . "South Carolina courts, like the federal courts, require a justiciable case or controversy before any decision on the merits can be reached. *See Waters v. South Carolina Land Resources Conservation Comm'n*, 321 S.C. 219, 467 S.E.2d 913 (1996); *Crocker v. Barr*, 303 S.C. 1, 397 S.E.2d 665 (Ct.App. 1990) (Goolsby, J., concurring), rev'd on other grounds, 305 S.C. 406, 409 S.E.2d 368 (1991)." *Lennon v. South Carolina Coastal Council*, 498 S.E.2d 906, 908, 330 S.C. 414, 417-18 (S.C.App., 1998). "Standing to sue is a fundamental requirement in instituting an action." *Joytime Distributors & Amusement Co. v. State*, 338 S.C. 634, 639, 528

S.E.2d 647, 649 (1999). A motion to dismiss for lack of standing challenges the court's subject matter jurisdiction. The same is true for this motion for summary judgment. *S.C. Pub. Int. Found. v. Wilson*, *supra*, 437 S.C. at 340, 878 S.E.2d at 894.

III

EVEN IF, *ARGUENDO*, THIS COURT HAD SUBJECT MATTER JURISDICTION TO CONSIDER PLAINTIFFS' OTHER ISSUES, THEY ALL LACK MERIT

A

The Attorney General Had Express Authority To Pay The Attorneys Pursuant To State Processes Without Judicial Review Of The Fee, Deposit Into The General Fund Or An Appropriation From The General Assembly

The authority below demonstrates that the Attorney General had the authority to authorize payment of attorney's fees and costs to his attorneys pursuant to their contract without judicial approval or deposit into the General Fund.

1

History and Application of § 1-7-150

Section 1-7-150 was enacted in 1998 as a permanent provision (Section 18) of the Appropriations Act (Act 419 of 1998). Press coverage from the time makes it clear that the overarching purpose of the statute was to determine the disposition of the proceeds from the settlement of the Reedy River oil spill—and not to impose a restriction upon the powers of the Attorney General with respect to the payment of contingency fees. The statute sought to ensure that such proceeds would benefit the Reedy River and would not be deposited in the General Fund, as would normally have occurred.²

² The Court may consider this historical background in interpreting § 1-7-150. *See, e.g., In re Hosp. Pricing Litig., King v. AnMed Health*, 377 S.C. 48, 54, 659 S.E.2d 131, 134 (2008) (noting that “the history of the period in which the statute was passed may be considered in interpreting the statute”).

As chronicled by an editorial in *The Greenville News*, following the announcement of the settlement from the Reedy River oil spill, there was some confusion and legal uncertainty as to where the proceeds from the settlement would be sent. See “Fighting for Reedy funds,” *The Greenville News* (Apr. 22, 1998) (Exhibits, p. 83) (“This apparent good news was quickly followed by confusion over the ultimate destination of the money from the settlement. The attorney general indicated the money might go into the state’s general fund, where it likely would be distributed for legislators’ pet projects all over the state.”). To address these concerns, the General Assembly acted to ensure that the settlement funds would go towards the cleanup of the Reedy River. See *id* (“Last week the House of Representatives passed a joint resolution directing the settlement to the trust fund and tagging it for restoring the Reedy. It appears there’s also strong support in the Senate for ensuring any money recovered from Colonial Pipeline goes to the area where the environmental devastation occurred.”). The General Assembly’s efforts ultimately culminated in the enactment of § 1-7-150. None of this history indicates that the General Assembly intended for that section to affect the Attorney General’s authority to enter into contingency fee agreements. Indeed, the Reedy River settlement was obtained by virtue of a contingency fee agreement.

It is also important to point out that a separate proposal which would have required the Budget and Control Board to approve contingency fee agreements between the Attorney General and private law firms was considered as a part of the bill but was included in a *different section*. See Section 18, 1997–98 General Appropriations Bill 4700, as passed by the House, https://www.scstatehouse.gov/sess112_1997-1998/appropriations1998/hp2p18.htm (adding Section 1-7-85 to require written approval from the State Budget and Control Board before the Attorney General may contract on a contingent or other basis for legal representation). And even that section was ultimately removed. See Section 18, 1997–98 General Appropriations Bill 4700,

as reported by the Senate Finance Committee, https://www.sctatehouse.gov/sess112_1997-1998/appropriations1998/sf2p18.htm.

The fact that the General Assembly removed a provision requiring oversight over the Attorney General's contingency fee contracts surely is strong evidence that his existing authority remained in place unchecked. In other words, such action by the General Assembly in removing any statutory oversight over the Attorney General's authority was a recognition that the Attorney General, as the State's chief legal officer, must possess the power to "institute, conduct and maintain all such suits and proceedings as he deems necessary for the enforcement of the laws of the States, the preservation of order, and the protection of public rights." *State ex rel. Condon v. Hodges*, 349 S.C. 232, 239, 562 S.E.2d 623, 627 (2002).

Thus, nothing surrounding the history of § 1-7-150 suggests that the General Assembly intended for that section to constrain the Attorney General's authority to enter into contingency fee agreements or to limit his authority to pay attorney's fees under those agreements. This Court should interpret § 1-7-150 in light of this intent and conclude that the section in no way limits the authority of the attorney general to enter into contingency fee contracts. *See Greenville Baseball v. Bearden*, 200 S.C. 363, 20 S.E.2d 813, 816 (1942) ("It is a familiar canon of construction that a thing which is in the intention of the makers of a statute is as much within the statute as if it were within the letter. It is also an old and well-established rule that words ought to be subservient to the intent, and not the intent to the words."); *see also Ingram v. Bearden*, 212 S.C. 399, 410, 47 S.E.2d 833, 837 (1948) (noting that the "paramount consideration and controlling factor in the interpretation of a statute is the intent of the Legislature, and each enactment of the Legislature is to be construed in light of its own context.").

But even if this Court concludes that § 1-7-150 applies in these circumstances, the section's

plain language nevertheless allows for the payment of fees. *See* S.C. Code Ann. § 1-7-150(B) (“All monies, except investigative costs or costs of litigation awarded by court order or settlement, awarded the State of South Carolina by judgment or settlement in actions or claims brought by the Attorney General on behalf of the State or one of its agencies or departments must be deposited in the general fund of the State, except for monies recovered for losses or damages to natural resources, which must be deposited in the Mitigation Trust Fund, or where some other disposition is required by law.”). That section plainly provides that if “some other disposition [of monies] is required by law,” those funds need not be deposited into either the general fund of the State or the Mitigation Trust Fund. In this case, “some other disposition” was “required by law” because the contingency fee contract required the Attorney General to pay the attorney’s fees directly to the private firm.

A contrary construction could well raise constitutional concerns because legislative bodies generally lack the authority to appropriate private funds. *See Bd. Of Regents of Higher Ed. Judge*, 168 Mont. 433, 446–47, 543 P.2d 1323, 1331 (1975) (“However we emphasize that the power to appropriate does not extend to private funds received by state government which are restrict by law, trust agreement or contract.”); *see also Com. ex rel. Armstrong v. Collins*, 709 S.W.2d 437, 446–47 (Ky. 1986) (“[T]he General Assembly has no authority to transfer private funds to the general fund”); *see also Gilstrap v. S.C. Budget & Control Bd.*, 310 S.C. 210, 216, 423 S.E.2d 101, 105 (1992) (describing the appropriation of “public funds” as a legislative function).

Here, the attorney’s fees were the private funds or property of the law firm. *See Button’s Estate v. Anderson*, 112 Vt. 531, 28 A.2d 404, 410 (1942) (noting that the attorney’s fee “never legally and equitably belonged to the State as part of its public funds”); *see also Ex Parte Brown v. Howard*, 393 S.C. 214, 221, 11 S.E.2d 899, 902 (2011) (an attorney’s services “constitute

property” for purposes of the Fifth Amendment Takings Clause); *Foster v. Taylor*, 210 S.C. 324, 332, 42 S.E.2d 531, 535 (1947) (citing *Button’s Estate* for the proposition that a constitutional provision applies to the funds of the public but “not another’s”). As such, the General Assembly lacks any authority to appropriate those funds, and § 1-7-150 should be construed to not require the deposit of those funds into the general fund of the State.

Finally, any potential argument that § 1-7-150 requires the settlement document itself to award the payment of a certain fee should be rejected as leading to an absurd result. *See Ray Bell Constr. Co. v. School Dist. of Greenville Co.*, 331 S.C. 19, 26, 501 S.E.2d 725, 729 (1998) (“However plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention.”). Such a construction would effectively make the Attorney General’s authority to pay a contingency fee subject to the approval of defense counsel via the settlement agreement. Such a construction would not only be absurd but may very well be unconstitutional. *See Long*, 406 S.C. at 515, 753 S.E.2d at 427 (rejecting attempt to interfere with power of the Attorney General).³

2

Judge Lee Found that Neither § 1-7-85 Nor § 1-7-150(B) Require Judicial Approval Of the Fees or Their Deposit Into the General Fund

Although the Supreme Court found that Judge Lee’s Order Denying a Preliminary Injunction was not a final determination of Plaintiffs’ rights, her findings regarding the statutes in

³ Moreover, even if *arguendo*, an “award” were required, the “Agreement to Voluntary Dismissal of Appeal” filed with the Court of Appeals for the Federal Circuit constitutes such an award because it expressly states that the settlement agreement is “inclusive of amounts for interest and the State’s attorneys’ fees and other costs, which are reimbursed and awarded from payment of the settlement amount” Exhibits p. 1. As noted, *infra*, next page, Judge Lee found that the fees were awarded by settlement.

relation to that motion are of guidance:

S.C. Code Ann. § 1-7-85 expressly states 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....” This Court finds that payment of attorneys’ fees is expressly authorized under § 1-7-85 and, pursuant to a valid and binding contract for services rendered in civil proceedings brought on behalf of the State, the fees constitute a cost which the Attorney General is authorized to pay. S.C. Code Ann. § 1-7-150 is unambiguous and allows the Attorney General to pay cost of litigation from the settlement proceeds. Plaintiffs concede the language is clear and unambiguous. The statute does not require court approval for the payment of the fee, and the appropriate State Officers followed applicable law in disbursing the funds to meet the State’s contractual obligations. . . .

Order at p. 5. As the Court further stated:

The Attorney General is the State’s chief legal officer, and he properly exercised his authority to contract with the W&H law firm to represent the State in its action against the United States and to pay them pursuant to that contract from the settlement proceeds. As Judge Cooper stated 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 judgement obtained in the case.” Order at 9 [Exhibits, p. 29]. Judge Roger Couch, in *State v. Eli Lilly*, 2007-CP-42-1855 (Sept. 22, 2009), also concluded § 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.” Order at p. 19. [Exhibits, p. 57]. 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.” Order at 20. 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.” Order at p. 18 [Exhibits, p. 38].

Contrary to Plaintiffs’ second assertion, these fees were also “awarded by settlement.” The settlement provides that each party bears its own fees thereby allowing the payment to be made from the settlement proceeds. [Exhibit 1 to Complaint] This understanding is ratified by the parties to the settlement in documents presented to the U.S. Court of Appeals for the Federal Circuit. The “Agreement To Voluntary Dismissal of Appeal” filed with the Federal Court and executed by all parties to the litigation incorporates the settlement into the dismissal. [Exhibits, p. 1] It specifically states that the settlement agreement is “inclusive of amounts for interest and the State’s attorneys’ fees and other costs, which are reimbursed and awarded from payment of the settlement amount and the State shall have no further claim against the United States for such fees and costs” The Attorney General had the authority to pay the attorney’s fees from settlement proceeds without depositing the money into a particular account. . . .

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

Order at pp. 11 – 14. In her Order of December 17, 2020, denying the Plaintiffs' Motion to Alter or Amend, Judge Lee found that her decision had "appropriately applied and considered the language of S.C. Code Ann. § 1-7-150(B) and S.C. Code Ann. § 1-7-85."

Furthermore, as noted above, §1-7-150(B) also authorizes withholding of fees from the General Fund "where some other disposition is required by law." Certainly, the payment of attorney's fees pursuant to a contingency fee contract, as here, is "required by law."

2

Proviso 59.8 Barred Depositing the Monies to the General Fund

Even if, *arguendo*, §1-7-150(B) would otherwise require deposit of the fees into the General Fund, its effect would have been barred by Proviso 59.8 that instead directed the Attorney General to deposit any funds that "otherwise" would go to the General Fund into a Litigation Recovery Account, as follows:

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

2019 S.C. Acts 91, Part 1.B, § 59.8 (2019-2020 fiscal year). The effect of this proviso was extended into the 2020-2021 fiscal year. 2020 S.C. Acts 135, § 2 (extending the effective dates of 2019 Act 91, Part 1.B. "until the effective date for appropriations made in a general appropriations

act for Fiscal Year 2020-2021”); see also 2019 S.C. Acts 91 (“All acts or parts of acts inconsistent with any of the provisions of ... Part 1B of this act are suspended for Fiscal Year 2019-20.”). Judge Lee agreed with this interpretation of the proviso in finding that “Proviso 59.8 suspended the requirements of §1-7-150(B) with respect to funds that ‘otherwise’ would go to the General Fund.” Order, October 14, at p. 7. She cited *Beaufort Cty. v. S.C. State Election, Comm’n*, 395 S.C. 366, 374, 718 S.E.2d 432, 436 (2011) for its “holding that a budget proviso that conflicts with a permanent statute suspends the statute for the period during which the proviso is effective.” *Id.* Accordingly, the Proviso would bar any application of §1-7-150(B) that would require deposit of the fees into the General Fund.

B

This Case Is Moot

Because the money at issue has already been paid to the law firm defendants, this case is moot. See Amended Complaint, ¶74. *S.C. Ret. Sys. Inv. Comm’n v. Loftis*, 402 S.C. 382, 384, 741 S.E.2d 757, 758-59 (2013) (“A case is moot where a judgment rendered by the Court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the Court.”). Courts “will not pass on moot and academic questions or make an adjudication when there remains no actual controversy.” *Byrd v. Irmo High Sch.*, 321 S.C. 426, 431, 468 S.E.2d 861, 864 (1996). “A case becomes moot when judgment, if rendered, will have no practical legal effect upon existing controversy.” *Mathis v. S.C. State Highway Dep’t*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973).

C

No Private Right Of Action Exists For A Third Party To Challenge The Attorney’s Fees Pursuant To The Rules Of Professional Conduct

Plaintiffs allege that the attorney’s fees paid are unreasonable and unenforceable under

Rule 1.5 of the South Carolina Rules of Professional Conduct, Rule 407, SCACR. Those rules do not create a cause of action for unreasonable fees or authorize a circuit court to strike them upon the request of a third party. *Spence v. Wingate*, 395 S.C. 148, 161, 716 S.E.2d 920, 927 (2011) (“the Rules of Professional Conduct do not, in themselves, create a cause of action . . . the rules are intended for guidance and disciplinary purposes, not to form the basis for civil litigation.”) *Cf. Whitworth v. Fast Fare Markets of S.C., Inc.*, 289 S.C. 418, 420, 338 S.E.2d 155, 156 (1985). (“the general rule is that a statute which does not purport to establish a civil liability, but merely makes provision to secure the safety or welfare of the public as an entity is not subject to a construction establishing a civil liability.”).⁴

D

No Constructive, Resulting Or Other Trust Applies To The Funds At Issue

Plaintiffs ask that this Court declare a constructive or resulting trust. Both are types of implied trusts. “Implied trusts are those which, without being expressed, are implied in law from the nature of the transaction, or that are imposed on the transaction by operation of law as matters of equity, independently of the particular intention of the parties.” 90 C.J.S. Trusts § 9; see also, *Beard v. Stanton*, 15 S.C. 164, 168 (1881) (“implied trusts are those raised and created by act or construction of law.”). Implied “trusts are said to be either resulting or constructive trusts.” *Green v. Green*, 56 S.C. 193, 34 S.E. 249, 254 (1899). “Resulting trusts are trusts that the courts presume to arise out of the transactions of parties; that a trust was intended. Constructive trusts are trusts which arise when a person clothed with some fiduciary character, by fraud or otherwise, has gained some advantage to himself, or where equity will not permit him to retain it, though acquired

⁴ Plaintiffs’ citation of *Getzen v. Law Offices of James M. Russ, P.A.*, 323 S.C. 377, 379, 475 S.E.2d 743, 744 (1996) is misplaced in that the Court followed Florida law regarding attorney’s fees.

without fraud.” *Traywick v. Wannamaker*, 153 S.C. 146, 150 S.E. 655, 662 (1929)

The allegations in the complaint do not support the creation of any of these types of trusts. Although an implied trust may arise from a fiduciary relationship (*see State v. Parris*, 353 S.C. 582, 592, 578 S.E.2d 736, 741–42 (Ct. App. 2003), *rev'd*, 363 S.C. 477, 611 S.E.2d 501 (2005)), the creation of any such trust would be subject to State law including the Constitution and statutes. *See, S.C. Const.* art. I §23 (Provisions of the Constitution are mandatory except where made “directory or permissive by its own terms.”); *see also Brewster v. Gillison*, 31 S.C. Eq. 435, 438 (S.C. App. Eq. 1859)(“the statute of limitations will bar a demand arising out of a trust raised by implication of law.”); *Joyce v. Gunnels*, 19 S.C. Eq. 259 (S.C. App. Eq. 1846)(“implied trusts constitute no exception to the operation of the statute” of limitations). The trusts that Plaintiffs envision would directly conflict with and be precluded by the statutory authority of the Attorney General to pay the fees as set forth above and as found by Judge Lee and also by Judges Cooper and Couch as set forth in their Orders.

CONCLUSION

Summary Judgment should be granted to the State because Plaintiffs have conceded the only issue on which the Supreme Court found standing which is the Attorney General’s authority to retain outside counsel under a contingency contract. Even if other issues could be considered under the Supreme Court’s ruling (and they cannot), no statute limits the Attorney General’s authority to pay attorney’s fees directly to the attorneys with whom he contracted as he did here.

[Signature block on next page]

Respectfully submitted,

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August 2, 2023

Attorneys for the Attorney General

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

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

Case No. 2020-CP-40-04603

Plaintiffs,

**MEMORANDUM IN OPPOSITION TO
DEFENDANTS' MOTION TO STAY
DISCOVERY**

v.

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

Defendants.

INTRODUCTION

Defendants seek a stay of discovery pending resolution of the pending motions to dismiss. However, the Defendants have since abandoned those previously filed motions and answered the Amended Complaint. Defendants have nevertheless refused to respond to Plaintiffs' discovery requests and filed summary judgment motions without ever having participated in discovery. This gamesmanship should be rejected. Instead, the Court should deny the motion to stay discovery and continue the pending motions for summary judgment under Rule 56(f), SCRCF until the Plaintiffs have had an opportunity to conduct discovery.

ARGUMENT

Motions to stay discovery are "generally disfavored because delaying discovery may cause case management problems as the case progresses or impede the court's responsibility to expedite discovery." *Kennedy v. Fed. Nat'l Mortg. Ass'n*, No. 4:13-CV-203-F, 2013 WL 5885154, at *1 (E.D.N.C. Oct. 31, 2013). The filing of a dispositive motion does not, by itself, warrant the issuance of a stay. *See Herring v. Lapolla Indus., Inc.*, No. 2:12-cv-02705-RMG, 2013 WL

12148769, at *1 (D.S.C. Aug. 30, 2013) (citing *Hollings v. U.S. Tennis Ass’n*, 469 F. Supp. 2d 67, 78 (E.D.N.Y. 2006)). The moving party bears the burden of showing good cause and that a stay of discovery is reasonable. See *Kron Med. Corp. v. Groth*, 119 F.R.D. 636, 637 (M.D.N.C. 1998); *Brown-Thomas v. Hynie*, No. 1:18-CV-02191-JMC, 2019 WL 1043724, at *4 (D.S.C. Mar. 5, 2019). See also *Gibbs v. Plain Green, LLC*, 331 F. Supp. 3d 518 (E.D. Va. 2018) (“Although denying a stay can risk waste, the opposite can also be true: *granting* a stay may waste judicial resources.” (citation omitted).); *Hooker v. Sirius XM Radio, Inc.*, No. 4:13CV3, 2015 WL 10937407 at 3-4 (Sept. 25, 2015) (“Defendant asserts that not granting a stay would cause a ‘waste of time,’ but the Court concludes that granting the stay would likely be a greater waste of time.”).

Furthermore, “[t]he party seeking a stay must justify it by clear and convincing circumstances outweighing potential harm to the party against whom it is operative.” *Williford v. Armstrong World Indus., Inc.*, 715 F.2d 124, 127 (4th Cir. 1983). “When considering a motion to stay, the district court should consider three factors: ‘(1) the interests of judicial economy; (2) hardship and equity to the moving party if the action is not stayed; and (3) potential prejudice to the non-moving party.’” *Impulse Monitoring, Inc. v. Aetna Health, Inc.*, 2014 WL 4748598, at *1 (D.S.C. Sept. 23, 2014) (quoting *Johnson v. DePuy Orthopaedics, Inc.*, 2012 WL 4538642, at *2 (D.S.C. Oct. 1, 2012)). In other words, the proponent of a stay “bears the burden of establishing its need.” *Clinton v. Jones*, 520 U.S. 681, 708 (1997) (citing *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936)); *Doe v. Bishop of Charleston*, No. 2:22-CV-00816-DCN, 2022 WL 10067536, at *2 (D.S.C. Oct. 17, 2022).

First, Defendants’ statement that “the action remains under a court order prohibiting discovery pending resolution of all outstanding motions to dismiss” is simply false. The operative order reads as follows: “All discovery and motions are stayed until ***pending motions to dismiss***

are decided.” Order Granting Motion to Stay Discovery, Jan. 26, 2021 (emphasis added). That order predated the appeal of this matter, and none of the referenced “motions to dismiss” are still pending. All that is pending is Defendants’ respective motions for summary judgment. Accordingly, by its terms, the January 26, 2021, order staying discovery is no longer applicable to this case.

Second, Defendants make no showing whatsoever of any harm they will suffer from providing the discovery requested by Plaintiffs. The record is bare as to Defendants’ purported harm. Accordingly, they do not come close to meeting their burden of justifying a discovery stay by clear and convincing circumstances. By contrast, the discovery requested by Plaintiff is necessary to provide the Plaintiffs and the Court a full and fair opportunity to address the merits of Plaintiffs’ claims. The discovery previously served upon the Defendants seeks to determine whether the attorneys’ fee that the Attorney General paid to the Law Firms was awarded by judgment or settlement. The discovery is also directed at determining whether a \$75 million fee paid to the Law Firms is reasonable for the work performed. In addition, Plaintiffs seek an order requiring the Law Firms to return the money to the State’s General Fund. The discovery seeks to determine where the \$75 million is today and whether additional defendants need to be added to this action so that the Court can award full and complete relief.

Third and finally, for the reasons stated in Plaintiffs’ Response in Opposition to Motions For Summary Judgment by Alan Wilson, Attorney General for the State of South Carolina, Willoughby & Hoefer, P.A., and Davidson, Wren & DeMasters, P.A. and incorporated herein by reference, Defendants interpret the Supreme Court’s order far too narrowly. Accordingly, this purported basis for staying discovery on that ground lacks merit as well.

CONCLUSION

For the foregoing reasons, the Defendants’ motion to say discovery should be denied.

Respectfully submitted,

s/James M. Griffin

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August 2, 2023

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

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

Plaintiffs,

v.

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

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Case No. 2020-CP-40-04603

**PLAINTIFFS' RESPONSE IN
OPPOSITION TO MOTIONS
FOR SUMMARY JUDGMENT BY:**

**ALAN WILSON, ATTORNEY GENERAL
FOR THE STATE OF SOUTH CAROLINA**

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AND

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South Carolina Public Interest Foundation (“SCPIF”) and John Crangle (“Crangle”) (collectively “Plaintiffs”) hereby respond collectively in opposition to the Motions for Summary Judgment filed by Defendants Alan Wilson, Attorney General for the State of South Carolina (“Wilson”), Willoughby & Hoefer, P.A. (“W&H”), and Davidson, Wren & DeMasters, P.A. (“DWD”) (collectively “Defendants”). For the reasons stated herein and based on the record before the Court, Defendants’ motions for summary judgment should be DENIED in their entirety.

I. INTRODUCTION

Plaintiffs have public interest standing to pursue their claims for declaratory and other relief asserting money had and received as well as seeking the imposition of a constructive trust over and restitution of \$75 million unlawfully paid to W&H and DWD (collectively the “Law Firms”) by Wilson.

Defendants’ motions for summary judgment are premised upon an extremely narrow interpretation of the Supreme Court’s reversal of the Court’s dismissal of Plaintiffs’ Amended Complaint for lack of standing. Plaintiffs expect Defendants’ interpretation of that opinion to be so narrow that Defendants’ motion is premised on denying Plaintiffs standing to assert the issues in this case. The Supreme Court clearly ruled otherwise for the reasons stated in that opinion and as discussed in more detail below.

In its decision, the Supreme Court concluded that Plaintiffs have adequately alleged public importance standing. The Court stated that “[b]y claiming Wilson improperly dispersed state settlement funds, [Plaintiffs] indisputably allege an issue of public importance.” *S.C. Pub. Interest Found. v. Wilson*, 437 S.C. 334, 342, 878 S.E.2d 891, 895 (2022). The Court then turned to the question of whether a need for future guidance exists. In finding that there was a need for future guidance, the Court explained as follows:

[Plaintiffs'] complaint presents a threshold issue of the Attorney General's statutory authority to enter contingency fee agreements with private law firms. This issue will inevitably arise again in the future because Wilson has seven other litigation retention agreements with private attorneys.... There is a need for future guidance as to whether subsection 1-7-150(B) authorizes the Attorney General to enter into contingency fee agreements. We therefore hold that [Plaintiffs] have public importance standing.

Id., 437 S.C. at 342-343, 878 S.E.2d at 895-896.

The Court did not, as the Defendants assert, limit the scope of review on remand to the question of whether the Attorney General can enter into contingency fee agreements with private attorneys in the abstract without considering the terms of the agreements at issue and the governing statutory provisions. Instead, the Court remanded the case "for the circuit court to consider the merits of Appellants' claims." *Id.* These claims include, but are not limited to, Plaintiffs' allegation that S.C. Code § 1-7-150(B) prohibits the Attorney General from diverting a portion of settlement proceeds from the General Fund to pay attorneys under a contingency fee agreement when the fees have not been awarded by court order or settlement. Plaintiffs also challenged the reasonableness of the \$75 million fee for the work done by counsel. Plaintiffs have also asserted claims for money had and received and equitable relief, including requiring the Law Firms to return the \$75 million to the State.

Plaintiffs have been denied any opportunity to conduct discovery on the claims alleged in the Amended Complaint. Therefore, Defendants' motions for summary judgment should be denied or continued pursuant to Rule 56(f), SCRPC, until Plaintiffs have had a reasonable opportunity to conduct discovery on the claims alleged in the Amended Complaint. Furthermore, the Court should deny the Defendants' motions for summary judgment on the record before it because there is a factual question as to whether the attorneys' fees were awarded by Court order or settlement, as required under subsection Section 1-7-150(B) of the South Carolina Code of Laws and whether \$75 million is a reasonable attorneys' fee for the services performed.

II. STATEMENT OF THE CASE

Former Governor James H. Hodges brokered an agreement pertaining to the storage of weapons-grade plutonium at the Savannah River Site (“SRS”). Governor Hodges’s brokered settlement is codified at Title 50, United States Code, Section 2566 (“Section 2566”). Under Section 2566, the United States Department of Energy (“DOE”) must pay the State of South Carolina “economic impact and assistance payments” of \$100 million per year from appropriated funds starting in 2016 for each year it fails to comply with deadlines relating to the disposition of the plutonium. 50 U.S.C. § 2566. The DOE failed to comply with the terms of the agreement. The DOE has not met the deadlines set forth in Section 2566 and, as of 2020, was liable to the State of South Carolina for at least \$400 million in economic impact and assistance payments (Ex. A, Affidavit of Badge Humphries (“Humphries Aff.”), Ex. 6, Record on Appeal (“R”), pp. 529-531).

On August 28, 2020, Wilson entered into a settlement agreement with the United States (the “Settlement Agreement”) regarding the DOE’s failure to abide by the Hodges agreement. Wilson agreed on behalf of the Citizens of this State to refrain from instituting any action to collect economic impact and assistance payments for an additional 15 years. In exchange, the DOE agreed to pay the State of South Carolina a substantially reduced economic impact and assistance payment of \$600 million. The Settlement Agreement requires the DOE to make “immediate payment . . . to the State of South Carolina . . . with each party to bear its own costs, attorneys’ fees and expenses.” (*Id.*, Ex. 6, R. p. 534).

At an August 31, 2020 press conference, Wilson announced that he intended to pay the Law Firms \$75 million from the proceeds of the DOE settlement. Wilson stated this settlement payment was expected on or after October 1, 2020.

Upon learning of Wilson’s intent, Governor Henry McMaster wrote Wilson objecting to the attorneys’ fee. The Governor had “concerns regarding the payment of attorneys’ fees” because

the settlement resulted from “the zealous advocacy and coordination with members of [the State’s] Congressional delegation.” (*Id.*, Ex. 6, R. pp. 541-42). Governor McMaster concluded by stating that he “cannot endorse the payment of \$75 million in attorneys’ fees under the circumstances.” (*Id.*, Ex. 6, R. p. 542). David Pascoe, First Circuit Solicitor, likewise wrote Wilson objecting to the use of these settlement proceeds for attorneys’ fees on the grounds that the entire amount must be deposited into the State’s General Fund. (*Id.*, Ex. 6, R. pp. 544-47).

On September 25, 2020, Plaintiffs filed this action against Wilson seeking a declaratory judgment that Wilson lacked authority to pay \$75 million from a DOE settlement to private law firms as attorneys’ fees absent a court order, authorization from the General Assembly, or provision in the Settlement Agreement providing that the DOE was paying the fees. (*Id.*, Ex. 6, R. pp. 44-56).

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

With the Complaint, on September 25, 2020, Plaintiffs filed a motion for a temporary restraining order and preliminary injunction, seeking to enjoin Wilson’s payment of \$75,000,000 to the law firms (“Plaintiffs’ Initial Motion”) (*Id.*, Ex. 6, R. pp. 57-66). That afternoon, Plaintiffs’ counsel provided Wilson copies of Plaintiffs’ filings and asked the circuit court to schedule a hearing on Plaintiffs’ Initial Motion. (*Id.*, Ex. 6, R. p. 659).

Wilson’s counsel emailed the circuit court requesting that the hearing on Plaintiffs’ Initial Motion not be held until Thursday, October 1, 2020. (*Id.*, Ex. 6, R. p. 664). The circuit court responded that Plaintiffs’ Initial Motion could be heard on Tuesday, September 29, 2020, at 3:00

p.m., over Wilson's objections. (*Id.*, Ex. 6, R. p. 663). On the afternoon of September 28, 2020, Plaintiffs' counsel emailed counsel for Wilson asking that Wilson agree not to disburse the disputed funds until the case could be decided on the merits. (*Id.*, Ex. 6, R. pp. 670-71). Counsel for Wilson ultimately responded, "I am checking w/ Bob Cook and this is what I am authorized to say. I have conveyed your request to him." (*Id.*, Ex. 6, R. p. 669).

Unbeknownst to Plaintiffs and the circuit court, Wilson had already received the \$600 million in settlement proceeds. Moreover, Wilson expedited the \$75 million transfer to the Law Firms on Tuesday morning, September 29, 2020, just hours before the scheduled hearing. Moments before the 3:00 p.m. hearing on Tuesday, September 29, 2020, the circuit court and Plaintiffs first learned that the disputed \$75 million had been disbursed to the Law Firms. (*Id.*, Ex. 6, R. p. 368). In his memorandum in opposition to the Plaintiffs' request for a temporary restraining order, circulated at 2:12 p.m., Wilson announced that the disputed funds had been transferred to the Law Firms and contended that, therefore, Plaintiffs' entire case was moot. (*Id.*, Ex. 6, R. pp. 68-69).

Following the hearing, Plaintiff Crangle contacted the South Carolina Office of the State Treasurer and was informed that the funds had not been transferred to the Law Firms. Plaintiffs' counsel informed the Court of this purported fact. (*Id.*, Ex. 6, R. p. 674). The circuit court set another hearing for 7:00 p.m. on September 29, 2020. Prior to and during that hearing, counsel for Wilson stated that his office had confirmed that the Law Firms had received the disputed funds. (*Id.*, Ex. 6, R. p. 673). During the hearing, out of an abundance of caution, the circuit court announced its intent to enter a temporary restraining order preventing the State from transferring funds to the Law Firms, in the event the funds had not been transferred. Following the hearing, the

Court entered such order (*Id.*, Ex. 6, R. pp. 35-38). That order expired at 5:00 p.m. on Friday, October 2, 2020.

On the morning of September 30, 2020, the Treasurer confirmed that the proceeds had been wired to the law firm on September 29, 2020, just hours before the 3:00 p.m. hearing: “[t]he Treasurer’s office received a warrant for payment from the Comptrollers’ Office Monday night [September 28, 2020].” Therefore, the Treasurer’s Office “processed and wired the funds on Tuesday morning [September 29, 2020] to the law firm’s account.” (*Id.*, Ex. 6, R. p. 681).

Later in the morning of September 30, 2020, Plaintiffs filed their amended complaint (*Id.*, Ex. 6, R. pp. 76-94) naming the Law Firms as additional defendants. At the same time, Plaintiffs filed their second Motion for Temporary Restraining Order and Preliminary Injunction, (*Id.*, Ex. 6, R. pp. 95-108). Thereafter, the circuit court, Honorable Alison R. Lee, entered an *Ex Parte* Temporary Restraining Order (TRO) restraining Law Firms from dispersing the proceeds (*Id.*, Ex. 6, R. pp. 39-41).

On October 2, 2020, the Law Firms filed a Petition for Writ of Supersedeas with the South Carolina Court of Appeals seeking to vacate Judge Lee’s TRO. Plaintiffs filed their response to the Petition on October 5, 2020. Plaintiffs also filed a Petition for Original Jurisdiction in the South Carolina Supreme Court on October 5, 2020. On October 6, 2020, Defendants filed a Motion to Certify Defendants’ Petition for Writ of Supersedeas with the South Carolina Supreme Court. Also, on October 6, 2020, the Court of Appeals entered an order denying the Petition.¹ On October 26, 2020, the Law Firms’ appeal from the entry of a TRO was dismissed.

¹ On November 18, 2020, the Supreme Court entered an order denying the Motion to Certify as moot.

On October 7, 2020, Judge Lee conducted a hearing on Plaintiffs' Motion for Preliminary Injunction. On October 14, 2020, Judge Lee denied Plaintiffs' motion. (*Id.*, Ex. 6, R. pp. 14-28). On October 23, 2020, Plaintiffs filed a motion to alter or amend Judge Lee's order denying the motion for preliminary injunction (*Id.*, Ex. 6, R. pp. 273-80). The Law Firms filed their oppositions to the motion to alter or amend on November 20, 2020 and November 23, 2020 (*Id.*, Ex. 6, R. pp. 304-12, 315-16). Wilson also filed an opposition on November 23, 2020 (*Id.*, Ex. 6, R. pp. 313-14). On December 17, 2020, Judge Lee denied the motion to alter or amend (*Id.*, Ex. 6, R. pp. 11-13).

The Law Firms filed separate motions to dismiss the Amended Complaint on October 20, 2020. (*Id.*, R. pp. 267-69, 270-72). Wilson filed a Motion to Dismiss the Amended Complaint on October 27, 2020 (*Id.*, R. pp. 281-82). Plaintiffs filed a memorandum in opposition to the motions to dismiss on January 20, 2021 (*Id.*, R. pp. 364-91). The Honorable R. Kirk Griffin conducted a hearing on the motions to dismiss on January 27, 2021. Judge Griffin granted the Motions to Dismiss on March 5, 2021, ruling that the Plaintiffs lacked standing and declining to rule on the merits (*Id.*, R. pp. 3-8).

Plaintiff filed their initial brief on August 4, 2021. Humphries Aff., Ex. 1, Initial Brief of Appellants, *S.C. Pub. Interest Found. v. Wilson et al.*, No. 2021-00343 (S.C. Sup. Ct. Aug. 4, 2021). Defendants submitted their opening briefs on September 3, 2020. *Id.*, Ex. 2, Initial Br. of Resp't W&H, *S.C. Pub. Interest Found. v. Wilson et al.*, No. 2021-00343 (S.C. Sup. Ct. Sept. 3, 2021); Ex. 3, Initial Br. of Resp't DWD, *S.C. Pub. Interest Found. v. Wilson et al.*, No. 2021-00343 (S.C. Sup. Ct. Sept. 3, 2021); and Ex. 4, Initial Br. of Resp't Wilson, *S.C. Pub. Interest Found. v. Wilson et al.*, No. 2021-00343 (S.C. Sup. Ct. Sept. 3, 2021). Then, Plaintiffs filed their reply brief on September 23, 2021. *Id.*, Ex. 5, Reply Br. of Appellants, *S.C. Pub. Interest Found.*

v. Wilson et al., No. 2021-00343 (S.C. Sup. Ct. Sept. 23, 2021). On October 25, 2021, the parties submitted the record on appeal. Humphries Aff., Ex. 6, Record on Appeal, *S.C. Pub. Interest Found. v. Wilson et al.*, No. 2021-00343 (S.C. Sup. Ct. Oct. 25, 2021). The Supreme Court held oral argument on April 6, 2022. Supreme Court Archived Videos, No. 2021-000343, S.C. Sup. Ct, Apr. 6, 2022, <https://media.sccourts.org/videos/2021-000343.mp4>.

On September 14, 2022, the South Carolina Supreme Court filed an opinion reversing the Circuit Court's order dismissing Plaintiffs' Amended Complaint, concluding that Plaintiffs have public importance standing to pursue the claims alleged. The Supreme Court remanded this case "for the circuit court to consider the merits of [Plaintiffs'] claims." *S.C. Pub. Interest Found.*, 437 S.C. at 343, 878 S.E.2d at 896.

Plaintiffs have alleged the following claims in the Amended Complaint:

- a. Declaratory Judgment that:
 - i. Section 1-7-150(B) SC Code requires the Attorney General to deposit all of the \$600 million in settlement proceeds from the DOE settlement into the State's General Fund;
 - ii. The General Assembly has exclusive authority to appropriate moneys from the General Fund and that the Attorney General has no such authority;
 - iii. The Attorney General's payment of \$75 million of public funds violates the South Carolina Constitution, Art. I, § 8, the Separation of Powers Clause; and
 - iv. In the alternative, that the Attorney General is prohibited from paying any fee from the DOE settlement unless and until the amount is approved by a court of competent jurisdiction as being reasonable.
- b. Imposition of a Constructive Trust over the \$75 million transferred to W&H and/or DWD;
- c. Return of the \$75 million to the State by W&H and DWD; and
- d. Injunctive Relief requiring that the funds not be further disbursed until this dispute is resolved on its merits.

On November 18, 2022, Plaintiffs served interrogatories and requests for documents upon Defendants W&H and DWD. Affidavit of James Griffin ¶ 6 (“J. Griffin Aff.”), Aug. 2, 2023, attached hereto as Ex. B. On December 16, 2022, Defendants W&H and DWD each filed motions for a protective order and to stay discovery. *Id.* at ¶ 7. Defendants have not responded to any Plaintiffs’ discovery requests since filing the motions on December 16, 2022. *Id.* at ¶ 8. Plaintiffs have been denied any opportunity to conduct discovery on the claims alleged in the Amended Complaint. *Id.* at ¶ 9.

