2012-212006

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

Eugene C Griffith, Jr , Circuit Court Judge

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Unpublished Opinion No 2012-UP-081(S C Ct App filed February 15, 2012)

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William Alvin Hueble, Jr , Petitioner,

v

South Carolina Department of Natural Resources and Eric Randall Vaughn, Defendants,

Of Whom Eric Randall Vaughn is Respondent

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# APPENDIX

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SMITH MOORE LEATHERWOOD

July 22, 2011

Hon Tanya A Gee
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

*RE* William Alvin Hueble, Jr v SCDNR and Eric Randall Vaughn
Case No 2007-CP- 24-1056
Tracking No 2010163506

Dear Ms Gee

Please accept this notice of additional citations to supplement Appellant's Final Brief and Final Reply Brief, pursuant to SCACR 208(b)(7)

Firstly, Appellant requests that this Court consider *Bosley v Mineral County Commission*, No 10 1203, 2011 U S App LEXIS 11985 (4th Cir June 14, 2011) This case pertains to the issues raised in Appellant's Briefs as to de novo review for fee awards based upon interpretation of law and rules of procedure, ambiguities in the offer being resolved against the offeror, evidence extrinsic to the offeror s terms not being considered, and settlement discussions not constituting an offer of judgment

Secondly, Appellant requests that this Court consider *Fox v Vice*, 563 U S _, 180 L Ed 2d 45 (2011) This June U S Supreme Court case discusses §1988 fee awards as related to competing or multiple claims and provides comment regarding appellate review of the same Thank you for your consideration of these matters

Sincerely,

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**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

---

William Alvin Hueble, Jr., Appellant,

v

South Carolina Department of Natural Resources and Eric Randall Vaughn, Defendants,

of whom Eric Randall Vaughn is, Respondent

---

Appeal From Greenwood County
Eugene C Griffith, Jr., Circuit Court Judge

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Unpublished Opinion No 2012-UP-081
Heard January 26, 2012 – Filed February 15, 2012

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**AFFIRMED**

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Jonathan S Gasser and Gregory P Harris, of Columbia and John P Riordan, of Greenville, for Appellant

Andrew F Lindemann, of Columbia, J Victor McDade, of Anderson and Thomas E. Hite, Jr, of Abbeville, for Respondent

**PER CURIAM:** Appellant William Alvin Hueble, Jr appeals from an order of the trial court denying his motion for costs and attorney's fees On appeal, Hueble argues the trial court erred by finding he was not the "prevailing party" and even if he was the prevailing party, the existence of special circumstances precluded an award of attorney's fees We find no error of law in the trial court's decision to decline awarding fees and costs, and therefore we affirm pursuant to Rule 220(b)(1), SCACR, and the following authorities 42 U S C § 1988(b) ("In any action or proceeding to enforce a provision of sections 1983 the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs "), Grissom v The Mills Corp., 549 F 3d 313, 318 (4th Cir 2008) (holding that in order for a plaintiff to qualify as the "prevailing party" for purposes of section 1988, there must be a material alteration of the parties' legal relationship and there must be judicial imprimatur on such an alteration), Buckhannon Bd & Care Home, Inc v West Virginia Dep't of Health & Human Res., 532 U S 598, 604 (2001) (providing there must be an enforceable judgment upon the merits or a court-ordered consent decree to create the kind of material alteration in the legal relationship of the parties that is necessary for an award of "prevailing party" attorney's fees under the fee shifting statutes), Belton v State, 339 S C 71, 74 n 4, 529 S E 2d 4, 5 n 4 (2000) ("A case resolved by acceptance of an offer of judgment is considered settled "), Hensley v Eckerhart, 461 U S 424, 429 (1983) (holding a prevailing plaintiff should ordinarily recover attorney's fees unless special circumstances would render such an award unjust), Gregg v Ham, No 3 08-4040-CMC, 2010 WL 5060583, at *1 n 3 (D S C Dec 6, 2010) (noting that a prevailing plaintiff is eligible for, rather than entitled to, an award of attorney's fees)

**AFFIRMED**

**HUFF, PIEPER, and LOCKEMY, JJ., concur.**

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM GREENWOOD COUNTY

Court of Common Pleas

Eugene C Griffith, Jr , Circuit Court Judge

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Case No 2007-CP-24-1056

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William Alvin Hueble, Jr — Appellant,

v

South Carolina Department of Natural Resources and Eric Randall Vaughn, — Defendants,

