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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
DeAndrea Gist Benjamin, Circuit Court Judge

Appellate Case No. 2020-001135
Case No. 2015-CP-40-01805

Ct. App. Opinion No. 6090
Heard May 7, 2024 – Filed September 25, 2024

Wendy Brawley ....Respondent-Appellant,

v.

Richland County, South Carolina, ...Appellant-Respondent.

RESPONDENT'S PETITION FOR REHEARING *EN BANC*

Pursuant to Rules 221(a) and 240 of the South Carolina Appellate Court Rules (SCACR), Respondent-Appellant ("Ms. Brawley") hereby files this Petition for Rehearing on Opinion No. 6090 filed September 25, 2024 ("Opinion"). Ms. Brawley respectfully requests rehearing on the basis that, in reversing and remanding Judge Benjamin's award of attorney's fees and costs, this Court: (i) without mentioning or applying the abuse of discretion standard, improperly substituted its judgment for that of the lower court on questions of fact despite a full record and overwhelming factual conclusions; and (ii) modified rules for determining reasonable attorney fees without regard to established precedent that has been recently affirmed.

Pursuant to Rule 219, SCACR, Respondent respectfully requests rehearing of this matter *en banc* on the basis that the Opinion conflicts with established law.

STANDARD FOR PETITION

To prevail on a petition for rehearing, a party "must demonstrate the Court overlooked or misapprehended their argument." Kennedy v. S.C. Ret. Sys., 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001); Rule 221(a), SCACR.

ANALYSIS

A. The Opinion errs by reversing and remanding the Circuit Court's award of attorneys' fees that strictly adhered established precedent, was supported by specific findings, and was founded upon a substantial evidentiary record.

In its Opinion filed September 25, 2024, the Court says "two problems" prevent it from affirming Judge Benjamin's award of attorneys' fees and costs to Respondent-Appellant (Opinion, p. 8). First, the Court states it "cannot discern" how Judge Benjamin reached her final award. (Id., the "***Discernment Problem***"). Second, the Court states that the award seems high based on the Opinion's selective characterization of events in the underlying case. (Id., p. 9, the "***Justification Problem***"). Both problems are addressed below, and neither justifies the reversal of Judge Benjamin's award of attorneys' fees and costs and a remand that requires another judge to undertake the same inquiry Judge Benjamin conducted as the trial judge four years ago.

Binding precedent establishes that Judge Benjamin's "decision to award or deny attorneys' fees and costs will not be disturbed on appeal absent an abuse of discretion." Gibbons v. Aerotek, Inc., 441 S.C. 180, 184, 893 S.E.2d 326, 329 (Ct. App. 2023) (quoting Maybank v. BB&T Corp., 416 S.C. 541, 579-80, 787 S.E.2d 498, 518 (2016)); "[T]he specific amount of attorneys' fees awarded pursuant to a statute authorizing reasonable attorneys' fees is left to the discretion of the trial judge and will not be disturbed absent an abuse of discretion." Horton v. Jasper Cty. Sch. Dist., 423 S.C. 325, 330, 815 S.E.2d 442, 444 (2018) (*quoting* Kiriakides v. Sch. Dist. of Greenville Cty., 382 S.C. 8, 20, 675 S.E.2d 439, 445 (2009)). "An abuse of discretion occurs when there is

an error of law or a factual conclusion that is without evidentiary support." Id. at 184-185 (citation omitted) (internal quotation marks omitted).

The Opinion errs in reversing and remanding Judge Benjamin's award of attorneys' fees and costs to Ms. Brawley, as the Opinion deviates from the South Carolina Supreme Court's directives, identifies no "error of law" committed by Judge Benjamin, and ignores the evidentiary support existing in the Record.

i. The Record enables the Court to discern how Judge Benjamin came to the amount in her final award of attorneys' fees and costs.

The "Discernment Problem" is resolved by a thorough review of Judge Benjamin's written Order, wherein she advises this Court how she came to the final amount of attorneys' fees and costs award to Ms. Brawley. In her eight-page "Amended Order Awarding Plaintiff Attorney's Fees and Costs," Judge Benjamin advises this Court that she first looked to S.C. Code Ann. § 30-4-100, which provides: "If the person or entity prevails in part, **the court may in its discretion** award him reasonable attorney's fees or an appropriate **portion of those attorney's fees**." (R. p. 98, emphasis in original).