III. LEGAL STANDARD

Because Defendants once again challenge Plaintiffs’ standing to assert all of the claims alleged in the Amended Complaint, they are asserting that the Court lacks subject matter jurisdiction. Accordingly, the proper mechanism for challenging the Court’s lack of subject matter jurisdiction is a motion to dismiss pursuant to Rule 12(b)(1), SCRCP, not a motion for summary judgment, which is designed to address the merits. *See Woodard v. Westvaco Corp.*, 319 S.C. 240, 242, 460 S.E.2d 392, 393 (1995), *overruled on other grounds by Sabb v. S.C. State Univ.*, 350 S.C. 416, 567 S.E.2d 231 (2002). “[I]f a party files a Rule 56 motion for summary judgment on the ground of lack of subject matter jurisdiction, the trial court should treat the motion as if it were a Rule 12(b)(1) motion to dismiss.” *Id.* “A motion to dismiss for lack of subject matter jurisdiction can arise in two ways: (1) when the moving party maintains that the complaint ‘fails to allege facts upon which subject matter jurisdiction can be based’ or (2) when the moving party maintains that the jurisdictional allegations within the complaint are not true. Defendants here assert the former, and accordingly, “all the facts alleged in the complaint are assumed to be true and the plaintiff, in effect, is afforded the same procedural protection as he would receive under a Rule 12(b)(6) consideration.” *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982)

Pursuant to Rule 56, SCRPC, summary judgment is only appropriate where there is no genuine issue of material fact, and it is clear the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRPC. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *Koester v. Carolina Rental Ctr.*, 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994). In cases applying the preponderance of evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment. *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 329-31, 673 S.E.2d 801, 802-03 (2009). Furthermore, a party moving for summary judgment asserting that the Plaintiff's claims are barred by the applicable statute of limitations has the burden of proof, and when testimony is conflicting on the question, it becomes an issue for the jury to decide. *Walbeck v. I'On Co., LLC*, 426 S.C. 494, 519-20, 827 S.E.2d 348, 361 (Ct. App. 2019). Additionally, "[s]hould it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just." Rule 56(f), SCRPC.

IV. ARGUMENT

A. Defendants assert a single narrow basis for summary judgment premised again on Plaintiffs' lack of standing.

In their respective motions, each Defendant asserts that "[t]he basis for this Motion is that there is no genuine issue of fact in the case and that Defendant is entitled to judgment as a matter of law on the ground that the South Carolina Supreme Court Opinion No. 28112, issued on appeal from this Court's prior order of dismissal in this action, found public interest standing only as to the question of the Attorney General's statutory authority to enter contingency fee agreements with

private law firms under S.C. Code Ann §1-7-150(B), and nothing else.” W&H Mot. Summ. J. at 1, Dec. 14, 2022; DWD Mot. Summ. J. at 1-2, Dec. 14, 2022; and Wilson Mot. Summ. J. at 1, Dec. 15, 2022.

Pursuant to the South Carolina Rules of Civil Procedure, this basis for their respective motions is the only basis for summary judgment that the Court should consider. *See* Rule 7(b), SCRPC (“An application to the court for an order shall be by motion which, unless made during a hearing or trial in open court with a court reporter present, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought.” (emphasis added)). Accordingly, any other bases for summary judgment are not properly before the Court.²

B. The Defendants’ single ground for relief lacks merit because the Supreme Court has already ruled that Plaintiffs’ have standing to bring this case.

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

A necessary corollary of Defendants’ argument is that Plaintiffs *lack standing* to argue issues other than whether the Attorney General has *any* authority *at all* to enter into contingency fee agreements with private law firms *under any circumstances*. Defendants’ argument lacks merit and flies in the face of the Supreme Court’s ruling above that Plaintiffs have standing. *S.C. Pub. Int. Found.*, 437 S.C. at 343, 878 S.E.2d at 896. Determining the statutory limitations and

² Defendants’ motions for summary judgment are all procedurally deficient because the motions should have been brought under Rule 12(b)(1), SCRPC because Defendants, in challenging Plaintiff’s standing, are asserting that the Court lacks jurisdiction over the subject matter of this case.

conditions on the Attorney's General authority to enter into contingency fee agreements with private law firms is essential to the threshold questions before this Court as acknowledged by the Supreme Court in holding that Plaintiffs have standing. Nowhere was the Attorney General's authority contested *in the abstract* as Defendants seek to frame it now. The records make that fact clear.

Indeed, the primary issue before the Supreme Court was "whether [Plaintiffs] have standing." *Id.*, 437 S.C. at 340, 878 S.E.2d at 894. To the extent the court found that Plaintiffs lacked standing in any respect, it would have dismissed the case with respect to those issues or instructed this Court to do so, rather than simply reversing and remanding it. *See Hallums v. Bowens*, 318 S.C. 1, 3, 428 S.E.2d 894, 895 (Ct. App. 1993) (dismissing the case on appeal based on lack of jurisdiction because "[a] court, lacking subject matter jurisdiction, cannot enforce its own decrees"); *see also Benham v. City of Charlotte, N.C.*, 635 F.3d 129, 134 (4th Cir. 2011) ("If an appellate court determines that the district court lacked jurisdiction, vacatur of the district court's ruling, along with a remand with instructions to dismiss, is the appropriate disposition."). The Supreme Court did no such thing. The justices did not affirm in part and reverse in part the trial court's finding that Plaintiffs lacked standing; it reversed that ruling and remanded the case "for the circuit court to consider the merits of [Plaintiffs'] claims." *S.C. Pub. Int. Found.*, 437 S.C. at 343, 878 S.E.2d at 896.

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

Appellants alleged that because attorneys' fees were not awarded by court order or settlement, South Carolina Code subsection 1-7-150(B)³ requires the entire \$600

³ Subsection (B) 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

million settlement to be deposited in the State's General Fund. Appellants also argued the attorneys' fee amount was patently unreasonable and, therefore, requires court approval.

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

Other language in the opinion makes clear that the Supreme Court did not intend to limit Plaintiffs' standing in any way. In holding that Plaintiffs "have public importance standing," the Supreme Court explained that "[b]ecause we decide this appeal on public importance grounds, we need not address derivative standing." *Id.*, 437 S.C. at 343 n.5, 878 S.E.2d at 896 n.5. Plaintiffs asserted derivative standing to assert all claims and issues, and accordingly, the Supreme Court's ruling that it need not consider derivative standing makes clear that its holding that Plaintiffs have public importance standing extends to all claims and issues in the case. If the Supreme Court intended to limit Plaintiffs' standing to argue only particular issues, that decision would not have obviated the need to discuss Plaintiffs' derivative standing to assert all claims and litigate all attendant issues. If the Supreme Court had intended for Plaintiffs' public interest standing to extend only to a single abstract issue as argued by Defendants, it would have been necessary for the Supreme Court to address Plaintiffs' derivative standing to assert all claims and argue all issues.

Additionally, it is clear from the record before the Supreme Court and the context of its statements about the Attorney General's authority that the Supreme Court was not asking this Court to consider that authority in the abstract. The question of the Attorney General's authority must be read in the context of the relevant statutes and contingency-fee agreements. The similar contingency fee agreements referenced by the Supreme Court speak in terms of the need to obtain court approval of attorneys' fees "[w]hen appropriate," which the Supreme Court noted was

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[.]" (2005). *Id.*

“identical to the one here for purposes of its analysis.” Litigation Retention Agreement for Special Counsel Appointed by the S.C. Att’y Gen. as to Purdue Pharma L.P., Purdue Pharma Inc., and Purdue Frederick Company Inc. 9, May 12, 2017, <https://www.scag.gov/wp-content/uploads/2018/09/Opioid-Manufacturers.-Litigation-Retention-Agreement-01784660xD2C78.pdf>; Litigation Retention Agreement for Special Counsel Appointed by the S.C. Att’y Gen. as to Economic and Impact Assistance for the Violations of 50 U.S.C.A. § 2566 Related to the Mixed Oxide (MOX) Facility 9, Feb. 8, 2016. In that context, the Supreme Court framed the “threshold” question as follows:

[Plaintiffs’] complaint presents a threshold issue of the Attorney General’s statutory authority to enter contingency fee agreements with private law firms. This issue will inevitably arise again in the future because Wilson has seven other litigation retention agreements with private attorneys. These agreements are currently listed on the Attorney General’s website, and five contain contingency fee provisions. ***Although the agreements differ in some respects, all contingency fee provisions persist. For example, Wilson recently announced a \$300 million settlement with opioid distributors. The litigation retention agreement in that case contains a contingency fee provision identical to the one here. There is a need for future guidance as to whether subsection 1-7-150(B) authorizes the Attorney General to enter into contingency fee agreements.*** We therefore hold Appellants have public importance standing.

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

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

2023). Accordingly, the word threshold means the beginning and not the extent of Plaintiffs' standing.

Finally, extensive statements during oral argument show that the justices fully understood the scope of the allegations and issues in this case as well as those not in issue, such as the abstract question posed by Defendants:

Justice James (at 06:10):

So, is it your position that every single contingent fee agreement the Attorney General ever enters into with a, a, a private law firm or private attorney violates the law?

Counsel for Appellants (at 06:22):

No. No. Um, one, one thing, uh, we, one thing that's a provision of this particular agreement, and I, if I could invite the court's attention to the, um, to the record on appeal, um, the second volume, um, page 602, um, at the top of the page, there's a provision in the litigation retention agreement that both the Attorney General and the law firms agreed to, Paragraph G at the top of page 602. And it says, when possible the attorney's fees and costs awarded to special counsel shall be approved by a court of competent jurisdiction. In this case they were not. And having a court review them is what we're trying to have happen in this case.

* * *

Chief Justice Beatty (at 08:43):

Mr. Carpenter, is there an issue as to the funds received by the Attorney General not making its way into the General Fund, uh, before being dispersed to the attorneys as a fee? Is that an issue here?

Counsel for Appellants (at 08:58):

Absolutely. And we have, there, there are two statutes that require that, um, and we've cited them in our brief, and I thought I could find them pretty quickly in my notes. Um, yes. Um, . . .

Um, 11-13-45, all federal funds received must be deposited in the state treasury and withdrawn from the state treasury as needed in the same manner as that provided for the disbursement of state funds. And then another statute, um, 17-150, all monies except investigative costs, et cetera, 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 and departments must be deposited in the

General Fund of the state, except for monies recovered from the loss or damages to natural resources and so on.

Chief Justice Beatty (at 09:56):

Now, give us an example of why this needs to be considered today. Meaning, and more specifically, *is there a possibility of repetition only likely to be repeated and meaning the funding never making it to the General Fund before being dispersed by the Attorney General?*

Counsel for Appellants (at 10:16):

Um, I guess we can just go on past practice that, um, that the Attorney General thinks that he has the right to decide, uh, which of these state funds he can allocate, um, as attorney's fees when . . .

* * *

Justice Kittredge (at 12:44):

Mr. Carpenter . . .

Counsel for Appellants (at 12:45):

Sir?

Justice Kittredge (at 12:46):

Uh, in reference to a question from Justice James, it, it appeared to me that you do not oppose the general concept of the Attorney general retaining outside counsel in cases.

Counsel for Appellants (at 12:58):

Right.

Justice Kittredge (at 13:14):

. . . I get the impression it's the amount that gets your attention here. If the, if the fee here was a million dollars, we wouldn't be here. Yet, the issue before is technically is standing, so it appears that, uh, the merits, there's an argument to get the merits, the, uh, what you believe to be an excessive fee of, you know, \$75 million to color our judgment on standing. So do the merits somehow, the higher the fee, the more it appears excessive in your eyes, the stronger your standing argument.

Counsel for Appellants (at 14:07):

It, it's, it's certainly the amount got our attention, but it's not, and, and it's one of the factors, it's a big factor, but the other factor is the procedural factor that they didn't, um, have it approved by either, uh, a court of competent jurisdiction or have it, um, appropriated by the General Assembly, uh, the, the litigation.

* * *

Justice Hearn (at 17:21):

Is your argument that because there was no court that passed on this fee, no matter what the fee is, or was that it would be arguably unreasonable, is, I mean, is that the linchpin of your argument, the fact that the Attorney General, uh, entered into this agreement, paid the fee without any oversight?

Counsel for Appellants (at 17:42):

Yes, the, the, it's, it's, it is two things. It's, it's procedural, no oversight, you know, didn't have a court review. It didn't have, the Attorney didn't, didn't, didn't have the General Assembly allocate the money through normal processes. The, the General Assembly didn't get to say how that \$75 million . . .

Justice Hearn (at 17:57):

So, I understand your response, you wouldn't be here if it was a \$20,000 flat fee and \$200 an hour, but your argument could be the same. Correct. If there was no judicial oversight of the fee.

Counsel for Appellants (at 18:13):

Yes, but as a practical matter, we wouldn't be here.

* * *

Justice Few (at 18:37):

Well, I don't understand that because if, if the contingent fee resulted, you might not be here because you didn't think it was important enough, but the statute that you contend is violated would be equally applicable, even if it were a small fee, would it not?

Counsel for Appellants (at 18:50):

Yeah, they, they would require court review or allocation by the General Assembly, yes.

* * *

Justice Few (at 24:36):

We're not talking, I don't, I don't see that we're talking the, the, the only discussion here has been about seven cases, this one and the six cases that Mr. Carpenter claims are on the Attorney General's docket, where there are similar contingent fees in cases that might yield a recovery of this magnitude.

Counsel for W&H (at 24:52):

Well, each one . . .

Justice Few (at 24:52):

Seven cases is not opening the floodgates. I mean, we got, one of the problems we have around South Carolina sometimes is our judges are sitting around with nothing to do, especially coming out of the pandemic. We got plenty of judicial resources to handle seven cases.

Counsel for W&H (at 25:05):

But, but, but your honor, respectfully, that is, that is looking at this issue in, in accordance with, uh, the Attorney General's contracting authority and these contingencies . . .

Justice Few (at 25:15):

Well, his contracting authority is limited by the statute.

* * *

Chief Justice Beatty (at 26:05):

. . . I was getting back to the point that I made initially with Mr. Carpenter and that Justice Few has raised, again, the fact of the matter that the statute requires funding received by the Attorney General to go into the General Fund, and these funds never made it there. Why wouldn't that be a matter of public importance?

Counsel for W&H (at 26:23):

I think that's, that is incorrect factually on this. Each one of these contracts, factually, you would have to look at, at that question.

Chief Justice Beatty (at 26:32):

Are you suggesting that the money made its way into the General Fund and was dispersed from the General Funds to the attorneys?

Counsel for W&H (at 26:38):

It did not. And, and it didn't matter.

Chief Justice Beatty (at 26:39):

Well, that's what the statute requires. So why would that not be a matter of public importance?

Counsel for W&H (at 26:45):

Your Honor. Respectfully, that is not the facts and circumstances here. Indeed. That's not even . . .

Chief Justice Beatty (at 26:51):

Well, you just said the money never made it to the General Fund.

Counsel for W&H (at 26:53):

It did, it did not, your Honor.

Chief Justice Beatty (at 26:53):

And, and you will have to admit that the statute requires funding received by, uh, the State to go. Anyone, any entity to go into the General Fund.

Counsel for W&H (at 27:01):

Respectfully disagree with that, your Honor.

Chief Justice Beatty (at 27:03):

Please show me why that's wrong.

Counsel for W&H (at 27:05):

Your Honor, for the, for the statutory reason of, of Section 150(B) excludes most funds going into the General Fund where they or are for attorney's fees. It . . .

* * *

Justice Kittridge (at 27:22):

It says investigation cost, litigation costs awarded by court order or settlement.

Counsel for W&H (at 27:27):

Yes, sir.

Justice Kittridge (at 27:28):

Those two features are not present here. So why wouldn't it default to the general disposition of going to the state fund?

Counsel for W&H (at 27:34):

But respectfully, Justice Kittridge, they are here. They, they are here. And, and this is where you have to go back to the allegations in the complaint and what

Chief Justice Beatty (at 27:44):

No, no, no. We're talking about the statute now. Let, let's not Mr. Simmons, let's deal with what the law requires, what's written in, in the statute, what the legislature has required of us, as well as the Attorney General's office. Let's not, those words that you are saying that gives you license or gives the Attorney Generals license to do what he did are not in the statute, . . . nowhere can they be found.

Counsel for W&H (at 28:04):

What I'm saying is what Judge Lee found below and, and what Judge Griffin found below that this payment, the, the attorney's fees were awarded by this settlement.

* * *

Justice Few (at 28:18):

That implicates Section 150(B).

Justice Few (at 28:21):

Well, I mean, I, from, as I follow up on this whole discussion, what you just said requires the monies to go into the General Fund.

Counsel for W&H (at 28:28):

No, sir, because those funds were excepted under that statute for the investigative cost and attorney's fees, they were awarded by settlement and therefore they don't go into the General Fund.

Chief Justice Beatty (at 28:39):

What about the approval . . . court approval requirement?

* * *

Justice Few (at 28:46):

You're suggesting that somehow the payment of a \$75 million contingent fee was a term of the settlement? That's not correct.

* * *

Justice Few (at 32:20):

. . . the payment of the fee is not made pursuant to federal statute. It's not made pursuant to the order of a federal judge. It's not made pursuant to the terms of a settlement agreement. It's made pursuant to the terms of a contingency fee agreement. And it should go into the General Fund as required by Section 150(B).

Counsel for W&H (at 32:35):

Justice Few I, that, that is not the way I read the amended complaint, nor is that the way that this . . .

Chief Justice Beatty (at 32:41):

. . . If you don't read the, the amended complaint that way does not change the law. The statute is what the statute is. And because you, you, the complaint—I see what, what's written here—but that doesn't change the statutory requirements.

* * *

Justice James (at 37:40):

Well, future guidance to me is an overarching concern where you have, uh, previously got received a decision of a court that sets forth why or why not the contingent fee agreement is valid in the first instance. In other words, does the \$300 million, the \$600 million, the \$200 million first have to go into the General Fund or do you get court approval first, or you have to get the legislature to approve it, or what? Wouldn't this case provide, uh, a framework for that?

Counsel for W&H (at 38:14):

I, I don't think so, your Honor. And, and again, I think that gets on that question of separation of powers and issues and second guessing the Attorney general who has that authority . . .

Justice James (at 38:23):

Wouldn't a decision in this case provide guidance on those issues, separation of powers and so forth?

Counsel for W&H (at 38:31):

Uh, I can't think of, of any way off the top. . . .

* * *

Justice Kittredge (at 39:56):

But we've established that the Attorney General, it's not uncommon to retain private counsel, um, pursuant to these contingency fee agreements. So given the prevalence of the, the general arrangement, why isn't that sufficient to satisfy the future guidance requirement? And I guess the subset of that is what does future guidance mean? I think the, the questions from the court indicate future guidance may be a little bit broader in a, in a, in a zone than just a linear decision that is limited to the specific question in that concrete case.

Counsel for W&H (at 40:41):

Perhaps, your Honor. . . .

Supreme Court Archived Videos, No. 2021-000343, S.C. Sup. Ct., at 6:10-7:13, 8:43-10:30, 12:44-12:58, 13:14-13:57: 14:07-14:26, 17:21-18:16, 18:37-18:54, 24:36-25:17, 26:05-27:15, 27:22-28:15, 28:18-28:42, 28:46-28:54, 32:20-32:59, 37:40-38:33, and 39:56-40:42 (Apr. 6, 2022), <https://media.sccourts.org/videos/2021-000343.mp4>.

From these statements, it is abundantly clear that the justices did not intend to limit Plaintiffs' standing to the abstract question presented by Defendants. The justices clearly understood that Plaintiffs did not dispute the authority of the Attorney General to enter into contingency fees with private law firms in the abstract. Plaintiffs respectfully assert that Defendants argument to the contrary is completely inconsistent with the record. Indeed, the Supreme Court's opinion—by the plain meaning of its terms, particularly as read in the context of the record before that court and this one—means that this Court has subject matter jurisdiction over this case and the law governing the Attorney General's authority to enter into contingency fee agreements with private law firms and can grant full relief for all claims alleged by Plaintiffs.

C. Wilson lacked authority to contract to pay the Law Firms unless the \$75 million in attorney's fees was awarded by court order or settlement.

As noted by the Supreme Court Plaintiffs' complaint presents a "threshold issue of the Attorney General's statutory authority to enter contingency fee agreements with private law

firms.” *S.C. Pub. Int. Found.*, 437 S.C. at 342, 878 S.E.2d at 895. Here, the Attorney General lacks authority to qualify the statutory requirement that attorneys’ fees paid pursuant to those contracts be awarded by court order or settlement. The Attorney General has been qualifying that requirement so that court approval is only required “when possible” or “when appropriate.” In so doing, the Attorney General is exceeding his statutory authority pursuant to S.C. Code Ann. § 1-7-150(B) and § 1-7-85. If not awarded by settlement or court order, the General Assembly—not the Attorney General—would have to allocate funds received to the payment of attorneys’ fees and litigation-related costs and expenses.

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

The Attorney General has no authority to appropriate money. The money in the settlement was **payable to the State of South Carolina** pursuant to the suit and by federal statute. As such, the General Assembly has the control of the appropriation of those funds, not the Attorney General or this Court. *State ex rel. Condon v. Hodges*, 349 S.C. 232, 246, 562 S.E.2d 623, 631 (2002).

The General Assembly has the duty and authority to appropriate money as necessary for the operation of the agencies of government and has the right to specify the conditions under which the appropriated monies shall be spent. *State ex rel. Condon v. Hodges*, 349 S.C. 232, 244, 562 S.E.2d 623, 631 (2002); *Gilstrap v. S.C. Budget and Control Bd.*, 310 S.C. 210, 216, 423 S.E.2d 101, 105 (1992) (noting that the appropriation of public funds is a legislative function); *Clarke v. S.C. Pub. Serv. Auth.*, 177 S.C. 427, 437, 181 S.E. 481, 484 (1935) (noting that the General Assembly has full authority to make appropriations as it deems wise in absence of any specific constitutional prohibition against the appropriation). This includes the duty to authorize and/or appropriate the use of all federal funds. S.C. Code Ann. § 11-11-160 (Supp. 2008). In the annual appropriations act, the General Assembly must appropriate all anticipated federal funds and must include any conditions on the expenditure of those funds, consistent with federal laws and regulations. S.C. Code Ann. § 2-65-20 (2005). Money may be drawn from the treasury only pursuant to appropriations made by law. S.C. CONST. art. X, § 8. An appropriation may be made by the General

Assembly in the annual appropriations act or in a permanent continuing statute. *State v. Cooper*, 342 S.C. 389, 401, 536 S.E.2d 870, 877 (2000).

Edwards v. State, 383 S.C. 82, 90-91, 678 S.E.2d 412, 416-17 (2009).

(Humphries Aff., Ex. 6, R. pp. 890-91 (emphasis added, citation to exhibit omitted)).

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

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

(*Id.*, R. pp. 887-88).

1. Neither S.C. Code Ann. § 1-7-85 nor § 1-7-150(B) authorizes the Attorney General to make payment of the attorneys' fees at issue.

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

Section 1-7-150(B) of the South Carolina Code of Laws requires that all funds received by judgment or settlement be deposited into the State's General Fund, **except for investigative costs and litigation costs awarded by court order or settlement**. *Id.* (emphasis added). The contract does not specifically require that the Law Firms be awarded attorneys' fees by court order or settlement and instead qualifies that such requirement, stating that the attorneys' fees be awarded

by court order “if possible.”⁴ Furthermore, the DOE Settlement Agreement expressly disclaims any obligation by the DOE to pay the Law Firms attorneys’ fees.

Defendants also erroneously rely upon S.C. Code § 1-7-85, which has the same language as § 1-7-150(B) limiting reimbursement to “attorney fees or investigative costs or costs of litigation **awarded by court order or settlement.**”

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

S.C. Code Ann. § 1-7-85 (emphasis added). *See also, Higgins v. State*, 307 S.C. 446, 449, 415 S.E.2d 799, 801 (1992) (“In construing statutory language, the statute must be read as a whole, and sections which are part of the same general statutory law must be construed together and each one given effect, if it can be done by any reasonable construction.”).

⁴ The Attorney General similarly lacks contractual authority to agree to pay attorneys’ fees but only requiring that the attorney’ fees be approved by court order “when appropriate” as stated in other contingency fee contracts available on the Attorney General’s website. *See* Litigation Retention Agreement for Special Counsel Appointed by the S.C. Att’y Gen. (“Litig. Retention Agr.”) as to Purdue Pharma L.P., Purdue Pharma Inc., and Purdue Frederick Company Inc., May 12, 2017; Litig. Retention Agr. as to Pharmacy Benefit Managers, Apr. 24, 2019, rev’d Oct. 10, 2019, Aug. 11, 2021, and July 1, 2022; Litig. Retention Agr. as to the “Sonny” Mevers Found., Feb. 13, 2020; Litig. Retention Agr. as to Insulin Pricing, July 13, 2021; Litig. Retention Agr. as to Google Advertising Technology Litig., Aug. 8, 2021; Litig. Retention Agr. as to TikTok, Aug. 19, 2022; and Litig. Retention Agr. as to Per- and Polyfluoroalkyl Substances (“PFAS”), June 16, 2023, *Litigation Retention Agreements*, S.C. Att’y Gen., <https://www.scag.gov/litigation-retention-agreements/> (last visited Aug. 1, 2023) (listing contingency fee agreements for Opioid Manufacturers, Pharmacy Benefit Managers, Sonny Mevers Foundation, Insulin Pricing, Google Advertising Technology Litigation, TikTok, and PFAS).

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

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

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

Id. § 1-7-150(B) (emphasis added).

In this matter, neither exception applies because there was not an order awarding attorneys’ fees and the Settlement Agreement does not allocate any portion of the \$600 million to attorneys’ fees. Rather, Section 5(a) the Settlement Agreement provides for the following: “Immediate

payment by the United States to the State of South Carolina in the amount of \$600 million (Six Hundred million), inclusive of interest, **with each party to bear its own costs, attorneys fees and expenses.**” (See Humphries Aff., Ex. 6, R. p. 534 (emphasis added)). Accordingly, it is clear that the settlement does not award attorneys’ fees to the Law Firms. See Oral Argument, *S.C. Pub. Interest Found. v. Wilson et al.*, No. 2021-00343 at 28:54, (S.C. Sup. Ct. Apr. 6, 2022) <https://media.sccourts.org/videos/2021-000343.mp4> (stating that it is “not correct” that “the payment of a \$75 million contingent fee was a term of the settlement”). Rather, Section 5(a) clearly requires that payment of the entire \$600 million be made directly to the State of South Carolina. Nevertheless, Defendant Wilson agreed to pay private lawyers \$75 million out of the \$600 million, which was required to be deposited into the State’s General Fund pursuant to Section 1-7-150(B) of the South Carolina Code.

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

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

the Attorney General is only permitted to use monies to pay litigation costs that are “awarded by court order.” *Id.* Absent a “court order” awarding litigation costs, the entire amount “awarded the State of South Carolina by judgment” must be deposited into the General Fund. *Id.*

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

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

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

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

2. The Federal Funds Oversight Act does not authorize the payment of the attorneys' fees at issue.

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

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

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

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

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

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

<https://admin.sc.gov/budget/otherfundsauthorization>). The EBO Request submitted on behalf of Wilson requesting authorization for the \$75 million fee also provides that approval is subject to review of the Joint Other Funds Oversight Committee. (Humphries Aff., Ex. 6, R. pp. 692-93). Although the application depicts approval by the Director of the EBO, there is no such approval on the portion of the decision made by the Joint Other Funds Oversight Committee. Senator Nikki Setzler, who is Co-Chair of the Joint Other Funds Oversight Committee, has provided an affidavit stating that the Committee has not considered an application for the payment of fees to the Law Firms, nor has the Committee been requested to review any application. (*Id.*, R. pp. 895-96). In short, the EBO Director by-passed the approval process, eliminating any oversight by the General Assembly, to authorize the payment of the \$75 million fee from funds that the Director lacks authority to appropriate.

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

3. Proviso 59.8 is immaterial.

Defendants also rely upon Proviso 59.8 of the State’s 2020 budget and argue that Plaintiffs’ entire argument “is therefore inapplicable.” Proviso 59.8 simply states that, for the current fiscal year, any funds received by the Attorney General that would otherwise have been credited to the General Fund shall be deposited first in a special account entitled the “Litigation Recovery

Account” and that then those funds “must be expended only as prescribed by law.” 2019 S.C. Acts 91, Part 1.B, § 59.8 (2019-2020 fiscal year). It does not otherwise suspend or contradict Section 1-7-150(B). Rather, Section 1-7-150(B) and Proviso 59.8 should be read consistently with one another. Accordingly, Proviso 59.8’s requirement that the funds “must be expended only as prescribed by law” should be read in conjunction with Section 1-7-150(B) and not as an exception to Section 1-7-150(B)’s requirements. Accordingly, Proviso 59.8 is immaterial.

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

D. The amount of the fee is patently unreasonable and should not have been paid unless and until approved by a court

A “lawyer shall not make an agreement for, charge, or collect an unreasonable fee. . . .” Rule 1.5(a), RPC, Rule 407, SCACR. Contingency fees are not exempt from this reasonableness standard. *Id.*, Cmt. 3. Fee agreements that run afoul of Rule 1.5 are unenforceable. *See, e.g., Getzen v. Law Offices of James M. Russ, P.A.*, 323 S.C. 377, 475 S.E.2d 743 (2006). Attorneys’ fees totaling \$75 million for the work performed in this case appear to be patently unreasonable.

In 2016, the Law Firms first sued in United States District Court for the District of South Carolina (D.S.C.) for an injunction to enforce the provisions of Section 2566 and to collect the \$100 million assistance payment owed for failing to comply with Section 2566. The federal court dismissed the claim for damages, ruling that such a claim must be filed in the United States Court of Federal Claims. (Humphries Aff., Ex. 6, R. pp. 549-551). The Law Firms refiled the same suit before the Court of Federal Claims, this time seeking \$200 million in economic impact and assistance payments because the DOE had not complied with Section 2566 for 2017. Once again, the law Firms lost the case. The Court of Federal Claims ruled with the DOE. (*Id.*, R. pp. 553-67).

The law Firms then appealed the ruling to the United States Court of Appeals for the Federal Circuit. While the appeal was pending, the State of South Carolina reached this settlement with the DOE. (*Id.*, R. pp. 533-39).

Upon information and belief, the Law Firms engaged in no discovery: no interrogatories, no depositions, no experts, no document requests. Instead, they drafted pleadings and wrote briefs arguing the DOE must pay South Carolina the statutory penalty from funds appropriated by Congress. (*See Humphries Aff.*, Ex. 6, R. pp. 569-92). Wilson had no need to hire private counsel to address a relatively straightforward issue that elected leaders ultimately negotiated. The Settlement Agreement was a political resolution brokered by elected leaders, including Governor McMaster and Senator Graham. (*See Humphries Aff.*, Ex. 6, R. pp. 541-42, 546).

Under similar circumstances, the court in *In re Cendant Corporation PRIDES Litigation*, 243 F.3d 722 (3d Cir. 2001), overturned a \$19 million fee award amounting to 5.7% of the total recovery because the settlement resulted from the efforts of public agencies and the attorneys did very little work compared to other cases involving settlements over \$100 million. In that case, the Third Circuit Court of Appeals noted that there was very little motion practice and discovery was virtually nonexistent. *Cendant Corporation*, 243 F.3d at 736. Class counsel spent approximately 5,600 hours on the case. *Id.* at 735. The Court compared the fee award to other large class settlements where the common fund exceeded \$100 million. *Id.* at 737. The Court observed that the fee awards in those cases ranged from 2.8% to 36% to the total settlement fund. *Id.* at 738. A fee of 5.7% appeared to be in line when just comparing percentages. *Id.* However, the attorneys in those other cases spent far more hours (45,000 in one case) and engaged in significantly more complex discovery (reviewing 11 million pages of documents). *Id.* at 739. The Court summarized its review of the other cases involving large fee awards, finding “in case after case, the same factors

recur: complex and/or novel legal issues, extensive discovery, acrimonious litigation, and tens of thousands of hours spent on the case” The court concluded that “[b]ecause none of these factors which increase the complexity of class litigation was present here, it makes sense that the fee awarded in this case should be far lower than those awarded in the charted cases, which fees ranged from 2.8% to 36% of the total settlement.” *Id.* at 741.

The court concluded that much of the work done to facilitate the settlement was accomplished by regulators, not counsel. *Id.* The court explained that “allowing private counsel to receive fees based on the benefits created by public agencies would undermine equitable principles which underlie the concept of the common fund, and would create an incentive for plaintiffs’ attorneys to minimize the cost of failure by free riding on the . . . efforts of others.” *Id.*

In *Layman v. State*, 376 S.C. 434, 658 S.E.2d 320 (2008), the attorneys’ fees were awarded against the State under the fee-shifting “state action” statute (S.C. Code Ann. § 15-77-300), rather than via the common fund doctrine, as in this case, but *Layman* emphasized the requirement of reasonableness using either method:

Regardless of any theoretical preference for one method of fee calculation over another, the overriding benchmark for awards of attorneys’ fees under both the state action statute and the general premise of the common fund doctrine is that attorneys’ fees must be “reasonable.” See [*Pennsylvania v.*] *Del. Valley Citizens’ Council for Clean Air*, 478 U.S. [546,] at 562, 106 S. Ct. 3088 [(1986)]. In light of the circumstances of this case, we hold that an award of \$8.66 million in attorneys’ fees is entirely unreasonable.

Layman, 376 S.C. at 455, 658 S.E.2d at 331 (emphasis added).

In addition, the fee agreement with the Law Firms expressly states that “when possible, the attorneys’ fees and costs awarded to Special Counsel shall be approved by a court of competent jurisdiction.” (Humphries Aff., Ex. 6, R. p. 602). There is nothing prohibiting Wilson or the Law Firms from seeking judicial approval of the payment of \$75 million to the Law Firms through a declaratory judgment action requesting a South Carolina state court determine whether the fee

amount is reasonable. However, Wilson and the Law Firms seek to avoid judicial review, and accordingly, Wilson paid the Law Firms \$75 million without making any showing of reasonableness.

Wilson entered into an amended fee agreement in June 2019 and agreed to provide W&H additional money from any proceeds recovered in the case pending before the Court of Federal Claims and as compensation for the firm's representation of the State on its claim for injunctive relief that was litigated before the United States District Court for the District of South Carolina. (*Id.*, R. pp. 609-16).

The State prevailed on its claim for injunctive relief before United States District Court Judge Childs. However, on January 8, 2019, the Fourth Circuit Court of Appeals reversed Judge Child's ruling in a published opinion, *South Carolina v. United States*, 912 F.3d 720 (2019). (Humphries Aff., Ex. 6, R. pp. 618-627). On June 7, 2019, W&H along with Wilson filed a Petition for Writ of Certiorari to the United States Supreme Court (*Id.*, R. pp. 629-45) and a Reply Brief on September 24, 2019 (*Id.*, R. pp. 647-53).

Under the terms of the amended fee agreement, Wilson agreed to pay W&H 2% of the ultimate recovery for representing the State in the United States District Court for the District of South Carolina, plus 1% for representing the State before the Fourth Circuit, plus .5% for filing a Petition for Writ of Certiorari to the United States Supreme Court. (*See id.*, R. p. 613). The amended fee agreement was executed on June 13, 2019 by W&H, after the State had lost in the Fourth Circuit and after the firm had filed the Petition for Writ of Certiorari with the Supreme Court. The Supreme Court denied that Petition on October 15, 2019, *South Carolina v. United States*, 140 S. Ct. 392 (2019). (Humphries Aff., Ex. 6, R. p. 655).

Under the terms of the amended contingency fee agreement, W&H is purported to be paid 3.5% of the \$600 million, or \$21 million, for ultimately losing the case before the District of South Carolina. Wilson was fully aware that W&H had lost the State's case for injunctive relief before the Fourth Circuit when he entered into the amended fee agreement.

Moreover, as further evidence of the unreasonableness of this fee, W&H is receiving .5% of \$600 million, or \$3 million, for writing a Petition for Writ of Certiorari and a Reply Brief filed with the Supreme Court. The Petition is 33 pages, and the Reply is only 13 pages, for a total of 46 pages. Thus, Wilson intends to pay W&H over \$65,000 per page for these filings.

Wilson as Attorney General entered into the fee agreement on behalf of the Citizens of South Carolina, who are third party beneficiaries of the contract. Plaintiffs, individually and on behalf of the Citizens of this State, demanded that Wilson seek judicial approval of the amount of any fee awarded to counsel under the fee agreement, if he is permitted to use any portion of the settlement proceeds to pay litigation costs, as required by the express terms of the fee agreement and South Carolina law.

E. Defendants' motion should be denied because Defendants have refused to participate in discovery, denying Plaintiffs the ability to properly oppose Defendants' motion.

Pursuant to Rule 56(f), SCRCP, the Court should deny Defendants' motion or order a continuance so that Plaintiffs can obtain needed discovery. See Rule 56(f), SCRCP (providing that "should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.") So far, Defendants have refused to participate in discovery, and accordingly, "Plaintiffs have been denied any opportunity to conduct discovery on the claims alleged in the Amended Complaint." (Griffin

Aff. ¶ 9.) Accordingly, the Court should, at a minimum, continue this hearing pursuant to Rule 56(f), SCRCP and provide Plaintiffs an opportunity to conduct discovery.

F. Additional arguments raised by Defendants before the Supreme Court lack merit and do not entitle Defendants to summary judgment if raised again in the hearing on this narrowly based motion.

1. Plaintiffs' claims are not moot.

As an “additional sustaining ground,” Defendants argued in their brief to the Supreme Court that because the Attorney General paid \$75 million to the lawyers just prior to the hearing in the Circuit Court, this whole matter is moot and beyond the authority of this Court to provide any remedy or correct any wrong. (Humphries Aff., Ex. 2, Initial Br. of W&H at 25-27.) Accordingly, the Supreme Court was well aware of Defendants’ argument that this controversy was moot. Tellingly, the Supreme Court did not dismiss this case for lack of justiciability.

Additionally, *Ex parte Hart* rejected a similar argument to that advanced by Defendants:

It is contended that payment by the county treasurer of the compensation directed in the order of Judge Sease, of date June 3, 1937, extinguishes the judgment, and that any issue thereabout as to its validity is academic. This argument necessarily presupposes that the judgment was valid in the first instance against Greenville County, and that it was voluntarily paid. . . . A void judgment, paid by county officials, not with their own, but with taxpayers’ funds, is not a voluntary payment, and does not bind the county.

Id., 190 S.C. 473, 2 S.E.2d 54, 55-56 (1939) (emphasis added).

Similarly, in this case, the Attorney General paid \$75 million dollars of taxpayer funds, without notice and a hearing, without authority from a court, and without authority from the General Assembly. This payment was improper and therefore void. It was not paid from the Attorney General’s funds. It was paid with funds owned by the people of South Carolina. The people of South Carolina did not make a voluntary payment, and the payment does not bind the State or its people. Accordingly, this case is not moot.

2. Plaintiffs' claims present justiciable issues.

Defendants have also argued that the Attorney General's payment of the \$75 million is an action of the executive branch, which makes this dispute a political question. In effect, they argue that the Attorney General speaks for the executive branch. This assertion ignores the fact that the Governor wrote to the Attorney General strongly opposing the payment of this outrageous amount of money. The Governor is the chief officer of the executive branch. "The supreme executive authority of this State shall be vested in a Chief Magistrate, who shall be styled 'The Governor of the State of South Carolina.'" S.C. Const., art. IV, § 1. As demonstrated above, the Attorney General acted beyond his authority, which makes the issue a constitutional issue of separation of powers. This Court is the ultimate arbiter of constitutional issues, including the questions of separation of powers. *See Williams v. Bordon's, Inc.*, 274 S.C. 275, 262 S.E.2d 881 (1980). If this Court rules on the unlawful actions of the Attorney General, that ruling does not set it in conflict with the executive department.

This is a matter of defining the powers of the different departments of government; it is not a matter of politics. Plaintiffs have articulated specific violations of the Constitution and violations of the laws of the State, and this Court is the appropriate forum in which those issues should be addressed. Accordingly, Plaintiffs have presented justiciable legal questions.