Of Whom Eric Randall Vaughn is — Respondent

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PETITION FOR REHEARING AND

PETITION FOR HEARING EN BANC

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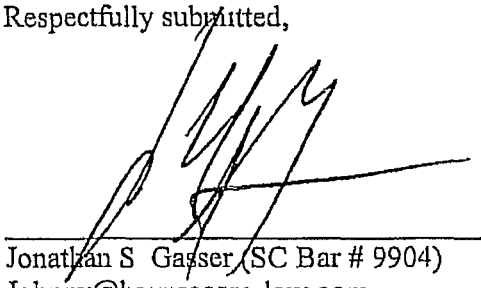
Pursuant to Rules 219 and 221 of the SCACR, the Appellant William Alvin Hueble, Jr moves for a rehearing and, additionally, that the rehearing be en banc This Petition for Rehearing is based upon the attached Memorandum in Support of the Petition for Rehearing

Respectfully submitted,



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March 1, 2012

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM GREENWOOD COUNTY



Court of Common Pleas

Eugene C Griffith, Jr , Circuit Court Judge

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Case No 2007-CP-24-1056

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William Alvin Hueble, Jr — Appellant,

v

South Carolina Department of Natural Resources and Eric Randall Vaughn, — Defendants,

Of Whom Eric Randall Vaughn is — Respondent

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MEMORANDUM IN SUPPORT OF
PETITION FOR REHEARING
AND HEARING EN BANC

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Petitioner William Alvin Hueble, Jr respectfully submits this Memorandum in Support of his Petition for Rehearing and Hearing En Banc For the following reasons, the Court should grant the Petition for Rehearing

**THE PER CURIAM OPINION'S REFUSAL TO REVERSE THE TRIAL COURT ORDER AND DEEM APPELLANT A PREVAILING PARTY MISAPPREHENDS AND/OR OVERLOOKS THE BUCKHANNON DECISION OF THE U S SUPREME COURT, AS FURTHER DISTILLED THROUGH THE GRISSOM OPINION OF THE U S COURT OF APPEALS FOR THE FOURTH CIRCUIT**

The trial court order consistently held that, having accepted an Offer of Judgment, Appellant was not a prevailing party as required by 42 U S C § 1988 and that costs, including attorney's fees, should therefore not be rewarded (R pp 6, 8 and 12) Ignoring the leading cases of Buckhannon Board & Care Home, Inc v West Va Dept' of Health and Human Services, 532 U S 598, 604, 121 S Ct 1835, 149 L Ed 2d 855 (2001) and Grissom v The Mills Corporation, 549 F 3d 313, 318 (4th Cir 2008), the trial court order instead relied upon dicta from a footnote in Belton v State of South Carolina, 339 S C 71, 529 S E 2d 4 (2000) Even per erroneous Belton analysis, taxable costs (at a minimum the fees for filing of the Complaint and service of the same) should have been awarded, such that the trial court order refusing the same is in error and requires reversal However, Belton analysis should be found inapplicable

It is not disputed that, upon the facts in Belton, the South Carolina Supreme Court determined that an Offer of Judgment "does not qualify as a court award" However, unlike the §1988 prevailing party statute, the Whistleblower Act at issue in Belton specifically required a "court or jury award" as a prerequisite to attorney's fees Therefore, any "settlement" prior to a court or jury award, including a Rule 68 Offer of Judgment, was admittedly an insufficient basis upon which attorney's fees could be awarded under the Whistleblower Act However, neither Belton nor any other S C case has considered whether the acceptance of a Rule 68 Offer of Judgment confers prevailing party status upon a §1983 plaintiff Unfortunately, the Per Curium Opinion makes no direct comment upon Appellant's prevailing party status, the most important aspect of the entire fee award dispute

To its credit, the Per Curium Opinion at least does cite Grissom and Buckhannon, but perversely and erroneously crafts the citations to support affirmation of the trial court's erroneous order Moreover, it then erroneously cites Belton to again assert "[a] case resolved by acceptance of an offer of judgment is considered settled" Clearly the import of Buckhannon and the fact that it overruled the Fletcher case from the U S District Court for the 7th Circuit cited in the Belton footnote has been misapprehended and/or overlooked Such misapprehension of Buckhannon as further illuminated through Grissom, overlooks the elementary explanation provided mere paragraphs after the Per Curium Opinion's referenced Grissom cite **"Acceptance of an offer of judgment made pursuant to Rule 68 has necessary judicial imprimatur per Buckhannon in the crucial sense that it is an enforceable judgment against defendant"** Grissom, at 319 (4th Cir 2008), citing Utility Automation 2000, Inc v Choctawatchee Electric Cooperative, Inc , 298 F 3d 1238, 1248 (11th Cir 2002) **(Emphasis added)** In addition, Bosley v Mineral County Commission, 650 F 3d 408 (4th Cir 2011) provides further illumination, but was apparently overlooked or misapprehended This opinion, in which Chief Judge Traxler concurred, reiterates that the acceptance of an Offer of Judgment confers prevailing party status and consideration of costs and fees Additional supporting language explains the difficulties offerees such as Appellant face when presented with vague and/or ambiguous Offers of Judgment and the necessity of such terms being strictly construed against the offeror, all the while distinguishing Offers of Judgment from settlement discussions In conjunction with Farrar v Hobby, 506 U S 103, 112, 113 S Ct 556, 121 L Ed 2d 494 (1992), which found the award of even the nominal sum of $1 00 to confer prevailing party status, there should be no question but that the