Next, Judge Benjamin advises this Court that she looked to binding precedent from the South Carolina Supreme Court in Dedes v. Strickland, 414 S.E.2d 134 (S.C. 1992) to determine how to exercise that discretion. (R. p. 98). Judge Benjamin states that her understanding of Dedes required her to consider the "nature, extent, and difficulty of the legal services rendered; the time and labor necessarily devoted to the case; the professional standing of counsel; the contingency of compensation; the customary fees charged in the locality for similar services; and the beneficial result obtained." (R. p. 98).

Judge Benjamin advises this Court that she then considered each of the six Dedes factors in light of the record before her, and she made specific findings. When identifying that record

before her, Judge Benjamin reminds this Court that she "held multiple hearings and considered the oral arguments of counsel" on the issue of reasonable attorneys' fees and costs. (R. p. 99). Moreover, she assures this Court that she conducted a "careful review" of the billing entries submitted by Ms. Brawley's counsel. (R. p. 99). Judge Benjamin's statement that she "carefully reviewed" the billing entries in light of the record is credible, as Judge Benjamin specifically applied a 50% reduction to fees incurred and submitted to her for the time period prior to August 15, 2015 - the date that Judge Clifton Newman dismissed Ms. Brawley's cause of action for injunctive relief. (R. pp. 94, 99).

When applying the Dedes factors, Judge Benjamin advises this Court that she looked first to the beneficial result obtained for Ms. Brawley, and she specifically found that Ms. Brawley's legal team was successful in securing a production of documents by Richland County.

Second, Judge Benjamin advises this Court that she considered the nature, extent and difficulty of services rendered, and she specifically found that Ms. Brawley's counsel was required to conduct hearings before the trial court, pre-trial motions, a bench trial, and post-trial motions on behalf of Ms. Brawley. (R. pp. 98-99).

Third, Judge Benjamin advises this Court that she considered the standing and experience of Ms. Brawley's attorneys, and she specifically found that both of them were partners at Rogers Lewis Jackson Mann & Quinn, LLC, when this case began and both had practiced civil litigation exclusively since 2006. (R. p. 99).

Fourth, Judge Benjamin advises this Court that she considered the fact that Ms. Brawley's counsel undertook this matter on a contingency basis and handled it without any payment or reimbursement for years. (R. p. 99).

Fifth, Judge Benjamin advises this Court that she considered the rates charged by Ms.

Brawley's counsel, and she specifically found those rates to be customary civil litigation rates for partners, associates and paralegals in this area of practice. (R. p. 99).

Sixth, Judge Benjamin advises this Court that she considered the fact that the billing records of Ms. Brawley's counsel, and she specifically found that those reflected 305 hours of work conducted on the case; she also specifically found that the billing records "do not include all hours devoted to the case." (R. p. 99).

In the Conclusion of her Order, Judge Benjamin advises this Court that she did <u>not</u> choose to award Ms. Brawley's counsel the $91,591.96 on the invoice. (R. p. 99). While the Opinion takes issue with the $419.25 reduction between Judge Benjamin's initial award of attorneys' fees and costs and her final award of attorneys' fees and costs, the Opinion ignores the fact that Judge Benjamin found that $91,591.96 was not reflective of all the work performed on the engagement and that Judge Benjamin declined to award Ms. Brawley the $91,591.96 stated on the invoice. In other words, the Opinion focuses only on the <u>last</u> reduction of attorneys' fees and costs and ignores the fact that the initial award of attorneys' fees and costs was already deflated by more than 11%.

After "carefully considering" each of the billing entries submitted, and discounting further those occurring before Judge Newman's dismissal of the claim for injunctive relief in 2015, Judge Benjamin decided to award a <u>portion</u> ($77,980.75) of the attorneys' fees and a <u>portion</u> of the costs ($2,864.96) that Ms. Brawley submitted. Upon a review of the record, there is no ambiguity as to how Judge Benjamin came to the amounts in her amended award. Her process of relying on the statute, referring to binding Supreme Court precedent, conducting the inquiry she was instructed to conduct, and recording of specific findings as to each of the six <u>Dedes</u> factors is precisely what was required of Judge Benjamin, and it is what would be required of any trial court on remand.