3. Plaintiffs' claims state valid causes of action.

a. Plaintiffs assert the illegality of the contract; they do not claim a private action for a violation of the Rules of Professional Conduct.

This payment of alleged attorneys' fees is the result of an unreasonable, illegal, and unenforceable contract, and therefore well within the authority of this Court to remedy.

Regardless of any theoretical preference for one method of fee calculation over another, **the overriding benchmark for awards of attorneys' fees** under both the state action statute and the general premise of the common fund doctrine **is that**

attorneys' fees must be "reasonable." See [*Pennsylvania v.*] *Del. Valley Citizens' Council for Clean Air*, 478 U.S. [546,] at 562, 106 S. Ct. 3088[(1986). In light of the circumstances of this case, we hold that an award of \$8.66 million in attorneys' fees is entirely unreasonable.

Layman v. State, 376 S.C. at 455, 658 S.E.2d at 331 (emphasis added). Defendants misconstrue the claims of the Plaintiffs. Plaintiffs do not claim a private right of action for a violation of the Rules of Professional Conduct. Rather, Plaintiffs assert that the violation of the Rules of Professional Conduct confirm that the contract is unreasonable and unenforceable.

4. Plaintiffs state valid claims for constructive trust and restitution.

This Court has power over the Defendants, who are officers of this Court. They are also parties before this Court. This Court is properly equipped with equitable powers to impose a constructive trust and to impose equitable remedies, including rescission and restitution.

After the Attorney General paid the money to the Law Firms, Plaintiffs filed an Amended Complaint adding the Law Firms as defendants and seeking to impose a constructive trust over the disputed funds. (Humphries Aff., Ex. 6, R. pp. 89-91, Am. Compl. Count II.) A constructive trust arises "whenever a party has obtained money which does not equitably belong to him and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it as where money has been paid by accident, mistake of fact, or fraud, or has been acquired through a breach of trust or the violation of a fiduciary duty." *SSI Medical Servs. v. Cox*, 301 S.C. 493, 500, 392 S.E.2d 789, 793-94 (1990); *McNair v. Rainsford*, 330 S.C. 332, 356, 499 S.E.2d 488, 501 (S.C. App. 1998); see also *Lollis v. Lollis*, 291 S.C. 525, 354 S.E.2d 559 (1987) (holding that constructive trust will arise whenever circumstances under which property was acquired make it inequitable that property should be retained by one holding legal title); *Dye v. Gainey*, 320 S.C. 65, 463 S.E.2d 97 (Ct. App. 1995) (ruling that a constructive trust results from fraud, bad faith,

abuse of confidence, or violation of fiduciary duty which gives rise to obligation in equity to make restitution).

In addition, Plaintiffs have pled a cognizable claim for restitution. (Humphries Aff., Ex. 6, R. p. 91, Am. Compl. Count III.) In *Trotter v. Merchants & Farmers Bank*, 180 SC 449, 186 S.E. 371 (1936), the South Carolina Supreme Court ruled that the recipient of funds paid under a mistake of law is required to make restitution to the lawful title holder. *Trotter* involved the improper payment of funds by a court appointed receiver to a creditor of an insolvent corporation. The trial judge explained, “I do not think a receiver can make a voluntary payment of money under a mistake of law when he had no title to the money, and it is not his own and he has no beneficial Interest in same. The receiver paid the money to the defendant, but title to same did not pass, and his successor is entitled to restitution of the amount so paid with interest from the date on which Demand for return of same was made.” *Id*; see also *United States v. Wurts*, 303 U.S. 414, 416, 58 S. Ct. 637, 638, 82 L. Ed. 932 (1938) (holding that it is a well-established principle that the Government generally can “recover funds which its agents have wrongfully, erroneously or illegally paid”); *Alsco-Harvard Fraud Litig.*, 523 F. Supp. 790, 806 (D.D.C. 1981) (finding that this common law basis for recovery of funds runs against a person “who received them by mistake and without rights”).

“A void judgment, paid by county officials, not with their own, but with taxpayers’ funds, is not a voluntary payment, and does not bind the county.” *Ex parte Hart*, 190 S.C. at 473, 2 S.E.2d at 56. Accordingly, Plaintiffs stated valid claims for a constructive trust and for restitution.⁵

⁵ Plaintiff also asserts a claim for money had and received. (Humphries Aff., Ex. 6, R. p. 91, Am. Compl. Count III.) Defendants did not address this claim before the Supreme Court. Pursuant to that claim, “[t]he plaintiff does not need to allege that money was ‘wrongfully’ obtained by the defendant.” Michael G. Sullivan & Douglas S. MacGregor, *Elements of Civil Causes of Action*,

V. CONCLUSION

For the reasons stated, the Defendants' motions for summary judgment must be denied.

Respectfully submitted,

s/James M. Griffin

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 August 2, 2023

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416 (6th ed. 2021). Rather, “[a]ctions for money had and received have been based on both mistaken transfers of funds as well as wrongful procuring of them.” *Id.*

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
South Carolina Public Interest	)	
Foundation and John Crangle,	)	Case No. 2020-CP-40-04603
individually and on behalf of all	)	
others similarly situated,	)	
	)	CORRECTED
Plaintiffs,	)	MEMORANDUM IN SUPPORT
	)	OF DEFENDANT LAW FIRMS’
v.	)	MOTION FOR SUMMARY JUDGMENT¹
	)	
Alan Wilson, Attorney General for	)	
the State of South Carolina,	)	
Willoughby & Hoefer, P.A., and	)	
Davidson, Wren & DeMasters, P.A.,	)	
	)	
Defendants.	)	
	)	

This matter is before the Court on the motions of Defendants Willoughby & Hoefer, P.A. (“W&H”) and Davidson & Wren, P.A. (“D&W,” formerly Davidson, Wren & DeMasters), (together, the “Law Firms”), each for an order granting judgment as a matter of law in favor of the Law Firms.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs challenge the payment of attorneys’ fees to private attorneys engaged by the South Carolina Attorney General (“Attorney General”) pursuant to a contingency fee contract. Fully performing under the terms of the contract, one or both of the law firms prosecuted four

¹ Defendant Law Firms also have motions pending to stay discovery. Those motions are supported by this memorandum as the issue remanded by the Supreme Court is a purely legal one to which discovery is not required. Moreover, there is already an Order of the Court staying discovery which remains in force. *See* Form 4 Order dated January 26, 2021 (“Motion from Discovery filed on December 16, 2020 is GRANTED. All discovery and motions are stayed until pending motions to dismiss are decided.”). Defendants’ motions to dismiss are still pending and have not yet been decided.

cases in three separate Federal trial courts, three separate Federal Courts of Appeal, and a petition to the United States Supreme Court, culminating in the successful settlement of a closed case filed by the State of South Carolina in the Court of Federal Claims, achieving what is believed to be the largest single-payment cash recovery for the State of South Carolina in its history, before even adding the value of the non-cash components of the settlement.

This herculean effort which culminated in this historic recovery began in March of 2014 (prior to the period covered by the fee contract in the present case), when the Law Firms 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 mixed oxide fuel fabrication facility (MOX Facility) at the Savannah River Site (SRS). Ex. 1, Ltr. to The Honorable W Jeffrey Young, Chief Deputy Attorney General, dated Sept. 16, 2020 at 1. At that time, DOE (through the National Nuclear Security Administration) was seeking to place the MOX Facility into "cold standby" status, which would have effectively terminated the project. *Id.* Seeking to avoid that result, the South Carolina Congressional delegation wrote to then-Governor Haley to ask that she work with the Attorney General to explore any legal avenues the State may have to address the pending injustice to the State. *Id.* After being briefed on a legal strategy to achieve that result, the State retained the Law Firms to represent it, and they filed a complaint on behalf of the State on March 18, 2014, followed by a motion for summary judgment on April 14. *Id.* Speed was of the essence given other factors at play in Congress. Through this rapid mobilization and concerted legal effort, on April 30, 2014, DOE was forced to capitulate and directed the contractor to continue the MOX Facility construction, a terrific win for South Carolina. *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 analyzing information about the issues associated with the MOX Facility, the Law Firms identified and 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 a draft complaint prepared by the Law Firms. This strategy included a multi-front approach that would assert 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 continuation of the MOX Facility or removal of the nuclear material from the State.

With political overtures by South Carolina having been rebuffed, and DOE missing the January 1, 2016 statutory deadline, 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 1-2. The Attorney General hired the Law Firms to implement the comprehensive strategy that they had developed and to pursue the claims they had identified, including representing the State in litigation against the Federal Government related to the MOX Facility. The litigation retention agreement, as amended (Litigation Retention Agreement), with the Law Firms was a contingency fee contract tailored to the demands of this unique and specialized situation. Ex. 2, Litigation Retention Agreement. The Litigation Retention Agreement provided that the Law Firms would assume 100% of the financial risk involved in the litigation and required them to advance all costs and work the hours necessary to execute the complex legal strategy in consideration of the contractual contingency fee to be paid only if successful. The State bore no risk under this arrangement; if the comprehensive strategy was successful, then the Law Firms would be paid

according to the terms of the contract. If the strategy was unsuccessful, the Law Firms could not seek reimbursement or payment for either their costs or the time worked on behalf of the State.

The Law Firms filed a complaint on behalf of the State against the Federal Government in Federal District Court in 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. *See* Ex. 2 at 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 the claim to 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, in a major victory for South Carolina, 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 Federal District Court in 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 (with local counsel). *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 major victory for South Carolina. *Id.* Nevada then appealed to the Ninth Circuit Court of Appeals on February 4, 2019. *Id.* During the pendency of the appeal, Nevada indicated that it believed the trial of this matter would take 14 days and sought unrestricted discovery rights. *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. The district court ultimately stayed the case pending the appeal. *Id.* After briefing at the Ninth Circuit, including an appearance and briefing by W&H on behalf of the State, the court dismissed the appeal as moot on August 13, 2019.² *Id.* The stay at the district court was lifted, and additional motions were filed and briefing began anew. *Id.* 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.

While the Nevada case was being litigated, on August 7, 2019, approximately 19 months after the Federal District Court in South Carolina ordered its removal, the Federal Government filed a declaration with the court that it had completed the removal of the one metric ton of defense

² 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 was placed in Texas.

plutonium from SRS, another major victory for the State. *Id.* at 3. During this time, South Carolina learned 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 and hundreds of South Carolina jobs would be lost. 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 was again directed by the Attorney General to move expeditiously on behalf of South Carolina, by filing a complaint and requesting a preliminary injunction on May 25, 2018, in the Federal District Court in South Carolina, along with a request for an expedited hearing given the exigencies involved. *Id.* On June 7, 2018, the court granted the preliminary injunction and ordered the Federal Government to continue constructing the MOX Facility. *Id.*

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, political efforts were made to obtain a solution that, unfortunately, never materialized and, on October 26, 2018, the Fourth Circuit ruled against South Carolina. *Id.* The Federal Government quickly terminated the MOX Facility construction, which confirmed the wisdom of South Carolina's efforts to try and maintain the status quo, which had achieved temporary success by extending the project and thereby benefiting hundreds of workers in the State in the interim.

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. *Id.* at 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 Law Firms, on behalf of South Carolina, appealed that decision to the Court of Appeals for the Federal Circuit. *Id.* Continuing to stay engaged and constantly working to develop strategies to promote a positive resolution for South Carolina, beginning in January 2020, additional discussions were held between the respective counsel for DOE and the State. These discussions were more promising and over months developed into a workable framework for possible resolution. While the political representatives of South Carolina 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 on South Carolina's appeal from the Court of Claims' adverse decision 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 additional productive meetings, settlement discussions culminated in an agreement in principle reached 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 3-4.

On August 28, 2020, a settlement agreement was executed providing for a payment of \$600 million from the Federal Government’s litigation “Judgment Fund,”³ 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. Ex. 3, Settlement Agreement, dated August 28, 2020. 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 to force removal⁴ and receive additional payments⁵ should the Federal Government not comply.⁶ *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. Ex. 4, Agreement to Voluntary

³ 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. The Law Firms’ idea to seek payment out of the Judgment Fund allowed payment to the State without reducing the operating budget for SRS, *see n. 6 infra*, and without the need for a specific appropriation from Congress.

⁴ The 15-year removal period for the remaining 9.5 metric tons of weapons-grade plutonium—an amount that is now known and was declassified as a result 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.

⁵ 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.

⁶ 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 Law Firms secured on behalf of the State for the removal of one metric ton of plutonium and the agreement to remove nine 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 Law Firms will receive no additional compensation under the Litigation Retention Agreement; nevertheless, these benefits are significant, real, and measurable.

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)).

For the fees in the litigation against the Federal Government, the Litigation Retention Agreement between the Attorney General and the Law Firms—which was first 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 cash settlement amount recovered on behalf of the State by the Law Firms.⁷

Following receipt of the settlement amount from the Federal Government, the State Attorney General approved payment of the attorneys’ fees owed to the Law Firms pursuant to the Litigation Retention Agreement. Ex. 5, Affidavit of Kimberly Buckley, Finance Director for the

⁷ 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 recently 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.”).

Office of Attorney General, dated Oct. 1, 2020 (filed with the circuit court on Oct. 6, 2020). The payment was approved by the Executive Budget Office (EBO) of the Department of 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.*

Plaintiffs instituted this action in the Richland County Court of Commons Pleas on September 25, 2020, against the State Attorney General, and on September 30, 2020, filed an amended complaint adding claims against the Law Firms. In their amended complaint, Appellants raised various arguments regarding the payment of attorneys' fees to the Law Firms pursuant to the Litigation Retention Agreement entered into between the Attorney General and the Law Firms. Appellants also filed a motion for temporary restraining order and preliminary injunction.

On October 1, 2020, the Honorable Alison Renee Lee issued an *Ex Parte* Temporary Restraining Order, but scheduled and then conducted a hearing on the motion for preliminary injunction on October 7, 2020. At the close of the hearing, Judge Lee extended the Temporary Restraining Order an additional seven days while she considered the arguments and information advanced by the parties. On October 14, 2020, Judge Lee denied the motion for preliminary injunction and dissolved the extended Temporary Restraining Order, based on her determination that Appellants lacked standing to bring this action and also her determination that Plaintiffs had not demonstrated that they met the legal standards for the issuance of a preliminary injunction. *See Ex. 6, Order Denying Plaintiffs' Motion for Preliminary Injunction Order.* Plaintiffs subsequently filed a motion to reconsider the October 14 Order, which Judge Lee denied on December 17, 2020. *See Ex. 7, Order Denying Plaintiffs' Motion to Alter or Amend.*

On October 20, 2020, W&H and D&W filed and served motions to dismiss seeking dismissal pursuant to Rules 12(b)(1) and 12(b)(6), SCRPC, on the grounds that Plaintiffs lacked standing and failed to state facts sufficient to constitute a cause of action against the Respondents. The State Attorney General filed his own motion to dismiss on October 27, 2020, seeking dismissal on similar grounds. On March 5, 2021, the Honorable R. Kirk Griffin issued a formal order dismissing the amended complaint on the basis that Judge Lee's prior findings that Plaintiffs lacked standing were dispositive. See Ex. 8, Order Granting Motions to Dismiss.⁸

Plaintiffs filed their Notice of Appeal with the Court of Appeals on March 29, 2021, appealing from Judge Griffin's dismissal order. By order dated July 6, 2021, the appeal was certified for review by the Supreme Court, which heard oral argument on April 6, 2022. On September 14, 2022, the Supreme Court issued its Opinion reversing Judge Griffin's dismissal order. Opinion No. 28112, Sept. 14, 2022 (S.C. Supr. Ct.). The Supreme Court held that Plaintiffs had "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 to this Court for resolution of this legal question. *S.C. Pub. Int. Found. v. Wilson*, 437, S.C. 334, 342-43, 878 S.E.2d 891, 896 (2022).

ARGUMENT

1. The Supreme Court remanded this case to the Circuit Court for a limited determination of whether the Attorney General has the legal authority to enter into contingency fee agreements. Decades of precedent show that the Attorney General has such authority and power.

A. The Constitution and applicable statutory framework vest the Attorney General with the authority and power to enter into contingency fee agreements with private law

⁸ As the standing issue was dispositive, Judge Griffin did not address the other grounds for dismissal set forth in the Defendants' motions to dismiss, which are currently pending and have not yet been addressed.

firms, which authority has been exercised for the benefit of the State by multiple Attorney Generals and has been acquiesced to by the General Assembly for decades.

As the Supreme 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.**

437, S.C. at 342, 878 S.E.2d at 896 (emphasis added). This purely legal question has only one valid answer and that is yes he does.

The Attorney General’s authority to represent State interests is rooted in the Constitution, statutes, and the common law. Our 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. The Supreme Court noted in *Cooley, et al. v. South Carolina Tax Comm’n*, 204 S.C. 10, 28 S.E.2d 445, 450 (1943), “[t]he office of Attorney General is created by the Constitution.” According to the Supreme Court, 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. The Supreme Court, in *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), the Supreme Court 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:

[T]he General Assembly has elaborated on the Attorney General's duties in several statutes. First, pursuant to S.C. Code Ann. § 1-7-40 (Supp. 2001), the Attorney General must

appear for the State in the Supreme Court and the court of appeals in the trial and argument of all causes, criminal and civil, in which the State is a party or interested, and in these causes when required by the Governor or either branch of the General Assembly.

. . . The General Assembly has also provided that the Attorney General, upon written request of a state officer has a duty to appear and defend that officer when the officer is being prosecuted in a civil or criminal action or other special proceeding, due to an act done or omitted in good faith in the course of employment. S.C. Code Ann. § 1-7-50 (1986) [footnote omitted]. The Attorney General also must 'give his opinion upon questions of law submitted to him by either branch' of the General Assembly or by the Governor. S.C. Code Ann § 1-7-90 (1986).... Further,

'[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*.

State ex rel. Condon v. Hodges, 349 S.C. at 239, 240 (Emphasis added) (internal citations omitted).

In *State ex rel. McLeod v. v. McInnis*, 278 S.C. 307, 311, 295 S.E.2d 633, 635 (1982), the Supreme Court explained that the Attorney General, by bringing this action in the name of the State, speaks for all its citizens, and may, on their behalf, bring to the Court's attention for adjudication charges that there is an infringement in the separation-of-powers area.

Moreover, in *Condon v. State*, 354 S.C. 634, 641, 583 S.E.2d 430, 434 (2003), the Supreme Court reiterated that "[t]his Court has recognized 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." *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.”).

Accordingly, the Attorney General is the State’s chief legal officer, and he properly exercised his authority to contract with the Law Firms to represent the State in its actions against the United States and to pay them pursuant to that contract from the settlement proceeds. As Judge Cooper stated 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.”

Judge Roger 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.”

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....” And S.C. Code Ann. § 1-7-170, titled, “Engaging attorney on fee basis,” provides that “[a] department or agency of state

government may not engage on a fee basis an attorney at law except upon the written approval of the Attorney General and upon a fee as must be approved by him.”

The authority of the Attorney General to enter into contingency fee agreements also has been exercised for decades. *See Cephalon*, Civil Action No. 2012-CP-400737; *Eli Lilly*, 2007-CP-42-1855. Not once has the General Assembly done anything to reject or dispute this power of the Attorney General to enter contingency fee contracts, demonstrating that the General Assembly agrees that the Attorney General has this authority. Indeed, several lawyers that have entered into contingency fee agreements with the Attorney General’s office are current or former members of the General Assembly. *See* Litigation Attention Agreements found at <https://www.scag.gov/litigation-retention-agreements/>.

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 into and fulfill contingency fee agreements with private law firms.

B. Plaintiffs do not dispute the Attorney General’s authority to enter into contingency fee agreements.

Notably, Plaintiffs agree that the Attorney General has the authority to enter into contingency fee agreements with private law firms. In particular, at the oral argument before the Supreme Court, Plaintiffs’ counsel made the following representations:

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 ---

Ex. 9, April Oral Argument Tr. 8:10-14; 14:12-16; 53:20-25.

Therefore, as they must, Plaintiffs acknowledge the Attorney General's authority to enter into contingency fee agreements with private law firms. This, of course, necessarily means that the Plaintiffs do not—and cannot—dispute that the Attorney General had the authority to enter into the Litigation Retention Agreement with the Law Firms and that the Litigation Retention Agreement is a legally binding contract enforceable against the State. This also means that the only issue for which the Supreme Court found Plaintiffs had standing to litigate must be resolved in favor of the Defendants, and this Court, having answered the limited legal questions for which this case was remanded, should grant summary judgments to Defendants, conclude its inquiry, and dismiss the case.

2. If this Court nevertheless should look beyond the issue of the Attorney General's authority to enter into contingency fee agreements with private law firms—which it should not given Plaintiffs' limited standing in this matter—the only possible issues that could remain present pure legal questions, the answers to which are all in favor of the Defendants.

A. Plaintiffs' argument that Section 1-7-150(B) precluded the payment of the contingency fee earned by the Law Firms pursuant to the binding Litigation Retention Agreement and the negotiated settlement with Federal Government lacks any legal merit.

Notwithstanding Plaintiffs' acknowledgment that the Attorney General had the authority to enter into the contingency fee agreement with the Law Firms and the undisputed fact that the

multi-year litigation against the Federal Government was resolved via a settlement resulting in one of the largest ever financial recoveries by the State, Plaintiffs claim the Law Firms are not entitled to any of their contractual fee. Plaintiffs' primary contention in support of this claim is that S.C. Code Ann. § 1-7-150 precluded the Attorney General's payment of the fee earned by the 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 Law Firms' fees, into the General Fund.

This contention is wrong as a matter of law. There are two primary reasons that this is true. First, Plaintiffs' reading of § 1-7-150 is not consistent with the statute. Second, 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.

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). There are several reasons 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.

As an initial matter, 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

Law Firms were “awarded by settlement.” Indeed, 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” See Ex. 4, Agreement to Voluntary Dismissal of Appeal (Emphasis added). The payment of the fees to the Law Firms by the Attorney General required by the Litigation Retention Agreement and the settlement with the Federal Government therefore fits squarely within the plain language of § 1-7-150(B).⁹ And Plaintiffs have provided nothing—because there is nothing—to refute this. They simply disregard it and hope this Court does too.

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 into by the State’s Chief Legal Officer and approved by the EBO is a disposition “required by law.” Indeed, the State’s failure to pay the fees pursuant to the binding Litigation Retention Agreement would be a *violation* of the law and deprivation of the Law Firms’ private property. See *Button’s Estate*

⁹ To the extent Plaintiffs contend that the statute required some further or different approval (or any approval at all) from the Federal Government (i.e., the defendant) in the MOX litigation, that is an absurd reading of the statute. Simply put, § 1-7-150(B) does not require the Attorney General of the State of South Carolina to obtain the approval of a settling defendant prior to the Attorney General making payment pursuant to a binding fee agreement. The references in § 1-7-150(B) to litigation costs “awarded by court order or settlement” are simply meant to ensure that litigation recoveries, minus litigation costs, are generally deposited as set forth in the statute, regardless of whether the recovery came as a result of a judgment or a settlement. If the General Assembly wished to impose a requirement that the Attorney General obtain approval of its fee agreements or prior to paying any attorney’s fees or other litigation costs pursuant to such agreements, it would have explicitly stated as much. Also, as evidenced by its title (i.e., “Accounting to Treasurer; deposit of funds”), Section 1-7-150 is a statutory accounting provision, it is not a restriction on the Attorney General’s contracting authority, as Plaintiffs apparently suggest.

v. Anderson, 112 Vt. 531, 28 A.2d 404, 410 (1942) (noting that the attorney’s fee “never legally and equitably belonged to the State as part of its public funds”); *see also Ex Parte Brown v. Howard*, 393 S.C. 214, 221, 11 S.E.2d 899, 902 (2011) (an attorney’s services “constitute property” for purposes of the Fifth Amendment Takings Clause). 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.) Plaintiffs’ contentions, therefore, have no support in the plain language of the statute.

Moreover, even if you assume *arguendo* that Plaintiffs’ interpretation of § 1-7-150(B) was somehow correct—which it is not—their interpretation is irrelevant to this case 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).¹⁰ This proviso was in effect at the time of the Attorney General’s receipt of the settlement funds and payment to the Law Firms of the fees owed pursuant to the Litigation Retention Agreement. Ex. 5, 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

¹⁰ 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 attorney’s fees in this case, this same Proviso was continued in 2021, 2022 and 2023.

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, even if Plaintiffs were correct that the portion of the settlement awarded for attorneys’ fees generally would have to be deposited in the General Fund, they legally could not have been so deposited—and were not—in this case. Ex. 5, 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.”). The argument articulated by Plaintiffs is therefore inapplicable. But even if it was applicable, the question then becomes: Doesn’t the Attorney General’s compliance with his lawful contractual obligation fulfill the requirement that expenditures from the Litigation Recovery Account must be “prescribed by law.” In sum, fulfilling a contractual obligation is a duty “prescribed by law” for the Attorney General.

The payment of the contractual attorneys’ fees also 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.”);¹¹ 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. Ex. 11, 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 necessarily have 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, Plaintiffs’ claims fail as a matter of law.

¹¹ Plaintiffs have claimed 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. Plaintiffs 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 Plaintiffs are completely wrong factually and legally.*** 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. 2020 S.C. Acts 135, § 7 (“The Executive Budget Office is authorized to approve agency requests for federal and other fund authorization adjustments.”); Ex. 10, Stavrakis 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 is, of course, the reason that, as Senator Setzler reports, there was no application for payment of the fees submitted to the Joint Other Funds Oversight Committee—by law, it was not required. It is also worthy to note that Senator Setzler did not offer the opinion that approval of the Joint Other Funds Oversight Committee was required; only that no application was submitted. The EBO Director therefore did not by-pass the requisite approval process, and Plaintiffs’ contentions are baseless.

B. The Attorney General is not required to obtain judicial approval of the Litigation Retention Agreement or the fees paid.

Plaintiffs also ask this Court to **require** the Attorney General to obtain judicial approval of the amount of fees paid to the Law Firms for services performed and costs incurred pursuant to their contract. However, Plaintiffs do not have a valid claim and this Court does not have authority to even entertain Plaintiffs' claim because there is no contractual or statutory provision or any other mechanism that imposes a requirement on the Attorney General to obtain judicial approval of the contract or the fees paid. Plaintiffs note in the Amended Complaint that the Litigation Retention Agreement contains a provision regarding judicial approval of the fees **when possible**, but that provision is optional and discretionary and does not constitute a requirement that he obtain judicial approval. *See* 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, Plaintiffs' argument that approval is mandatory is directly contradicted by the use of the prefatory condition "when possible" and renders such argument inapposite. Moreover, given that the parties to the Litigation Retention Agreement—the Attorney General and the Law Firms—agree on the payment of the fee and the amount pursuant to the terms of their valid contract, there is no live controversy affording jurisdiction to a trial court, and thus no declaratory relief is available, and Plaintiffs' attempts to stand in the shoes of the Attorney General to create a claim where none otherwise exists is unavailing. Further, the settlement reached between the State and the Federal Government did not require court approval, and there is no common law requirement that the Attorney General seek judicial approval of his contracts. In

short, as a matter of law, there is nothing that would have required the Attorney General to seek judicial approval of the fees earned by the Law Firms under the Litigation Retention Agreement.

It all boils down to a simple proposition. The Attorney General had the power to engage private lawyers pursuant to the terms of a contingency fee agreement. He did so. The Law Firms fully performed to the satisfaction of the Attorney General, and he fully performed by paying them as agreed. That is exactly how contracts are supposed to work.

Plaintiffs’ (unfounded) allegation that the Litigation Retention Agreement—which provides for an effective contingency fee rate of 12.5% for services performed over several years and in multiple lawsuits—violates the South Carolina Rules of Professional Conduct does not somehow confer upon this Court authority to review the Litigation Retention Agreement. *See Spence v. Wingate*, 395 S.C. 148, 161, 716 S.E.2d 920, 927 (2011) (“the Rules of Professional Conduct do not, in themselves, create a cause of action . . . the rules are intended for guidance and disciplinary purposes, not to form the basis for civil litigation.”). A mere allegation of a violation of the South Carolina Rules of Professional Conduct also does not change the simple and indisputable fact that there is no requirement—statutory or otherwise—that the Attorney General seek judicial approval of its contracts with outside counsel. This is especially so because the actual party to the contract in this case—the Attorney General—has already approved the fee amount, and three other State officials or agencies—the State Treasurer, the State Comptroller General, and EBO—have authorized the payment of the fee. Accordingly, Plaintiffs’ claims seeking to require the Attorney General to seek judicial approval of the Litigation Retention Agreement or the fees paid pursuant to such contract fail as a matter of law and judgment should be entered in favor of the Defendants.

CONCLUSION

For the foregoing reasons, summary judgment should be granted to Defendants, and the case dismissed with prejudice.

Respectfully submitted,

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Columbia, South Carolina
August 2, 2023

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

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

Case No. 2020-CP-40-04603

**PLAINTIFFS' MOTION TO
RECONSIDER**

Plaintiffs,

v.

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

Defendants.

Plaintiffs South Carolina Public Interest Foundation and John Crangle, through undersigned counsel, move the Court pursuant to Rule 59, SCRCF, to reconsider its Order dated October 20, 2023 (the "Order") granting Defendants summary judgment. This Court's Order failed to fully consider Plaintiffs' arguments regarding the plain language of S.C. Code § 1-7-150 ("Section 1-7-150") and failed to rule on the penultimate issue in the case of whether the Attorney General can apply settlement proceeds payable to the State of South Carolina to pay attorneys' fees pursuant to a contingency fee agreement when the fees have not been awarded by court order or settlement. Instead, this Court misconstrued the Supreme Court's mandate and erroneously limited its analysis to an uncontested issue of whether the Attorney General has authority to enter into contingency fee agreements.

STANDARD OF REVIEW

A motion under Rule 59(e) has long been viewed as a "motion for reconsideration." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 21, 602 S.E.2d 772, 778 (2004). The Supreme Court has clarified that a party may file a motion to reconsider "when she believes the court has

misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it.” *Id.* at 24, 602 S.E.2d at 780. “[C]onsequently, a party usually is allowed to ask the Court to reconsider its decision even if it means rehashing all or part of an argument previously presented.” *Id.* at 22, 602 S.E.2c at 778-79.

ARGUMENT

This Court concluded that the Attorney General has authority to enter into contingency fee agreements with private law firms without addressing the meaning of the language in Section 1-7-150 stating that “all monies, except investigative costs or costs of litigation awarded by court order of settlement, awarded the State of South Carolina by judgment or settlement in actions brought by the Attorney General on behalf of the State . . . must be deposited in the general fund.” Furthermore, this Court’s conclusion that Plaintiffs’ interpretation of Section 1-7-150(B) requires judicial intervention and would therefore create a separation of powers issue is based upon a misunderstanding of Plaintiffs’ arguments. In this regard, the Court also grants summary judgment on an issue not raised by Defendants in their respective motions. Finally, the legislative history of S.C. Code § 1-7-85 (“Section 1-7-85”) and Section 1-7-150 in no way supports the Court’s conclusion.

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

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

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

Indeed, the primary issue before the Supreme Court was "whether [Plaintiffs] have standing." *Id.*, 437 S.C. at 340, 878 S.E.2d at 894. To the extent the court found that Plaintiffs lacked standing in any respect, it would have dismissed the case with respect to those issues or instructed this Court to do so, rather than simply reversing and remanding it. *See Hallums v. Bowens*, 318 S.C. 1, 3, 428 S.E.2d 894, 895 (Ct. App. 1993) (dismissing the case on appeal based on lack of jurisdiction because "[a] court, lacking subject matter jurisdiction, cannot enforce its own decrees"); *see also Benham v. City of Charlotte, N.C.*, 635 F.3d 129, 134 (4th Cir. 2011) ("If an appellate court determines that the district court lacked jurisdiction, vacatur of the district court's ruling, along with a remand with instructions to dismiss, is the appropriate disposition."). The Supreme Court did no such thing. The justices did not affirm in part and reverse in part the trial court's finding that Plaintiffs lacked standing; it reversed that ruling and remanded the case "for the circuit court to consider the merits of [Plaintiffs'] claims." *S.C. Pub. Int. Found.*, 437 S.C. at 343, 878 S.E.2d at 896.

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

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

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

Other language in the opinion makes clear that the Supreme Court did not intend to limit Plaintiffs' standing in any way. In holding that Plaintiffs "have public importance standing," the Supreme Court explained that "[b]ecause we decide this appeal on public importance grounds, we need not address derivative standing." *Id.*, 437 S.C. at 343 n.5, 878 S.E.2d at 896 n.5. Plaintiffs asserted derivative standing to assert all claims and issues, and accordingly, the Supreme Court's ruling that it need not consider derivative standing makes clear that its holding that Plaintiffs have public importance standing extends to all claims and issues in the case. If the Supreme Court intended to limit Plaintiffs' standing to argue only particular issues, that decision would not have obviated the need to discuss Plaintiffs' derivative standing to assert all claims and litigate all attendant issues. If the Supreme Court had intended for Plaintiffs' public interest standing to extend only to a single abstract issue as argued by Defendants, it would have been necessary for the Supreme Court to address Plaintiffs' derivative standing to assert all claims and argue all issues.

Additionally, it is clear from the record before the Supreme Court and the context of its statements about the Attorney General's authority that the Supreme Court was not asking this

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

Court to consider that authority in the abstract. The question of the Attorney General's authority must be read in the context of the relevant statutes and contingency-fee agreements. The similar contingency fee agreements referenced by the Supreme Court speak in terms of the need to obtain court approval of attorneys' fees "[w]hen appropriate," which the Supreme Court noted was "identical to the one here for purposes of its analysis." *Litigation Retention Agreement for Special Counsel Appointed by the S.C. Att'y Gen. as to Purdue Pharma L.P., Purdue Pharma Inc., and Purdue Frederick Company Inc.* 9, May 12, 2017, <https://www.scag.gov/wp-content/uploads/2018/09/Opioid-Manufacturers.-Litigation-Retention-Agreement-01784660xD2C78.pdf>; *Litigation Retention Agreement for Special Counsel Appointed by the S.C. Att'y Gen. as to Economic and Impact Assistance for the Violations of 50 U.S.C.A. § 2566 Related to the Mixed Oxide (MOX) Facility* 9, Feb. 8, 2016. In that context, the Supreme Court framed the "threshold" question as follows:

[Plaintiffs'] complaint presents a threshold issue of the Attorney General's statutory authority to enter contingency fee agreements with private law firms. This issue will inevitably arise again in the future because Wilson has seven other litigation retention agreements with private attorneys. These agreements are currently listed on the Attorney General's website, and five contain contingency fee provisions. ***Although the agreements differ in some respects, all contingency fee provisions persist. For example, Wilson recently announced a \$300 million settlement with opioid distributors. The litigation retention agreement in that case contains a contingency fee provision identical to the one here. There is a need for future guidance as to whether subsection 1-7-150(B) authorizes the Attorney General to enter into contingency fee agreements.*** We therefore hold Appellants have public importance standing.

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

Moreover, the Supreme Court's use of the word "threshold" indicates that it did not intend to limit Plaintiffs' standing to only that issue. According to Merriam-Webster, a threshold is "the place or point of entering or beginning." *Threshold*, Merriam-Webster.com, <https://www.merriam->

[webster.com/dictionary/threshold](https://www.webster.com/dictionary/threshold) (last visited Aug. 1, 2023). Similarly, according to the American Heritage Dictionary, threshold means “[t]he place or point of beginning; the outset.” *Threshold*, AHDictionary.com, <https://ahdictionary.com/word/search.html?q=threshold> (last visited Aug. 1, 2023). Accordingly, the word threshold means the beginning and not the extent of Plaintiffs’ standing.

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

As noted by the Supreme Court, Plaintiffs’ complaint presents a “threshold issue of the Attorney General’s statutory authority to enter contingency fee agreements with private law firms.” *S.C. Pub. Int. Found.*, 437 S.C. at 342, 878 S.E.2d at 895. Here, the Attorney General lacks authority to qualify the statutory requirement that attorneys’ fees paid pursuant to those contracts be awarded by court order or settlement. The Attorney General has been qualifying that requirement so that court approval is only required “when possible” or “when appropriate.” In so doing, the Attorney General is exceeding his statutory authority pursuant to S.C. Code Ann. § 1-7-150(B) and § 1-7-85. If not awarded by settlement or court order, the General Assembly—not the Attorney General—would have to allocate funds received to the payment of attorneys’ fees and litigation-related costs and expenses.

Neither S.C. Code Ann. § 1-7-85 nor § 1-7-150(B) authorizes the Attorney General to make payment of the attorneys’ fees at issue. Section 1-7-150(B) of the South Carolina Code of Laws requires that all funds received by judgment or settlement be deposited into the State’s General Fund, **except for investigative costs and litigation costs awarded by court order or settlement.** *Id.* (emphasis added). The contract does not specifically require that the Law Firms be awarded attorneys’ fees by court order or settlement and instead qualifies such requirement, stating that the

attorneys' fees be awarded by court order "if possible."² Furthermore, the DOE Settlement Agreement expressly disclaims any obligation by the DOE to pay the Law Firms attorneys' fees.

This Court's reliance upon S.C. Code § 1-7-85 ("Section 1-7-85"), which has the same language as Section 1-7-150(B) limiting reimbursement to "attorney fees or investigative costs or costs of litigation **awarded by court order or settlement**" is misplaced. Section 1-7-85 provides as follows:

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

S.C. Code Ann. § 1-7-85 (emphasis added); *see also Higgins v. State*, 307 S.C. 446, 449, 415 S.E.2d 799, 801 (1992) ("In construing statutory language, the statute must be read as a whole, and sections which are part of the same general statutory law must be construed together and each one given effect, if it can be done by any reasonable construction.").

² The Attorney General similarly lacks contractual authority to agree to pay attorneys' fees while only requiring that the attorney' fees be approved by court order "when appropriate" as stated in other contingency fee contracts available on the Attorney General's website. *See* Litigation Retention Agreement for Special Counsel Appointed by the S.C. Att'y Gen. ("Litig. Retention Agr.") as to Purdue Pharma L.P., Purdue Pharma Inc., and Purdue Frederick Company Inc., May 12, 2017; Litig. Retention Agr. as to Pharmacy Benefit Managers, Apr. 24, 2019, rev'd Oct. 10, 2019, Aug. 11, 2021, and July 1, 2022; Litig. Retention Agr. as to the "Sonny" Mevers Found., Feb. 13, 2020; Litig. Retention Agr. as to Insulin Pricing, July 13, 2021; Litig. Retention Agr. as to Google Advertising Technology Litig., Aug. 8, 2021; Litig. Retention Agr. as to TikTok, Aug. 19, 2022; and Litig. Retention Agr. as to Per- and Polyfluoroalkyl Substances ("PFAS"), June 16, 2023, *Litigation Retention Agreements*, S.C. Att'y Gen., <https://www.scag.gov/litigation-retention-agreements/> (last visited Aug. 1, 2023) (listing contingency fee agreements for Opioid Manufacturers, Pharmacy Benefit Managers, Sonny Mevers Foundation, Insulin Pricing, Google Advertising Technology Litigation, TikTok, and PFAS).

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

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

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

Id. § 1-7-150(B) (emphasis added).

In this matter, neither exception applies because there was not an order awarding attorneys’ fees, and the Settlement Agreement does not allocate any portion of the \$600 million to attorneys’ fees. Rather, Section 5(a) the Settlement Agreement provides for the following: “Immediate

payment by the United States to the State of South Carolina in the amount of \$600 million (Six Hundred million), inclusive of interest, **with each party to bear its own costs, attorneys fees and expenses.**” (See Humphries Aff., Ex. 6, R. p. 534 (emphasis added)). Accordingly, it is clear that the settlement does not award attorneys’ fees to the Law Firms. See Oral Argument, *S.C. Pub. Interest Found. v. Wilson et al.*, No. 2021-00343 at 28:54, (S.C. Sup. Ct. Apr. 6, 2022) <https://media.sccourts.org/videos/2021-000343.mp4> (stating that it is “not correct” that “the payment of a \$75 million contingent fee was a term of the settlement”). Rather, Section 1-7-150(B) clearly requires that payment of the entire \$600 million be made directly to the State of South Carolina. Nevertheless, Defendant Wilson agreed to pay private lawyers \$75 million out of the \$600 million, which was required to be deposited into the State’s General Fund pursuant to Section 1-7-150(B) of the South Carolina Code.