acceptance of an Offer of Judgment by Appellant herein in the amount of $5,100 00 requires a finding of prevailing party status and an award of costs and/or attorney's fees Through proper consideration of Farrar, Buckhannon, Grissom and Bosley, the very worst determination Appellant should have endured from the Court of Appeals was a designation as prevailing party and the award of taxable costs (at a minimum those expenses related to the filing and service of the Complaint), thereafter a precise explanation would be due of "special circumstances" existent justifying refusal of attorney's fees

The Court of Appeals was presented with a novel question whether a §1983 plaintiff's acceptance of an Offer of Judgment affords prevailing party status and therefore eligibility for an award of costs, including attorney's fees The failure by the Per Curiam Opinion to even address the trial court's erroneous rejection of prevailing party status is of extreme importance to all plaintiffs who undertake the noble burden of "fighting city hall " There can hardly be a more important circumstance than when a citizen, as a private attorney general, combats a rogue government official who, under color of law, infringes their constitutional rights The erroneous reliance upon Belton by both the trial court and the Per Curiam Opinion is manifest error Per these holdings, in direct contrast with Buckhannon, Grissom and Bosley, acceptance of ANY amount under an offer of judgment could never afford prevailing party status and/or the award of attorney's fees Thwarting the very aim of 42 U S C §§1983 and 1988, as well as Rule 68, the trial court's error, not specifically addressed by the Per Curiam Opinion, is of such exceptional importance as to afford rehearing En Banc to secure and/or maintain uniformity of the court's decisions in this important field

**FINDING NO ERROR IN THE TRIAL COURT ORDER AND SUGGESTING THROUGH ITS CITATION OF ECKERHART THAT SPECIAL CIRCUMSTANCES EXIST TO RENDER AN AWARD UNJUST, THE PER CURIAM OPINION CLEARLY MISAPPREHENDS ECKERHART AND IMPROPERLY FAILS TO DELINEATE WHAT BASIS MIGHT EXIST FOR A "SPECIAL CIRCUMSTANCE" IN THIS CASE**

The trial court order, erroneously refusing to confer prevailing party status, nonetheless attempts to provide an alternative and/or advisory opinion as to why "special circumstances" would prevent any award of costs and/or attorney's fees As earlier stated, the mere failure to confer prevailing party status and award at least minimal costs is error requiring reversal Moreover, none of the reasons set forth by the trial court find support in any relevant case Each and every case cited by the trial court, as detailed in Appellant's briefs, has either been overruled, is inapplicable, or instead **supports** an award of reasonable attorney's fees upon consideration of the factors set forth in Johnson v Georgia Highway Express, Inc , 488 F 2d 714 (CA 5 1974)

The trial court order erroneously states "there has been no resolution of the dispute which has changed the legal relationship between plaintiff and defendant or affected the behavior of defendants toward the plaintiff as referenced by the Supreme Court in Garland " (R p 7) Such a finding contravenes the record, wherein Judgment has been entered in favor of Appellant against all defendants, including respondent and therefore equates to an abuse of discretion amounting to an error of law Moreover, in the same manner that a victim can expect a bully's assaults to cease only upon fighting back, the simple initiation of suit in this matter "affected the behavior of defendants" by curtailing the harassment and infringement on Appellant's property and constitutional rights In accord with all infringement upon the rights and property of others, the

transgressions are liable to continue until confronted with resistance With an investment in property of well over a half million dollars, the preservation of the same via initiation of suit by Appellant brought value, independent of the eventual award of Judgment At least thus far, worthy and substantial "changes in the behavior" received from respondent has been achieved Though respondent may still regret his inability to purchase Appellant's property and continue his hunts upon it, his efforts which infringed upon Appellant's enjoyment of the same have ceased However, given the erroneous rulings by the trial court and the Per Curiam Opinion, it is feared that respondent may be emboldened and that harassment may resume if the adverse rulings continue or are affirmed Ultimately, having obtained judgment for $5,100 as to a rogue DNR officer and his agency, this enforceable judgment certainly "changed the legal relationship between the plaintiff and defendants " It apparently cannot be stressed enough that "[a]cceptance of an offer of judgment made pursuant to Rule 68 has necessary judicial imprimatur per Buckhannon in the crucial sense that it is an enforceable judgment against defendant " Grissom, at 319 (4th Cir 2008) Appellant's is the only such Judgment existent upon the Clerk of Court records, it remains the record of the case and a Satisfaction of Judgment has yet to be filed The attempt to define Appellant's objectives in such a manner as to find "special circumstances" or justify rejection as prevailing party is not supported by the record