In short, there is an answer in the Record that resolves the Discernment Problem. (R. p. 93-

100). The Opinion errs by overlooking Judge Benjamin's specific findings and assurances regarding her exercise of discretion.

ii. The Record contains ample justification for Judge Benjamin's exercise of discretion to award Ms. Brawley $77,980.75 in attorneys' fees and costs of $2,864.96.

The Justification Problem, as laid out by the Opinion, is: (1) in Horton, the Supreme Court found that $35,611.50 in fees and $1,096.56 in costs – the amount sought by the prevailing party – were appropriate; and (2) the Court feels that the discovery conducted in this case was not "extensive discovery" in the Court's opinion.

As to the Opinion's reference to the award in Horton, the Court ignores the fact that the rates Ms. Brawley submitted for Mr. Blake and Mr. Mann are only $5 higher than the rates relied upon by the Supreme Court for Mr. Twombly when the Court increased the fee award in the Horton Action. The actual difference between Horton and this case are the total hours considered in Horton totaled **135.3 hours (**423 S.C. at 328, 815 S.E.2d at 443), whereas the hours submitted to and considered by Judge Benjamin in this case totaled **305 hours**. R. pp. 44-67, 99. The Order never references or considers this distinction.

Otherwise, the Opinion is simply critical of Judge Benjamin's use of the word "extensive" to describe the discovery conducted in this case. However, the Opinion's statement that "the additional responsive documents were provided relatively early in the litigation without any significant adversarial proceedings" is not supported by the Record. The additional responsive documents to Ms. Brawley's were never provided – a finding confirmed by Judge Benjamin at the conclusion of the trial and affirmed in the Opinion. The entire adversarial proceeding was spent in pursuit of the additional responsive documents, and Ms. Brawley awaits the County's production of those records following the conclusion of this appeal. (R. pp. 12-23; Opinion p. 7).

Semantics aside, however, the Opinion never addresses the Record that Judge Benjamin relied upon as her justification for the award. First, Judge Benjamin received a four-page affidavit of attorneys' fees and costs from Jenkins Mann, Esq. (R. 220-223) outlining the nature of the services provided to Ms. Brawley in the case and describing 23 categories of work performed for Ms. Brawley. Judge Benjamin was not just provided a record regarding discovery, "extensive" or otherwise, and awarded fees based on that alone. Rather Judge Benjamin considered a Record that showed Ms. Brawley's counsel:

- conducted in-person client meetings;
- performed document review and public records review in connection with FOIA request;
- performed legal research and case assessment; prepared the written lawsuit and responded to the County's efforts to have the case dismissed;
- attended the hearing on the County's motion to dismiss;
- engaged in extensive correspondence with the County's counsel;
- conducted written discovery on the County;
- performed an in-person attorney review with Ms. Brawley of thousands of pages of records produced by the County;
- prepared and resolved discovery motions;
- prepared written opposition to the County's motion for summary judgment;
- attended court and argued against the County's motion for summary judgment;
- prepared for and attended mediation;
- engaged in "extremely lengthy" post mediation settlement efforts, including the preparation of proposed settlement agreements;

- attended status conferences with the trial court;
- prepared and served numerous witness subpoenas each of the four (4) times the case was scheduled for trial;
- prepared all trial documents, including the Trial Brief for Judge Benjamin and the Trial Exhibits;
- met with and prepared Ms. Brawley to testify at trial;
- prepared for the opening trial presentation, witness examination, and trial motions practice;
- prepared the proposed Order on the Merits for Judge Benjamin; and
- substantively addressed the County's propose Order on the Merits and post-trial motions.

In other words, the Opinion commits the cherry-picking fallacy when it relies on the Court's disagreement with Judge Benjamin over whether "discovery" was "extensive" in this case.