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

[webster.com/dictionary/awarded](https://www.webster.com/dictionary/awarded) (last visited Oct. 19, 2020) (emphasis added). This Court's Order simply deletes the requirement under Section 1-7-150(B) that the attorneys' fees in this case be awarded by settlement.

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

C. This Court Misconstrues Plaintiffs' Argument in Its Separation of Powers Analysis

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

Executive officers possess no authority to appropriate funds. Such authority lies exclusively with the General Assembly, which has directed that all such funds be deposited in the State's General Fund. *See State ex rel. Condon v. Hodges*, 349 S.C. at 245, 562 S.E.2d at 630 (2002) ("[T]here is no provision in the South Carolina Code or Constitution which provides that

members of the executive branch have the ability to transfer funds from those to whom the General Assembly has appropriated money”). Expenditures of public funds cannot be controlled “by administration rather than by legislation.” *State ex rel. McLeod v. McInnis*, 278 S.C. 307, 317, 295 S.E.2d 633, 638 (1982). Doing so would give the executive branch a “veto” over the General Assembly. *Id.* Wilson’s payment of \$75 million from the State’s \$600 million would amount to an appropriation of public funds by a member of the executive branch, rather than the General Assembly, in violation of the separation of powers. S.C. Const. art. I, § 8.

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

The Attorney General has no authority to appropriate money. The money in the settlement was **payable to the State of South Carolina** pursuant to the suit and by federal statute. As such, the General Assembly has the control of the appropriation of those funds, not the Attorney General or this Court. *State ex rel. Condon v. Hodges*, 349 S.C. 232, 246, 562 S.E.2d 623, 631 (2002).

The General Assembly has the duty and authority to appropriate money as necessary for the operation of the agencies of government and has the right to specify the conditions under which the appropriated monies shall be spent. *State ex rel. Condon v. Hodges*, 349 S.C. 232, 244, 562 S.E.2d 623, 631 (2002); *Gilstrap v. S.C. Budget and Control Bd.*, 310 S.C. 210, 216, 423 S.E.2d 101, 105 (1992) (noting that the appropriation of public funds is a legislative function); *Clarke v. S.C. Pub. Serv. Auth.*, 177 S.C. 427, 437, 181 S.E. 481, 484 (1935) (noting that the General Assembly has full authority to make appropriations as it deems wise in absence of any specific constitutional prohibition against the appropriation). This includes the duty to authorize and/or appropriate the use of all federal funds. S.C. Code Ann. § 11-11-160 (Supp. 2008). In the annual appropriations act, the General Assembly must appropriate all anticipated federal funds and must include any conditions on the expenditure of those funds, consistent with federal laws and regulations. S.C. Code Ann. § 2-65-20 (2005). Money may be drawn from the treasury only pursuant to appropriations made by law. S.C. CONST. art. X, § 8. An appropriation may be made by the General Assembly in the annual appropriations act or in a permanent

continuing statute. *State v. Cooper*, 342 S.C. 389, 401, 536 S.E.2d 870, 877 (2000).

Edwards v. State, 383 S.C. 82, 90-91, 678 S.E.2d 412, 416-17 (2009).

(Humphries Aff., Ex. 6, R. pp. 890-91 (emphasis added, citation to exhibit omitted)).

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

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

(*Id.*, R. pp. 887-88).

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

Additionally, Judge Cooper's decision in *Cephalon*, which this Court relies upon, clearly recognizes the Court's role in approving the attorneys' fees calculated under a contingency fee agreement. *Cephalon Inc. v. Wilson*, C/A No. 2012-CP-40-07317, p. 14 (Sept. 29, 2020) ("*The Litigation Retention Agreement simply puts the Attorney General's intention to seek those funds in writing, serves to notify outside counsel of the manner in which the Attorney General will calculate the attorneys' fees he will ultimately seek the court approve, and provides notice that any fees approved by the court will be paid from outside counsel's contingent fee rather than the*

State's recovery." (emphasis added)). There is simply no separation of powers issue created by the proper interpretation of S.C. Code § 1-7-150(b). Instead, a separation of powers issue is created by the Attorney General's use of State funds in contravention of the plain language of Section 150(B).

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

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

The Court somehow concludes that "[p]ress coverage from the time makes it clear that the overarching purpose of the [Section 1-7-150] was to determine the disposition of proceeds from the settlement of the Reedy River oil spill—and not to impose a restriction on the on the powers of the Attorney General with respect to the payment of attorneys' fees. " Order 5. Nothing about the press coverage suggests that the legislature intended anything other than the plain meaning of the statute.³

The legislative history of Section 1-7-85 that the Court cites as somehow supporting the Court's conclusion, in fact, supports Plaintiffs' reading of Section 1-7-150. Pursuant to the

³ The copy of *The Greenville News* editorial submitted by the Attorney General was illegible as scanned. Attached hereto as **Exhibit A** is a legible copy of that editorial, which shows that the editorial spoke nothing at all about the provision in Section 1-7-150 requiring attorneys' fees to be awarded by court order or settlement. See Ex. A, Editorial, *Fighting for Reedy funds*, The Greenville News, Apr. 22, 1998, at 10A.

proposed amendment to Section 1-7-85 that was not adopted, the State Budget and Control Board would have to approve any contract the Attorney General sought to enter for legal representation whether “on a contingent or other basis.” That proposed amendment shows that the legislature was obviously concerned by the ability of the Attorney General to agree to contingency fee agreements on behalf of the state. The proposed amendment to Section 1-7-85 would have merely added another check on the Attorney General’s ability to pay attorneys’ fees to outside counsel—one in addition to that provided by the requirement that “costs of litigation [be] awarded by court order or settlement.” S.C. Code § 1-7-150.

That the legislature ultimately decided not to pass this additional check on the Attorney General’s authority does not suggest that this Court should read out the other check on the Attorney General’s authority to pay legal fees only when “awarded by court order or settlement.” That simply makes no sense. The contrary conclusion makes far more sense—that the legislature was satisfied by the check on the Attorney General’s ability to pay fees by requiring such payment be awarded by Court order or be paid directly by the defendants by settlement.⁴ The Court did not consider or analyze this issue and instead merely incorporated this section of the Attorney General’s brief in the Order.

⁴ The Law Firms argue in a footnote that the language in Section 1-7-150 requiring an award “by settlement” as an alternative to an award by court order means that the plain language of the statute is absurd. Accordingly, they argue that the Court should read out both provisions because otherwise they would “require the Attorney General . . . to obtain the approval of a settling defendant prior to . . . making payment pursuant to a binding fee agreement.” What these Defendants ignore is that in many cases brought pursuant to statutes with a fee-shifting provision, attorneys’ fees are paid directly by the defendants. In those instances, it would make perfect sense for a settlement to award the Attorney General reasonable attorneys’ fees paid directly by the defendants separate and apart from the recovery of the state.

CONCLUSION

For the reasons stated, this Court should reconsider and deny Defendants' motions for summary judgment.

Respectfully submitted,

s/James M. Griffin

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Columbia, South Carolina
October 30, 2023

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Daniel Coble, Circuit Court Judge

Case No. 2020-CP-40-04603

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.

NOTICE OF APPEAL

South Carolina Public Interest Foundation, and John Crangle, individually and on behalf of all others similarly situated, appeal the orders of the Honorable Daniel Coble, granting Defendants' Motion for Summary Judgment, entered October 20, 2023 (Ex. 1), and the Order denying Plaintiffs' Motion for Reconsideration of the Order granting Defendants' Motion for Summary Judgment, entered December 15, 2023 (Ex. 2). Appellant received written notice of entry of the Order denying Plaintiffs' Motion for Reconsideration on December 15, 2023.

January 12, 2024

s/James M. Griffin

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
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Case No. 2020-CP-40-04603

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

Respondents.

PROOF OF SERVICE

I, Jaime Harmon, legal assistant to the attorneys for the Appellants, Griffin Humphries LLC, located at 4408 Forest Drive, Suite 300, Columbia, South Carolina 29206, hereby certify that on January 12, 2024, I have served all counsel in this action a copy of the **Notice of Appeal** by emailing a copy to each attorney listed below using their primary email address listed in the Attorney Information System.

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Daniel Coble, Circuit Court Judge

Appellate Case No. 2024-000065

Lower Court Case No. 2020-CP-40-04603

South Carolina Public Interest Foundation and John Crangle,
individually, and on behalf of all others similarly situated,.....Plaintiffs – Appellants,

v.

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

PLAINTIFFS – APPELLANTS’ MOTION TO CERTIFY CASE FOR REVIEW

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Attorneys for Plaintiffs-Appellants
March 19, 2024

Pursuant to Rule 204(b), SCACR, South Carolina Public Interest Foundation (“SCPIF”) and John Crangle (“Crangle”) hereby move to certify for review by this Court the case of *South Carolina Public Interest Foundation et al. v. Alan Wilson, Attorney General for the State of South Carolina, et al.*, S.C. Appellate Case No. 2024-000065 currently pending before the South Carolina Court of Appeals.

Certification is appropriate because the case involves issues of significant public interest and legal principles of major importance as previously recognized by this Court in its Order of July 6, 2021 certifying a previous dismissal of Plaintiff-Appellant’s claims based upon lack of standing, (Exhibit A). This Court reversed the Circuit Court’s order of dismissal on September 14, 2022, Opinion No. 28112 (Exhibit B), and remanded the case to the Circuit Court. Upon remand the Circuit Court again dismissed Plaintiffs-Appellants Complaint in an Order filed October 20, 2023, (Exhibit C).

In the Circuit Court, the parties disputed the directive issued by this Court in its September 14, 2022 ruling. Appellees and the Circuit Court interpreted this Court’s ruling as limiting the scope of review on remand to a very narrow question: “whether subsection 1-7-150(b) authorized the Attorney General to enter into contingency fee agreements” and nothing more.¹ Appellants interpret this Court’s ruling differently—at issue here are the statutory limits on the Attorney General’s authority to retain counsel on a contingency fee basis, not the question of whether he has such general authority in the abstract. Appellants contend that this Court remanded the case for a full consideration of Plaintiffs’ claims, including whether subsection 1-7-150(b) permits the Attorney General to use settlement proceeds to pay contingency fees when the fees are NOT awarded by court order or settlement. The ultimate question is whether the Attorney General can

¹ See Motion of Attorney General For Summary Judgment (12/15/22) (Exhibit D).

divert settlement proceeds payable to the State of South Carolina from the State's general fund to pay retained counsel's fees without violating subsection 1-7-150(b). Only this Court knows for certain the scope of issues that this Court intended for the Circuit Court to address on remand. For this reason alone, certification of this appeal is appropriate.

Respectfully submitted,

s/ James M. Griffin

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March 19, 2024

Attorneys for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that I have am herewith serving the foregoing PLAINTIFFS–
APPELLANTS’ MOTION TO CERTIFY CASE FOR REVIEW upon the Respondents via email
as permitted by part (g)(3) of Supreme Court Order 2020-05-29-02, on this the 19th day of March
2024:

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Daniel Coble, Circuit Court Judge

Appellate Case No. 2024-000065

Lower Court Case No. 2020-CP-40-04603

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

v.

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

**DEFENDANTS – RESPONDENTS RETURN TO MOTION TO CERTIFY CASE
FOR REVIEW**

By way of Return to Plaintiffs–Appellants’ Motion to Certify Case (“Motion”) filed March 19, 2024, the undersigned Defendants-Respondents agree with Appellants that “[c]ertification is appropriate because the case involves issues of significant public interest and legal principles of major importance” Motion at 2. These Defendants-Respondents further note, in certifying the prior appeal in this case, this Court cited SCACR Rule 204(b), which contains the “significant public interest” or “legal principle of major importance” standards. Accordingly, this Court has already determined that this case involves an issue of “significant public interest” or a “legal principle of major importance.”

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S.C. SUPREME COURT

Nevertheless, Appellants claim in their Motion that “Appellees and the Circuit Court interpreted this Court’s ruling as limiting the scope of review on remand to a very narrow question: ‘whether subsection 1-7-150(b) authorized the Attorney General to enter into contingency fee agreements’ and nothing more.” Motion at 2 (footnote omitted). But that is precisely the language this Court used, holding that “There is a need for future guidance as to whether subsection 1-7-150(B) authorizes the Attorney General to enter into contingency fee agreements.” *S.C. Pub. Int. Found. v. Wilson*, 437 S.C. 334, 342–43, 878 S.E.2d 891, 896 (2022). Earlier in the opinion, the Court used similar language, finding the threshold issue to be “the Attorney General's statutory authority to enter contingency fee agreements with private law firms.” *Id.*, 437 S.C. at 342, 878 S.E.2d at 895.

The Court below stated the issue before it by directly quoting this Court’s language as set forth immediately above, that is, “‘whether subsection 1-7-150(B) authorizes the Attorney General to enter into contingency fee agreements.’ 437 S.C. 334, 342 (2022).” October 20, 2023, Order at 1 (Exhibit C to Appellants’ Motion).

Thus, while Respondents do not agree with Appellants’ characterization of the issue on appeal, Respondents do agree that this Court’s prior decision must be duly considered in the present appeal, which means that this Court is the most appropriate forum to address the Order below. As a result, Respondents join Appellants in requesting that this appeal be certified.

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,

s/ J. Todd Rutherford, S.C. Bar No. 12097

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March 26th, 2024

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Mar 27 2024

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court Of Common Pleas
Daniel Coble, Circuit Court Judge
Circuit Court Case 2020CP4004603

Appellate Case No. 2024-000065

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

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

**RETURN OF ATTORNEY GENERAL
TO MOTION TO CERTIFY**

The Attorney General concurs in the Return of the Respondent law firms to the Motion to
Certify this case to the Supreme Court. He agrees that certification is appropriate in this case.

Respectfully submitted,

ALAN WILSON
Attorney General

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S.C. Bar No. 1373

s/ J. Emory Smith, Jr.
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March 27, 2024

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
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v.

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

CERTIFICATE OF SERVICE

I hereby certify that I have served the Attorney General's Return to Motion to Certify by
emailing it to counsel for the other parties at the email addresses below this March 27, 2024

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March 27, 2024

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March 27, 2024

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Cc: [Jaime Harmon](#); [Daphne L. Greve](#)
Subject: RE: Appellant Case No. 2024-000065 South Carolina Public Interest Foundation , plaintiff, et al vs Alan Wilson , defendant, et al
Date: Wednesday, March 27, 2024 4:39:00 PM
Attachments: [Return of AG to Motion to Certify \(03538496xD2C78\).PDF](#)
[image001.png](#)

Good afternoon.

Attached is the Return of the AG to the Motion to Certify.

Emory

J. Emory Smith, Jr. | Deputy Solicitor General
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STATE OF SOUTH CAROLINA **TRANSCRIPT OF RECORD**

COUNTY OF RICHLAND CASE NO.:2020-CP-40-04603

ORIGINAL - WEBEX MOTIONS

October 11, 2023

BEFORE: The Honorable Daniel Coble

SOUTH CAROLINA PUBLIC INTEREST FOUNDATION, et. al,
Plaintiffs,

vs.

ALAN WILSON, et. al,
Defendants.

APPEARANCES:

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Appearing for the Plaintiffs.

James Todd Rutherford, Esq.
Emory Smith, Esq.
Kenneth Woodington, Esq.
Appearing for Defendants

Recorded by: WebEx Video Courtroom

Transcriber:
Natalie Dahl, RPR
Official Stenographic Court Reporter
National Registered Professional Reporter

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NOTE: Pursuant to Rule 607 (H) (1) (B), SCACR "A Court REPORTER SHALL RECEIVE THE FEE OF \$1.00 PER PAGE FOR FURNISHING A COPY OF A PREVIOUSLY PREPARED TRANSCRIPT." All requests for a copy of the enclosed transcript shall be sent to: Natalie Dahl, RPR, P.O. Box 762, Conway, SC 29526

INDEX

Witnesses

Page

(NONE)

EXHIBITS

(None)

TRANSCRIPT LEGEND

Dash (--) Indicates an interruption in speech
Ellipses (...) Indicates trailing off in speech
Phonetic (ph) Indicates a phonetic word
(Indiscernible) Indicates word(s) are not discernable due to audio recording quality

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P R O C E E D I N G S

THE COURT: Good morning, ladies and gentlemen. We're going to get started with this morning's docket.

First up we have South Carolina Public Interest Foundation versus Alan Wilson, among others. I see Mr. Griffin is present, Mr. Smith, Mr. Rutherford, as well as others. I believe this is the plaintiffs' motion -- several motions. So I'll let whoever is arguing go right ahead.

MR. RUTHERFORD: Your Honor, I believe that we have a motion for summary judgment that we would like to argue, and I think that should be the first motion that Your Honor hears. But, again, I'll leave it to Your Honor to decide how you want to take whatever is in front of you.

THE COURT: Yeah. I would like to hear the summary judgment motion to kind of paint a full picture of this case, and then we can go from there.

MR. RUTHERFORD: Thank you, Your Honor. May with it please the Court?

Jim, I'll go ahead and start, if that's okay?
Jim, can you hear me?

MR. GRIFFIN: Yeah. Sure. Go ahead, Todd.

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1 MR. RUTHERFORD: Your Honor, as you can see
2 from the pleadings we submitted, the supreme court
3 sent this case back to the circuit court to decide
4 what they said is a threshold issue, and that
5 threshold issue being as to whether the Attorney
6 General of South Carolina can enter into a
7 contingency fee agreement with the lawyers, and in
8 this case, Willoughby & Hoefer and other lawyers.

9 What we believe is clear in the South
10 Carolina statute -- and I'll just refer to
11 1-7-150(b), but I'll shorten it to 150(b) in the
12 future -- is that the Attorney General has that
13 authority, was given that authority by the South
14 Carolina General Assembly. That authority was
15 further recognized when passing (indiscernible) to
16 take into account all of the moneys that were being
17 collected, and created a litigation recovery
18 account, recognitions that the Attorney General
19 could enter into contingency fee agreements has
20 done so in the past, is doing so currently, and can
21 do so in the future.

22 As the supreme court stated, this is a
23 threshold issue. We would argue that once Your
24 Honor agrees that the Attorney General can enter
25 into contingency fee agreements, that ends this

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1 case. Because if the Attorney General can do so,
2 he did so in this case. It would be perfectly
3 legal at that point, and there is nothing else to
4 argue, and that is why we're asking for summary
5 judgment.

6 We have looked at all the pleadings that the
7 plaintiffs put up, but believe that they go past
8 what is, again, considered by the supreme court to
9 be the threshold issue. Threshold meaning you
10 either enter, or you do not. We believe, again,
11 that the Attorney General was right to sign this
12 contract, to enter into this contract. He did so
13 legally, lawfully, with the consent of the General
14 Assembly as 150(b) states, and is later recognized
15 by the litigation recovery account that was created
16 by the General Assembly.

17 THE COURT: Okay. Thank you.
18 Mr. Rutherford, let me ask you this -- I read the
19 opinion from Justice James on this question -- is
20 this Court, myself, are we getting into the merits
21 of the -- of the actual contract or the dispute?
22 Because I read Mr. Griffin's brief and they kind of
23 take the threshold question a little bit
24 differently as opposed to can he enter into these
25 agreements under the entire law, kind of a broader

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1 picture.

2 MR. RUTHERFORD: In reading their brief, I
3 believe they are trying to jump over the threshold
4 without entering the threshold. And as stated by
5 the supreme court, by the majority, you have to
6 enter the threshold. By entering the threshold,
7 you are relying on the statute, plain language of
8 the statute, which considers litigation costs.

9 What is litigation costs if it's not
10 attorney's fees? That's the broad reading of
11 litigation costs. It is exactly what the General
12 Assembly said, and exactly what they meant. To
13 jump into the merits, like the plaintiffs wish to
14 do, is jumping over the threshold. They can't do
15 that. We have to decide that the Attorney General
16 can either enter into the contract, or he cannot.

17 If he cannot, then I believe that's when you
18 get into the merits. But we would argue that the
19 statute that the creation of the litigation of
20 recovery account, that everything later on that the
21 General Assembly has done to recognize that these
22 contracts have been going on for decades, that they
23 continue to go on, suggests that that threshold
24 cannot be crossed by the plaintiff. They have to
25 stop with the fact that the General Assembly

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1 recognizes and has authorized the Attorney General
2 to enter into contingency fee contracts.

3 THE COURT: Thank you, Mr. Rutherford.

4 I'm happy to hear from you, Mr. Griffin.

5 MR. SMITH: Your Honor, if I may, Emory
6 Smith. We have a motion for summary judgment also.
7 It probably would be best to address both at the
8 same time. If I might confer just briefly with my
9 co-counsel as to whether I have anything to add to
10 Mr. Rutherford's argument, but we do concur on
11 that.

12 THE COURT: Yes, sir, please.

13 MR. SMITH: I'm going to mute.

14 (A brief pause in the proceedings.)

15 MR. WOODINGTON: Your Honor, this is Ken
16 Woodington with Will Davidson. I'm not sure if we
17 were on when the hearing came on, but I just wanted
18 to let you know we are here representing the firm
19 of Davidson, Wren.

20 THE COURT: Thank you, sir.

21 MR. SMITH: Your honor, I would just simply
22 -- as I said, we concur in the arguments of
23 Mr. Rutherford. I refer Your Honor to our
24 memorandum we filed in this case. In particular, I
25 would call your attention, Your Honor, please, to

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1 Page 11 of our brief that recites the history of
2 Section 150(b), and how it was not intended to
3 restrict the Attorney General from hiring
4 contingency fee contracts and paying out the
5 proceeds pursuant to the contracts, which are
6 binding and lawful documents.

7 I would also note that, as set forth in that
8 history section, that we -- the General Assembly
9 back in '97/'98 had considered a proposal that
10 would have given the Budget Control Board oversight
11 over the Attorney General's contingency fee
12 contracts, and that the budget control board --
13 that that provision was not passed, and so the
14 General Assembly determined then that there was no
15 oversight over these contingency fee contracts
16 tendered by the Attorney General.

17 We agree with Mr. Rutherford that the inquiry
18 stopped with whether the Attorney General has the
19 authority to enter contingency fee contracts, given
20 that he does, that the plaintiffs have conceded
21 that he does, that should end the inquiry, because
22 the contract is a legally binding instrument that
23 the Attorney General is bound to honor and follow,
24 and we believe that it is controlling in this
25 instance, and that that really stops the inquiry

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1 here.

2 We may have something else to add on reply,
3 but as for now, that is our argument.

4 THE COURT: And let me ask you this,
5 Mr. Smith: So, you know, reading the opinion,
6 "Appellant's complaint presents a threshold issue
7 of the Attorney General's statutory authority to
8 enter contingency fee agreements with private law
9 firms."

10 So I've read all of the briefs, and a lot of
11 it is quoting the arguments out of the supreme
12 court about the admissions by plaintiffs
13 essentially conceding what -- that point. But if
14 it doesn't -- and Mr. Griffin, I read theirs where
15 they tried to further dispute the threshold -- the
16 threshold question, that it's more complexed than
17 that.

18 Do you -- I mean, obviously, you would say
19 you still win even if we go along with Mr.
20 Griffin's definition -- or what the issue from the
21 supreme court was, why would that be? If that
22 makes sense?

23 MR. SMITH: I'm sorry. Why would what be,
24 Your Honor?

25 THE COURT: Well, when Mr. Griffin responds

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1 and says that the question from the supreme court
2 was actually broader than what you all are saying.

3 MR. SMITH: Well, Your Honor, I believe that
4 the reference to consider the merits of the claims
5 has to refer back to the issue on which the Court
6 remanded it, which was the Attorney General's
7 authority to enter contingency fee contracts.

8 Not only did they concede that authority,
9 it's also clear from case law and from the statutes
10 that he does have that authority. Our memorandum
11 cited orders of other circuit court judges in the
12 Cephalon and Eli Lilly cases in which they found
13 that the Attorney General did have authority to
14 enter contingency fee contracts and pay out the
15 proceeds pursuant to them. And that was also the
16 preliminary finding of Judge Lee in this case, and
17 it was also the preliminary finding of -- I can't
18 recall the name of which judge -- who decided the
19 motion to dismiss, that he indicated that he
20 concurred with her on that point.

21 But we believe that once it's determined that
22 there is a contingency fee contract, that that's
23 dispositive. That is binding. That is a document,
24 a matter of law that the Attorney General is bound
25 to honor, and so any merits inquiry really stops

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1 with that.

2 And -- but -- but even if this Court were to
3 go beyond that, our briefs go into reasons why
4 under common law, under these orders I mentioned,
5 under the various statutes in play, that the
6 Attorney General clearly has the authority here to
7 enter this contract, and to pay out these proceeds.

8 I'll be glad to go into that further, but I
9 hope I've answered your question, Your Honor.

10 THE COURT: Yeah. Thank you, Mr. Smith.

11 All right. Mr. Griffin?

12 MR. GRIFFIN: Thank you. Thank you, Judge
13 Coble. Just for the record, I'm here on behalf of
14 John Crangle, and the South Carolina Public
15 Interest Foundation. Jim Carpenter is as well.
16 Badge Humphries. Badge is down the hall in my
17 conference room. I believe Mr. Crangle is present,
18 and John Mumph (phonetic) from the state newspaper
19 was going to attend. I think he was there. If
20 he's not there, he will be there shortly.

21 Judge Coble, it's -- the supreme court
22 doesn't send cases back to the circuit court for
23 futile reasons. In the argument before the supreme
24 court, in the abstract, we did not take the
25 position that the Attorney General lacks authority

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1 to enter in contingency fee agreements.

2 What the question is, and what the question
3 on remand is: Is what authority -- what statutory
4 authority does the -- does the Attorney General
5 have to enter into this fee agreement, and those
6 like it that are on the website, where, according
7 to the Attorney General and his counsel, that he
8 can give away as much of this recovery of the State
9 as he wishes?

10 Under the Attorney General's theory, and
11 under counsel's theory, if -- if they negotiated a
12 contract where they got a 90-percent recovery, that
13 would be okay. No one can second guess it. And so
14 the fact of the matter is what was on remand is for
15 this Court to examine, among other things, the
16 interplay between 150(b) and the language in
17 150(b), and how -- what restrictions there are on
18 the Attorney General's ability to use proceeds,
19 settlement proceeds, when there's not been an
20 attorney's fee award or an award by the other party
21 pursuant to a settlement to pay the attorney's
22 fees. What is the authority of the Attorney
23 General to take state funds and appropriate towards
24 a contingency fee agreement? And that is the issue
25 that is on remand.

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1 And, Your Honor, I have prepared a PowerPoint
2 to address these arguments. I'm trying to pull
3 this up. I hope I can do this successfully.

4 Is everyone able to see that? Maybe not.

5 THE COURT: I can see it.

6 MR. GRIFFIN: Okay.

7 THE COURT: Mr. Smith and Rutherford, can you
8 see that as well?

9 MR. RUTHERFORD: I can, too, Your Honor.
10 Thank you.

11 THE COURT: Mr. Smith can, too. Okay.

12 MR. GRIFFIN: We e-mailed this around right
13 before the hearing, and I appreciate everyone's
14 accommodation.

15 So the supreme court did not limit the
16 plaintiffs' standing to the one single issue that
17 the Attorney General and counsel have claimed.

18 Clearly, the opinion says, The complaint --
19 I'm sorry. "The complaint presents a threshold
20 issue of the Attorney General's statutory authority
21 -- statutory authority to enter into contingency
22 fee agreements with private laws."

23 The opinion further says that there is a need
24 -- "There's a need for future guidance as to
25 whether Subsection 1-7-150(b) authorizes the

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1 Attorney General to enter into contingency fee
2 agreements. We, therefore, hold appellants have
3 public importance standing." That's the question:
4 Public importance standing.

5 Importantly, Judge Coble, in Footnote 5 of
6 the supreme court's decision, which is right after
7 they find that public importance standing, the
8 supreme court says: "Because we decide this appeal
9 on public importance grounds, we need not address
10 derivative standing."

11 Your Honor, we had pled, in the alternative,
12 that we had taxpayer derivative standing to sue, to
13 challenge the fee award, to recoup the money.
14 There is much broader claims than just the single
15 issue that -- that the defendants wish the Court to
16 think is all before the Court.

17 And, of course, we don't need to address
18 derivative standing because we have concluded the
19 public importance standing. And, then, to make it
20 crystal clear, the Court says: "We reverse the
21 circuit court's finding that appellants lack public
22 importance standing and remand for the circuit
23 court to consider the merits of appellant's
24 claims." Claims, multiple. Claims, multiple.

25 And here are the plaintiffs' claims: "We

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1 alleged in a declaratory action, Section 1-7-150(b)
2 limits the Attorney General's authority to pay
3 attorney's fees from settlement proceeds." And
4 we'll get to that in more detail.

5 And then declaratory judgment is the General
6 Assembly has the exclusive authority to appropriate
7 money from the general fund, and that the Attorney
8 General has no authority.

9 And then we also allege that the Attorney
10 General's payment of \$75 million in public funds
11 violates the separation of powers clause. And then
12 in the alternative, we seek that the Attorney
13 General has no authority to pay any fee from the
14 settlement, unless and until it is approved by the
15 Court as reasonable.

16 Further, we've alleged a constructive trust,
17 over \$75 million, that was transferred to the laws.
18 We seek the return of the \$75 million to the State
19 and injunctive relief.

20 Those are the claims that have been remanded.
21 Your Honor, if the Court had determined that a
22 standing was lacking as to any of those claims, it
23 would have dismissed those claims before it sent it
24 back to remand. None of our claims were dismissed
25 at the supreme court. They were all remanded back

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1 to this court. It's a standing issue, frankly. I
2 mean, if we don't have public importance standing
3 to pursue -- if the only claim we have public
4 importance standing to pursue is the single issue
5 as to does the Attorney General have abstract
6 authority to enter into contingency fees without,
7 you know, examining 170(b), and the other factors,
8 then they would have dismissed all of these other
9 claims. They would have, because we wouldn't have
10 had standing to pursue, but it remanded the case
11 because we have public importance standing, and
12 asked the Court, you, Your Honor, in this circuit
13 court to consider all of our claims.

14 Now, we think summary judgment at this point
15 is premature because we've been denied any
16 opportunity to conduct discovery. I filed a
17 Rule 56(f) affidavit in support of this argument,
18 and there are issues that need to be addressed.
19 One is the reasonableness of attorney's fees, and
20 you saw that in one of our declaratory judgment
21 claims as, you know, is it reasonable? It has to
22 be court approved.

23 The defendants argue in their brief that the
24 attorney's fees were, in fact, awarded by
25 settlement. And the settlement agreement, Your

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1 Honor, that is attached says: "Each side is
2 responsible for their own attorney's fees." And
3 then after we filed the lawsuit, the Attorney
4 General and his counsel got together with counsel
5 for the Department of Energy, and they submitted a
6 dismissal from the court of claims of appellant
7 courts, and in that, you know, they have some
8 curative language.

9 Now, the question is: Were the fees awarded
10 by settlement? You know, they took the position in
11 their brief that the fees were awarded by
12 settlement. We think clearly not, and I think
13 Justice Few in his questioning and points he raised
14 during oral argument -- I mean, he points out
15 clearly that the attorney's fees were determined by
16 contract with the Attorney General, and not
17 determined by the Department of Energy, and this is
18 not fees like the cost shifting statute that was
19 awarded by settlement.

20 And then we think, you know, discovery is
21 opened up because of the Attorney General's prior
22 practices. Have they had contingency fees being
23 approved by the court in the past? What is the
24 extent of that, and how have they performed that?

25 We hear today, and the argument is, Oh, we've

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1 always done it this way, and the General Assembly
2 hasn't changed anything we've done; so, therefore,
3 you know, you need to accept the fact that it's
4 always been this way. Well, how do we know it's
5 always been this way? We haven't had any discovery
6 to determine if it's always been this way. So
7 we're entitled to that.

8 And I'll point out, Judge Coble, that ten
9 pages of their brief -- nearly half of it -- they
10 go into their Herculean efforts of what they did to
11 get the -- you know, a settlement award of
12 \$600 million. I mean, if this doesn't open up our
13 right to discovery, I don't know what does. They
14 are relying upon all of the factual predicate to
15 argue that they are entitled to summary judgment,
16 yet we have been denied every opportunity for
17 discovery.

18 So we think under 56(f) it is premature. We
19 ask the Court to continue this hearing until we
20 have a sufficient opportunity to conduct discovery.
21 We have served discovery. They have not answered
22 it. They filed a motion for a protective order
23 that is before the Court. And so you want to talk
24 about threshold, this is the threshold point that
25 needs to be addressed. We are entitled to

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1 discovery before we hear the motion for summary
2 judgment.

3 If the Court gets into the merits, which
4 we're more than happy for the Court to analyze the
5 statutory requirements here, but Section 1-7-150(b)
6 requires that -- I have something blocking my
7 screen here. Hold on one second -- requires that
8 all funds received by judgment or settlement be
9 deposited into the State's general fund, except for
10 investigative costs and litigation costs awarded by
11 court order or settlement."

12 Now, I do agree with Mr. Rutherford that
13 litigation costs include attorney's fees, but it is
14 qualified here: "Litigation costs awarded by court
15 order or settlement."

16 Now, the specific language of 1-7(b) says
17 this: "Attorney General shall" -- this is A.
18 "Attorney General shall account to the State
19 Treasurer for all fees, bills of costs, and monies
20 received by him by virtue of his office."

21 So it says fees, bills of costs and monies
22 received by him, so it has to account. So they
23 talk about accounting. Subsection A talks about
24 accounting. Subsection B says: "All monies
25 awarded the State of South Carolina by judgment or

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1 settlement in actions or claims brought by the
2 Attorney General on behalf of the State or one of
3 its agencies, must be deposited in the general fund
4 of the State."

5 Now, there is a carve-out from that, but this
6 is mandatory: "All monies awarded the State by
7 judgment or settlement has to go in the general
8 fund." This is not an accounting thing. This is a
9 direction. This is a direction. It is not an
10 accounting. It is a direction. It is a mandate.
11 And the only exception to that mandate is: "Except
12 investigative costs or costs of litigation awarded
13 by court order or settlement."

14 And, here, we do not have a court order of
15 attorney's fees or by settlement. Now, if they
16 want to argue that in their brief that, oh, it was
17 awarded by settlement, we say it's not. That is a
18 factual issue that we need discovery on.

19 That's -- they also rely on Section 1-7-85,
20 which essentially authorizes the Attorney General
21 to be paid for his time and effort from other state
22 agencies or circuits where they're doing --
23 representing the State in criminal proceedings.
24 And then there's a provision in 1-7-85 that says:
25 "These costs may include, but are not limited to,

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1 attorney's fees or investigative costs" or -- here
2 we go -- "costs of litigation awarded by court
3 order or settlement."

4 And then, lastly, it says: "Reimbursement of
5 these costs may be obtained by the Office of
6 Attorney General from the budget of an agency or
7 officer that it is representing, or funds generally
8 appropriated for legal expenses with the approval
9 of the State Budget and Control Board."

10 This says nothing about what you do with
11 monies that the Attorney General collects through
12 judgment or settlement representing the State. So
13 this does not specifically address our factual
14 scenario. But, again, it has the same language:
15 "Litigation costs awarded by court order or
16 settlement."

17 And then the defendants rely on this Proviso
18 59.8, which essentially says that during the
19 current fiscal year when there's a recovery or an
20 award in any litigation managed by the Attorney
21 General, any funds received that would have
22 otherwise been credited to the general funds shall
23 be deposited to the credit in a special account
24 created in the Office of the State Treasurer
25 entitled "litigation recovery account." The funds

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1 deposited in this account must be expended only as
2 prescribed by law.

3 Now, I mean, what this is basically saying is
4 that the money that -- instead of putting it in a
5 general fund, we'll put it in this holding account
6 at the Office of the State Treasurer. Not the
7 holding account of the Attorney General, at the
8 Office of the State Treasurer. And then, you know,
9 at the end of the year, the next budget year, they
10 are going to determine what to do with that money.

11 It says: "The funds deposited in this
12 account must be expended only as prescribed by
13 law." The most circular argument that we've heard
14 in the case is, well, prescribed by law means if
15 the Attorney General enters into a contract that
16 violates 150(b), that the Attorney General has to
17 abide by it, and it's prescribed by law. And the
18 Attorney General cannot violate the law by entering
19 into a contract and say, oh, I made new law
20 because, you know, we support contract. It is an
21 illegal contract. It is void ab initio. So that
22 is a circular argument, and it gets them nowhere,
23 and it's improper.

24 And so, you know, at this point, Your Honor,
25 we strongly believe that the case should go

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1 forward. We're entitled to discovery, and that,
2 you know, it's premature to hear this motion for
3 summary judgment.

4 If the Court were to, you know, rule on the
5 merits of the summary judgment, there are factual
6 issues as to whether the fee was reasonable,
7 whether the fee was awarded by settlement. I don't
8 think that it really should be factual, but they
9 did, you know, at the eleventh hour, after we filed
10 the lawsuit, tried to fix, you know, something in a
11 dismissal filing.

12 But, in any event, those will be factual
13 issues. The statutory issue before the Court, I
14 mean, it's pretty clear -- pretty clear. All the
15 monies -- and 150(b) is crystal clear. It says:
16 "All monies shall be deposited into the general
17 fund, and monies from settlements, monies from
18 judgment. And there is an exception: "Litigation
19 costs awarded by settlement in a court order." And
20 that is the question here. Were these attorney's
21 fees awarded by settlement or court order? And
22 that is a factual order at a minimum. We don't
23 think it is really subject to dispute.

24 And, lastly, Your Honor, we cited in our
25 briefs, you know, some colloquy from the questions

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1 from the Court. I can tell you it was a hot court
2 that day. We've all been in front of the supreme
3 court or heard arguments. Every Justice had
4 questions to ask. And -- and, Your Honor, I would
5 just encourage you -- it is online. You can still
6 listen to it. If you have any question about the
7 scope of the remand or how that Court viewed the
8 legal issues in this case, just listen to the
9 argument. It's crystal clear that the defendants
10 here have an uphill battle in the supreme court, in
11 our view.

12 MR. RUTHERFORD: If I could respond, Your
13 Honor?

14 THE COURT: Yes, sir, Mr. Rutherford.

15 MR. RUTHERFORD: Thank you, Your Honor. And,
16 again, may it please the Court.

17 This is the fourth time we've heard all of
18 the arguments, both via brief and oral arguments,
19 not just in front of Judge Lee, Judge Griffin, but
20 also the supreme court. The supreme court heard
21 everything they said, read everything they pled,
22 and Your Honor came down with this issue, that the
23 plaintiffs have standing. The question is whether
24 the Attorney General of this state has the
25 authority to enter into contingency fee agreements.

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1 That's the wording of their order. That's what
2 they allowed them to have standing to ask.

3 That question is posed to Your Honor. We
4 believe it is answered by 150(b). We believe it is
5 further answered by the General Assembly's actions
6 in the past, in the present, and in the future
7 where the General Assembly's ability and
8 willingness to accept the money that the Attorney
9 General has generated, placing it into a special
10 account that the General Assembly created just for
11 these monies.

12 The argument that the plaintiffs make, they
13 already made. They failed on those arguments.
14 They want to continue this discussion. They want
15 to continue this lawsuit past the threshold that
16 the supreme court has laid out.