All cases suggesting a purely technical or de minimus recovery by the plaintiff were overruled by Farrar v Hobby, 506 U S 103, 112, 113 S Ct 556, 121 L Ed 2d 494 (1992) The trial court's reference to these cases is clearly an error of law requiring rehearing and reversal

Sadly, in groping for nonexistent support, the trial court order states "the Plaintiff has failed to show he recovered on the §1983 claim" (R p 8), this, in direct contrast to the earlier acknowledgement of the Order that "defendants offered to settle with plaintiff **on all his claims, both federal and state,** for $5,100[,] **plaintiff accepted this offer**

(R p 6)(Emphasis added) This proposed rationale of a "special circumstance" is violative of the order's own findings, facts for which the court could take judicial notice that Judgment exists as to the Complaint filed by Appellant No exception to the Offer of Judgment existed Is it truly believed that, after accepting the Offer of Judgment, Appellant could have brought an additional §1983 suit on the same facts and argued res judicata had not attached because the Offer of Judgment contained no specific reference or exception? Of course not Nor can this "ruling" by the trial court constitute valid basis for a "special circumstance" justifying the denial of costs, including attorney's fees to a prevailing party such as Appellant Rehearing and reversal is appropriate

For each and every cited case in the trial court order which sought to compare "outcomes" versus demands or compared joint recoveries by opposing parties, those matters were either overruled, were wholly inapplicable to §§1983 and/or 1988, or instead supported an award of costs and/or attorney's fees to Appellant Determination otherwise, is in error Therefore, the only remaining justification of "special circumstances" relates to respondent's "settlement agreement" with Appellant's insurance company

**IF THE IMPROPER "SETTLEMENT AGREEMENT" BETWEEN RESPONDENT AND APPELLANT'S INSURANCE COMPANY CONSTITUTES THE "SPECIAL CIRCUMSTANCE" JUSTIFYING DENIAL OF COSTS AND/OR FEES, THE COURT OF APPEALS SHOULD DECLARE THE SAME**

The Per Curiam Opinion makes no mention whatsoever of respondent's "settlement agreement " Of course, such refrain is proper given that the actual "settlement agreement" was never presented to the trial court and is not included in the Record on Appeal It could have been a simple matter in this instance for the Court of Appeals to specifically note that consideration by the trial court of the "settlement agreement," the precise terms of which have never been a part of the record, was in error But for the improper raising of the issue, there would be NO basis to suggest "special circumstances" for which the total refusal to award attorney's fees could be other than an error of law Even if an appropriate settlement agreeement had been properly introduced, Appellant denies that consideration of the same would necessarily be appropriate in regard to §§1983 and 1988 fee determinations Moreover, there can be little validity of a "comparison" between a Judgment entered on the record and a supposedly confidential settlement agreement resulting in dismissal of counterclaims Respondent's settlement agreement would necessarily encompass the entirety of any recovery by respondent To compare this final award with the first portion of the expected overall award to be received by Appellant is error This is especially so when Appellant maintains a recorded Judgment against respondent, but was NOT a party to the "settlement agreement " Such "agreement" was created against the specific objection of Appellant and his personal counsel and was wholly unnecessary, initially due to the spurious claims of respondent, and more so following the entry of Judgment If the "settlement agreement" with

respondent is the true "special circumstance" preventing an award of attorney's fees, the Per Curiam Opinion should have declared the same so that proper consideration could be given as to how to address those who created this improper "settlement" and/or improperly violated its confidentiality terms Rehearing is appropriate

The Per Curiam Opinion in justifying affirmance, cites a footnote from Gregg v Ham, No 3 08-4040-CMC, 2010 WL 5060583 (D S C December 6, 2010) "noting that a prevailing party is eligible for, rather than entitled to, an award of attorney's fees " Of course, Gregg merely dealt with fees actually awarded and whether the entirety of the award for the prevailing party was justified Reliance on Gregg might better suggest that, having obtained roughly one-sixth the recovery, an appropriately proportional award of attorney's fees to Appellant might be a reasonable reward Nothing in Gregg suggests "special circumstances" denying an award of costs and/or fees