However, Judge Benjamin did not simply rely on the attorneys' fees affidavit in reaching her final award. Judge Benjamin received into evidence a 24-page, single-spaced invoice from Rogers Lewis Jackson Mann & Quinn, LLC detailing $88,425.50 of legal services provided by the law firm to Ms. Brawley in pursuit of her case. To describe each detailed entry here would require extensively more pages than permitted for this Petition. However, the Record has 23 pages of unredacted, detailed time entries, explaining to the tenth of an hour each legal service and the amount of fees associated with it.

The invoice Judge Benjamin received also details every cost advanced for Respondent-Appellant by Rogers Lewis Jackson Mann & Quinn, LLC, totaling $3,166.46. (R. p. 66-67). However, Judge Benjamin did not simply rely on the detailed invoice. Judge Benjamin also

received 26 pages of third-party receipts and invoices substantiating the $3,166.46 advanced by Rogers Lewis for Respondent-Appellant. (R. pp. 68-93).

Further, Judge Benjamin did not simply accept Ms. Brawley's attorneys' sworn affidavit, billing records, and supporting third party invoices and justify her decision based on that evidence alone. Rather, in addition to receiving this documentary evidence, Judge Benjamin conducted two (2) live hearings on the issue of reasonable attorneys' fees.

Judge Benjamin's first hearing was on November 9, 2020. During that hearing, Judge Benjamin inquired into the substance of the attorneys' fees sought by Ms. Brawley. Judge Benjamin confirmed through inquiry that the attorneys' fees submitted did <u>not</u> include time that Ms. Brawley's attorneys spent working for the dismissed non-profit plaintiff. (R. pp. 720-721). Judge Benjamin also confirmed that the vast majority of the work spent on behalf of Respondent-Appellant was spent in pursuit of the FOIA request that was the subject of trial, not the FOIAs that were resolved early in the case. (R. p. 721). Judge Benjamin considered all the County's arguments against the attorneys' fees and costs, and she considered Ms. Brawley's rebuttal of those. The more than forty (40) pages of argument and counter-argument Judge Benjamin conducted on November 9, 2020, is a part of the Record and part of her justification. (R. pp. 715-757).

Moreover, when the County objected to Judge Benjamin's initial award of attorneys' fees and costs, she did not simply disregard the County's concerns by issuing a Form 4 in support of her prior ruling. Rather, Judge Benjamin held a second substantive hearing into the matter of attorneys' fees and costs on January 8, 2021. During this hearing, Judge Benjamin once more accepted argument and counter-argument, and she inquired into specific billing issues appearing on the detailed invoice records. (R. pp. 758 – 801). Judge Benjamin discussed that she would not award fees for time entries regarding the appeal. (R. pp. 784-785). Judge Benjamin discovered that

some of the entries for client meetings included the time counsel spent driving from downtown Columbia to Hopkins to conduct those meetings in 2015. (R. p. 786). Judge Benjamin also discovered that the bill submitted to her was not intended to reflect the 305 hours of time Rogers Lewis Jackson Mann & Quinn, LLC had in the file at the time Mr. Mann signed the attorney's fees affidavit the prior year; rather, the detailed billing submitted to the court was printed from software after approximately 30 hours of time was removed from the invoice because of redundant billing by multiple staff or excessive staff time on a task (R. pp. 789-791).

In light of the extensive billing records, affidavit testimony, supporting documentation, and hours of hearings conducted by Judge Benjamin, the Opinion's claim that there is not "justification" for the fee award in the record is error. There is nothing more Judge Benjamin, or any other trial judge can do – short of doing a task by task, billing entry by billing entry analysis – to note its justification for an attorneys' fees and costs award. When pushed on this issue, even the County agreed Judge Benjamin was not required to conduct that level of justification. (R. p. 797).

iii. The Opinion does not identify, and Judge Benjamin did not commit, an abuse of discretion in awarding attorneys' fees and costs.

As the Opinion notes, "Precedent explains the circuit court should consider six factors in setting an award of fees," and make specific findings of fact on the record for each. Opinion, p. 9 (*citing* Burton v. York Cnty. Sheriff's Dep't,, 358 S.C. 339, 358, 594 S.E.2d 888, 898 (Ct. App. 2004). There is no requirement in South Carolina that a trial judge perform any further finding or analysis be considered than what Judge Benjamin considered. Indeed, the South Carolina Supreme Court did not demand anything more of itself in reversing the trial court and setting the attorneys' fees and cost award in Horton, which is the controlling authority on this issue.