17 Your Honor, most importantly, we didn't
18 appeal this case to the supreme court. The
19 plaintiffs did. They are unhappy with their answer
20 because the supreme court narrowed what Your Honor
21 can look at to one issue. We believe if you answer
22 that issue, that ends this lawsuit. To say
23 otherwise would be to open it up to the merits of
24 the case, like they suggest. But even then, they
25 have argued the merits. The merits are exactly

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1 what they talked about. It is whether someone
2 agrees with that or not. Discovery as to whether
3 you have a contingency fee agreement, whether it is
4 by settlement, all of this is as transparent as it
5 gets. This is not some lawsuit brought in the
6 dark. The contract is online. The agreement is
7 online. The settlement is online. The judge's
8 names, everything that was done in this case is
9 open. This was not a lawsuit brought against
10 somebody that tried to keep it a secret.
11 Everything here is out in the open.

12 Your Honor can simply rule on this based on
13 what they've already alleged four different times,
14 from what they have argued four different times.
15 In doing so, the plain language in not only in the
16 statute, but of the order from the supreme court,
17 the answers that were given by Mr. Carpenter in
18 front of the supreme court imposed by the question
19 by Justice James which was: So is it your position
20 every single contingency fee agreement by the
21 Attorney General that he enters into with a law
22 firm or private attorney violates the law? Mr.
23 Carpenter's answer: No.

24 Your Honor, they have answered the threshold
25 question. They did so in front of the supreme

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1 court. We could not -- we could not -- no one here
2 could generate the order from the supreme court.
3 They gave it to us. It said the plaintiffs have
4 standing to ask the threshold question, and in
5 answering that question, we believe this lawsuit
6 ends here by way of summary judgment.

7 THE COURT: Mr. Smith, did you want to add
8 anything for the Attorney General?

9 MR. SMITH: Yes, please. Briefly, Your
10 Honor, we concur with Mr. Rutherford's remarks.
11 But, again, we believe that the contingency fee
12 contract, which plaintiffs agree the Attorney
13 General has the authority to enter, is of course a
14 legally binding agreement. The fees under that
15 agreement belong to the attorneys. The legislature
16 would not have authority to appropriate monies that
17 belong to private parties; in this instance, the
18 contracting attorneys.

19 For the plaintiffs to argue differently would
20 mean that an attorney entering a contingency fee
21 contract would know that it could be breached, that
22 it would be uncertain as to what, if any, money
23 they would get, because according to the
24 plaintiffs' view, it would all have to go to the
25 General Assembly and be appropriated, subject to

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1 court approval, all of which conflicts with the
2 nature of a contract as a legally binding
3 instrument, and how that under that contract these
4 monies belong to the attorneys.

5 And so we believe that this is conclusive. I
6 would note -- as I mentioned earlier -- the
7 Cephalon order said -- and that is at Page 29 of
8 our exhibits, Judge G. Thomas Cooper said the
9 Attorney General possesses the authority to
10 associate outside attorneys to assist with
11 enforcement actions, and to pay those outside
12 attorneys on a contingency fee basis with money
13 received in any settlement or judgment obtained in
14 the case.

15 The Lilly case is consistent with that, and
16 so is Judge Lee's preliminary ruling in this case.

17 Let me, please, if I may, confer with my
18 counsel as to whether....

19 (A brief pause in the proceedings.)

20 MR. SMITH: Your Honor, that concludes our
21 reply, unless Your Honor has questions.

22 THE COURT: I'll hear from Mr. Davidson at
23 this point.

24 MR. WOODINGTON: Actually, I'm Mr.
25 Woodington. Mr. Davidson is off screen. But I'm

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1 sorry we were late getting on. We had some
2 technical problems with our Webex this morning.

3 I just want to say that we adopt by reference
4 everything Mr. Smith has said and everything that
5 is in the Attorney General's brief.

6 I would call particular attention to the part
7 of the AG brief on Page 14 where they argue that
8 the statute should not be read as requiring that
9 the settlement agreement itself must contain an
10 award of attorney's fees, because that would be an
11 absurd requirement requiring -- would give the
12 defendant the control over whether the attorney's
13 fees are awarded. It is set forth in that one
14 paragraph on Page 14. I don't need to elaborate on
15 it, but I did just want to call attention to that
16 and the fact that we join in that, and this law
17 firm joins in that.

18 THE COURT: Thank you, sir.

19 Mr. Griffin, you wanted to add something?

20 MR. GRIFFIN: Yes, Your Honor, if you don't
21 mind.

22 THE COURT: I'm here all morning, so we can
23 go back and forth as much as needed. But,
24 obviously, whoever's motion it is, I always give
25 them the last word, but I'm happy to hear from you.

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1 MR. GRIFFIN: A couple of points. The fee
2 agreements in this case, and the ones online, all
3 have a very similar provision that says the amount
4 of the fee is subject to court approval or, you
5 know, must be court approved when appropriate.

6 So the contracting authorities, when they
7 entered into an agreement, they recognize there is
8 some supervision. So there is not just carte
9 blanche under the written fee agreement.

10 Secondly, the Cephalon case by Judge Cooper,
11 you read that case and Judge Cooper says at the end
12 of the case, I will be awarding the fees and
13 determining what is reasonable. Judge Cooper says
14 that, and that is the relief we're seeking in this
15 case, is some judicial supervision over the amount
16 of the order, amount of the fees, and it can't be
17 left totally to the discretion of the Attorney
18 General. Even the fee agreement is recognized, and
19 that's why we need discovery on this. Even the fee
20 agreements recognize that when appropriate, it
21 shall be subject to court approval, and that's all
22 we're asking. Thank you.

23 THE COURT: Let me ask you this, Mr.
24 Griffin -- and that -- a lot of this is a
25 separation of powers issue, potentially. But if

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1 the statute says the Attorney General from the
2 executive branch can come into these agreements,
3 and some of that money has to go to the legislative
4 branch, but then if the judicial branch --
5 obviously we're in charge of making sure that
6 statutes are complied with and the
7 constitutionality of them, but if I'm coming in and
8 saying, well, I believe in this case 12.5 percent
9 is not enough, it should be 12.8 percent should go
10 to this attorney, or I should take less from the
11 General Assembly, is that not setting the courts up
12 to become a super court almost, in charge of
13 monies, something outside of our scope?

14 MR. GRIFFIN: I mean, there are two points
15 there. One approach, frankly, is I think what
16 Justice Few described is awarded by court order.
17 What that means is a fee shifting statute, like
18 unfair trade practices or something where the
19 courts award the attorney's fees and it's coming
20 directly from the defendant. Awarded by settlement
21 is similar when you're compromising an attorney's
22 fee claim that is statutory.

23 So that is, you know -- I think that's
24 probably the cleanest way to look at it, Your
25 Honor. But, I mean, you are tasked with

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1 interpreting what that language means in 150 when
2 it says "litigation costs awarded by court order or
3 settlement." And so is it possible for the Court
4 to award attorney's fees when there is no fee
5 shifting statute? I don't know. That is an issue
6 for another day. But, certainly, at this point in
7 time, you know, we're entitled to discovery on how
8 that has been handled in the past.

9 I mean, it was a fee shifting statute because
10 I think it was an unfair trade practices claim, and
11 that's what Judge Cooper said. Judge Cooper said,
12 I will be making the determination.

13 MR. RUTHERFORD: Your Honor, again -- and I
14 know you said you are here all morning. Did you
15 say we have the last word, or Mr. Griffin gets the
16 last word?

17 THE COURT: I'll let -- whoever's motion it
18 was, I'll let them have the last word, so go right
19 ahead.

20 MR. RUTHERFORD: Yes, sir. It is our motion
21 for summary judgment.

22 Your Honor, you pointed out a salient point
23 in this because the plaintiffs, again, are arguing
24 that any judge could reduce the amount of recovery.
25 He ignores the point that a judge could increase

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1 it, which, again, does create a super court or
2 super judge who now sits in a position to look at
3 what is clearly a settlement. I don't know that
4 there's any other factual way, any other Miriam
5 Webster -- who they cited in their brief -- way to
6 determine what happened here.

7 When another party who is being sued settles
8 or gives out \$600 million, if they can come up with
9 another basic definition for that, then have at it.
10 The proper definition, the only definition, is that
11 it was a settlement.

12 The issue that the supreme court based their
13 order on was the threshold issue of whether the
14 Attorney General could enter into a contingency fee
15 agreement. If the Attorney General cannot, and
16 that does not count as litigation costs, then that
17 is where you get into the other issues that Mr.
18 Griffin brings up.

19 If the Attorney General can, by virtue of the
20 separation of powers executive branch, the powers
21 given to him by the Constitution, Article 1,
22 Section 8, and further by 150(b), and even further,
23 by the litigation recovery account, the Attorney
24 General can do all he did in this case. It was
25 transparent. It was legal. It was authorized by

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1 the South Carolina General Assembly, and that is
2 how we ended up here.

3 What the plaintiffs again seek to do is ask
4 Your Honor to do something that this court, no
5 federal court, no circuit court would have the
6 authority to do because of how this case was
7 brought. But as I get to that, I'll stay away from
8 it, not because I can't, because it gets past the
9 threshold, and the threshold, again, we believe,
10 has to be set by what the supreme court said. It's
11 a threshold issue as to whether the Attorney
12 General can enter into these contracts, and
13 specifically the contract in this case, and that's
14 it.

15 THE COURT: All right. We got -- if there is
16 anything else, I'm happy to hear on the motion of
17 summary judgment, but I believe we heard --

18 MR. GRIFFIN: Your Honor, one point came to
19 my mind as Todd was arguing, and I don't mean to
20 get in the last word, but he certainly can come
21 back.

22 But the question you raised about the Court's
23 authority to determine reasonable fees, I would
24 just point out in the class action context, where
25 there is a settlement, and I know it doesn't

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1 involve state money, but what the courts frequently
2 do in exercising their authority in the case
3 determines whether the fee is reasonable or not, or
4 court approval of the fees. And, here, we're
5 talking about state money and reasonableness of
6 fees, and I think courts are appropriately the body
7 to do that.

8 Also, you know, we could probably brief it,
9 but I do think that the State has inherent
10 authority to seek attorney's fees in an enforcement
11 action that they bring against a defendant. They
12 may not be able to do it against the United States
13 of America, but I believe the State has authority
14 to seek attorney's fees, even in the absence of a
15 fee shifting statute. Thank you.

16 THE COURT: I believe we heard everything on
17 those motions for summary judgment.

18 The remaining motion, we have the motion to
19 stay discovery and protection of discovery. I
20 believe that is from the plaintiffs' law firm as
21 well; is that correct?

22 MR. GRIFFIN: Your Honor, the defendants
23 filed a motion. We didn't lay a motion to compel
24 on top of that, but we think it should be denied so
25 that we can go forward.

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1 THE COURT: Let's go ahead and hear the other
2 motions for protection, the ones -- I believe that
3 is from Davidson, Wren, as well as Willoughby &
4 Hoefer.

5 MR. RUTHERFORD: Your Honor, we believe, as I
6 stated earlier, that this is not a case requiring
7 discovery.

8 We further argue, more importantly, that
9 pending your order, your decision on our motion for
10 summary judgment, that would be the appropriate
11 time to get into what the discovery issues are,
12 because obviously it is dispositive. But if Your
13 Honor would like to hear it now, we certainly can.

14 But as it relates to the fact that the
15 plaintiffs in this case state everything that
16 they've already argued four different times, there
17 is no need for us to get into discovery to
18 determine what the supreme court has said is
19 statutory. Either the Attorney General can enter
20 into these contracts, or he cannot.

21 The supreme court could have said that the
22 plaintiffs have standing to ask about the
23 reasonableness of the fee. The plaintiffs have
24 standing to get into whether this contract is valid
25 and/or invalid in another way. What they said --

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1 and they are, unfortunately for the plaintiffs, the
2 deciding factor is that the plaintiffs have
3 standing to assert that the Attorney General cannot
4 enter into a contingency fee agreement.

5 No discovery is necessary to determine
6 whether the plaintiff -- whether the plaintiffs'
7 statements, in front of the supreme court, where
8 they have already stated that the Attorney General
9 has that authority, we don't see how discovery
10 would be necessary to enter into that -- to enter
11 into the fray.

12 But, most importantly, Your Honor, once Your
13 Honor makes your decision, the plaintiffs can
14 continue on to assert that the Attorney General did
15 not have the authority to enter into this contract,
16 absent any discovery, unless they plan on taking
17 depositions of lawmakers as to what they meant by
18 150(b), what they meant by the litigation recovery
19 account. There is no discovery that needs to be
20 taken, because everything is already transparent.
21 They already have access to everything. In fact,
22 not only do they have access to it, the general
23 public has access to the contract, everything that
24 was done in this case.

25 We would argue that no discovery is

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1 necessary, that you stay discovery until after you
2 make your decision on the summary judgment motion.

3 THE COURT: Mr. Griffin?

4 MR. GRIFFIN: Yes, Your Honor. I addressed
5 this issue in my PowerPoint and my argument
6 previously. You know, the one question in the case
7 is, you know, were these attorney's fees awarded by
8 settlement, and that's a significant issue.

9 They spend ten pages of their brief arguing
10 and pointing out everything they did to earn the
11 attorney's fees. I mean, they want that to go
12 uncontested.

13 The Attorney General says, This is how we've
14 always done it; so, therefore, the General Assembly
15 has given their stamp of approval. Well, you know,
16 that's just their words.

17 And then Mr. Smith argued about the context
18 of when -- when 150(b) was enacted, and it was in
19 response to some legislative history. I mean,
20 we've not had any opportunity to do any discovery
21 on those points that they are sitting here arguing
22 to you, and we're entitled to that before Your
23 Honor rules -- or anyone rules -- on a motion for
24 summary judgment. Thank you.

25 MR. RUTHERFORD: Your Honor, I'm sorry, I did

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1 not hear an issue that would be dispositive by
2 discovery. What the plaintiffs' counsel spoke
3 about were things, again, that are statutory in
4 nature, things that are arguments about where we
5 already are, nor did I hear a definition of what
6 occurred in this case, other than the word
7 "settlement."

8 Settlement, as Your Honor knows, is the
9 plaintiff brings a lawsuit. The defendant can
10 fight it. But if they choose not to, they settle
11 the case. That's what happened here. That's how
12 we got here. Unless there is an alternative
13 definition that exists outside of any legal
14 dictionary or Miriam Webster that I'm aware of,
15 then I don't know how they can get around the fact
16 that this was clearly a settlement.

17 But, again, no discovery is necessary to
18 redefine the word "settlement," to redefine
19 "litigation costs," and to redefine what the
20 supreme court has already said. We have entered
21 into this fray because of the plaintiffs. They are
22 unhappy, again, with what the supreme court has
23 ordered, but the supreme court's wording is clear.
24 It does not go into any other issue beyond the
25 Attorneys General's ability to enter into a

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1 contingency fee agreement. That's it, and no
2 discovery is necessary to decide that issue.

3 THE COURT: All right. I think that covers
4 all of the motions today for this case. What I'm
5 going to do is, obviously, take it under
6 advisement. I have reviewed both motions, the
7 memos in support and in opposition. I'll review
8 those again as well. I'm going to, obviously, read
9 the case a few more times and get my full
10 understanding, because, obviously, that is
11 important. And I'm going to listen to the oral
12 arguments, you know, to try to get a further
13 understanding of the Justices' intention of this
14 case.

15 So I'll take this under advisement, and I'll
16 have an answer to you relatively -- hopefully
17 shortly, within the next week or so.

18 MR. GRIFFIN: Yes, sir. If you would like
19 proposed orders, if you will, just let us know, or
20 have your law clerk let us know, and we'll get it
21 to you.

22 THE COURT: Yeah, if we need proposed orders,
23 we'll reach out to the attorneys.

24 MR. RUTHERFORD: Thank you, Your Honor.

25 MR. WOODINGTON: This is on the trial roster

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1 next week. Has something been done about that, or
2 will something be done?

3 MR. RUTHERFORD: I filed an order of
4 protection for next week, so I wouldn't be
5 available next week.

6 THE COURT: This case is on a trial roster?

7 MR. WOODINGTON: Yes, on a non-jury trial
8 roster.

9 THE COURT: I'll talk with -- if you all will
10 e-mail the chief administrative judge and copy my
11 law clerk on it, but I don't -- so we can figure
12 out the status of that by today.

13 MR. RUTHERFORD: They have my order of
14 protection already, Your Honor, but we'll e-mail it
15 to you as well.

16 THE COURT: Thank you. Thank you for being
17 here today.

18 (Whereupon, the WebEx hearing concluded.)
19
20
21
22
23
24
25

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CERTIFICATE OF TRANSCRIBER

Case Name: S.C. Public Interest Foundation, et.al
v. ALAN WILSON, et. al

Case No.: 2020-CP-40-04603

Date of Hearing: October 11, 2023

* * * * *

I, Natalie Dahl, do hereby certify that the
foregoing transcript is a true and correct record
of the recorded proceedings; **that said proceedings
were transcribed to the best of my ability from the
audio recording.**

I do further certify that I am neither of
kin, counsel, nor have interest to any party
hereto.

Natalie Dahl, RPR

Natalie Dahl, Registered Professional
Reporter and transcriber for the State of
South Carolina

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EXHIBIT 9

[Attached hereto are excerpts from the transcript of the oral argument held before the South Carolina Supreme Court on April 6, 2022]

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Appellate Case No. 2021-000343

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.

TRANSCRIPT OF
APPELLATE HEARING



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1 under the future guidance component, how likely
2 is it that this particular fee agreement will
3 arise in the future? Adams says it's li- -- if
4 it's likely to possibly recur.

5 **MR. CARPENTER:** Well, the -- there may be minor
6 differences between this agreement and the ones
7 posted on the website, but in -- in composition
8 and structure and content and effect, they're
9 very, very similar and we think that ---

10 **JUSTICE JAMES:** So, is it your position that every
11 single contingent fee agreement the Attorney
12 General ever enters into with a private law
13 firm or private attorney violates the law?

14 **MR. CARPENTER:** No, no. One thing -- one thing
15 that's a provision of this particular
16 agreement, and if I could invite the Court's
17 attention to the -- to the Record on Appeal,
18 the second volume, page 602, at the top of the
19 page, there's a provision in the litigation
20 retention agreement that both the Attorney
21 General and the law firms agreed to, paragraph
22 G at the top of page 602, and it says when
23 possible, the attorneys' fees and costs awarded
24 to special counsel shall be approved by a court
25 of competent jurisdiction. In this case they



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1 jurisdiction to pass on this fee.

2 **MR. CARPENTER:** I -- I would respectfully disagree
3 with the suggestion that it wasn't possible.
4 I mean, it's very possible. It's exactly what
5 we're trying to do in this case.

6 **JUSTICE HEARN:** Well, I'm sure opposing counsel
7 will explain to us why it wasn't possible ---

8 **MR. CARPENTER:** Because they ---

9 **JUSTICE HEARN:** --- to comply with that.

10 **JUSTICE KITTREDGE:** Mr. Carpenter?

11 **MR. CARPENTER:** Sir.

12 **JUSTICE KITTREDGE:** In reference to a question from
13 Justice James, it appeared to me that you do
14 not oppose the general concept of the Attorney
15 General retaining outside counsel in cases ---

16 **MR. CARPENTER:** Right.

17 **JUSTICE KITTREDGE:** And I don't want to violate the
18 directive of the Chief Justice by bringing in
19 the merits, so I'm trying to be careful here.
20 I get the impression it's the amount that gets
21 your attention here. If the ---

22 **MR. CARPENTER:** Certainly ---

23 **JUSTICE KITTREDGE:** --- if the fee here was \$1
24 million, we wouldn't be here. Yet, the issue
25 before us technically is standing, so it



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1 that this Court could provide future guidance
2 on that particularly ---

3 **CHIEF JUSTICE BEATTY:** We're not going to address
4 the fee.

5 **MR. CARPENTER:** Well, I'm addressing future
6 guidance.

7 **JUSTICE JAMES:** But is your argument about future
8 guidance a matter of degree? To follow-up on
9 Justice Few's question to you earlier. I gave
10 a poor hypothetical about an up-front retainer
11 fee, I just withdraw that. Does your argument
12 on future guidance depend upon the number
13 before the percent symbol?

14 **MR. CARPENTER:** Not necessarily. What the standard
15 from this Court in the Layman case is that the
16 attorney's fee must be reasonable. And the big
17 question in this case is is the payment of \$75
18 million for this case when there was loss after
19 loss after loss ---

20 **JUSTICE JAMES:** So, you want future guidance on the
21 issue of whether or not a large fee is payable,
22 not any contingent fee is payable?

23 **MR. CARPENTER:** Right. We're not -- we're not
24 attacking contingency fees ---

25 **JUSTICE JAMES:** Gotcha.



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State of South Carolina) In The Court of Common Pleas
) Fifth Judicial Circuit
 County of Richland) 2020-CP-40-04603

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

Plaintiffs,)

vs.)

Transcript of Record
VIA WEBEX

Alan Wilson, Attorney General)
 for the State of South Carolina;)
 Willoughby & Hoefer, PA; and)
 Davidson, Wren, & DeMasters, PA,)

Defendants.)

October 07, 2020
 Columbia, South Carolina

B E F O R E:

The Honorable Alison Renee Lee, Judge

A P P E A R A N C E S:

James M. Griffin, Esquire
 Badge Humphries, Esquire
 Attorneys for the Plaintiffs

J. Emory Smith, Jr., Esquire
 Attorney for Defendant Attorney General Wilson

Gerald Malloy, Esquire
 J. Todd Rutherford, Esquire
 John S. Simmons, Esquire
 Attorneys for Defendant Willoughby & Hoefer

William H. Davidson, II, Esquire
 Kenneth P. Woodington, Esquire
 Attorneys for Defendant Davidson, Wren, & DeMasters

Elizabeth B. Harris, CVR-M-CM
 Circuit Court Reporter

1 actual litigation pursuant to a statute in which you can
2 petition the court to award you fees.

3 MR. GRIFFIN: Your Honor, the, the attorney general
4 has -- and as represented by Judge Cooper's order in the
5 *Cephalon* case, Judge Cooper ruled that the attorney general
6 has authority under, under South Carolina common law and
7 the various state statutes to seek an award of attorneys'
8 fees against a defendant in litigation brought in South
9 Carolina. The -- and Judge Cooper addressed the, the
10 ability of the attorney general to hire attorneys under a
11 contingency agreement for that purpose. Judge Cooper held
12 that a contingency fee arrangement represents the cap: the
13 most that lawyers can obtain through a court order
14 resulting from the litigation. And so clearly is -- the
15 attorney general has authority to hire lawyers pursuant to
16 a contingency fee agreement.

17 If the attorney general -- the attorney general could
18 have sought a judicial determination for an award of
19 attorneys' fees in this case. They could have. They could
20 have petitioned the circuit courts. They could have
21 brought their case here and gotten a court order permitting
22 the attorney general to pay 75 million or 30 million or
23 whatever the contingency fee arrangement was. The ---

24 THE COURT: But that was optional under the fee
25 agreement, was it not?

1 the state, on behalf of the state to prevent an injury to
2 the, to the, to the corporate body. Here, the state. And,
3 and we -- and then this was recognized in *Hart* as early as
4 1939. And the language we cite here is the question under
5 discussion appears to be a novel one that's been held in
6 quite a number of jurisdictions, and correctly so, that it
7 -- and this was a county:

8 If a county has a cause of action for injuries
9 sustained which should be enforced for the
10 protection of the citizens or taxpayers, and its
11 governing board unjustifiably refuses to assert
12 its causes of action, any citizen, because of his
13 indirect interest, indirect interest, may sue on
14 behalf of himself and others similarly situated.

15 So, those two cases and those two lines of authority
16 don't require individual, unique injury as a result of the
17 act. Public interest standing and, and derivative taxpayer
18 standing in this case to freeze and to return the money
19 that was transferred, what we say was a violation of the
20 statute.

21 THE COURT: Mr. Griffin, are you, are you, in essence,
22 arguing that the attorney general's office didn't have the
23 authority to enter into the fee agreement with ---

24 MR. GRIFFIN: No, Your Honor.

25 THE COURT: --- the defense?

1 MR. GRIFFIN: I am not arguing that at all. I'm
2 arguing that under this, the attorney general can enter
3 into a fee agreement. And as Judge Cooper says,
4 contingency fee agreement puts the other side on notice
5 that this is how much the attorney general is going to seek
6 in court for an award of attorneys' fees. That's the
7 *Cephalon* case.

8 THE COURT: But there's no requirement that there be a
9 court order to approve those fees.

10 MR. GRIFFIN: Your Honor, we believe that -- we
11 believe the statute 1-7-150 requires either a, a
12 arm's-length negotiations between the attorneys on behalf
13 of the state and the defendant, separate, separate
14 arm's-length transaction, separate settlement to pay the
15 attorneys' fees separately from the, from the money that's
16 intended to go to the state. Absent that, there has to be
17 a court order of attorneys' fees absent that, and that's
18 what 1-7-150 clearly says. Otherwise, Your Honor, why
19 would it say attorneys' fees awarded by settlement, awarded
20 by settlement? It would say the attorney general can pay
21 attorneys' fees out of a settlement. It says awarded by
22 settlement.

23 Award is a meaningful word in this statute. It has to
24 be an award by settlement, award by court order or
25 settlement, award being the operative language here. It

Exhibit A

Affidavit of Badge Humphries

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

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

Plaintiff,

v.

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

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Case No. 2020-CP-40-04603

AFFIDAVIT OF BADGE HUMPHRIES

Comes Badge Humphries and after being first duly sworn, states as follows:

1. I am over 18 years of age and have personal knowledge of the facts set forth in this Affidavit. I am an attorney and partner in the law firm of Griffin Humphries LLC and represent Plaintiffs in this matter.

2. I hereby certify that the following exhibits attached hereto are true and correct copies of the documents referenced in the Plaintiffs' Response in Opposition to Motions for Summary Judgment by Alan Wilson, Attorney General for the State of South Carolina, Willoughby & Hoefer, P.A., and Davidson, Wren & DeMasters, P.A. filed concurrently herewith.

Exhibit 1	Initial Brief of Appellants, <i>S.C. Pub. Interest Found. v. Wilson et al.</i> , No. 2021-00343 (S.C. Sup. Ct. Aug. 4, 2021)
Exhibit 2	Initial Brief of Respondent Willoughby & Hoefer, P.A., <i>S.C. Pub. Interest Found. v. Wilson et al.</i> , No. 2021-00343 (S.C. Sup. Ct. Sept. 3, 2021)
Exhibit 3	Initial Brief of Respondent Davidson, Wren & DeMasters, P.A., <i>S.C. Pub. Interest Found. v. Wilson et al.</i> , No. 2021-00343 (S.C. Sup. Ct. Sept. 3, 2021)

Exhibit 4	Initial Brief of Respondent Alan Wilson, Attorney General for the State of South Carolina, <i>S.C. Pub. Interest Found. v. Wilson et al.</i> , No. 2021-00343 (S.C. Sup. Ct. Sept. 3, 2021)
Exhibit 5	Reply Brief of Appellants, <i>S.C. Pub. Interest Found. v. Wilson et al.</i> , No. 2021-00343 (S.C. Sup. Ct. Sept. 23, 2021)
Exhibit 6	Record on Appeal, <i>S.C. Pub. Interest Found. v. Wilson et al.</i> , No. 2021-00343 (S.C. Sup. Ct. Oct. 25, 2021)

Further Affiant sayeth naught.

Dated this 2nd day of August 2023.


Badge Humphries

[illegible]

Subscribed and sworn to before me
by Badge Humphries on this
the 2nd day of August 2023.

Daphne L Grove
Notary Public, State at Large, South Carolina
My Commission Expires: June 4, 2030

EXHIBIT 1

Initial Brief of Appellants,
S. C. Pub. Interest Found. v. Wilson et al.,
No. 2021-00343 (S.C. Sup. Ct. Aug. 4, 2021)

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

Aug 04 2021

S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY

R. Kirk Griffin, Circuit Court Judge

Supreme Court Case No. 2021-000472

Court of Appeals Case No. 2021-000343

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

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

v.

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

INITIAL BRIEF OF APPELLANTS

August 4, 2021

s/ James M. Griffin

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STATEMENT OF ISSUES ON APPEAL

1. When the Attorney General pays \$75 million of public funds to private law firms without authorization from a court, the General Assembly, or any public authority, and for many years, has made similar payments, and Appellants challenge the legality of the payment, does his unreviewed expenditure of public funds raise an issue of great public importance, requiring judicial guidance, and supporting the grant of public importance standing to Appellants?
2. When attorneys take a case on a contingency, and lose in the US District Court, lose in the Court of Claims, lose in the Court of Appeals for the Federal Circuit, and lose a petition for writ of certiorari to the United States Supreme Court; but elected officials pressure the federal government to settle the case, is a payment of \$75 million in attorneys' fees excessive and patently unreasonable for the work done?
3. Was the Attorney General's payment of \$75 million of public funds to private attorneys, without authorization from a Court or the General Assembly unlawful?
4. Is a ruling on a temporary injunction considered the law of the case?

STATEMENT OF THE CASE

Former Governor James H. Hodges brokered an agreement pertaining to the storage of weapons-grade plutonium at the Savannah River Site (“SRS”). Governor Hodges’s brokered settlement is codified at Title 50, United States Code, Section 2566 (“Section 2566”). Under Section 2566, the United States Department of Energy (“DOE”) must pay the State of South Carolina “economic impact and assistance payments” of \$100 million per year from appropriated funds starting in 2016 for each year it fails to comply with deadlines relating to the disposition of the plutonium. 50 U.S.C. § 2566. The DOE failed to comply with the terms of the agreement. The DOE has not met the deadlines set forth in Section 2566, and as of 2020 was liable to the State of South Carolina for at least \$400 million in economic impact and assistance payments (*Affidavit of James M. Griffin, Sept. 25, 2020, Am. Compl., Ex. A, or “Griffin Aff.”*).

On August 28, 2020, Attorney General Alan Wilson (“Wilson”) entered into a settlement agreement with the United States (the “Settlement Agreement”) regarding the DOE’s failure to abide by the Hodges agreement. Wilson agreed on behalf of the Citizens of this State to refrain from instituting any action to collect economic impact and assistance payments for an additional 15 years. In exchange, the DOE agreed to pay the State of South Carolina a substantially reduced economic impact and assistance payment of \$600 million. The Settlement Agreement requires the DOE to make “immediate payment . . . to the State of South Carolina . . . with each party to bear its own costs, attorneys’ fees and expenses.” *Griffin Aff., Ex. 1, ¶ 5(a)*.

At an August 31, 2020 press conference, Wilson announced that he intended to pay two law firms, Willoughby & Hoefer, P.A. (“WH”) and Davidson, Wren & DeMasters (“DWD”) [collectively the “Law Firms”], \$75 million from the proceeds of the DOE settlement. Wilson stated this settlement payment was expected on or after October 1, 2020.

Upon learning of Wilson's intent, Governor Henry McMaster wrote Wilson objecting to the attorneys' fee. The Governor had "concerns regarding the payment of attorneys' fees" because the settlement resulted from "the zealous advocacy and coordination with members of [the State's] Congressional delegation." *Id.*, Ex. 2. Governor McMaster concluded by stating that he "could not endorse the payment of \$75 million in attorneys' fees under the circumstances." *Id.* David Pascoe, First Circuit Solicitor, likewise wrote Wilson objecting to the use of these settlement proceeds for attorneys' fees on the grounds that the entire amount must be deposited into the State's General Fund. *Id.*, Ex. 3.

On September 25, 2020, Appellants South Carolina Public Interest Foundation ("SCPIF") and John Crangle ("Crangle") [collectively "Appellants"] filed this action against Wilson seeking a declaratory judgment that Wilson lacked authority to pay \$75 Million from a DOE settlement to private law firms as attorneys' fees absent a court order, authorization from the General Assembly, or provision in the Settlement Agreement providing that the DOE was paying the fees. (*Compl.*)

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

With the Complaint, on September 25, 2020, Appellants filed a motion for a temporary restraining order and preliminary injunction, seeking to enjoin Wilson's payment of \$75,000,000 to the law firms (Plaintiffs' "Initial Motion") (*Mot. for TRO and Prelim. Inj.*). That afternoon, Appellants' counsel provided Wilson copies of Appellants' filings and asked the circuit court to schedule a hearing on Appellants' Initial Motion. (*Mem. in Opp'n Mot. to Dismiss, Griffin Aff.*, Ex. 14).

Wilson's counsel emailed the circuit court requesting that the hearing on Appellants' Initial Motion not be held until Thursday, October 1, 2020. (*Id. at Ex. 15*). The circuit court responded that Appellants' Initial Motion could be heard on Tuesday, September 29, 2020 at 3:00 p.m., over Wilson's objections. (*Id.*) On the afternoon of September 28, 2020, Appellants' counsel emailed counsel for Wilson asking that Wilson agree not to disburse the disputed funds until the case could be decided on the merits. Counsel for Wilson ultimately responded, "I am checking w/ Bob Cook and this is what I am authorized to say. I have conveyed your request to him." *See id., Ex. 17*.

Unbeknownst to Appellants and the circuit court, Wilson had already received the \$600 million in settlement proceeds. Moreover, Wilson expedited the \$75 million transfer to the Law Firms on Tuesday morning, September 29, 2020, just hours before the scheduled hearing. Moments before the 3:00 p.m. hearing on Tuesday, September 29, 2020, the circuit court and Appellants first learned that the disputed \$75 million had been disbursed to Appellant. (*Mem. in Opp'n Mot. to Dismiss*). Wilson announced in his memorandum in opposition to the Appellants' request for a temporary restraining order, circulated at 2:12 p.m., that the disputed funds had been transferred to the Law Firms, and therefore Wilson contended Appellants' entire case was moot. (*See Mem. Att'y. Gen. in Opp'n. to Mot. TRO or Temp. Inj., Sept. 29, 2020, at 2-3*).

Following the hearing, Appellant Crangle contacted the South Carolina Office of the State Treasurer and was informed that the funds had not been transferred to the Law Firms. Appellants' counsel informed the Court of this purported fact. (*Memo in Opp. Mot. Dismiss. Griffin Aff., Ex. 18*). The circuit court set another hearing for 7:00 p.m. on September 29, 2020. Prior to and during that hearing, counsel for Wilson stated that his office had confirmed that the Law Firms had received the disputed funds. *See id.* During the hearing, out of an abundance of caution, the circuit court announced its intent to enter a temporary restraining order preventing the State from

transferring funds to the Law Firms, in the event the funds had not been transferred. Following the hearing, the Court entered such order (*Order Granting Temp. Inj. Pendente Lite*, signed Sept. 29, 2020 and entered Sept. 30, 2020). That order expired at 5:00 p.m. on Friday, October 2, 2020.

On the morning of September 30, 2020, the Treasurer confirmed that the proceeds had been wired to the law firm on September 29, 2020, just hours before the 3:00 p.m. hearing: “[t]he Treasurer’s office received a warrant for payment from the Comptrollers’ Office Monday night [September 28, 2020].” Therefore, the Treasurer’s Office “processed and wired the funds on Tuesday morning [September 29, 2020] to the law firm’s account.” (*Mem. in Opp’n Mot. to Dismiss, Griffin Aff. Ex 19*).

Later in the morning of September 30, 2020, Appellants filed their amended complaint (*Am. Compl.*) naming the Law Firms as additional defendants. At the same time, Appellants filed their second Motion for Temporary Restraining Order and Preliminary Injunction, (*Pls.’ 2d Mot. for TRO and Prelim. Inj.*). Thereafter, the circuit court, Honorable Alison R. Lee, entered an Ex Parte Temporary Restraining Order (TRO) restraining Law Firms from dispersing the proceeds (*Ex Parte TRO Order*).

On October 2, 2020, the Law Firms filed a Petition for Writ of Supersedeas with the South Carolina Court of Appeals seeking to vacate Judge Lee’s TRO. Appellants filed their response to the Petition on October 5, 2020. Appellants also filed a Petition for Original Jurisdiction in the South Carolina Supreme Court on October 5, 2020. On October 6, 2020 Respondents filed a Motion to Certify Respondents’ Petition for Writ of Supersedeas with the South Carolina Supreme

Court. Also, on October 6, 2020 the Court of Appeals entered an order denying the Petition.¹ On October 26, 2020 the Law Firms' appeal from the entry of a TRO was dismissed.

On October 7, 2020, Judge Lee conducted a hearing on Appellants' Motion for Preliminary Injunction. On October 14, 2020, Judge Lee denied Appellants' motion. (*Order Denying Mot. for Prelim. Inj.*). On October 23, 2020, Appellants filed a motion to alter or amend Judge Lee's order denying the motion for preliminary injunction (*Mot. to Alter or Amend*). The Law Firms filed oppositions to the motion to alter or amend on November 20, 2020 and November 23, 2020 (*Law Firms' Mem. in Opp'n to Mot. to Alter or Amend*). Wilson also filed an opposition on November 23, 2020 (*Wilson Mem. in Opp'n to Mot. to Alter or Amend*). On December 17, 2020, Judge Lee denied the motion to alter or amend (*Order Denying Mot. to Alter or Amend*).

The Law Firms filed separate motions to dismiss the Amended Complaint on October 20, 2020 (*Law Firms' Mot. to Dismiss*). Wilson filed a Motion to Dismiss the Amended Complaint on October 27, 2020 (*Wilson Mot. to Dismiss*). Appellants filed a memorandum in opposition to the motions to dismiss on January 20, 2021 (*Mem. in Opp'n Mot. to Dismiss*). The Honorable R. Kirk Griffin conducted a hearing on the motion to dismiss on January 27, 2021.

Judge Griffin granted the Motion to Dismiss on March 5, 2021, ruling that the Plaintiffs lacked standing, and declined to rule on the merits (*Order*).

Appellants filed a timely Notice of Appeal on March 29, 2021 (*Notice of Appeal*).

¹ On November 18, 2020, the Supreme Court entered an order denying the Motion to Certify as moot.

STANDARD OF REVIEW

On appeal from the dismissal of a case pursuant to Rule 12(b)(6), an appellate court applies the same standard of review as the trial court. *Freemantle v. Preston*, 728 S.E.2d 40, 43 (S.C. 2012); *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). “That standard requires the Court to construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case.” *Id.* (internal quotations omitted). If the facts alleged and inferences deducible therefrom would entitle the plaintiff to any relief, then dismissal under Rule 12(b)(6) is improper. *Sloan Constr. Co. v. Southco Grassing, Inc.*, 377 S.C. 108, 113, 659 S.E.2d 158, 161 (2008).

ARGUMENT

I. APPELLANTS POSSESS STANDING.

A. Appellants Have Public Importance Standing.

The South Carolina Supreme Court recently addressed public importance standing in *Adams v. McMaster*, 432 S.C. 225, 851 S.E.2d 703 (2020). *Adams* addressed a one-time federal payment to the state of \$48,467,924 in coronavirus relief funds for educational purposes. Governor McMaster decided to make \$32,000,000 of the funds available for grants to students attending private schools. Petitioners challenged that decision, and Governor McMaster challenged their standing to bring suit. The Court ruled that the petitioners had public importance standing. The Court discussed the nature of the coronavirus pandemic and concluded that “[a] resolution for future guidance is needed here because **this case involves the conduct of government entities and the expenditure of public funds**, a prompt decision is necessary, and it is **likely the situation will occur** in the future if and when Congress approves additional education funding in response to the continued COVID-19 pandemic.” *Id.* at 236, 851 S.E.2d at 707 (emphasis added). Under *Adams*, “[t]he key to the public importance analysis is whether a resolution is needed for future guidance.” *Id.* (quoting *ATC S., Inc. v. Charleston Cnty.*, 380 S.C. 191, 199, 669 S.E.2d 337, 341 (2008)).

As in *Adams*, this case involves the conduct of government entities. It also involves the expenditure of public funds. A prompt decision is necessary in this case as it was in *Adams*. It is likely that the same situation will recur. Wilson has issued several contingency fee contracts, similar to the one here, and upon information and belief, he plans to continue to issue them. See Alan Wilson, South Carolina Attorney General, Contingency Fee Litigation Retention Agreements, <http://www.scag.gov/litigation-retention-agreements>.