Finally, in an apparent attempt to reiterate the long standing nature of "special circumstances" which might exist to affect an attorney fee award, the Per Curiam Opinion quotes Hensley v Eckerhart, 462 U S 424 (1983) In doing so, it is clear that the Per Curiam Opinion misapprehends and/or overlooks the extensive explanation in Eckerhart of the purpose of 42 U S C §1988 Given the trial court's award of an exceptional amount of fees, the U S Supreme Court in Eckerhart discussed whether the trial court was required to more thoroughly justify the reasonableness of the fee given that approximately seventy to eighty percent of the attorney time in the case was spent on the sole constitutional violation out of six for which success was not obtained The citation just preceding the Per Curiam Opinion cite states "[t]he purpose of §1988 is to ensure "effective access to the judicial process," for persons with civil rights grievances "

Eckerhart at 429 The Per Curiam Opinion's cite actually is a quote from Newman v Piggie Park Enterprises, Inc., 390 U S 400 (1968) for which our recently departed and esteemed Jurist, Matthew J Perry, served as an attorney on behalf of the wronged plaintiff In obtaining an injunction as to racial discrimination at Piggie Park's restaurants and sandwich shops, but no monetary damages, Judge Perry's client acted as a "private attorney general" for whom attorney's fees were deemed appropriate That opinion in Eckerhart by Justice Brennan, with whom Justices Marshall, Blackmon and Stevens joined, concurring in part and dissenting in part, highlights the entire rationale behind §1988 and its history up to that point, all of which stand in support of some reasonable attorney's fee being awarded to Appellant

> All of these civil rights laws depend heavily on private enforcement and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must recover what it cost them to vindicate those rights in court Congress could, of course, have provided public funds or Government attorneys for litigating private civil rights claims, but it chose to "limi[t] the growth of the enforcement bureauracy by continuing to rely on the private bar and by making defendants bear the full burden of paying for enforcement of their civil rights obligations
>
> Eckerhart, at 444-446

Though Eckerhart acknowledged that special circumstances might exist when an award would be "unjust" even if the plaintiff prevailed, it reminded that the matter was left "to the discretion of the judge, **guided of course by the case law interpreting similar attorney's fees provisions**" Id at 447 (Emphasis added) Even in the year previous to Eckerhart it was noted that "[i]t is now axiomatic that plaintiffs who prevail in actions brought under section 1983 are entitled to attorney's fees unless special

circumstances would render such an award unjust, and the discretion of the district court in deciding whether to award such fees to prevailing party is **narrowly limited**" Consumers Union of the United States Inc v Virginia State Bar, 688 F 2d 218 222 (4th Cir 1982) (R p 118)( Emphasis added) Eckerhart further states that "the Senate report specifies that fee awards under §1988 should be equivalent to fees 'in other types of equally complex federal litigation, such as anti-trust cases and **not be reduced because the rights involved may be non-pecuniary in nature Congress did not intend fees in civil rights cases, unlike most private-law litigation, to depend on obtaining relief with substantial monetary value** '" Eckerhart, at 447-448 (Emphasis added)

Finally, regarding concerns of the fees to be applied in unsuccessful claims, it is stated **"although it is an abuse of discretion to deny fees entirely to any plaintiff who has crossed the 'prevailing party' threshhold, district courts should consider the degree of the plaintiff's success in setting a fee award** " Eckerhart at 452 (Emphasis added)

Accordingly, much like the trial court order, the cases cited by the Per Curiam Opinion actually support an award of costs and/or attorney's fees rather than erroneously suggesting "special circumstances" which justify outright denial The nature of the actual "special circumstance" must be specified to allow due consideration of whether an abuse of discretion amounting to an error of law has occurred Rehearing to appropriately address and reverse the erroneous trial court order is appropriate

## CONCLUSION

The Appellant's Petition for Rehearing should be granted because the Per Curiam Opinion overlooks or misapprehends case law concerning the proper determinations regarding prevailing party status and the narrow limitations regarding the refusal of costs and/or fees with regard to 42 U S C §§1983 and 1988

Appellant's suit pursuant to 42 U S C § 1983 was not undertaken lightly Rather, it constituted an unfortunate necessity to combat the rogue possessor of a gun and badge, protected by an agency that finds no impropriety with officers bringing and/or threatening charges against landowners whose property they could not purchase and whose overtures for the allowance of hunting rights on the same are ignored Only through such litigation, and the discovery related therein, was Appellant able to further corroborate and at least temporarily diffuse respondent's transgressions Per the applicable federal case law, as earlier referenced, Appellant and his personal counsel had every right to expect that acceptance of the Offer of Judgment would result in the designation of prevailing party status and an award of costs (filing and service fees at the very least) and some proper analysis and determination of an award of attorney's fees The appropriate cases having thus far been overlooked or misapprehended, the Petition for Rehearing should be granted Furthermore, the Court of Appeals should rehear this appeal en banc, given the exceptional importance of §§1983 and/or 1988 litigation in providing protection of constitutional rights The Per Curiam Opinion undermines each and every matter related to §§1983 and/or 1988, as well as Rule 68, SCRCP and the determination of Judgments Accordingly, en banc review is necessary to maintain the uniformity of decisions