Judge Benjamin's Amended Order clearly considers and applies this court's six factors in

Burton, Dedes, and Horton. The Opinion cannot reverse Judge Benjamin simply because it feels some fact or circumstance should be given more or less weight than Judge Benjamin chose to give it following her trial of the case, review of the bills, invoices and affidavits, two specific hearings, and a number of attorney briefs. An abuse of discretion exists "when there is an error of law or a factual conclusion that is without evidentiary support." Gibbons, at 184-185 (*quoting* Ellis v. Davidson, 358 S.C. 509, 524, 595 S.E.2d 817, 825 (Ct. App. 2004)). Here, there is no error of law found, and it is without question that the Circuit Court's findings are with substantial evidentiary support as detailed in the Amended Order and above. Based on the above, the Circuit Court's Amended Order awarding Respondent attorney's fees and cost should be affirmed.

B. **The Court erred in applying a new, higher standard for determination of awarding attorney's fees**

As stated above and in the Opinion, to determine a reasonable attorney's fee award the court need only apply the Dedes factors; there is no binding precedent in South Carolina that requires a more detailed analysis. Nevertheless, the Opinion errs in establishing additional factors that it says must be considered to determine a reasonable attorney's fee award and requiring a more detailed analysis for such.

As summarized in M & T Chems. v. Barker Indus., 296 S.C. 103, 109, 370 S.E.2d 886, 890 (Ct. App. 1988):

> The South Carolina Court of Appeals was made a part of the unified judicial system to address a mounting plethora of appeals and thereby make the appellate process more efficient. The maintenance of a harmonious body of decisional law is essential to the efficient administration of justice. Therefore, if the judicial system is to operate efficiently, this court must be bound by decisions of the Supreme Court. Where, as here, the law is unmistakably clear, this court has no authority to change it.

(citation omitted). The Supreme Court may modify previous decisions, but the Court of Appeals cannot. Id. (*citing* Cf. Ludwick v. This Minute of Carolina, Inc., 283 S.C. 149, 321 S.E. (2d) 618

(Ct. App. 1984) (where the Court of Appeals invited certiorari for the purpose of modifying the rule relating to an employment at-will); and, Ludwick v. This Minute of Carolina, Inc., 287 S.C. 219, 337 S.E. (2d) 213 (1985) (where the Supreme Court, after granting certiorari, modified the rule)); *see also,* M & T Chems., Inc. v. Barker Industries, Inc., 296 S.C. 103, 109, 370 S.E.2d 886, 890 (Ct.App.1988) (stating that an intermediate appellate court has no authority to change existing law, but maintaining that the supreme court may want to grant certiorari and modify previous decisions).

In this case, the Court's modification of longstanding precedent is an error of law and amounts to an abuse of discretion. The Court undertakes a thorough evaluation of the litigation taken in this case to examine the degree of success obtained by Respondent's counsel in attempting to support the finding that "the amount of the award is difficult to justify" based on the Court's view of the facts. Opinion, pp 10-11. The evaluation by the Court was based on guidance the Court found from Hensley v. Eckerhart, 461 U.S. 424 (1983) and analyzed whether Respondent's counsel's hours spent on the litigation were "reasonably expended". Id. After the analysis, citing no binding South Carolina precedent, the Court specifically held that "[a] reasonable fee award ***must*** include only 'reasonable expended' hours and ***must*** be proportional to the degree of success obtained". Id., p. 11 (emphasis added). These new mandates are above and beyond the longstanding precedent in Dedes, and under this standard, the Supreme Court's findings in Horton would be insufficient and its conclusion error. The Court's reliance on Hensley, and the Court's establishment of new requirements in addition to decades of our Supreme Court authority is clear error.