Appellants should have public importance standing because this dispute involves a challenge to the unauthorized expenditure of government funds by the Attorney General, and a resolution of this dispute is needed for future guidance. See *S.C. Pub. Interest Found. v. S.C. Dep't of Transp.*, 421 S.C. 110, 119, 804 S.E.2d 854, 859 (2017); *S.C. Pub. Interest Found. v. Lucas*, 416 S.C. 269, 786 S.E.2d 124 (2016); *S.C. Pub. Interest Found. v. S.C. Transp. Infrastructure Bank*, 403 S.C. 640, 744 S.E.2d 521 (2013); *Sloan v Friends of the Hunley*, 393 S.C. 152, 711 S.E.2d 895 (2011); *Am. Petroleum Inst. v. S.C. Dep't of Revenue*, 382 S.C. 572, 677 S.E.2d 16 (2009); *S.C. Pub. Interest Found. v. Harrell*, 378 S.C. 441, 663 S.E.2d 52 (2008); *Sloan v. Dep't of Transp.*, 379 S.C. 160, 666 S.E.2d 236 (2008); *Sloan v. Hardee*, 357 S.C. 495, 640 S.E.2d 457 (2007); *Cornelius v Oconee Cnty.*, 369 S.C. 531, 633 S.E.2d 492 (2006); *Sloan v. Dep't of Transp.*, 365 S.C. 299, 618 S.E.2d 876 (2005); *Sloan v. Wilkins*, 362 S.C. 430, 608 S.E.2d 579 (2005); *Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004); *Sloan v. Greenville Cnty.*, 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003); *Sloan v. Sch. Dist. of Greenville Cnty.*, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000); *Baird v. Richland Cnty.*, 333 S.C. 519, 511 S.E.2d 69 (1999); *Newman v. Richland Cnty. Historic Pres. Comm'n*, 325 S.C. 79, 480 S.E.2d 72 (1997).

B. Appellants Have Adequately Alleged Standing to Pursue the Equitable Claims.

The Amended Complaint alleges an equitable claim of restitution and the imposition of a constructive trust over the disputed attorneys' fees that were transferred to the Law Firms after the commencement of this lawsuit, just hours before the Circuit Court conducted a hearing on Appellants' motion for a preliminary injunction. A constructive trust arises whenever a party has obtained money which does not equitably belong to him and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it as where money has been paid by accident, mistake of fact, or fraud, or has been acquired through a breach of trust or the violation

of a fiduciary duty.” *SSI Medical Servs., Inc. v. Cox*, 301 S.C. 493, 500, 392 S.E.2d 789, 793-94 (1990); *McNair v. Rainsford*, 330 S.C. 332, 356, 499 S.E.2d 488, 501 (S.C. App. 1998); *see also*, *Lollis v. Lollis*, 291 S.C. 525, 354 S.E.2d 559 (1987) (constructive trust will arise whenever circumstances under which property was acquired make it inequitable that property should be retained by one holding legal title). *Dye v. Gainey*, 320 S.C. 65, 463 S.E.2d 97 (Ct. App. 1995) (constructive trust results from fraud, bad faith, abuse of confidence, or violation of fiduciary duty which gives rise to obligation in equity to make restitution).

In addition, that the recipient of funds paid under a mistake of law is required to make restitution to the lawful title holder. *Trotter v. Merchants & Farmers Bank*, 180 SC 449, 186 S.E. 371 (1936). *Trotter* involved the improper payment of funds by a court appointed receiver to a creditor of an insolvent corporation. The trial judge explained,

I do not think a receiver can make a voluntary payment of money under a mistake of law when he had no title to the money, and it is not his own and he has no beneficial interest in same. The receiver paid the money to the defendant, but title to same did not pass, and his successor is entitled to restitution of the amount so paid with interest from the date on which demand for return of same was made.

Id. *See also*, *United States v. Wurts*, 303 U.S. 414, 58 S. Ct. 637, 82 L. Ed. 932 (1938) (“It is a well-established principle that the Government generally can “recover funds which its agents have wrongfully, erroneously or illegally paid); *Alsco-Harvard Fraud Litig.*, 523 F. Supp. 790, 806 (D.D.C. 1981) (This common law basis for recovery of funds runs against a person “who received them by mistake and without rights).

As established above, Appellants have public importance standing to challenge Wilson’s unauthorized expenditure of government funds. Wilson cannot defeat the Court’s jurisdiction over this matter simply by transferring the disputed funds to the Law Firms during the pendency of this action. Under these circumstances, Appellants’ public importance standing permits the enforcement of a constructive trust over these funds.

The South Carolina Supreme Court first addressed the ability of a citizen to assert claims for the recoupment of money on behalf of a governmental entity in *Ex Parte Hart*:

The question under discussion appears to be a novel one in this state, but it has been held in quite a number of jurisdictions, and correctly so, in our opinion, that if a county has a cause of action for an injury sustained, which should be enforced for the protection of its citizens or taxpayers, and its governing board unjustifiably refuses to assert such cause of action, any citizen, because of his indirect interest, may sue, in behalf of himself and others similarly situated, the person against whom the cause of action exists, and thereby enforce the rights of the county. . . .

Generally it should be shown by allegation and proof that the corporate authorities have neglected or refused to proceed, after being requested so to do, or that a request to them to proceed by judicial remedies would be unavailing.

Ex Parte Hart, 190 S.C. 473, 2 S.E.2d 52 at 53-54 (1939).

Accordingly, Plaintiffs have standing to assert claims on behalf of the State of South Carolina under the facts and circumstances of this case, particularly because derivative lawsuits sound in equity. *See Straight v. Goss*, 383 S.C. 180, 191, 678 S.E.2d 443, 449 (Ct. App. 2009) (explaining that shareholder derivative actions sound in equity); *see also Richardson v. Blackburn*, 41 Del. Ch. 54, 55-56, 187 A.2d 823, 823-24 (1963); *Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr.*, 386 S.C. 108, 116-17, 687 S.E.2d 29, 33 (2009) (“The equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other” (internal quotation marks omitted)); *Taff v. Smith*, 114 S.C. 306, 103 S.E. 551, 553 (1920) (describing as well-settled the equitable maxim that “[e]quity will not suffer a wrong without a remedy”). Indeed, “[t]he requirement of standing is not an inflexible one.” *Sloan v. Sch. Dist. of Greenville Cnty.*, 342 S.C. at 524, 537 S.E.2d at 304 (internal quotation marks omitted).

As shown by affidavit, Wilson refused repeated demands to assert the State of South Carolina’s rights vis-à-vis the Defendant and has instead violated the South Carolina Constitution

in an attempt to overpay the Law Firms for their services. First, Wilson refused to act in response to Governor McMaster's August 30, 2020 letter questioning the attorneys' fees Wilson intended to pay. *See Griffin Aff., Ex. 2.* Next, Wilson refused to act in response to the September 10, 2020 letter from First Circuit Solicitor David Pascoe. *See id., Ex. 3.* Then, Wilson refused to act in response to Plaintiffs' Initial Complaint and Initial Motion, filed and provided to Defendant Wilson on September 25, 2020. Instead of acting accordingly in response to these demands to prevent payment of the disputed \$75,000,000 to the Law Firms, Wilson expedited payment to the Law Firms via wire transfer on the afternoon of September 28, 2020, after the Court had set a hearing on Plaintiffs' Initial Motion for the following afternoon at 3:00 p.m. *See Affidavit of Kimberly Buckley, Oct. 1, 2020, Exhibit F.* Finally, Wilson argued to the circuit court that this wire transfer made Plaintiffs' claims moot.

Under these circumstances, where the Attorney General has repeatedly refused to assert the State's claims against the Law Firms and instead has taken drastic unconstitutional and inequitable actions to make a patently unreasonable \$75 million payment to the Law Firms, Plaintiffs have standing to assert the State of South Carolina's claims against Defendants. *See Ex Parte Hart*, 190 S.C. 473, 2 S.E.2d at 53-54; *see also Berry v. McLeod*, 328 S.C. 435, 447-48, 492 S.E.2d 794, 800-01 (Ct. App. 1997) (citing and quoting *Ex Parte Hart* with approval); *Richardson*, 41 Del. Ch. at 55-56, 187 A.2d at 823-24.

II. THE AMOUNT OF THE FEE IS PATENTLY UNREASONABLE AND CANNOT BE PAID UNTIL APPROVED BY COURT ORDER.²

A "lawyer shall not make an agreement for, charge, or collect an unreasonable fee. . . ." Rule 1.5(a), RPC, Rule 407, SCACR. Contingency fees are not exempt from this reasonableness

² Appellants request that this Court address the merits of their claim in the interest of justice and judicial economy. *See e.g., Widdicombe v. TuckerCales*, 366 S.C. 75, 85, 620 S.E.2d 333, 338-39 (Ct. App. 2005) ("[T]he issues raised by [the m]other on appeal have been the subject of much

standard. *Id.*, Cmt. 3. Fee agreements that run afoul of Rule 1.5 are unenforceable. *See, e.g., Getzen v. Law Offices of James M. Russ, P.A.*, 323 S.C. 377, 475 S.E.2d 743 (2006). Attorneys' fees totaling \$75 million for the work performed in this case appears to be patently unreasonable.

In 2016,³ the Law Firms first sued in United States District Court for the District of South Carolina (D.S.C.) for an injunction to enforce the provisions of Section 2566 and to collect the \$100 million assistance payment owed for failing to comply with Section 2566. The federal court dismissed the claim for damages,⁴ ruling that such a claim must be filed in the United States Court of Federal Claims. *Griffin Aff., Ex. 4*. The Law Firms refiled the same suit before the Court of Federal Claims, this time seeking \$200 million in economic impact and assistance payments because the DOE had not complied with Section 2566 for 2017. Once again, the Law Firms lost the case. The Court of Federal Claims ruled with the DOE. *Id., Ex. 5*. The Law Firms then appealed the ruling to the U.S. Court of Appeals for the Federal Circuit. While the appeal was pending, the State of South Carolina reached this settlement with the DOE. *Id., Ex. 1*.

Upon information and belief, the Law Firms engaged in no discovery: no interrogatories, no depositions, no experts, no document requests. Instead, they drafted pleadings and wrote briefs arguing the DOE must pay South Carolina the statutory penalty from funds appropriated by Congress. *See id., Ex. 6*. Wilson had no need to hire private counsel to address a relatively straightforward issue that elected leaders ultimately negotiated. The Settlement Agreement was a

contention in this case. They will inevitably be raised to the family court again in the future, and because they have been fully briefed by the parties, we find that it would be in the interest of judicial economy to decide the matters now.”), *aff'd in part and vacated in part on other grounds*, 375 S.C. 427, 428, 653 S.E.2d 276, 276 (2007).

³ Respondents attempt to justify their \$75 million fee by providing a summary of work performed prior to January 2016. However, the earliest effective date of Defendant's contingency fee agreement is February 8, 2016. *Griffin Aff. Ex. 7*.

⁴ The District Court did not dismiss the State's claim for injunctive relief.

political resolution brokered by elected leaders, including Governor McMaster and Senator Graham. *See id.*, Ex. 2.

Under similar circumstances, the court in *Cendant Corporation Prides Litigation*, 243 F.3d 722 (3d Cir. 2001), overturned a \$19 Million fee award amounting to 5.7% of the total recovery because the settlement resulted from the efforts of public agencies, and the attorneys did very little work, compared to other cases involving settlements over \$100 Million. The Third Circuit Court of Appeals noted that there was very little motion practice and discovery was virtually non-existent. Class counsel spent approximately 5,600 hours on the case. The Court compared the fee award to other large class settlements where the common fund exceeded \$100 Million. The Court observed that the fee awards in those cases ranged from 2.8% to 36% to the total settlement fund. A fee of 5.7% appeared to be in line when just comparing percentages. However, the attorneys in those other cases spent far more hours (45,000 in one case) and engaged in significantly more complex discovery (reviewing 11 million pages of documents). The Court summarized its review of the other cases involving large fee awards, “in case after case, the same factors recur: complex and/or novel legal issues, extensive discovery, acrimonious litigation, and tens of thousands of hours spent on the case Because none of these factors which increase the complexity of class litigation was present here, it makes sense that the fee awarded in this case should be far lower than those awarded in the charted cases, which fees ranged from 2.8% to 36% of the total settlement.” *Id.* at 741.

The court concluded that much of the work done to facilitate the settlement was accomplished by regulators, not counsel. The court explained, “allowing private counsel to receive fees based on the benefits created by public agencies would undermine equitable principles which

underlie the concept of the common fund, and would create an incentive for plaintiffs' attorneys to minimize the cost of failure by free riding on the . . . efforts of others." *Id.*

In *Layman v. State*, 376 S.C. 434, 658 S.E.2d 320 (2008), the attorneys' fees were awarded against the State under the fee-shifting "state action" statute (S.C. Code Ann. § 15-77-300), rather than via the common fund doctrine, as in this case, but *Layman* emphasized the requirement of reasonableness using either method:

Regardless of any theoretical preference for one method of fee calculation over another, **the overriding benchmark for awards of attorneys' fees under both the state action statute and the general premise of the common fund doctrine is that attorneys' fees must be "reasonable."** See [*Pennsylvania v.*] *Del. Valley Citizens' Council for Clean Air*, 478 U.S. [546,] at 562, 106 S. Ct. 3088[(1986)]. In light of the circumstances of this case, we hold that an award of \$8.66 million in attorneys' fees is entirely unreasonable.

Layman, 376 S.C. at 455, 658 S.E.2d at 331 (emphasis added).

In addition, the fee agreement with the Law Firms expressly states that "when possible, the attorneys' fees and costs awarded to Special Counsel shall be approved by a court of competent jurisdiction." *Griffin Aff., Ex. 7, Fee Agreement* at 9. There is nothing prohibiting Wilson or the Law Firms from seeking judicial approval of the payment of \$75 million to the Law Firms through a declaratory judgment action requesting a South Carolina state court determine whether the fee amount is reasonable.⁵ However, Wilson and the Law Firms seek to avoid judicial review, and accordingly, Wilson paid the Law Firms \$75 million without making any showing of reasonableness.

⁵ Under South Carolina, the following factors are considered to determine whether an award of attorneys' fees is reasonable: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services. *Jackson v. Speed*, 26 S.C. 289, 308, 486 S.E.2d 750, 760 (1997).

Wilson entered into an amended fee agreement in June 2019 and agreed to provide WH additional money from any proceeds recovered in the case pending before the Court of Federal Claims and as compensation for the firm's representation of the State on its claim for injunctive relief that was litigated before the United States District Court for the District of South Carolina. *See id.*

The State prevailed on its claim for injunctive relief before United States District Court Judge Childs. However, on January 8, 2019 the Fourth Circuit Court of Appeals reversed Judge Child's ruling in a published opinion, *South Carolina v. United States*, 912 F.3d 720 (2019). *Id.*, Ex. 9. On June 7, 2019, WH along with Wilson filed a Petition for Writ of Certiorari to the United States Supreme Court (*id.*, Ex. 10) and a Reply Brief on September 24, 2019 (*id.*, Ex. 11).

Under the terms of the amended fee agreement, Wilson agreed to pay WH 2% of the ultimate recovery for representing the State in the United States District Court for the District of South Carolina, plus 1% for representing the State before the Fourth Circuit, plus .05% for filing a Petition for Writ of Certiorari to the United States Supreme Court. *See id.*, Ex. 8. The amended fee agreement was executed on June 13, 2019 by WH, *after* the State had lost in the Fourth Circuit and *after* the firm had filed the Petition for Writ of Certiorari with the Supreme Court. The Supreme Court denied that Petition on October 15, 2019, *South Carolina v. United States*, 140 S. Ct. 392 (2019). *Id.*, Ex. 12.

Under the terms of the amended contingency fee agreement, WH is purported to be paid 3.5% of the \$600 million, or \$21 million, for ultimately losing the case before the District of South Carolina. Wilson was fully aware that WH had lost the State's case for injunctive relief before the Fourth Circuit when he entered into the amended fee agreement.

Moreover, as further evidence of the unreasonableness of this fee, WH is receiving .5% of \$600 Million, or \$3 million, for writing a Petition for Writ of Certiorari and a Reply Brief filed with the Supreme Court. The Petition is 33 pages, and the Reply is only 13 pages, for a total of 46 pages. Thus, Wilson intends to pay WH over \$65,000 per page for these filings.

Wilson as Attorney General entered into the fee agreement on behalf of the Citizens of South Carolina, who are third party beneficiaries of the contract. Plaintiffs, individually and on behalf of the Citizens of this State, demanded that Wilson seek judicial approval of the amount of any fee awarded to counsel under the fee agreement, if he is permitted to use any portion of the settlement proceeds to pay litigation costs, as required by the express terms of the fee agreement and South Carolina law.

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

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

The Attorney General has no authority to appropriate money. The money in the settlement was payable to the State of South Carolina pursuant to the suit and by federal statute. As such, the General Assembly has the control of the appropriation of those funds, not the Attorney General or this Court. *State ex rel. Condon v. Hodges*, 349 S.C. 232, 246, 562 S.E.2d 623, 631 (2002).

The General Assembly has the duty and authority to appropriate money as necessary for the operation of the agencies of government and has the right to specify the conditions under which the appropriated monies shall be spent. *State ex rel. Condon v. Hodges*, 349 S.C. 232, 244, 562 S.E.2d 623, 631 (2002); *Gilstrap v. S.C. Budget and Control Bd.*, 310 S.C. 210, 216, 423 S.E.2d 101, 105 (1992) (noting that the appropriation of public funds is a legislative function); *Clarke v. S.C. Pub. Serv. Auth.*, 177 S.C. 427, 437, 181 S.E. 481, 484 (1935) (noting that the General Assembly has full authority to make appropriations as it deems wise in absence of any specific constitutional prohibition against the appropriation). This

includes the duty to authorize and/or appropriate the use of all federal funds. S.C. Code Ann. § 11-11-160 (Supp. 2008). In the annual appropriations act, the General Assembly must appropriate all anticipated federal funds and must include any conditions on the expenditure of those funds, consistent with federal laws and regulations. S.C. Code Ann. § 2-65-20 (2005). Money may be drawn from the treasury only pursuant to appropriations made by law. S.C. CONST. art. X, § 8. An appropriation may be made by the General Assembly in the annual appropriations act or in a permanent continuing statute. *State v. Cooper*, 342 S.C. 389, 401, 536 S.E.2d 870, 877 (2000).

Edwards v. State, 383 S.C. 82, 90-91, 678 S.E.2d 412, 416-17 (2009).

(*Mem. in Opp'n Mot. to Dismiss, Ex. L, Mem. Att'y Gen. in Opp'n to Mot. to TRO or Temp. Inj.*, 4-5, *Ex Parte Barnwell County et al. v. Wilson*, C/A No. 2020-CP-06-00294 (Barnwell Cnty. Comm. Pleas Sept. 29, 2020)) (emphasis added, citation to exhibit omitted).

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

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

Id. at 1-2.

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

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

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

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

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

S.C. Code Ann. § 1-7-85 (emphasis added). *See also, Higgins v. State*, 307 S.C. 446, 449, 415 S.E.2d 799, 801 (1992) ("In construing statutory language, the statute must be read as a whole, and sections which are part of the same general statutory law must be construed together and each one given effect, if it can be done by any reasonable construction.").

These costs may be reimbursed from the "the budget of an agency or officer that it is representing or from funds generally appropriated for legal expenses." S.C. Code Ann. § 1-7-85. This statute does not contemplate that the Attorney General can rely upon § 1-7-85 to ignore the more particular statutory provision in § 1-7-150(B) addressing how the Attorney General must handle recoveries awarded to the State by judgment or settlement. To the extent these statutory provisions are inconsistent, § 1-7-150(B) should control because it is more specific in addressing

proceeds of a settlement or judgment. *DomainsNewMedia.com, LLC v. Hilton Head Island-Bluffton Chamber of Commerce*, 423 S.C. 295, 304, 814 S.E.2d 513, 518 (S.C. 2018) (“Where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect” (internal quotation marks omitted)).

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

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

Id. § 1-7-150(B) (emphasis added).

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

was required to be deposited into the State's General Fund pursuant to Section 1-7-150 of the South Carolina Code.

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

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

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

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

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

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

an appropriation of public funds by a member of the executive branch, rather than the General Assembly, in violation of the separation of powers. S.C. Const. art. I, § 8.

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

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

Section 2-65-20 provides that "the General Assembly shall appropriate all anticipated *federal funds* and *other funds*." S.C. Code Ann. § 2-65-20 (emphasis added). Federal funds "means financial assistance made to a state agency by the United States Government in any form." S.C. Code Ann. § 2-65-15(5). Examples of federal funds include "a grant, loan, subsidy, reimbursement, contract, donation, or shared federal revenues, or noncash federal assistance in the form of equipment, buildings, and land." *Id.* The settlement proceeds, although provided by the federal government, do not fall within this definition. Respondent's reliance upon the South Carolina Federal Funds Oversight Act, S.C. Code § 2-65-10 *et seq.* is misplaced. The DOE settlement proceeds were not intended as financial assistance for the South Carolina Attorney General's Office or any other State agency and thus not within the purview of the South Carolina Federal Funds Oversight Act.

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

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

In addition, the EBO did not provide the fee request for review by the Joint Other Funds Oversight Committee as required. The EBO instructions for an application for an increase in other funds expenditures state that “the [EBO] will coordinate requests with the Other Funds Oversight Committee, who will review and make a recommendation relative to the request to the EBO.” *See* South Carolina Dept. of Admin. Request for Other Funds Auth. Form (available at <https://admin.sc.gov/budget/otherfundsauthorization>). The EBO Request submitted on behalf of Wilson requesting authorization for the \$75 million fee also provides that approval is subject to review of the Joint Other Funds Oversight Committee. *See Form BD-100, Exhibit G, Mem. Att’y. Gen. in Opp’n. to Mot. for TRO or Temp. Inj, Ex. 2.* Although the application depicts approval by the Director of the EBO, there is no such approval on the portion of the decision made by the Joint Other Funds Oversight Committee. Senator Nikki Setzler, who is Co-Chair of the Joint Other Funds Oversight Committee, has provided an affidavit stating that the Committee has not considered an application for the payment of fees to the Law Firms, nor has the Committee been requested to review any application. (*Mem. in Opp’n Mot. to Dismiss, Ex. M, Honorable Nikki G.*

Setzler Affidavit). In short, the EBO Director by-passed the approval process, eliminating any oversight by the General Assembly, to authorize the payment of the \$75 million fee from funds that the Director lacks authority to appropriate.

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

C. Proviso 59.8 is Immaterial.

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

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

IV. THE LAW OF THE CASE DOES NOT BAR APPELLANTS' CLAIMS.

Judge Lee's factual findings and legal rulings, when denying Plaintiffs' motion for a preliminary injunction are not binding on the merits of Appellants' claims. In *University of Texas v. Camenish*, 451 U.S. 390 (1981), the United States Supreme Court explained that "given the haste that is often necessary" when addressing a motion for preliminary injunction, "the findings of fact and conclusions of law made by a court . . . are not binding at trial on the merits."

In *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013), the Supreme Court explained that the law of the case doctrine does not apply to interlocutory rulings and that do not finally determine a substantive right. The issue on appeal in *Shirley's Iron Works* was whether plaintiff had a third-party beneficiary claim against a municipality for not requiring a general contractor to be bonded, as required by statute. The circuit court had previously stricken plaintiff's claim for pre-judgment interest and attorneys' fees, concluding that plaintiff's claim sounded in tort only, and that pre-judgment interest and attorneys' fees are not available under the South Carolina Tort Claims Act (TCA). Subsequently, another circuit court judge granted the City of Union summary judgment on all causes of action, concluding that Plaintiff's claims sounded in tort and were barred by the TCA. The Court of Appeals reversed, concluding that the plaintiff has an implied statutory cause of action that sounds in contract, not tort, and is therefore not barred by the TCA. The Supreme Court granted certiorari and affirmed the Court of Appeals. The Supreme Court rejected the City of Union's argument that the law of the case doctrine foreclosed a third-party beneficiary claim. The South Carolina Supreme Court stated:

The doctrine of the law of the case applies to an order or ruling which finally determines a substantial right Ordinarily an interlocutory ruling which merely decides some point or matter essential to the progress of the cause, collateral to the issues in the case, is not binding as the law of the case, and may be reconsidered and corrected by the court before entering a final order on the merits.

403 S.C. at 573.

The Supreme Court further explained that the order “merely granted the City’s motion to strike with regard to attorneys’ fees and prejudgment interest pursuant to Section 15-7-300 and should not be viewed beyond their intended and limited purpose. *Id.* at fn. 11.

Moreover, Rule 54(b), SCRCP provides “[i]n the absence of [the court directing entry of a final judgment as to one or more but fewer than all the claims], any order or other form of decision, however designated, which adjudicates fewer than all the claims . . . shall not terminate the action as to any of the claims . . . , and *the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.*” Rule 54(b), SCRCP (emphasis added).

Here, Judge Lee did not direct entry of a final judgment on the merits of Appellants’ claims. In fact, Respondents filed their motions to dismiss after Judge Lee issued the order denying preliminary injunctive relief and requested that she rule upon the same. Judge Lee refused. *Mem. in Opp’n to Mot. Dismiss, Ex. K, Judge Lee email to Counsel, Oct. 28, 2020.* Thus, the preliminary factual findings and legal rulings contained in the order denying Appellants’ motion for preliminary injunction are non-binding and subject to revision at any time prior to the entry of a final judgment. Judge Lee’s Order should not be viewed beyond its intended and limited purpose.

Finally, the standard for granting a motion to dismiss is significantly different from the standard on motion for preliminary injunction. At the motion to dismiss stage, this Court is required to accept all facts alleged in the Complaint as true. *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247-48 (2007). By contrast, in evaluating whether a plaintiff is entitled to a

preliminary injunction, the Court must examine the merits of the underlying case to determine whether the plaintiff has made a sufficient prima facie showing of entitlement to relief. *Compton v. S.C. Dept. of Corrections*, 392 S.C. 361, 367, 709 S.E.2d 639, 642 (2011).

CONCLUSION

Appellants respectfully request that this Court reverse the decision of the Circuit Court, rule that the appellants possess standing in this case, rule that that Wilson lacked authority to pay Law Firms and remand the case to the circuit court for further proceedings.

Respectfully submitted,

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EXHIBIT 2

Initial Brief of Respondent Willoughby & Hoefer,
P.A.,
S.C. Pub. Interest Found. v. Wilson et al.,
No. 2021-00343 (S.C. Sup. Ct. Sept. 3, 2021)

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
R. Kirk Griffin, Circuit Court Judge

Supreme Court Case No. 2021-000472

Court of Appeals Case No. 2021-000343

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

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

v.

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

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INTRODUCTION

After more than four and a half years of litigation against the Federal Government across a number of 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), which was the result of the litigation efforts of the Attorney General's litigation team, which included Respondents Willoughby & Hoefer, P.A. (W&H) and Davidson, Wren & DeMasters, P.A. (DW&D, and together with W&H, the Respondent Law Firms). That settlement secured the largest single upfront monetary recovery ever on behalf of the State—\$600 Million—in addition to significant other monetary and non-monetary legally binding contractual commitments from the Federal Government inuring to the State's benefit going forward.

Appellants 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 assured 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 casting stones and disparaging the work and result in which they played no part, all for the sole purpose of obtaining a portion of the fees earned by and paid to the Respondent Law Firms based upon a factually meritless and legally non-justiciable contention that a violation of the South Carolina Rules of Professional Conduct (Rules) has occurred.

In the action underlying this appeal, Appellants challenged the amount of attorneys' fees paid to the 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 applied the precedent of this Court and dismissed the case because Appellants lacked standing, rejecting Appellants' attempt to conjure some new form of standing for their politically-motivated "money grab."

This Court should reject Appellants' gambit as well and affirm the order of the circuit court dismissing this case because Appellants' lack of standing is now the law of the case and, in any event, was correctly determined by the circuit court. This appeal also should result in affirmance because, as additional sustaining grounds, Appellants' claims in this case are frivolous and fail on their face as a matter of law for myriad reasons.

COUNTER STATEMENT OF ISSUES ON APPEAL

1. Should the dismissal of Appellants' action be affirmed because Appellants failed to appeal the circuit court's order finding that Appellants lack standing, thus rendering that finding the law of the case?
2. Did the circuit court properly dismiss Appellants' claims challenging the fulfillment of the Attorney General's contractual obligation to the Respondent Law Firms for lack of standing where the attorneys' fees were paid consistent with the terms of their litigation retention agreement with the State, such contractual payment was approved by the Attorney General, the Executive Budget Office of the Department of Administration, the State Comptroller General, and the State Treasurer, and where Appellants were not parties to the litigation retention agreement and did absolutely nothing to advance the State's interests in the multiple lawsuits against the Federal Government brought by the Respondent Law Firms?
3. Should the circuit court be affirmed on the additional sustaining grounds that Appellants' claims challenging the payment of attorneys' fees to the Respondent Law Firms (a) are moot, (b) present non-justiciable political questions, and (c) fail to state facts sufficient to constitute a cause of action?

COUNTER STATEMENT OF THE CASE

Appellants instituted the action underlying this appeal in the Richland County Court of Commons Pleas on September 25, 2020, against the State Attorney General. **(R. pp.)** (Complaint). Several days later, upon learning that the State had paid the Respondent Law Firms the fee to which they were contractually entitled, Appellants filed an amended complaint adding claims against the Respondent Law Firms. **(R. pp.)** (Amended 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 into 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 1, 2020, the Honorable Alison Renee Lee issued an *Ex Parte* Temporary Restraining Order but scheduled and then conducted a hearing on the motion for preliminary injunction on October 7, 2020. At the close of the hearing, Judge Lee extended the Temporary Restraining Order an additional seven days while she considered the arguments and information advanced by the parties. **(R. pp.)** (Form 4 Order Extending TRO). On October 14, 2020, Judge Lee denied the motion for preliminary injunction and dissolved the extended Temporary Restraining Order based on two independent determinations: first, that Appellants lacked standing; and second, that Appellants had not demonstrated that they met the legal standards for the issuance of a 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, W&H and DW&D filed and served motions to dismiss seeking dismissal pursuant to Rules 12(b)(1) and 12(b)(6), SCRCP, on the grounds that Appellants lacked standing and failed to state facts sufficient to constitute a cause of action against the Respondents. **(R. pp.)**. The Attorney General filed his own motion to dismiss on October 27, 2020, seeking dismissal on similar grounds. **(R. pp.)**. On January 26, 2021, the Honorable R. Kirk Griffin conducted a hearing on the motions to dismiss. On February 12, 2021, Judge Griffin sent the parties a letter announcing his decision to grant the motions to dismiss stating, in part, “[t]he Court finds that Circuit Court Judge Alison Lee’s order dated October 14, 2020 is dispositive as to the issue of standing.” **(R. pp.)**. On March 5, 2021, Judge Griffin issued a formal order dismissing the Amended Complaint on the basis that Judge Lee’s prior findings that Appellants lacked standing were dispositive. **(R. pp.)** (Order Granting Motions to Dismiss (March 5 Order)) (“Judge Lee’s findings are dispositive and require dismissal”). Judge Griffin also concurred with and restated Judge Lee’s analysis and findings in the alternative. **(Id.)**. Appellants filed their Notice of Appeal with the Court of Appeals on March 29, 2021, appealing only from Judge Griffin’s March 5 Order.¹ **(R. pp.)**. By order dated July 6, 2021, the appeal was certified for review by this Court.

FACTUAL BACKGROUND

It is important for this Court to know at the outset how this lawsuit came to pass. In the action underlying this appeal, Appellants challenged the payment of attorneys’ fees to private attorneys as required by contract, fees that were earned through the prosecution of four cases in

¹ On May 5, 2021, Respondents filed with the Court of Appeals a Motion to Dismiss this appeal on the grounds that Judge Lee’s unappealed finding that Appellants lack standing is the law of the case and, therefore, no justiciable controversy exists. By order dated June 8, 2021, the Court of Appeals denied the Motion to Dismiss but provided that nothing prevented the parties from addressing the arguments raised in the Motion to Dismiss in their briefs. Appellants have addressed this issue in their brief. Br. of Appellants at 26-28.

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.

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 significant 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 following the associated issues 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 a draft complaint prepared by the Respondent Law Firms. **(Id.)**. This strategy included a multi-front approach that would assert 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 continuation of the MOX Facility or removal of the material from the State.

With political overtures by South Carolina having been rebuffed, and DOE missing the January 1, 2016 statutory deadline, 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 1-2). 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, 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 or payment for either their costs or the time worked on behalf of the State.

The Respondent Law Firms filed a complaint on behalf of the State against the Federal Government in Federal District Court in 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. pp.**) (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 the claim to 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 Federal District Court in 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 directions—represented the State in intervening in the Nevada case. (*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. (*Id.*). After briefing at the Ninth Circuit, the court dismissed the

appeal as moot on August 13, 2019.² 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 the Federal District 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.*).

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, political efforts were made to obtain a solution that, unfortunately, never materialized and, 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

² Notably, 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 was placed in Texas.

maintain the status quo, which had achieved temporary success and benefited hundreds of workers in the State.³

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. pp.)** (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.)**. 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 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 additional productive meetings, settlement discussions culminated in an agreement in principle reached on July 1, 2020, subject to further approvals and consultation

³ 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 the possibility of damages to the State on which an attorneys' fee would be based.

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 3-4).

On August 28, 2020, a settlement agreement was executed providing for a payment of \$600 million from the Federal Government's litigation "Judgment Fund,"⁴ 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 to force removal⁵ and receive additional payments⁶ should the Federal Government not comply.⁷ (*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

⁴ 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. The 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* n. 6 *infra*, and without the need for a specific appropriation from Congress.

⁵ The 15-year removal period for the remaining 9.5 metric tons of weapons-grade plutonium—an amount that is now known and was declassified as a result 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.

⁶ The rationale for the grace period on payment was that the source of funds for the economic and impact assistance payments changes beginning 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.

⁷ The additional payments could be up to \$1.5 billion if the Federal Government fails to honor its contractual commitment to South Carolina in the settlement agreement.

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)).

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 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.⁸

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.

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.

6, 2020)). The payment was approved by the Executive Budget Office (EBO) of the Department of 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 to dismiss, this Court applies the same standard of review as the trial court. *Carolina Park Associates, LLC v. Marino*, 732 S.E.2d 876, 878, 400 S.C. 1, 6 (2012); *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). Dismissal is proper and should be affirmed unless "the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory." *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 753 S.E.2d 846, 850, 407 S.C. 67, 75 (2014).

ARGUMENT

1. **This appeal should be dismissed because Appellants did not appeal from Judge's Lee's order denying Appellants' motion for preliminary injunction, which order Judge Griffin found to be dispositive on the issue of Appellants' lack of standing, rendering it the law of the case.**

In the October 14 Order and the December 17 Order, Judge Lee made the specific finding that Appellants did not have standing to pursue any of their claims against Respondents. (**R. p.**) (October 14 Order at 14 ("After hearing the issues and arguments of counsel and considering the materials submitted, this Court finds Plaintiffs lack standing...")); (**R. p.**) (December 17 Order at 2 ("This Court properly ruled Plaintiffs lack standing in this matter.")). This finding was made independent of her determination that Appellants had failed to satisfy their burden for the issuance of a preliminary injunction; rather, it was made as a threshold determination of justiciability of the

underlying claims. (*Id.*). Appellants did not identify in or attach to their Notice of Appeal either of Judge Lee's orders (they only identified and attached Judge Griffin's March 5 Order), and the time period within which Appellants could have appealed them has expired.⁹ See Rule 203, SCACR (providing, in part, that a party intending to appeal from the Court of Common Pleas shall serve a notice of appeal within 30 days of receipt of written notice of entry of the order or judgment and that the notice of appeal "*shall* be accompanied by... [a] copy of the order(s) and judgment(s) to be challenged on appeal" (Emphasis added)). Because Appellants have not appealed either the October 14 Order or the December 17 Order, Judge Lee's conclusion that Appellants lack standing is the law of the case. See *ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (holding that an unappealed ruling is law of the case). In addition, Appellants have not challenged or identified in their brief as an issue in this case Judge Griffin's ruling that he did not have the power to reverse or modify Judge Lee's findings that Appellants lacked standing.¹⁰ (**R. p.**) (March 5 Order at 4-5) ("It is settled [law] that one circuit judge does not have the power to review, modify, affirm or reverse the findings of another circuit judge.") (quoting *State ex rel. Medlock v. Love Shop, Ltd.*, 286 S.C. 486, 334 S.E.2d 528 (1985)). Judge Griffin's ruling in this regard, therefore, is also now law of the case. *ML-Lee Acquisition*, 327 S.C. at 241, 489 S.E.2d at 472.

"A threshold inquiry for any court is a determination of justiciability, i.e., whether the litigation presents an active case or controversy." See *Peoples Fed. Sav. & Loan Ass'n v. Res. Plan. Corp.*, 358 S.C. 460, 477, 596 S.E.2d 51, 60 (2004) (quoting *Lennon v. S.C. Coastal Council*, 330

⁹ Also, Appellants did not appeal from the October 14 Order and the December 17 Order within thirty (30) days of the issuance of the December 17 Order.

¹⁰ Rather, Appellants only contend that Judge Lee's findings are not law of the case, which is, of course, a separate and distinct issue than whether Judge Griffin's rulings were correct.

S.C. 414, 415, 498 S.E.2d 906, 906 (Ct. App. 1998)); *Jowers v. S.C. Dep't of Health & Env't Control*, 423 S.C. 343, 353, 815 S.E.2d 446, 451 (2018) (“Our courts will not address the merits of any case unless it presents a justiciable controversy.”). The concept of justiciability includes the doctrine of standing. *Jackson v. State*, 331 S.C. 486, 490 n.2, 489 S.E.2d 915, 917 n.2 (1997). “No justiciable controversy is presented unless the plaintiff has standing to maintain the action.” *Lennon*, 330 S.C. at 415, 498 S.E.2d at 906 (quoting *Brock v. Bennett*, 313 S.C. 513, 519, 443 S.E.2d 409, 413 (Ct. App. 1994)). Because it is the law of the case that Appellants do not have standing in this matter, there is no justiciable controversy, and this appeal must be dismissed.

This straightforward and inescapable conclusion is not altered because the Appellants have appealed from Judge Griffin’s March 5 Order dismissing Appellants’ Amended Complaint. In his order, Judge Griffin recognized that Judge Lee’s findings that Appellants lacked standing were “dispositive and require[d] dismissal.” (**R. p.**) (March 5 Order at 4-5). But, critically, an appeal of Judge Griffin’s order is not also an appeal of Judge Lee’s orders.¹¹ Two prior decisions—one by this Court and one by the Court of Appeals—confirm this.

In *Bakala v. Bakala*, 352 S.C. 612, 576 S.E.2d 156 (2003), this Court considered the appeal of an order of a family court judge denying a motion to quash a bench warrant. The appellant had filed a motion to quash, which had been denied by the family court on the basis that the court lacked jurisdiction to grant the motion. Several months later, the appellant moved for the same relief from another family court judge. The second family court judge denied the motion for the same reason (lack of jurisdiction) as the first family court judge. Pertinent here, the appellant *only* appealed the order of the second family court judge. On appeal, this Court agreed with the appellant

¹¹ And, again, while Appellants appealed from Judge Griffin’s order, they have not challenged Judge Griffin’s ruling that he did not have the power to reverse or modify Judge Lee’s findings that Appellants lacked standing.

that the family court erred in finding that it lacked jurisdiction to quash the bench warrant but held that the second motion to quash was properly denied because the second family court judge “could not overrule the prior order” of the first judge and the first judge’s “unappealed ruling finding no jurisdiction [was] therefore the law of the case.” *Bakala*, 352 S.C. at 631-32, 576 S.E.2d at 166 (Internal citations omitted).