Respectfully submitted,

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March 1, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM GREENWOOD COUNTY
Eugene C Griffith, Jr , Circuit Court Judge

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Case No 2007-CP-24-1056

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William Alvin Hueble, Jr , Appellant,

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South Carolina Department of Natural Resources and
Eric Randall Vaughn, Defendants,

Of whom, Eric Randall Vaughn is Respondent

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**RESPONDENT'S RETURN TO
PETITION FOR REHEARING
AND PETITION FOR REHEARING EN BANC**

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On February 15, 2012, this Court issued an unpublished per curiam decision affirming the order of Circuit Court Judge Eugene C Griffith, Jr denying the

Appellant's motion for attorney's fees and costs under 42 U S C § 1988 The Appellant William Alvin Hueble, Jr has now filed a petition for rehearing In response, the Respondent Eric Randall Vaughn submits that this Court correctly addressed each of the issues raised by Hueble in his petition for rehearing Vaughn submits the following discussion with respect to the arguments raised in the petition

I

In this Court's unpublished opinion, the Court found no error of law was committed by Judge Griffith in denying the request for attorney's fees and costs under 42 U S C § 1988 Judge Griffith ruled that Hueble did not qualify as a "prevailing party" under Section 1988 Alternatively, he ruled that, even if Hueble were a "prevailing party," attorney's fees and costs were not recoverable due to special circumstances that rendered such an award unjust

With respect to the "prevailing party" issue, Hueble argues that Judge Griffith and this Court have misapplied federal law Hueble overlooks, however, that the application of Rule 68, SCRCP, is a procedural issue and is governed by state law This Court correctly cited the controlling case of *Belton v State of South Carolina*, 339 S C 71, 529 S E 2d 4 (2000), in which the South Carolina Supreme Court explained that an accepted offer of judgment "does not qualify as a 'court award'" under South Carolina law because "there has been no resolution on the

merits of the claim " 529 S E 2d at 5 Further explaining that an accepted offer of judgment is to be treated as a settlement, the Supreme Court wrote that "[a] case resolved by acceptance of an offer of judgment is considered 'settled '" 529 S E 2d at 5, n 4 In short, under South Carolina law, an accepted offer of judgment is the equivalent of a settlement

Hueble has cited federal case law suggesting that an accepted offer of judgment may be deemed a resolution on the merits However, that is not the law in South Carolina per *Belton* Moreover, the Supreme Court in *Belton* cited with favor the Seventh Circuit case of *Fletcher v City of Fort Wayne*, 162 F 3d 975 (7th Cir 1998), in which the Seventh Circuit reaffirmed that "a case resolved by acceptance of a Rule 68 offer has been settled " 162 F 3d at 978 Thus, there does exist federal case law supporting *Belton* as well In his petition for rehearing, Hueble states that *Fletcher* was overruled by the U S Supreme Court in *Buckhannon Board and Care Home, Inc v West Virginia Dept of Health and Human Resources*, 532 U S 598 (2001) That is absolutely unsubstantiated and incorrect *Buckhannon* does not overrule *Fletcher* [1] The *Buckhannon* opinion, in fact, makes no mention of *Fletcher* The Court may further note that *Fletcher*

[1] Westlaw does not show *Fletcher* as being overruled Westlaw, in fact, only reflects that *Fletcher* has been distinguished by one Seventh Circuit decision, and that distinguishing case pre-dated *Buckhannon*

continues to be cited by numerous courts including the Seventh Circuit since *Buckhannon* was issued [2]

It is also important to note that Judge Griffith also ruled that Hueble does not qualify as a "prevailing party" because the parties had competing claims and both settled While Hueble alleged various state and federal claims against Vaughn, Vaughn also alleged counterclaims for slander, libel, abuse of process and intentional infliction of emotional distress (R 65-69) Shortly after accepting the offer of judgment from SCDNR and Vaughn, Hueble entered into a settlement of the counterclaims with Vaughn requiring payment of $25,000 to Vaughn Therefore, through their respective settlements, both litigants recovered monetarily Vaughn's recovery, in fact, far exceeded Hueble's recovery Vaughn received almost five times the amount that Hueble did

Based on the settlements reached by the parties, Judge Griffith also determined that neither party was the "prevailing party" and that attorney's fees should not be awarded There is no case law in South Carolina that addresses this