The Court appears to have concerns with awarding attorney fees and costs associated with tangential matters not directly related to the material FOIA issues and procuring the FOIA

documents. However, failing to award Respondent's attorney's fees and costs for the time and efforts expended to fully advance Respondent's interest, which includes defending contentions by Appellate that attorney's fees are not warranted, would run counter to the mandates of FOIA. FOIA should be liberally construed to carry out the legislative purpose of guaranteeing the public reasonable access to certain activities of the government. Pope v. Wilson, 427 S.C. 377, 384-385, 831 S.E.2d 442, 446 (Ct. App. 2019). Any reduction in Respondent's attorney's fees and costs would only serve to put a chilling effect on future FOIA claims as such would decrease the willingness of potential plaintiffs to bring FOIA complaints even for the clearest FOIA violations when such could result in plaintiffs bearing the burden of all or a portion of prolonged defenses. Judge Benjamin properly exercised her discretion to award full attorney's fees and costs to plaintiffs, and specifically in this case, to comply with the overarching purpose of FOIA to "make it possible for citizens . . . to learn and report fully the activities of their public officials at a minimum cost or delay ….." S.C. Code Ann. § 30-4-15.

CONCLUSION

Based on the above, Respondent respectfully requests that this Court grant this petition for rehearing, and uphold the Circuit Court's Amended Order awarding Respondent attorney's fees and costs in the amount of $80,845.71. Respondent request this Court grant a rehearing of this matter en banc given the Opinion significantly deviates from well-settled South Carolian law on awarding attorney's fees, creating a conflict that could have far-reaching implications for future cases involving such.

s/ Shaun C. Blake
Shaun C. Blake, Esq. (S.C. Bar # 76349)
Jenkins M. Mann, Esq. (S.C. Bar # 74894)
L. Cody Smith, Esq. (S.C. Bar # 74477)
MANN BLAKE & JACKSON, LLC
1619 Sumter Street, Suite 100
Columbia, SC 29201

Phone: 803-256-1268
Fax: (839) 213-4300
Email: jmann@mannblake.com
sblake@mannblake.com
csmith@mannblake.com

October 10, 2024

ATTORNEYS FOR RESPONDENT

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THE STATE OF SOUTH CAROLINA
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Ct. App. Opinion No. 6090
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Wendy Brawley... Respondent-Appellant,
v.
Richland County, South Carolina... Appellant-Respondent.

RESPONDENT-APPELLANT'S PROOF OF SERVICE OF PETITION FOR REHEARING *EN BANC*

I certify that I have served the Petition for Rehearing *En Banc*, and this Proof of Service electronically to the Court of Appeals, and to the following attorneys of record in the United States Mail, postage prepaid and to their electronic addresses, on **October 10, 2024**, listed as follows:

Andrew F. Lindemann, Esq.
Lindemann Law Firm, PA
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920
Email: andrew@ldh-law.com

Dated: October 10, 2024

s/ Shaun C. Blake

Shaun C. Blake, Esq. (S.C. Bar # 76349)
Jenkins M. Mann, Esq. (S.C. Bar # 74894)
L. Cody Smith, Esq. (S.C. Bar # 74477)
MANN BLAKE & JACKSON, LLC
1619 Sumter Street, Suite 100
Columbia, SC 29201
Phone: 803-256-1268
Fax: (839) 213-4300
Email: jmann@mannblake.com
sblake@mannblake.com
csmith@mannblake.com

October 10, 2024

ATTORNEYS FOR RESPONDENT

RECEIVED
Oct 10 2024
SC Court of Appeals

Sarah Chambers, Paralegal
Direct: (803) 978-1972
Email: schambers@mannblake.com

October 10, 2024

VIA ELECTRONIC MAIL ONLY
South Carolina Court of Appeals
Jenny Abbott Kitchings, Clerk of Court
1220 Senate Street
Columbia, SC 29201
ctappfilings@sccourts.org

RE: Wendy Brawley v. Richland County, South Carolina
Civil Action No.: 2015CP4001805
Appellate Case No.: 2020-001135

Dear Ms. Kitchings:

Attached for filing please the following:

1. Respondent-Appellant's Petition for Rehearing *En Banc*

2. Respondent-Appellant's Proof of Service.

Please file and return file-stamped copies to me. By copy hereof, all counsel of record are being served with the above. Thank you for your assistance, and should you have any questions, please do not hesitate to contact me.

With kind regards, I am

s/ Sarah Chambers

Sarah Chambers
Paralegal

/swc
Enclosures

Cc: Andrew F. Lindemann, Esq.