Similarly, in *McAleese v. McAleese*, 309 S.C. 548, 424 S.E. 2d 558 (Ct. App. 1992), the Court of Appeals also considered an appeal from a family court order. As described by the Court of Appeals in its opinion, the “appealed order” had found that two prior orders “were dispositive of the issues presented by the pleadings of this case.” *McAleese*, 309 S.C. at 550, 424 S.E. 2d 559. As in this case, the appellant in *McAleese* did not appeal the two prior orders. In affirming, the Court of Appeals held that because the two prior orders were not appealed, they constituted the law of the case. *Id.* at 551, 424 S.E. 2d at 559-60.

In short, to challenge the finding that they lacked standing to pursue their claims against Respondents, Appellants needed to appeal from and challenge Judge Lee’s October 14 and December 17 Orders, which were dispositive as to that issue. They failed to do so and, therefore, the law of the case is that Appellants lack standing.

In their brief, Appellants do not—because they cannot—dispute that they failed to appeal Judge Lee’s orders but rather contend that Judge Lee’s rulings were somehow “not binding” because her orders were issued in the context of resolving a preliminary injunction.¹² Br. of

¹² Appellants contend this Court’s decision in *Shirley’s Iron Works, Inc. v. City of Union*, 403 S.C. 560, 743 S.E.2d 778 (2013), supports their claim that Judge Lee’s finding of lack of standing is not the law of the case. But, in fact, the opposite is true. In *Shirley’s Iron Works*, this Court stated that the doctrine of the law of the case applies to an unappealed “order or ruling which finally determines a substantial right.” *Id.* at 573, 743 S.E.2d at 785 (quoting *Weil v. Weil*, 299 S.C. 84, 89, 382 S.E.2d 471, 473 (Ct. App. 1989)). Here, Judge Lee’s ruling “finally determine[d] a substantial right” because (1) a party’s standing is a substantial right; and (2) her ruling could not

Appellant at 26. The obvious and fatal deficiency of this contention is that Judge Lee specifically stated that her ruling on the legal issue of Appellants' standing was separate and apart from her determination that Appellants did not meet the legal standards for issuance of a preliminary injunction. *See* (**R. pp.**) (December 17 Order (holding that "[Appellants]' standing and request for preliminary injunction *are separate issues*," and that "[t]he question of standing had to be determined" and "[Appellants]' lack of standing ... could have ended [the inquiry]") (Emphasis added))).

Contrary to Appellants' unsupported claims, *see* Br. of Appellant at 26-27, Judge Lee's findings and conclusions were not made in the context of determining whether Appellants had a "likelihood of success on the merits" under the preliminary injunction standard. Judge Lee did not limit her finding that Appellants lacked standing to the request for preliminary injunction. Rather, Judge Lee ruled—separate from her determination that Appellants failed to meet their burden for entitlement to a preliminary injunction—that Appellants lacked standing to pursue any of their claims against Respondents. (**R. p.**) (October 14 Order at 14 ("[T]his Court finds Plaintiffs lack standing *and* have failed to meet their burden for a Preliminary Injunction in this matter.")) (Emphasis added)); (**R. p.**) (December 17 Order at 2 ("This Court properly ruled Plaintiffs lack standing *in this matter*.")) (Emphasis added)).

Therefore, because Appellants' lack of standing is the law of the case, this appeal should be denied and the dismissal of this case should be affirmed.

be overruled by another judge. *See id.* ("This State has a long-standing rule that one judge of the same court cannot overrule another."). Moreover, if a party does not have standing to maintain any of its claims, then the party has no lawful means by which to maintain the litigation itself.

2. Even if the law of the case does not bar the appeal, the circuit court should be affirmed because Appellants lack standing.

As the United States Supreme Court has emphasized, the increasing demand for judicial attention and intervention on most every conceivable perceived grievance “has not eliminated the basic principle that to invoke judicial power the claimant must have a “personal stake in the outcome,” or a “particular, concrete injury,” or “a direct injury”; in short, something more than “generalized grievances.” *U.S. v. Richardson*, 418 U.S. 166, 179-80 (1974). “Few exercises of the judicial power are more likely to undermine public confidence in the neutrality and integrity of the Judiciary than one which casts the Court in the role of a Council of Revision, conferring on itself the power to invalidate laws at the behest of anyone who disagrees with them.” *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 145-46 (2011). For that reason, “courts must be more careful to insist on the formal rules of standing, not less so.” *Id.* at 146; *see S.C. Pub. Interest Found. v. S.C. Dep’t of Transp.*, 421 S.C. 110, 117, 804 S.E.2d 854, 858 (2017) (“A plaintiff must have standing to institute an action.”); *Blandon v. Coleman*, 285 S.C. 472, 475, 330 S.E.2d 298, 299 (1985) (“Standing to sue is a fundamental requirement in instituting an action.”); *Joytime Distribs. & Amusement Co., Inc. v. State*, 338 S.C. 634, 639, 528 S.E.2d 647, 649 (1999) (same).

“Under our current jurisprudence, there are three ways in which a party can acquire this fundamental threshold of standing: (1) by statute; (2) through what is called “constitutional standing”; and (3) under the public importance exception.” *Bodman v. State*, 403 S.C. 60, 66–67, 742 S.E.2d 363, 366 (2013) (citing *ATC S., Inc. v. Charleston Cnty.*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008)). There is no assertion in this case of statutory or constitutional standing,¹³ so

¹³ In any event, Appellants do not have constitutional standing because they have not alleged and cannot allege an injury in fact. *Commander Health Care Facilities, Inc. v. S.C. Dep’t of Health & Env’t Control*, 370 S.C. 296, 301, 634 S.E.2d 664, 666 (Ct. App. 2006) (“Constitutional standing requires, at a minimum, that the party bringing the action sustain a direct injury or the immediate danger a direct injury will be sustained.”). Appellants are not parties to the contract between the

Appellants are left to assert the “public importance” exception.¹⁴ The circuit court correctly ruled that they did not meet—and cannot meet—their burden demonstrating this exception applies.

A. *Appellants cannot proceed pursuant to the “public importance” exception.*

The “public importance” exception to the general standing requirements allows citizens in some limited instances, which are not present here, to seek judicial resolution of an issue “of such public importance as to require its resolution for future guidance.” *Davis v. Richland Cnty. Council*, 372 S.C. 497, 500, 642 S.E.2d 740, 741 (2007). However, this Court has recognized it “must be cautious with this exception, lest it swallow the rule.” *Jowers*, 423 S.C. at 360, 815 S.E.2d at 455 (quoting *S.C. Pub. Interest Found. v. S.C. Transp. Infrastructure Bank*, 403 S.C. 640, 646, 744 S.E.2d 521, 524 (2013)). Indeed, “standing cannot be granted to every individual who has a grievance against a public official. Otherwise, public officials would be subject to numerous lawsuits at the expense of both judicial economy and the freedom from frivolous lawsuits.” *Sloan v. Sanford*, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004). The general importance of an issue, without more, is insufficient to invoke the exception because “the same may be said of most legislative and executive actions. For a court to relax general standing rules, the matter of

Respondent Law Firms and the Attorney General, were not involved in the Federal litigation in any way, and have no claim, entitlement, or right to the settlement funds or the attorneys’ fees. Likewise, Appellants do not have so-called “taxpayer standing” because Appellants state no specific claim that they have regarding the settlement proceeds and, thus, have no harm arising from their alleged claims that differs from all other taxpayers and residents in the State. *See Bodman*, 403 S.C. at 67, 742 S.E.2d at 366 (“In *ATC*, [this Court] unanimously closed the door to a litigant asserting standing simply by virtue of his status as a taxpayer [asserting harm shared by all taxpayers in the State]....This feature of commonality defeats the constitutional requirement of a concrete and particularized injury.”) (quoting *ATC*, 380 S.C. at 198, 669 S.E.2d at 340-41).

¹⁴ Appellants also have argued that they have what they claim is “derivative standing” to pursue claims on behalf of the State. As explained below, there is no such thing and this contention is meritless.

importance must, in the context of the case, be inextricably connected to the public need for court resolution for future guidance.” *ATC*, 380 S.C. at 199, 669 S.E.2d at 341.

Appellants essentially assert two claims in this case. First, Appellants assert a claim against the Attorney General alleging that he did not have authority to approve the one-time payment of attorneys’ fees for services performed pursuant to the Litigation Retention Agreement, notwithstanding the clear grants of statutory authority to the Attorney General to enter into the Litigation Retention Agreement and hire the Respondent Law Firms. Second, Appellants assert a claim against the Respondent Law Firms alleging that the amount of attorneys’ fees owed and paid pursuant to the Litigation Retention Agreement is “unreasonable.” There are three primary reasons why the “public importance” exception does not permit the Appellants to proceed with these claims.

First, and most importantly, Appellants have not and cannot meet their burden to show that resolution of its claim “is needed for future guidance.” *ATC*, 669 S.E.2d at 341, 380 S.C. at 199 (2008) (“The key to the public importance analysis is whether a resolution is needed for future guidance. It is this concept of ‘future guidance’ that gives meaning to an issue which transcends a purely private matter and rises to the level of public importance.”). Appellants’ challenge is to the one-time payment of the attorneys’ fees in this particular and unique situation and pursuant to this specific Litigation Retention Agreement. Indeed, Appellants candidly acknowledged before the circuit court that it is because of the “amount of the fee” judicial intervention is purportedly warranted. (**R. p.**) (October 14 Order at 6 (“Plaintiffs acknowledge that it is because of the amount of the fee the statute requires interpretation.”). Any determination with respect to this challenge would therefore be entirely limited to the Litigation Retention Agreement and payment for services performed pursuant to this single contract. *See Freemantle v. Preston*, 398 S.C. 186, 194, 728

S.E.2d 40, 44 (2012) (affirming dismissal of citizen’s challenge to invalidate public body’s payment to former employee pursuant to severance agreement for lack of “public importance” exception standing because such one-time payment did “not necessitate further guidance.”). Such a determination would not provide “future guidance” as to any issue of public importance, especially considering that Appellants do not—nor could they—challenge the Attorney General’s authority to enter into the Litigation Retention Agreement on behalf of the State.

This conclusion is not changed by Appellants’ contention that guidance is needed with respect to other contracts for outside litigation counsel entered into by the Attorney General. Appellants’ claims are specific to the Respondent Law Firms’ Litigation Retention Agreement and the authority to make the payment in this specific case. This is not a case about the Attorney General’s authority to enter into contracts for outside litigation counsel because Appellants do not challenge that authority. Thus, application of the “public importance” exception is inappropriate because applying it here would allow the “exception [to] swallow the rule.” *Jowers*, 423 S.C. at 360, 815 S.E.2d at 455. Simply put, allowing Appellants to proceed pursuant to the “public importance” exception to standing in this context would ensure that the courts of this State will routinely be faced with lawsuits challenging government contracts because some one person or another is unhappy with the contract.

A second reason that Appellants cannot demonstrate that the “public importance” exception should apply is because they are seeking to recover damages under a “common fund” theory while purportedly representing taxpayers and the public. Appellants’ claim essentially devolves into a statement that the Respondent Law Firms do not deserve to be compensated in the manner in which the State contracted for their services. That assessment apparently does not apply to Appellants, however, because they seek to appear after-the-fact and take any amount of

attorneys' fees not paid to the Respondent Law Firms for themselves. Accordingly, their self-serving claims "directly conflict[] with the purpose and spirit of the public importance exception." *Freemantle*, 398 S.C. at 194, 728 S.E.2d at 44.

Finally, the "public importance" exception does not apply to claims against the Respondent Law Firms, which are private entities. The "public importance" exception, by definition, only applies to claims against governmental or public bodies and officials.¹⁵ It does not apply to a contract claim against private entities asserted by a non-party to the contract. Nor do the principles of standing transfer among independent causes of action or defendants. *Daimler Chrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) ("[A] plaintiff must demonstrate standing separately for each form of relief sought." (Internal citations and quotation marks omitted)). Thus, Appellants may not satisfy their burden of standing against the Respondent Law Firms through an assertion of purported public importance standing to challenge the Attorney General's conduct under a wholly independent claim. "[S]tanding is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 (1996). Because there is no South Carolina authority to support a finding of standing under the public importance exception against private litigants, any arguable claim of public importance standing as to the Attorney General, which is disputed, would not satisfy Appellants' burden of standing as to the Respondent Law Firms in any event.

¹⁵ See, e.g., *Sloan v. Dep't of Transp.*, 365 S.C. 299, 618 S.E.2d 876 (2005) (alleged violation of statutory bidding requirements by state agency); *Sloan v. Wilkins*, 362 S.C. 430, 608 S.E.2d 579 (2005) (alleged violation of constitutional requirements for legislation by legislature); *Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004) (alleged violation of constitutional provisions regarding Governor's role in Air Force Reserve); *Sloan v. Greenville Cnty.*, 356 S.C. 531, 548, 590 S.E.2d 338, 347 (Ct. App. 2003) (alleged violations of county ordinances governing procurement).

Therefore, as the circuit court correctly ruled, Appellants have no legitimate argument that the “public importance” exception permits them to proceed with their claims in this case.¹⁶

B. “Derivative standing” does not exist.

Appellants erroneously contend that they can step into the shoes of the State and challenge a contract that the duly elected Attorney General entered into and upheld. Br. of Appellant at 11 (“Accordingly, Plaintiffs have standing to assert claims on behalf of the State of South Carolina under the facts and circumstances of this case...”). They argue that the 1939 decision in *Ex parte Hart*, 190 S.C. 473, 2 S.E.2d 52 (1939), which allowed a citizen of a county to assert a claim on behalf of that county, should be extended to the State even though it is a sovereign entity. They further analogize their purported claims to that of a shareholder derivative action. As the circuit court correctly recognized, there are many problems with this argument.

First, “a private citizen cannot test the validity of executive or legislative action unless he or she has sustained or will sustain prejudice not common to the public from such action.” *Berry v. McLeod*, 328 S.C. 435, 447, 492 S.E.2d 794, 801-02 (Ct. App. 1997) (also rejecting claim to proceed as class action “because there is no claim of injury or damage not common to the public”). Appellants have alleged no injury or damage not common to the public and, thus, cannot proceed with their putative derivative class action. *See Freemantle*, 398 S.C. at 193, 728 S.E.2d at 43 (holding that a “taxpayer lacks constitutional standing when he suffers in some *indefinite* way in

¹⁶ Appellants apparently recognize this as their brief lacks any real analysis on this issue and instead consists of a brief summary of a recent decision by this Court, a few conclusory statements, and then string citation of cases (without any discussion). *But see ATC*, 380 S.C. at 199, 669 S.E.2d at 341 (“Yet the very nature of the public importance exception to general standing requirements *resists a formulaic approach, as each case must turn on “the competing policy concerns”* as we expressed in *Sloan v. Sanford* [, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004)].”) (Emphasis added).

common with people *generally*.”) (Emphasis added and internal quotation marks omitted). Appellants have no discrete injury entitling them to maintain this action.

Second, *Hart* is inapplicable here. *Hart* allowed a county resident to assert a “plain” claim on behalf of a county. *See Hart*, 190 S.C. at 477, 2 S.E.2d at 53. Critical to analyzing that decision is that *Hart* and the few decisions that follow its analysis involve claims with respect to counties, municipalities, and local government entities. *Berry*, 328 S.C. at 447, 492 S.E.2d at 800 (municipality) (“[T]his power cannot normally be controlled or exercised by a taxpayer to bring an action on behalf of a town, unless it is clear that the governmental entity has unjustifiably refused to assert the claim.”); *Hart*, 190 S.C. at 477, 2 S.E.2d at 53 (municipality); *see also Newman v. Richland County Historic Preservation Comm’n*, 325 S.C. 79, 480 S.E.2d 72 (1997) (county, city, and county historic preservation commission); *Johnston v. City of Myrtle Beach*, 285 S.C. 453, 454, 330 S.E.2d at 321, 322 (Ct. App. 1985) (municipality) (“Generally, a private citizen cannot test the validity of executive or legislative action unless he or she has sustained or will sustain prejudice not common to the public from such action”). Here, however, Appellants seek to extend *Hart* to allow a derivative suit on behalf of the State—a sovereign entity that is not subject to suit in the same manner as local governments may be.

Third, this Court has recognized that derivative actions are not applicable with respect to government actions by entities such as a historic commission because those entities are in the nature of a “body politic.” *Newman*, 325 S.C. at 74, 480 S.E.2d at 74. Which stands to reason because, for the same reasons that Appellants do not have taxpayer standing, citizens are not shareholders of the government by virtue of being taxpayers and, thus, cannot bring derivative actions. *See id.*; *see also Bodman*, 742 S.E.2d at 366, 403 S.C. at 66–67 (“We reaffirm this principle today and hold that Bodman’s status as a mere taxpayer is insufficient to confer standing

upon him.”); *ATC*, 380 S.C. at 198, 669 S.E.2d at 341, (“[A] taxpayer lacks standing when he ‘suffers in some indefinite way in common with people generally.’”) (quoting *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923)).

Thus, even if Appellants might be able to challenge local government actions under *Hart*, they cannot challenge executive branch action absent some discrete injury not common to the general public. This type of injury they do not have. *Berry* is instructive in this regard because it rejected an effort to bring a legal malpractice claim on behalf of a municipality. That is, the town residents brought a claim against the town’s former attorneys, alleging that they committed malpractice in how they handled the issuance of a revenue bond on behalf of the Town of New Ellenton. *Berry*, 328 S.C. at 440, 492 S.E.2d at 797. The Court of Appeals held that the town residents had no standing to sue either on behalf of New Ellenton or as a class of New Ellenton citizens. *Id.*, 328 S.C. at 446-47, 492 S.E.2d at 800. However, the Court of Appeals noted that the “authority to decide when a claim should or should not be brought by a governmental entity is vested with the entity.” *Berry*, 328 S.C. at 447, 492 S.E.2d at 800. Consequently, absent some plain cause of action, citizens do not have the right to bring a claim on behalf of a government. The plaintiffs in *Berry* could not avail themselves of that option because “the claim alleged by Residents on behalf of the town is not clearly set forth and is far from plain.” *Id.*, 328 S.C. at 448, 492 S.E.3d at 801. Thus, the Court of Appeals rejected plaintiff’s efforts to bring the claim on behalf of the town because there was no plain remedy, and similarly rejected their efforts to allege a class action “because there [was] no claim of injury or damage not common to the public.” *Id.*, 328 S.C. at 449, 492 S.E.2d at 802. For the same reasons, Appellants cannot proceed with respect to the State even if that option were available to them.

At bottom, Appellants are seeking to exercise the powers entrusted to the Executive (and, specifically, constitutional officers) and are asking the Judiciary to assist in their quest. However, as noted above, governmental officials and entities are given the discretion to determine what action should be taken by the agency or entity for which they are responsible. *Berry*, 328 S.C. at 447, 492 S.E.2d at 800. Appellants, therefore, lack standing, and neither the “public importance” exception nor Appellants’ claim of “derivative standing” remedy this deficiency or allow Appellants to proceed with their claims. Accordingly, this appeal should be denied and the dismissal of this case should be affirmed.

3. The circuit court should be affirmed on the additional sustaining grounds that Appellants’ claims are moot, present non-justiciable political issues, and fail to state facts sufficient to constitute a cause of action.

A. *Appellants’ claims are moot.*

Appellants’ claims are moot because the payment of the attorneys’ fees has already been made by the State pursuant to the approval of the Attorney General and the EBO and the authorization of the State Treasurer based on a warrant issued by the State Comptroller General. **(R. pp.)** (Am. Compl. ¶ 74 & Exs. 18, 19); *Sloan v. Greenville Cnty.*, 380 S.C. 528, 535, 670 S.E.2d 663, 667 (Ct. App. 2009) (“A case becomes moot when judgment, if rendered, will have no practical legal effect upon the existing controversy.”). Appellants’ claims therefore are merely a request for an advisory opinion because their claims have been rendered moot by payment of the fees to private counsel pursuant to the Attorney General’s contract with those attorneys and the approval of four separate State officials and agencies. *See id.* (“The court does not concern itself with moot or speculative questions.”); *Matter of Angela Suzanne C.*, 286 S.C. 186, 189, 332 S.E.2d 542, 543 (Ct. App. 1985) (“It is settled law that this Court will not issue advisory opinions on questions for which no meaningful relief can be granted.”). Appellants’ claims therefore are moot, and for this additional reason, this appeal should be denied and the dismissal of this case affirmed.

B. *Appellants' claims present non-justiciable political questions.*

“The fundamental characteristic of a nonjusticiable ‘political question’ is that its adjudication would place a court in conflict with a coequal branch of government.” *S.C. Pub. Interest Found. v. Judicial Merit Selection Comm’n*, 369 S.C. 139, 142–43, 632 S.E.2d 277, 278 (2006) (citing *U.S. v. Munoz-Flores*, 495 U.S. 385, 393-94 (1990)). “Thus, the courts will not rule upon questions which are exclusively or predominantly political in nature rather than judicial.” *Id.* (citing *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948)). Unlike the Federal Constitution, the South Carolina Constitution expressly requires that the branches of government remain separate so that one branch does not claim or exercise powers belonging to another branch. S.C. Const. art. I, § 8.

Here, Appellants’ request that the judicial branch invalidate not only the Attorney General’s ability to request payment through the procedures set forth in the law, but also the ability of the EBO, Comptroller General, and Treasurer (all non-parties to this lawsuit) to process the requested payments, seeks to have the Judiciary violate the separation of powers by asking it to rule on what amounts to a nonjusticiable political question. *E.g.*, *Segars-Andrews v. Judicial Merit Selection Comm’n*, 387 S.C. 109, 121–22, 691 S.E.2d 453, 460 (2010) (“The nonjusticiability of a political question is primarily a function of the separation of powers.”) (quoting *Judicial Merit Selection Comm’n*, 369 S.C. at 142, 632 S.E.2d at 278). Therefore, it would be a violation of the separation of powers required by Article I, § 8 of the South Carolina Constitution for the judicial branch to intrude upon the process followed for government payments, thereby usurping the authority of the Attorney General, EBO, Comptroller General, and Treasurer, respectively, to make a contractually-required payment.

At bottom, Appellants’ complaint states nothing more than a generalized grievance with a decision of the Attorney General, and Appellants are attempting to put this Court in the position

of wading into matters reserved for the Attorney General as the Chief Legal Officer of the State. However, Appellants do not challenge—nor could they challenge—the Attorney General’s authority to enter into the Litigation Retention Agreement or to hire private counsel on a contingency basis. Indeed, as discussed below, South Carolina Code § 1-7-170 unequivocally grants the Attorney General that authority, which he exercised here. *See also Cooley v. S.C. Tax Comm’n*, 204 S.C. 10, 28 S.E.2d 445, 450 (1943) (“[The Attorney General] is authorized to contract for the collection of debts due the State, or any of its departments or institutions, ***on a contingent basis.***”) (Emphasis added). The Attorney General determined that the Litigation Retention Agreement was in the best interests of the State, and Appellants’ mere disagreement with it, especially after it has been fully performed, does not support a legally-cognizable claim, nor does it provide this Court jurisdiction or authority to require judicial approval of the Litigation Retention Agreement.

C. *Appellants claims fail to state facts sufficient to constitute a cause of action.*

To be clear, Appellants’ arguments as to the merits of their claims are not preserved for this Court’s review, notwithstanding the fact that Appellants focus most of their brief on those arguments. It is undisputed that the circuit court did not reach the merits of Appellants’ allegations; nor did Appellants move for reconsideration based on an assertion that the circuit court erred in failing to reach Appellants’ allegations.¹⁷ By identifying these additional sustaining grounds,

¹⁷ *See Lapp v. S.C. Dep’t of Motor Vehicles*, 387 S.C. 500, 507, 692 S.E.2d 565, 569 (Ct. App. 2010) (“To be preserved for appellate review, an issue must have been: (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity.”); *Chastain v. Hiltabidle*, 381 S.C. 508, 515, 673 S.E.2d 826, 829 (Ct. App. 2009) (“When an issue is raised to but not ruled upon by the trial court, the issue is preserved for appeal only if the party raises the same issue in a Rule 59(e) motion.”). Given Appellants’ failure to undertake any efforts to preserve these questions for appeal, their request that the Court entertain these unpreserved questions “in the interest of justice and judicial economy,” itself an admission that those issues are unpreserved for appellate review, rings decidedly hollow.

W&H is not conceding at all that this Court should address Appellants' arguments as to the merits of their claims. That said, Appellants' claims fail to state facts sufficient to constitute a cause of action for four separate reasons and the circuit court may therefore be affirmed for this reason as an additional sustaining ground.

- i. There is no private action for a third party to challenge the payment of attorneys' fees as violative of the Rules of Professional Conduct.

The foundation for Appellants' claim that the attorneys' fees to the Respondent Law Firms are unreasonable is their assertion that the Litigation Retention Agreement with the Attorney General violates Rule 1.5 of the South Carolina Rules of Professional Conduct. (**R. pp.**) (Am. Compl. ¶¶ 33-35). However, even putting aside that, as discussed below, there is no legal basis to require the Attorney General to seek judicial approval of his contracts with outside legal counsel, there is no private right of action for a third party to challenge the attorneys' fees as violative of the Rules of Professional Conduct, and, in any event, there is no avenue for the circuit court to consider any allegations of violations of the Rules of Professional Conduct, which are committed to the *exclusive* province of this Court. *See In re Dickey*, 395 S.C. 336, 353–54, 718 S.E.2d 739, 748 (2011) (“[The Supreme Court] has the sole authority to discipline attorneys and to decide the appropriate sanction after a thorough review of the record.”) (citing *In re Welch*, 355 S.C. 93, 96, 584 S.E.2d 369, 370 (2003)); *In re Unauthorized Practice of Law Rules Proposed by South Carolina Bar*, 422 S.E.2d 123, 124, 309 S.C. 304, 305 (1992) (“The Constitution commits to [the Supreme Court] the duty to regulate the practice of law in South Carolina.”); *see also Hambrick v. GMAC Mortg. Corp.*, 370 S.C. 118, 124-25, 634 S.E.2d 5, 8-9 (2006) (affirming dismissal for lack of jurisdiction and finding no private action for the unauthorized practice of law).

- ii. The Attorney General had authority to pay the attorneys' fees without the necessity of depositing those amounts into the General Fund.

Appellants contend that S.C. Code Ann. § 1-7-150 precluded the Attorney General's payment of \$75 million pursuant to the Litigation Retention Agreement. Br. of Appellant at 18-23. This contention is wrong as a matter of law.¹⁸ There are two primary reasons for this. First, Appellants' reading of § 1-7-150 is not consistent with the statute. Second, even assuming without conceding that Appellants' reading is correct, none of the MOX settlement funds would ever reach the General Fund in any event 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 to a separate account. Appellants' lack of basic comprehension of what laws even apply to the settlement funds is reason alone to affirm the circuit court. And the fact that Appellants brought a lawsuit accusing the State's Chief Legal Officer (and the third-party EBO) of impropriety without having even a basic understanding of the applicable law is disturbing and clearly demonstrates that this lawsuit is just a politically motivated gambit and baseless effort to enrich themselves.

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." There are several reasons 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.

¹⁸ Appellants do not challenge the Attorney General's authority to retain outside counsel. Nor could they make such a challenge in good faith, as the Attorney General's ability to engage outside counsel on a contingency fee basis has been codified. *See* S.C. Code Ann. §§ 1-7-85, 170.

As an initial matter, 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. (**R. pp.**) (October 14 Order (unappealed holding that “S.C. Code Ann. § 1-7-150 is unambiguous and allows the Attorney General to pay cost of litigation from the settlement proceeds.”)). Consequently, § 1-7-150 authorized the Attorney General to pay the amounts to the Respondent Law Firms without first depositing those monies in the General Fund.

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 into 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....” Appellants’ contentions, therefore, have no support in the plain language of the statute.

Moreover, even if Appellants’ interpretation of § 1-7-150(B) was somehow correct—which it is not—it is irrelevant to this case 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). 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. 2020 S.C. Acts 135, § 2 (extending the effective dates of 2019 Act 91, Part 1.B. “until the effective date for appropriations made in a general appropriations act for Fiscal Year 2020-2021”); *see also* 2019 S.C. Acts 91 (“All acts or parts of acts inconsistent with any of the provisions of ... Part 1B of this act are suspended for Fiscal Year 2019-20.”); *see Beaufort Cnty. 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, even if Appellants were correct that the portion of the settlement awarded for attorneys’ fees generally would have to be deposited in the General Fund, they would not have to be in this case. The argument articulated by Appellants is therefore inapplicable. But even if it was applicable, the question becomes the Attorney General’s compliance with the requirement that expenditures from the Litigation Recovery Account must be “prescribed by law.” Again, fulfilling a contractual obligation is a duty “prescribed by law” for the Attorney General.

The payment of the contractual attorneys’ fees also 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.”);¹⁹ S.C. Code Ann. § 2-65-10, *et seq.* Moreover, the

¹⁹ Appellants also 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 23-25. Appellants even go so far as to allege “the EBO

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, even if there was some ambiguity regarding the applicable statutory provisions, the agencies charged with administering this statute necessarily have 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 & Env't 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.

Finally, and contrary to Appellants’ contention, the fees paid to the Respondent Law Firms were also “awarded by settlement.” Indeed, in making this contention, Appellants completely

Director by-passed the approval process.” *Id.* at 25. 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 completely 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. 2020 S.C. Acts 135, § 7 (“The Executive Budget Office is authorized to approve agency requests for federal and other fund authorization adjustments.”); **(R. pp.)** (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 is, of course, the reason that, as Mr. Setzler reports, there was no application for payment of the fees submitted to the Joint Other Funds Oversight Committee—by law, it was not required. The EBO Director therefore did not by-pass the requisite approval process, and Appellants’ contentions are baseless.

ignore the fact that 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.**) (Agreement to Voluntary Dismissal of Appeal (Emphasis added)). The primary contention of the Appellants is, therefore, based on a fiction contradicted by the undisputed record, demonstrating, again, the frivolity of Appellants’ lawsuit.

Thus, the Attorney General’s payment of the attorneys’ fees was proper and in accordance with the applicable law, and Appellants’ complaint failed to state facts sufficient to constitute a cause of action against Respondents. For this additional reason, the circuit court’s dismissal of this case should be affirmed.

- iii. The Attorney General is not required to obtain judicial approval of the Litigation Retention Agreement or the fees paid.

In their Amended Complaint, Appellants asked the circuit court to *require* the Attorney General to obtain judicial approval of the amount of fees paid to the Respondent Law Firms for services performed and costs incurred pursuant to their contract. But 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. And any procedure in that regard would violate the separation of powers by putting the Judiciary in the position of supervising the Executive Branch’s discharge of its duties.

Appellants note in their Amended Complaint that the Litigation Retention Agreement contains a discretionary provision regarding judicial approval of the fees when possible, but that provision is optional 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 is directly contradicted by the use of the prefatory condition “when possible” and renders such argument inapposite. Moreover, 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, and there is no common law requirement that the Attorney General seek judicial approval of his contracts. In short, as a matter of law, there is nothing that would have required the Attorney General to seek judicial approval of the fees earned by the Respondent Law Firms under the Litigation Retention Agreement.

Appellants’ (unfounded) allegation that the Litigation Retention Agreement—which provides for an effective contingency fee rate of 12.5%²⁰ for services performed over several years and in multiple lawsuits—violates the South Carolina Rules of Professional Conduct does not somehow confer upon the courts of South Carolina authority to review the Litigation Retention Agreement. A mere allegation of a violation of the South Carolina Rules of Professional Conduct does not change the simple and indisputable fact that there is no requirement—statutory or otherwise—that the Attorney General seek judicial approval of its contracts with outside counsel. This is especially so because the actual party to the contract in this case—the Attorney General—

²⁰ This percentage is based solely on the immediate \$600 Million payment and not future payments the State might receive as a result of the settlement—which payments do not entitle the Law Firms to any further compensation. *See* n. 8, *supra*.

has already approved the fee amount, and three other State officials or agencies—the State Treasurer, the State Comptroller General, and EBO—have approved and authorized the payment of the fee. Accordingly, as a matter of law Appellants’ claims seeking to require the Attorney General to seek judicial approval of the Litigation Retention Agreement or the fees paid pursuant to such contract fail to state facts sufficient to constitute a cause of action.

iv. Appellants’ constructive trust and restitution claims fail as a matter of law.

As discussed throughout, the Respondent Law Firms received payment of their fee for services performed pursuant to a legally-binding contract entered into with the Attorney General. As established by the Amended Complaint, the payment of the fee was authorized and approved by the Attorney General, the Treasurer’s Office, the Comptroller General’s Office, and the EBO. No statute requires court approval of the payment of the fee. And payment was intentionally and voluntarily made by the State to meet the State’s binding contractual obligations. Critically, none of those State officials contend that payment was somehow induced by “fraud, bad faith, abuse of confidence, or violation of a fiduciary duty” or that the Respondent Law Firms are not entitled to their contractual fees. *Lollis v. Lollis*, 354 S.E.2d 559, 561, 291 S.C. 525, 529 (1987) (discussing requirements to impose constructive trust); *JASDIP Properties SC, LLC v. Estate of Richardson*, 395 S.C. 633, 640, 720 S.E.2d 485, 489 (Ct. App. 2011) (“[I]f there is no basis for unjust enrichment, there is no basis for restitution.”).

Despite all this, which they know, Appellants nevertheless seek to stand in the shoes of the State and non-party State Executive Branch officials to contend a “constructive trust” should be created “*in favor of [Appellants]*,” (R. p.) (Am. Compl. ¶ 85), to deprive the Law Firms of their rights to the fee owed and already paid to them for services performed and costs incurred pursuant to their contract with the State. This contention completely lacks merit. “A constructive trust results from fraud, bad faith, abuse of confidence, or violation of a fiduciary duty which gives rise

to an obligation in equity to make restitution.” *Lollis*, 354 S.E.2d at 561, 291 S.C. at 529. “Fraud is an essential element, although it need not be actual fraud.” *Id.* “In order to establish a constructive trust, the evidence must be clear, definite, and unequivocal.” *Id.*

Appellants make the remarkable (and entirely frivolous) claim that the Respondent Law Firms’ receipt of the funds—which were owed and paid to them pursuant to a legally-binding and valid contract for services performed and for which payment was authorized by four separate State officials—was somehow wrongful and necessitates the creation of a constructive trust, thereby depriving the Respondent Law Firms of their rights to and the benefit of these funds. However, Appellants do not allege, nor could they allege, a single act on the part of either of the Respondent Law Firms that in any way amounts to “fraud, bad faith, abuse of confidence, or violation of a fiduciary duty.” *Lollis*, 354 S.E.2d at 561, 291 S.C. at 529. The closest Appellants come to such an allegation is their contention that the Respondent Law Firms’ contingency fee pursuant to its contract is not “reasonable” under the Rules of Professional Conduct.²¹ But, as discussed, the circuit court did not have jurisdiction over such claims; the Rules of Professional Conduct do not give rise to a private cause of action; Appellants are not parties to the underlying contract; and Appellants have no standing to assert such a claim. And the actual party to the contract—the Attorney General—approved the fee, and multiple other State officials authorized payment of the fee.

²¹ Other than this mere contention, there also is nothing in Appellants’ Amended Complaint that supports their claim that the 12.5% fee paid is unreasonable. Notably, as part of the proceedings before Judge Lee, W&H introduced the affidavits of Professor Nathan Crystal, Professor John Freeman, Professor Michael Verzi, 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. Accordingly, Appellants’ contention is contrary to the evidence of record in this case and wholly without merit. Moreover, as previously discussed, this contention is not preserved by Appellants for review in this appeal.

Like with their reasonableness claim, at bottom, 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 the State. Therefore, Appellants’ request for imposition of a constructive trust and for restitution are devoid of merit and warrant affirmance of the circuit court for this reason as well.

CONCLUSION

For the myriad reasons explained above, this Court should deny the appeal of Appellants and affirm the order of the circuit court dismissing this case.

[SIGNATURE PAGE FOLLOWS]

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September 3, 2021

EXHIBIT 3

Initial Brief of Respondent Davidson, Wren &
DeMasters, P.A.,
S.C. Pub. Interest Found. v. Wilson et al.,
No. 2021-00343 (S.C. Sup. Ct. Sept. 3, 2021)

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
R. Kirk Griffin, Circuit Court Judge

Supreme Court Case No. 2021-000472
Court of Appeals Case No. 2021-000343
Lower Court Case No. 2020-CP-40-04063

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

v.

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

**INITIAL BRIEF OF RESPONDENT
DAVIDSON, WREN & DEMASTERS, P.A.**

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ARGUMENT

Respondent Davidson, Wren & DeMasters, P.A. (DW&D) joins in, and incorporates by reference, the Brief of Respondent Willoughby & Hoefer, P.A., as it applies to this Respondent. This Respondent would add only the following brief discussion of the underlying federal litigation and the results it produced on behalf of the State of South Carolina. Simply summarized, if that litigation had not occurred, South Carolina would be over half a billion dollars poorer, and there would have been no enforceable schedule for the removal of highly radioactive plutonium stored at the Savannah River Site.

As the Court is doubtless aware, the Governors of South Carolina have been trying for over forty years to get the Department of Energy (DOE) to do something about the radioactive materials that have been in *de facto* storage at the Savannah River Site. Until the 2016 federal litigation was filed, however, the federal government not only did not remove nuclear material from SRS, it added still more such material in the early 2000s. At that time, however, and in response to efforts by Governor Hodges and others, Congress in 2002 enacted 50 U.S.C.A. § 2566, which provided for supposedly-firm deadlines for the removal of certain plutonium from South Carolina, along with significant monetary penalties (\$100 million per year to be paid to South Carolina) if certain actions relating to the removal or other disposition of plutonium did not occur by certain annual deadlines.

By January 1, 2016, though, and despite having obtained several extensions of time from Congress, the Department of Energy had not met, and did not even have a plan to meet, its statutory obligations as imposed by 50 U.S.C.A. § 2566. The Law Firms were retained, and the State sued the federal government on February 9, 2016. It soon became apparent that the federal government intended to follow its usual practice of delay and inaction when, in response to the State's lawsuit, the federal government resisted all efforts to move the plutonium and also denied that it should be required to pay even the first \$100 million, despite the undisputed fact that nothing had happened by the first annual deadline, January 1, 2016.

In the litigation, the federal government responded with every procedural and substantive defense it could muster. The State, represented by the Law Firms, pressed on, seeking both an injunction with regard to moving plutonium out of the State, and the monetary relief contemplated by 50 U.S.C.A. § 2566. W&H also pressed on in other related litigation, sending the signal that South Carolina would join battle with the federal government (or with other states) in any other litigation that might have made it easier for the federal government to avoid its responsibilities to South Carolina.

In late 2017, Judge Michelle Childs granted the State's request for an injunction, ordering that by January 1, 2020 at the latest, DOE was required to "remove from the State of South Carolina, for storage or disposal elsewhere, not less

than one metric ton of defense plutonium or defense plutonium materials. . . .” *South Carolina v. United States*, No. 1:16-CV-00391-JMC, 2017 WL 7691885, at *5 (D.S.C. Dec. 20, 2017). Although the federal government appealed that Order, claiming that such removal would be “impossible,” the Fourth Circuit affirmed the Order by published opinion dated October 26, 2018. *South Carolina v. United States*, 907 F.3d 742 (4th Cir. 2018). DOE thereafter managed to accomplish the action it claimed was “impossible,” removing the one metric ton by August 2019 (Docket No. 130-1 filed 8/7/19 in *South Carolina v. United States*, No. 1:16-CV-00391-JMC.)