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[2] Hueble's reliance on two Fourth Circuit's decisions is misplaced In *Bosley v Mineral County Commission*, 650 F 3d 408 (4th Cir 2011), the Fourth Circuit did not even discuss whether the plaintiff who accepted an offer of judgment is a "prevailing party" because that issue was not raised Furthermore, reliance on cases such as *Bosley* and *Grissom v The Mills Corp* , 549 F 3d 313 (4th Cir 2008), overlook the fact that South Carolina construes Rule 68 differently from its federal counterpart State law governs on this issue, and the *Belton* case is controlling Further, the validity of such cases as *Bosley* and *Grissom* should also be questioned *Buckhannon* explicitly requires "enforceable judgments *on the merits* " 532 U S at 604 (Emphasis added) Yet, an accepted offer of judgment, by no definition, is a judgment *on the merits* With an offer of judgment, such as in the present case, there is no judicial determination of the merits This remains a critical point missed by the Fourth Circuit

scenario in a civil context, absent a specific statutory framework such as the mechanic's lien statutes Likewise, there are no cases from other jurisdictions addressing whether one party may be considered a "prevailing party" under Section 1988 where both parties recover or "prevail" on competing claims for monetary relief This case appears to be entirely novel in that respect

Nonetheless, Judge Griffith was correct in relying on authority from other jurisdictions where the parties to a civil action both succeed on claims for monetary relief As the cases cited point out, many courts have ruled that where a plaintiff has recovered on his complaint and the defendant has recovered on his counterclaim, there is either no "prevailing party" or the "prevailing party" is the party who received the "net judgment" or the highest amount recovered by the parties *See generally, Who is the "Successful Party" or "Prevailing Party" for Purposes of Awarding Costs Where Both Parties Prevail on Affirmative Claims*," 66 A L R 3d 1115 (2010) Applying those two primary rules to the case at bar, it is clear that Hueble does not qualify as a "prevailing party" in this litigation under either rule

In a related context, the South Carolina Supreme Court ruled in *Heath v County of Aiken*, 302 S C 178, 394 S E 2d 709 (1990), that "[a] court determines the prevailing party by evaluating the degree of success obtained " 394 S E 2d at 711 In the case at bar, there was no adjudication on the merits of any claims or

counterclaims The parties voluntarily resolved those claims, and hence, it cannot be said that Hueble prevailed and Vaughn did not At best, a comparison of the monetary recoveries by both parties would suggest that if anyone prevailed, it was Vaughn But at any rate, there is no basis for determining under the present circumstances that Hueble qualifies as a "prevailing party" in this litigation and thus is entitled to costs under Rule 54(d), SCRCP, including attorney's fees If Hueble is not entitled to recover costs under Rule 54(d), then he is clearly not entitled to recover under Section 1988[3] In short, Judge Griffith's ruling that Hueble is not a "prevailing party" entitled to recover under Section 1988 should be affirmed on this additional basis as well

II

In addition to ruling that Hueble does not qualify as a "prevailing party," Judge Griffith also ruled that, even if Hueble were a "prevailing party," attorney's fees and costs are not recoverable due to special circumstances that rendered such an award unjust In *Hensley v Eckerhart*, 461 U S 424 (1983), the U S Supreme Court held that "a prevailing plaintiff should ordinarily recover an attorney's fee *unless special circumstances render such an award unjust*" 461 U S at 429

[3] Section 1988(b) provides that in federal civil rights actions, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee *as part of the costs*" 42 U S C § 1988(b) (Emphasis added)

(Emphasis added) [4]

Nonetheless, in his petition for rehearing, Hueble confuses the two distinct concepts – "prevailing party" status vis-a-vis the entitlement to fees This Court cites the case of *Gregg v Ham*, 2010 WL 5060583 (D S C 2010), for the proposition that "[a]s the prevailing party, [p]laintiff is *eligible* for, rather than *entitled* to, an award of attorney's fees " 2010 WL 5060583 at, *1 n 3 (Emphasis added) Thus, a plaintiff must first qualify as a "prevailing party" in order to claim attorney's fees under Section 1988, however, even if a plaintiff is a "prevailing party," he is not automatically *entitled* to fees Where special circumstances exist, an award of fees may be deemed unjust and thus be denied

In claiming to be a "prevailing party," Hueble also appears in his petition for rehearing to rely on the catalyst theory which was soundly rejected by the U S Supreme Court in *Buckhannon* Hueble writes "the simple initiation of suit in this matter 'affected the behavior of defendants' by curtailing the harassment and