However, DOE was still left with another 9.5 metric tons of plutonium that need to be removed, and it had no firm plans for how to accomplish that move, much less accomplish it in accordance within the statutory deadlines. This absence of a plan was another example of DOE’s established practice of evading and ignoring supposedly-firm deadlines, even those set by Congress, regarding the disposition of nuclear material, including the removal of nuclear material from South Carolina. It can be deduced that the injunction obtained by the State requiring the removal of the first metric ton of plutonium by January 1, 2020, created quite an emergency for the federal government, which lacked a plan to dispose of the other 9.5 metric tons with any alacrity. Suddenly it was no longer “business as usual” for DOE.

At the time of the settlement of the case in August 2020 (more than four years after the litigation began), the monetary aspect of the case had not been finally resolved by a court. Oral argument regarding the overdue annual payments of \$100 million had occurred in the U.S. Court of Appeals for the Federal Circuit in May 2020. That Court's questions to counsel for the federal government suggested that the outcome might not favor the federal government. That case was then stayed by agreement not long after the oral argument, in order to permit the discussions that led to the August 2020 settlement of the federal litigation.

The end result of the August 2020 settlement was that the federal government obtained a much-needed grace period to remove additional weapons-grade plutonium from the State, while the State obtained not only a payment of \$600 million in 2020, but also an enforceable agreement that the federal government would make additional payments of up to \$1.5 billion if the federal government did not comply with the grace period deadline. That latter \$1.5 billion would not be subject to fees to be paid to the Law Firms.

The attorney's fee paid by the State was computed pursuant to the terms of the contingency contract entered with the Attorney General. The amount of fee was based on the amount of the recovery for the State, which was unprecedented in its size. Again, had the State never filed the federal litigation, the State would be over half a billion dollars poorer, all the plutonium would still be at the SRS, and the

prospects for ever having the plutonium removed would be as unenforceable and illusory as those prospects had previously been, so many times in the past. This Respondent accordingly joins the other Respondents in their contentions that the State lawfully complied with its contractual obligations with the Law Firms. The Court should therefore affirm the dismissal of Appellant's claims that the State's contractual obligation should be abrogated, especially at the insistence of parties with no standing, and essentially for no reason other than that the litigation resulted in a financial recovery for the State that was of historic size.

CONCLUSION

For the reasons set forth above and in the filings of the other Respondents, this Court should deny the appeal of Appellants and affirm the order of the circuit court dismissing this case.

Respectfully submitted,

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September 3, 2021

EXHIBIT 4

Initial Brief of Respondent Alan Wilson, Attorney
General for the State of South Carolina,
S.C. Pub. Interest Found. v. Wilson et al.,
No. 2021-00343 (S.C. Sup. Ct. Sept. 3, 2021)

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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Sep 03 2021

APPEAL FROM RICHLAND COUNTY
Court Of Common Pleas
R. Kirk Griffin, Circuit Court Judge
Circuit Court Case 2020CP4004603

S.C. SUPREME COURT

Appellate Case No. 2021-000472

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

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

INITIAL BRIEF OF ATTORNEY GENERAL

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Pursuant to Rule 208(b)(6), SCACR, Alan Wilson, Attorney General for the State of South Carolina, concurs in the briefs of the Respondents Willoughby & Hoefer, P.A., and Davidson, Wren & DeMasters, P.A., and for the reasons set forth in those briefs, respectfully requests that this Court affirm the Order of the Honorable R. Kirk Griffin, Circuit Court Judge, granting his Motion to Dismiss and dismissing this case.

Respectfully submitted,

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EXHIBIT 5

Reply Brief of Appellants,
S. C. Pub. Interest Found. v. Wilson et al.,
No. 2021-00343 (S.C. Sup. Ct. Sept. 23, 2021)

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY

R. Kirk Griffin, Circuit Court Judge

Supreme Court Case No. 2021-000472

Court of Appeals Case No. 2021-000343

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

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

v.

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

REPLY BRIEF OF APPELLANTS

September 23, 2021

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STATEMENT OF THE CASE

Appellants South Carolina Public Interest Foundation and John Crangle challenged the legality of the Attorney General's \$75 million payment, allegedly for attorneys' fees. Appellants asserted public importance standing to pursue their claims for declaratory judgment and equitable relief seeking the imposition of a constructive trust over the \$75 million unlawfully paid to Willoughby & Hoefer, P.A. (WH) and Davidson, Wren & DeMasters (DWD) (WH and DWD, collectively, the "Law Firms") by Attorney General Alan Wilson (collectively, with WH and DWD, "Respondents").

The Circuit Court granted Respondents' Motion to Dismiss for lack of standing. Appellants appealed and filed their Initial Brief.

Respondents make two main arguments in their Brief and assert several "additional sustaining grounds" for the dismissal of Appellants' Complaint. First, they argue Judge Lee's order denying Appellants' Motion for Preliminary Injunction established the law of the case. Appellants adequately addressed these arguments in Appellants' Initial Brief. Appellants' Br. 8-12. No ruling on a temporary or preliminary injunction establishes the law of the case. It must be "an order or ruling which finally determines a substantial right." *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013). Moreover, if her ruling finally determined Appellants' lack of standing, she would have dismissed the case. *See Dove v. Gold Kist, Inc.*, 314 S.C. 235, 238, 442 S.E.2d 598, 600 (1994) ("A court lacking subject matter jurisdiction, however, has no authority to act . . ."); *see also Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006) ("[W]hen a federal court concludes that it lacks subject-matter jurisdiction, the court must dismiss the complaint in its entirety."). Judge Lee's preliminary finding that Appellants lacked standing could not be a final determination such that it became law of the case because there would be no case.

Second, Respondents argue Appellants lack standing, including public importance standing. Although this Court is very familiar with public importance standing and Appellants addressed public importance standing in Appellants' Initial Brief (Appellants' Br. 26-28), Appellants will further address standing herein.

Respondents assert several "additional sustaining grounds" to affirm the dismissal of this action. They contend the following:

- (A) Appellants' claims are moot;
- (B) Appellants' claims present non-justiciable political questions; and
- (C) Appellants claims fail to state facts sufficient to constitute a cause of action.
 - (1) Appellants do not have right to challenge the payment of the attorneys' fees;
 - (2) the Attorney General had authority to pay the fees;
 - (3) the Attorney General did not need judicial approval; and
 - (4) Appellants' constructive trust and restitution claims fail as a matter of law.

Appellants address each of these "additional sustaining grounds" herein.

ARGUMENT

I. JUDGE LEE'S "RULING" ON STANDING IS NOT LAW OF THE CASE, NOR COULD IT POSSIBLY BE.

Respondents argue Judge Lee's order denying Appellants' Motion for Preliminary Injunction established the law of the case. Appellants have already addressed these arguments in Appellants' Initial Brief. Appellants' Br. 8-12. No ruling on a temporary or preliminary injunction establishes the law of the case. It must be "an order or ruling which finally determines a substantial right." *Shirley's Iron Works, Inc.*, 403 S.C. at 573, 743 S.E.2d at 785.

Moreover, if her ruling finally determined Appellants' lack of standing, she would have dismissed the case. *See Dove*, 314 S.C. at 238, 442 S.E.2d at 600 ("A court lacking subject matter

jurisdiction, however, has no authority to act”); *see also Arbaugh*, 546 U.S. at 514 (“[W]hen a federal court concludes that it lacks subject-matter jurisdiction, the court must dismiss the complaint in its entirety.”). Judge Lee’s preliminary finding that Appellants lacked standing could not be a final determination such that it became law of the case because there would be no case at that point.

II. APPELLANTS HAVE STANDING.

A. Appellants have public importance standing.

In challenging Appellants’ public-importance standing, Respondents misconstrue the law and ignore facts upon which Appellants rely.

First, they argue that “Appellants have not and cannot meet their burden to show that resolution of its claim ‘is needed for future guidance.’” Respondents’ Br. 19. In this regard, they ignore applicable law as well as the facts on which Appellants rely. In so arguing, they portray this case as a “challenge to a one-time payment of in this particular and unique situation and pursuant to this specific Litigation Retention Agreement.” *Id.*

In this regard, Respondents fail to discuss the holding in *Adams v. McMaster*, 432 S.C. 225, 851 S.E.2d 703 (2020), where it addressed multiple factors in determining whether future guidance is needed:

A resolution for future guidance is needed here because this case involves the conduct of government entities and the expenditure of public funds, a prompt decision is necessary, and it is likely the situation will occur in the future if and when Congress approves additional education funding in response to the continued COVID-19 pandemic.

Adams, 432 S.C. at 236, 851 S.E.2d at 708-09 (internal citations omitted) (emphasis added).

These factors are the relevant considerations to determining whether future guidance is needed, not merely whether the situation will recur in the future. Indeed, in light of their brief, Respondents concede that this case involves the conduct of government entities, the expenditure

of public funds, and that a prompt decision is necessary. Respondents only challenge whether “the situation will occur in the future.” Respondents’ Br. 19-20. However, that requirement is not the sole consideration, and it is not as exacting as Respondents suggest. As shown by *Adams*, the requirement can be met where a future event is far from certain to recurring, particularly where the other factors are present. *See Adams*, 432 S.C. at 236, 851 S.E.2d at 708-09.

Respondents also completely ignore the facts on which Appellants rely to show that it is likely this same situation will occur in the future. As noted in Appellants’ opening brief, the Attorney General *regularly* retains special counsel pursuant to contingency fee agreements. These fee agreements are publicly available on the Attorney General’s website. The active contingency fee agreements are available at this link: <https://www.scag.gov/litigation-retention-agreements/>. However, a simple search for “retention agreements” shows that there are tens of prior contingency retention agreements between the Attorney General and special counsel. The number of contingency retention agreements demonstrates that it is a regular, routine practice for the Attorney General to enter into such agreements.

As shown by the agreements themselves, they have similar structure and terms, including provisions contemplating court-approval of attorneys’ fees awards. *See* Litig. Retention Agrmt. for Special Counsel Appointed by the S.C. Atty. Gen. as to the “Sonny” Mevers Found. (Feb. 13, 2020) available at <https://www.scag.gov/media/fj5m1111/mevers-foundation-lra-02226082xd2c78.pdf>; Litig. Retention Agrmt. for Special Counsel Appointed by the S.C. Atty. Gen. as to Insulin Pricing (July 13, 2021) available at <https://www.scag.gov/wp-content/uploads/2021/07/Insulin-Fully-Executed-Litigation-Retention-Agreement-02641866xD2C78.pdf>. Accordingly, Appellants have met their burden of showing that future guidance is needed in this instance.

Respondents' second reason that Appellants cannot demonstrate public importance standing reiterates a recurring and false theme throughout their brief. Respondents repeatedly assert throughout their brief something similar to what appears here: that Appellants "seek to appear after the fact and take any attorneys' fees not paid to the Respondent Law Firms for themselves." Respondents' Br. 20-2; *see also id.* at 1-2 (characterizing this case as "all for the sole purpose of obtaining a portion of the fees earned by and paid to the Respondent Law Firms" and referring to it as a "money grab"). Nothing could be further from the truth as shown by the fact that Appellants assert public importance standing and seek to bring this case derivatively on behalf of the State of South Carolina. Obviously, any recovery by this action will be paid to the State, not Appellants. *See, e.g., Patterson v. Witter*, 425 S.C. 213, 232, 821 S.E.2d 677, 687 (2018) (distinguishing direct from derivative claims based, in part, on "who would receive the benefit of any recovery or other remedy, the corporation or the stockholders individually"). Accordingly, Respondents' second argument for why Appellants lack public-interest standing is utterly baseless.

As a third reason for why public-importance standing is lacking, Respondent claims that Appellants cannot obtain standing as to them "[b]ecause there is no South Carolina authority to support the public importance exception against private litigants." Respondents' Br. 21. However, there is also no authority to prevent the Court from finding public importance standing in this instance. Indeed, "[t]he requirement of standing is not an inflexible one." *Sloan v. Sch. Dist. of Greenville Cnty.*, 342 S.C. 515, 524, 537 S.E.2d 299, 304 (Ct. App. 2016) (internal quotation marks omitted). Their argument also ignores the fact that pursuant to the Litigation Retention Agreement, the Law Firms are Special Counsel to the Attorney General, and therefore, they are agents and attorneys of the State of South Carolina. Accordingly, they are far from being "private litigants" as they assert. Finally, this argument ignores the fact that Appellants assert an equitable

claim for constructive trust over the money in dispute, which was transferred to them under questionable circumstances after this lawsuit was commenced.

B. Appellants have derivative standing.

Respondents' brief represents a fundamental misunderstanding of derivative lawsuits. They repeatedly claim that Appellants need a particularized injury to allege a derivative lawsuit. Respondents' Br. 22-24. That is a misstatement of the law, and it litters this section of their brief. By its nature, a derivative suit is brought on behalf of the entity to enforce its rights. *See Richardson v. Blackburn*, 41 Del. Ch. 54, 187 A.2d 823, 823 (1963) (explaining that "[t]he right sought to be enforced belongs primarily to the State"); *see also Patterson*, 425 S.C. at 232, 821 S.E.2d at 687 (distinguishing direct from derivative claims based, in part, on "who suffered the alleged harm, the corporation or the suing stockholders, individually"); *Ward v. Griffin*, 295 S.C. 219, 221, 367 S.E.2d 703, 704 (Ct. App. 1988) (explaining that "[a] derivative action is a suit brought by a stockholder to enforce a corporate right." and that "[a] suit brought by a stockholder is a derivative action if the gravamen of the complaint is injury to the corporation and not injury to the individual interests of the stockholder"). That is the case here, where Appellants seek to assert the state's rights on its behalf because the Attorney General has refused to do so. Accordingly, as with Appellant's assertion of public importance standing, no particularized injury is required for Appellants to maintain a derivative lawsuit on behalf of the State.

Respondents also assert that *Ex parte Hart* does not apply to actions brought on behalf of the state because it is a sovereign entity. Respondents Br. 23. The authorities cited by Respondents are inapposite because none of them deal with actions on behalf of the state. *Id.* Moreover, Respondents' distinction that the State is the sovereign again ignores the very nature of a derivative claim. In such case, the State is not a defendant per se; rather, the plaintiff stands in the shoes of the State to assert the State's claim. *See Johnson v. Baldwin*, 221 S.C. at 149, 69 S.E.2d at 588

(“The stockholder in an action of this kind is only a nominal plaintiff, the corporation being the real party interest.”)

In this regard, the Delaware Chancery Court has explained that “[t]he right sought to be enforced belongs primarily to the State” in a case brought on behalf of the State by a taxpayer asserting derivative standing. *Richardson*, 41 Del. Ch. at 55, 187 A.2d at 823-24.¹ “Otherwise stated, it is the State’s money which is allegedly involved,” and “[p]laintiffs sue only derivatively as members of the taxpayer class because the State through the then Attorney General refused to sue.” *Id.* South Carolina courts have previously looked to Delaware law in deciding matters dealing with derivative lawsuits. *See Carolina First Corp. v. Whittle*, 343 S.C. 176, 539 S.E.2d 402 (Ct. App. 2000).

Next, Respondents incorrectly argue that body politics are not subject to derivative suits. Respondents’ Brief 23. In this section of their brief, they fail to address, much less distinguish, *Ex parte Hart*. Instead, they ask the Court to overrule it without any good reason. *Ex parte Harte* dealt with taxpayers’ ability to pursue derivative claims on behalf of a county, which is indisputably a body politic. *Ex parte Hart*, *Appeal of Bowen*, 190 S.C. 473, 2 S.E.2d 52, 53-54 (1939) (holding that “if a *county* has a cause of action for an injury sustained, which should be enforced for the protection of its citizens or taxpayers, and its governing board unjustifiably refuses to assert such cause of action, any citizen, because of his indirect interest, may sue, in behalf of himself and others similarly situated, the person against whom the cause of action exists, and thereby enforce the rights of the county” (emphasis added)); *Gaud v. Walker*, 214 S.C. 451, 471, 53 S.E.2d 316, 325 (1949) (“A ‘municipal corporation’ in its broader sense, is a body politic, such as a state and

¹ South Carolina courts have looked to Delaware law in deciding matters dealing with derivative lawsuits. *See, e.g., Patterson*, 425 S.C. at 232, 821 S.E.2d at 687; *Carolina First Corp. v. Whittle*, 343 S.C. 176, 539 S.E.2d 402 (Ct. App. 2000).

each of the governmental subdivisions of the state, such as *counties*, parishes, townships, hundreds, New England ‘towns,’ and school districts, as well as cities and incorporated towns, villages, and boroughs.” (emphasis added)); *Lombard Iron Works & Supply Co. v. Town of Allendale*, 187 S.C. 89, 196 S.E. 513, 518 (1938) (discussing states, counties, and lesser municipal bodies as political bodies).

Although the reasoning in their brief is not entirely clear, Respondents apparently do so based on their misreading of several cases, including *Newman v. Richland County Historic Preservation Commission*, 325 S.C. 79, 480 S.E.2d 72 (1997). That case merely stands for the proposition that a disaffected member of a governing body cannot sue the governing body when that member is outvoted. *Newman*, 480 S.E.2d at 73 (“The dispositive issue in this appeal is whether a member of the governing board of a special purpose district has standing to bring a declaratory judgment action challenging passage by the board of a resolution which the member opposed.”). It barely addresses taxpayer standing and does so without any meaningful discussion at all. *Id.* at 74-75. The other cases on which Respondents simply stand for the same basic proposition, discussed earlier, that taxpayer standing requires a concrete and particularized injury. As discussed, that requirement, by necessity, does not apply to derivative lawsuits. Otherwise, the taxpayer would have direct claims. *Patterson*, 425 S.C. at 232, 821 S.E.2d at 687 (distinguishing direct from derivative claims). For a derivative suit, all that is required is for the State to have suffered a concrete and particularized injury, which Appellants allege it has. Appellants’ constitutional standing is *derivative of* the State’s constitutional standing. *See id.*

Finally, in addition to arguing twice that Appellants need a particularized injury, Respondents argue that Appellants have no standing because they have not alleged that the State has a “plain” claim. Respondents’ Br. 24. Respondents’ argument fails to address Appellants’

allegations, much less the evidence in the record supporting the same, and instead relies simply on their conclusory statement that, therefore, “Appellants cannot proceed with respect to the State.” Indeed, if Respondents truly wanted to show that Appellants lacked a plain claim, the Law Firms would have submitted their itemized time records below and/or to this Court.² They did not and instead purportedly rely on a self-serving, aggrandizing narrative of the case at the outset of their brief that lacks any substantive information as to whether their fee is reasonable. Nonetheless, without the benefit of any discovery, Appellants’ allegations and supporting evidence show that the State has a plain claim against the Law Firm. Am. Compl. ¶¶ 47-48; J. Griffin Aff., Ex. 7; Appellants’ Br. 15, 17-23; *see also infra* Part V.

C. *Ex parte Hart* should be controlling on the issue of standing.

Appellants invite the Court to consider a trio of Supreme Court cases arising from Greenville County: *Ex parte Hart*, *In re Bowen*, 186 S.C. 125, 195 S.E. 253 (1938); *Ex parte Greenville County, Appeal of Bowen*, 190 S.C. 188, 2 S.E.2d 47 (1939); and *Ex parte Hart, Appeal of Bowen*, 190 S.C. 473, 2 S.E.2d 52 (1939).

In that matter, two Greenville County attorneys, Bowen and Stover, performed extra work for Greenville County. The General Assembly had allocated money to the County so that it could pay for such additional legal services. To claim the payment for services, Bowen and Stover were

² *See In re Vioxx Prod. Liab. Litig.*, 760 F. Supp. 2d 640, 658 (E.D. La. 2010) (“To confirm that the determined percentage-fee value in this case is appropriate, the Court believes it is important to conduct a lodestar cross-check.”); *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 586 F. Supp. 2d 732, 751 (S.D. Tex. 2008) (“The purpose of a lodestar cross-check of the results of a percentage fee award is to avoid windfall fees, i.e., to ensure that the percentage approach does not lead to a fee that represents an extraordinary lodestar multiple.” (internal quotation marks omitted)); *see also* Vaughn R. Walker & Ben Horwich, The Ethical Imperative of A Lodestar Cross-Check: Judicial Misgivings About “Reasonable Percentage” Fees in Common Fund Cases, 18 Geo. J. Legal Ethics 1453, 1455 (2005) (suggesting that “courts using a “reasonable percentage” approach to set common fund fees at the end of the litigation may be ethically bound to apply a lodestar cross-check).

required to file an action in Circuit Court. On June 2, 1937, believing Greenville Judge Dewey Oxner was out of the circuit, they went to Spartanburg to file their petition for compensation. Judge Sease, the resident circuit judge in Spartanburg, heard the petition and granted it.

On June 3, 1937, Bowen and Stover learned that Judge Oxner had not been away from Greenville when they went to Spartanburg on June 2, but instead was out of town on June 3. Accordingly, on June 3, they went back to Spartanburg and asked Judge Sease to reconfirm his findings and rulings from the previous day, which he did. The orders from June 2 and June 3 were filed in Greenville County, and based on those orders, the County paid the attorneys' fees.

Both the June 2 and June 3 hearings were conducted ex parte and without notice to Greenville County officials.

On June 11, 1937, J. Ed. Hart, "a citizen and taxpayer of Greenville County, on behalf of himself and all others similarly situated" presented a verified petition to Judge Sease in his chambers in Spartanburg, requesting to have Bowen and Stover show cause why the orders dated June 2 and June 3 should not be "declared void, vacated and set aside." *Ex parte Greenville County*, 190 S.C. 188, 2 S.E.2d at 49.

Several Greenville County officials were served with notice of Hart's petition, but they did not respond or participate. Bowen and Stover filed their return. Judge Sease held a hearing on Hart's petition on June 17 in Spartanburg. Judge Sease ruled that because Judge Oxner had actually been in Greenville on June 2, the June 2 Order was void, and thus, the June 3 Order confirming the June 2 Order was likewise void.

Bowen and Stover appealed. The Supreme Court of South Carolina ruled that the case was a Greenville County matter, but the *Hart* hearing was held in Spartanburg. The parties had not shown that no Greenville Judge was available either June 11, when Hart petitioned, or June 17,

when Judge Sease heard the rule to show cause. *Ex parte Hart*, 186 S.C. 125, 195 S.E. at 255-57. Accordingly, Judge Sease's June 17 Order was void for lack of jurisdiction, and incapable of overturning the June 2 and 3 orders. *Id.* The Supreme Court issued its opinion on February 7, 1938.

Thereafter, the then-current Greenville County Attorney, Mr. Earle, filed suit in Greenville County to have the June 2 and 3 Orders overturned. In the hearing, the secretary of the Greenville County Board of Commissioners testified that she did not know whether the Greenville County Board of Commissioners had authorized Mr. Earle's lawsuit. Judge Rice, presiding in Greenville County, found the testimony of the secretary to the Board of Commissioners to be insufficient "to overcome the presumption that the county attorney was authorized to take the action he did." *Ex parte Greenville County*, 190 S.C. 188, 2 S.E.2d at 50.

Also in the hearing, Earle admitted that the Greenville County Board of Commissioners had not specifically authorized or instructed him to file suit. Nevertheless, Judge Rice ruled that the June 2 and 3 orders were null and void because they had been issued in Spartanburg. Bowen and Stover appealed again.

The Supreme Court ruled that because Earle admitted that the County Board of Commissioners had not specifically authorized or instructed him to file suit, Earle did not have authority to bring the lawsuit. The Supreme Court reversed Judge Rice's ruling. *Ex parte Greenville County*, 190 S.C. 188, 2 S.E.2d at 52.

When Greenville County Attorney Mr. Earle filed suit, Hart also filed suit, this time in Greenville County, again challenging the June 2 and June 3 orders from Judge Sease. Hart again stated that he was suing as a citizen and taxpayer of Greenville County, for himself and all others similarly situated. Judge Rice again ruled that the June 2 and 3 orders were null and void. Bowen

and Stover appealed. This time, the Supreme Court affirmed. *Ex parte Hart*, 190 S.C. 473, 2 S.E.2d at 56.

In light of the foregoing cases, Appellants will further address standing and the “additional sustaining grounds” of the Respondents. Respondents argue that Appellants have no right to challenge the payment of the attorneys’ fees in this case.

Respondents argue that Appellants have no right to challenge the payment of the attorneys’ fees in this case. Similarly, Bowen and Stover argued that Hart “had no right to institute the proceeding to vacate and set aside the judgment rendered in favor of [Bowen and Stover].” The Supreme Court rejected this argument in *Ex parte Hart*:

The question under discussion appears to be a novel one in this state, but it has been held in quite a number of jurisdictions, and correctly so, in our opinion, that if a county has a cause of action for an injury sustained, which should be enforced for the protection of its citizens or taxpayers, and its governing board unjustifiably refuses to assert such cause of action, **any citizen, because of his indirect interest, may sue, in behalf of himself and others similarly situated, the person against whom the cause of action exists, and thereby enforce the rights of the county. In such case it is proper to make the corporation a defendant as trustee for all of its members.** 14 Am. Jur., page 237, Sec. 77; *Zuelly v. Casper*, 160 Ind. 455, 67 N.E. 103, 63 L.R.A. 133 [(1903)]; *Clark v. George*, 118 Kan. 667, 236 P. 643 [(1925)]; *State ex rel. Buchanan County v. Fulks*, 296 Mo. 614, 247 S.W. 129 [(1922)]; *Gosso v. Riddell*, 123 Or. 57, 261 P. 77 [(1927)]; *Northern Trust Co. v. Snyder*, 113 Wis. 516, 89 N.W. 460, 90 Am. St. Rep. 867 [(1902)]; *Webster v. Douglas County*, 102 Wis. 181, 77 N.W. 885, 78 N.W. 451, 72 Am. St. Rep. 870 [(1899)]; *Land, Log & Lumber Co. v. McIntyre*, 100 Wis. 245, 75 N.W. 964, 69 Am. St. Rep. 915 [(1898)].

Ex parte Hart, Appeal of Bowen, 190 S.C. 473, 2 S.E.2d at 53-54 (emphasis added).

The Court continued with the following:

In such cases, **where officers neglect to do their duty, the wrong need not by any means go unredressed, so long as there is a single taxpayer with courage and public spirit enough to set the judicial machinery in motion. He may stand in court in place of the unfaithful public officials.** The court, in him, will recognize the interests of the corporation as a whole, and with the evidence produced before it, calling for action by its decree, compel the performance of duty by all within its reach.

Id. (emphasis added). The Court further reasoned as follows:

Ordinarily we readily concede that the duty of determining when a suit should be brought being vested in the county board, it cannot be controlled or exercised by a taxpayer. The discretionary power is vested in the county board of determining when a suit shall be brought, but that means legal discretion. **Where it clearly appears that that power is abused, the governing body places itself outside the protection of the rule stated, and may be compelled to act, or in some instances further remedies may be resorted to.** As was said in *Land, Log & Lumber Co. v. McIntyre*, supra [100 Wis. 245, 75 N.W. 967]: “If a county or other corporation has a plain cause of action for an injury done to it, that should be enforced for the protection of its members, and its governing body refuses to perform its plain duty in the premises, our system of jurisprudence is by no means so weak that justice can thereby be defeated. On the contrary, **any member of the corporation, by reason of his indirect interest therein, suing in behalf of himself and all similarly situated, may set judicial proceedings in motion, making the corporation a defendant, as trustee for all of its members, and thereby enforce the rights of the corporation.**”

Id. (emphasis added).

Like Hart, the Appellants in the case at bar are “taxpayer[s] with courage and public spirit enough to set the judicial machinery in motion. [They] may stand in court in place of the unfaithful public officials.” *See id.* at Appellants have claimed public interest standing, rather than taxpayer standing. *See* Appellants Brief, pp. 8-9. But the rationale is similar. Misuse of public funds by public officials, a situation that may recur, is an issue of great public importance.

A resolution for future guidance is needed here because this case involves the conduct of government entities and the expenditure of public funds, a prompt decision is necessary, and it is **likely the situation will occur in the future** if and when Congress approves additional education funding in response to the continued COVID-19 pandemic. *See S.C. Pub. Interest Found. [v. S.C. Dep’t. of Transportation]*, 421 S.C. [110,] 119, 804 S.E.2d [854,] 859 [(2017)](finding although a “close call,” the balance of the policy concerns weighed in favor of conferring public importance standing where the matter involved the conduct of a government entity and the expenditure of public funds and there was evidence the entity would undertake the conduct at issue again); *Breeden v. S.C. Democratic Exec. Comm.*, 226 S.C. 204, 208, 84 S.E.2d 723, 725 (1954) (finding the question of who is the nominee of the Democratic party for public office “is not only of public interest, but one which should be promptly decided”). **Accordingly, Petitioners have public importance standing to bring this claim.**

Adams v. McMaster, 432 S.C. 225, 236, 851 S.E.2d 703, 708-09 (2020) (emphasis added).

The case at bar “involves the conduct of government entities and the expenditure of public funds . . . and it is likely the situation will occur in the future.” *Id.* According, Appellants should be granted “standing to bring this claim.” *Id.*

III. APPELLANTS’ CLAIMS ARE NOT MOOT.

As an “additional sustaining ground,” Respondents first argue that because the Attorney General paid \$75 million to the lawyers just prior to the hearing in the Circuit Court, this whole matter is moot and beyond the authority of this Court to provide any remedy or correct any wrong. *Ex parte Hart* rejected a similar argument:

It is contended that payment by the county treasurer of the compensation directed in the order of Judge Sease, of date June 3, 1937, **extinguishes the judgment**, and that any issue thereabout as to its validity is **academic. This argument necessarily presupposes that the judgment was valid in the first instance against Greenville County, and that it was voluntarily paid. . . . A void judgment, paid by county officials, not with their own, but with taxpayers’ funds, is not a voluntary payment, and does not bind the county.**

Id., 2 S.E.2d at 55-56 (emphasis added).

Similarly, in this case, the Attorney General paid \$75 million dollars of taxpayer funds, without notice and a hearing, without authority from a court, and without authority from the General Assembly. This payment was improper and therefore void. It was not paid from the Attorney General’s funds. It was paid with funds owned by the people of South Carolina. The people of South Carolina did not make a voluntary payment, and the payment does not bind the State or its people. Accordingly, this case is not moot.

IV. APPELLANTS’ CLAIMS PRESENT JUSTICIABLE LEGAL QUESTIONS.

Respondents also argue that the Attorney General’s payment of the \$75 million is an action of the executive branch, which makes this dispute a political question. In effect, they argue that the Attorney General speaks for the executive branch. This assertion ignores the fact that the Governor wrote to the Attorney General strongly opposing the payment of this outrageous amount

of money. The Governor is the chief officer of the executive branch. “The supreme executive authority of this State shall be vested in a Chief Magistrate, who shall be styled ‘The Governor of the State of South Carolina.’” S.C. Const., art. IV, § 1. As demonstrated above, the Attorney General acted beyond his authority, which makes the issue a constitutional issue of separation of powers. This Court is the ultimate arbiter of constitutional issues, including the questions of separation of powers. *See Williams v. Bordon’s, Inc.*, 274 S.C. 275, 262 S.E.2d 881 (1980). If this Court rules on the unlawful actions of the Attorney General, that ruling does not set it in conflict with the executive department.

This is a matter of defining the powers of the different departments of government; it is not a matter of politics. Appellants have articulated specific violations of the Constitution and violations of the laws of the State, and this Court is the appropriate forum in which those issues should be addressed. Accordingly, Appellants have presented justiciable legal questions.

V. APPELLANTS’ CLAIMS STATED VALID CAUSES OF ACTION.

A. Appellants assert the illegality of the contract; they do not claim a private action for a violation of the Rules of Professional Conduct.

This payment of alleged attorneys’ fees is the result of an unreasonable, illegal, and unenforceable contract, and therefore well within the authority of this Court to remedy. *See* Appellants’ Br., pp. 12-17.

Regardless of any theoretical preference for one method of fee calculation over another, **the overriding benchmark for awards of attorneys’ fees** under both the state action statute and the general premise of the common fund doctrine **is that attorneys’ fees must be “reasonable.”** *See [Pennsylvania v.] Del. Valley Citizens’ Council for Clean Air*, 478 U.S. [546,] at 562, 106 S. Ct. 3088[(1986)]. In light of the circumstances of this case, we hold that an award of \$8.66 million in attorneys’ fees is entirely unreasonable.

Layman v. State, 376 S.C. 434, 455, 658 S.E.2d 320, 331 (2008) (emphasis added).

Respondents misconstrue the claims of the Appellants. Appellants do not claim a private right of action for a violation of the Rules of Professional Conduct. Rather, Appellants assert that the violation of the Rules of Professional Conduct confirm that the contract is unreasonable and unenforceable.

B. The attorneys' fees must be deposited into the General Fund, and the Attorney General lacked authority to appropriate from the General Fund.

The Attorney General himself strongly affirmed that he has no authority to distribute any of the \$600 million, but rather, the General Assembly allocates all funds. As Appellants argued in their initial brief (at pages 17-19), requiring "all monies . . . awarded the State of South Carolina . . . must be deposited in the general fund of the State" and requiring the Attorney General's costs of litigation to be "awarded by court order or settlement." S.C. Code Ann. § 1-7-85; § 1-7-150(B).

Respondents now argue that the Attorney General has authority in and of himself to decide whom to pay, and how much. Appellants contend that the Attorney General has usurped the authority of the General Assembly. *See* Appellants' Br. 12-18.

C. In the alternative, the Attorney General needs judicial approval to pay the fees.

In the absence of General Assembly action, the Attorney General needs, at a minimum, a proper judicial hearing on the matter and a court order. *See* Appellants' Br. 17-26. . As argued in Appellants' opening brief, the Litigation Retention Agreement between the Attorney General and the Law Firms clearly contemplates that "the attorneys' fees and costs awarded to Special Counsel shall be approved by a Court of competent jurisdiction. *See* Appellants' Br. 15; Griffin Aff., Ex. 7, Fee Agreement, at 9. It is clear from the Litigation Retention Agreement that "a Court of competent jurisdiction" means one in the State of South Carolina. In that regard, the Litigation Retention Agreement between the Attorney General and the Law Firms provides as follows:

This Agreement shall be administered in the State of South Carolina and shall be interpreted under the laws of the State of South Carolina. **Special Counsel consents to complete jurisdiction in the appropriate courts of the State of South Carolina.** This Agreement and any claims arising in any way out of it shall be governed by the laws of the State of South Carolina. **Any litigation arising out of or relating in any way to this Agreement or the performance thereunder shall be brought in state courts of appropriate jurisdiction in the State of South Carolina,** and Special Counsel hereby irrevocably consents to such exclusive jurisdiction.

Griffin Aff., Ex. 7, Fee Agreement, at 12.

Additionally, the findings and reasoning of this Court in *Ex parte Hart* are instructive. In *Ex parte Hart*, there was at least what purported to be a hearing and judicial award, flawed though it was for lack of notice to Greenville County. This Court ruled that the ex parte hearing was insufficient to protect the rights of the real party in interest, Greenville County, which received no notice of the hearing on June 2 or June 3, and no opportunity to be heard. Here, the interests of the South Carolina taxpayer received **less protection** than Greenville County did in *Ex parte Hart*. There was no court hearing at all prior to the award and payment of the \$75 million in attorneys' fees. It was totally behind the scenes and underhanded.

In the second *Ex parte Hart* case, the Supreme Court explained as follows:

It is necessary only to refer to the case of *Ex parte Hart et al.*, 186 S.C. 125, 195 S.E. 253, to show that the order of June 2nd is void.

It is likewise our opinion that the order of June 3rd is invalid. **The proceedings were wholly ex parte, and the order resulting therefrom undertook to pass upon the interest of Greenville County, when it was not a party and not before the court.**

We are not concerned with the merits of the contention that the fees allowed and paid the appellants on account were excessive and unreasonable. We are not to be understood as expressing or intimating any opinion as to the merits of that question. **The appellants, although the then duly appointed attorneys for Greenville County, occupied an adversary relation to the county when making their ex parte motion for the allowance of fees. And in our opinion, regardless of good faith, it is contrary to fundamental principles of judicial action to hold under these circumstances that Greenville County was not entitled to legal notice of the hearing as a matter of law.** As the county was not made a party to that proceeding,

Judge Sease had **no jurisdiction** of the county, and therefore **his order is void** as to it.

Id., 2 S.E.2d at 54-55 (emphasis added).

In the case at bar, the Respondents were acting adversely to the State of South Carolina in attempting to award the \$75 million in attorneys' fees, especially for unsuccessful litigation (losing four cases). Further, the Attorney General acted contrary to the interests of the people of South Carolina in paying such an outrageous sum for meager legal results, particularly when the settlement was a political settlement, brought about by political officials, who had political connections to politicians in Washington. Accordingly, in the case at bar, as in *Ex parte Hart*, it is "contrary to fundamental principles of judicial action to hold under these circumstances that [the people of South Carolina were] not entitled to legal notice [and a] hearing as a matter of law." *Id.*, 2 S.E. 2d at 55.

D. Appellants stated valid claims for constructive trust and restitution.

This Court has power over the Respondents, who are officers of this Court. They are also parties before this Court. This Court is properly equipped with equitable powers to impose a constructive trust and to impose equitable remedies, including rescission and restitution. *See* Appellants' Br. 9-12.

After the Attorney General paid the money to the Law Firms, Appellants filed an Amended Complaint adding the Law Firms as defendants and seeking to impose a constructive trust over the disputed funds. Am. Compl. Count II. A constructive trust arises "whenever a party has obtained money which does not equitably belong to him and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it as where money has been paid by accident, mistake of fact, or fraud, or has been acquired through a breach of trust or the violation of a fiduciary duty." *SSI Medical Servs. v. Cox*, 301 S.C. 493, 500, 392 S.E.2d 789, 793-94 (1990);

McNair v. Rainsford, 330 S.C. 332, 356, 499 S.E.2d 488, 501 (S.C. App. 1998); *see also Lollis v. Lollis*, 291 S.C. 525, 354 S.E.2d 559 (1987) (constructive trust will arise whenever circumstances under which property was acquired make it inequitable that property should be retained by one holding legal title); *Dye v. Gainey*, 320 S.C. 65, 463 S.E.2d 97 (Ct. App. 1995) (constructive trust results from fraud, bad faith, abuse of confidence, or violation of fiduciary duty which gives rise to obligation in equity to make restitution).

In addition, Appellants have pled a cognizable claim for restitution. Am. Compl. Count III. In *Trotter v. Merchants & Farmers Bank*, 180 SC 449, 186 S.E. 371 (1936), the South Carolina Supreme Court ruled that the recipient of funds paid under a mistake of law is required to make restitution to the lawful title holder. *Trotter* involved the improper payment of funds by a court appointed receiver to a creditor of an insolvent corporation. The trial judge explained, “I do not think a receiver can make a voluntary payment of money under a mistake of law when he had no title to the money, and it is not his own and he has no beneficial interest in same. The receiver paid the money to the defendant, but title to same did not pass, and his successor is entitled to restitution of the amount so paid with interest from the date on which demand for return of same was made.” *Id. See also, United States v. Wurts*, 303 U.S. 414, 416, 58 S. Ct. 637, 638, 82 L. Ed. 932 (1938) (holding that it is a well-established principle that the Government generally can “recover funds which its agents have wrongfully, erroneously or illegally paid”); *Alsco-Harvard Fraud Litig.*, 523 F. Supp. 790, 806 (D.D.C. 1981) (finding that this common law basis for recovery of funds runs against a person “who received them by mistake and without rights”).

“A void judgment, paid by county officials, not with their own, but with taxpayers’ funds, is not a voluntary payment, and does not bind the county.” *Ex parte Hart*, 190 S.C. 473, 2 S.E.2d at 56. Accordingly, Appellants stated valid claims for a constructive trust and for restitution.

CONCLUSION

Appellants respectfully request that this Court reverse the decision of the Circuit Court, rule that the Appellants possess public importance standing in this case, rule that the Complaint stated valid causes of action, rule that Attorney General Wilson lacked authority to pay Law Firms, and remand the case to the Circuit Court for further proceedings.

Respectfully submitted,

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September 23, 2021

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