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[4] The Court is also urged to be very careful in evaluating Hueble's citations to *Hensley* in his petition for rehearing Hueble quotes at length from the concurring *and dissenting* opinion of Justice Brennan – rather than from the majority opinion By way of example, Hueble includes the following quote on page 11 of his petition for rehearing "although it is an abuse of discretion to deny fees entirely to any plaintiff who has crossed the 'prevailing party' threshold, district courts should consider the degree of plaintiffs' success in setting a fee award " *Hensley*, 461 U S at 447 Hueble fails to make clear, however, that that quote is from Justice Brennan's opinion that is dissenting in part *More problematic, Hueble takes that quote entirely out of context in an attempt to fit his argument* In fact, this quote is from a general discussion by Justice Brennan regarding Eighth Circuit case law that pre-dates *Hensley* Justice Brennan did not suggest that that quote accurately reflects the majority's holding in *Hensley* In fact, the holding from *Hensley* is without dispute – a trial judge may find that special circumstances may justify the denial of attorney's fees even to a prevailing party

infringement on Appellant's property and constitutional rights " *See*, Petition of Rehearing, p 5 He further writes that "[w]ith an investment in property of well over a half million dollars, the preservation of the same via initiation of suit by Appellant brought value, *independent of the eventual award of Judgment* [sic] " *See*, Petition of Rehearing, p 6 (Emphasis added) That is a classic application of the catalyst theory to justify an award of attorney's fees As indicated, the catalyst theory, which once enjoyed acceptance in many circuits (but not the Fourth Circuit) was finally rejected in *Buckhannon*, and as a result, Hueble's new-found reliance on such a theory should likewise be rejected

III

Finally, even if Hueble were deemed a "prevailing party," Hueble still loses As indicated, Judge Griffith found that an award of attorney's fees to Hueble would be unjust for three separate and independent reasons First, he determined that the settlement of Vaughn's counterclaims by Hueble, which allowed both parties to recover on competing claims, did not entitle him to attorney's fees Second, he ruled that the offer of judgment of $5,100 was a nuisance-value settlement and did not constitute a level of success as would justify an attorney's fees award And third, he concluded that Hueble did not obtain the desired result from this litigation because he settled for a nominal monetary recovery alone

Importantly, and without dispute, the standard of review is an abuse of discretion standard Hueble has quite simply not shown any abuse of discretion by Judge Griffith Hueble does not even attempt to refute *each* of Judge Griffith's independent rulings – he did not do so in his brief or at oral argument or in his petition for rehearing He cites only to the settlement that was reached on Vaughn's counterclaims and argues that his insurance company, not he, settled those claims He insists that he is "NOT a party" to that settlement However, that assertion is meritless The monies paid for the settlement on both sides were paid by insurers for the benefit of the parties Hueble certainly cannot deny the benefit that he received from the settlement and from resolving Vaughn's counterclaims against him

Nonetheless, as indicated, Judge Griffith's reliance on the mutual settlement of the competing claims was but one basis for finding special circumstances Even if that basis is rejected or not considered, the remaining two bases also support his finding of special circumstances that render an award of attorney's fees unjust As indicated, no showing has been made that those alternative and independent bases constitute an abuse of discretion In sum, Judge Griffith acted within his broad discretion in concluding that an award of attorney's fees under Section 1988 would be unjust under the circumstances That ruling was correctly affirmed by this Court A rehearing is simply not warranted

## CONCLUSION

Based on the foregoing discussion, the Respondent Vaughn respectfully requests that this Court deny the petition for rehearing

Respectfully submitted,

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March 22, 2012

# The South Carolina Court of Appeals

William Alvin Hueble, Jr , Appellant,

v

South Carolina Department of Natural Resources and Eric Randall Vaughn, Defendants,

of whom Eric Randall Vaughn is, Respondent

The Honorable Eugene C Griffith, Jr
Greenwood County
Trial Court Case No 2007-CP-24-1056

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ORDER DENYING PETITION FOR REHEARING

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PER CURIAM After a careful consideration of the Petition for Rehearing, the court is unable to discover that any material fact or principle of law has been either overlooked or disregarded

It is, therefore, ordered that the Petition for Rehearing be denied

Thomas E. Huff, J

Daniel F. Pieper, J

John Cannon Lockemy, J

Columbia, South Carolina

cc Jonathan S Gasser, Esquire
Gregory P Harris, Esquire
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FILED
20 April 2012

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM GREENWOOD COUNTY

Court of Common Pleas

Eugene C Griffith, Jr , Circuit Court Judge

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Case No 2007-CP-24-1056

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William Alvin Hueble, Jr — Appellant,

v

South Carolina Department of Natural Resources and Eric Randall Vaughn, — Defendants,

Of Whom Eric Randall Vaughn is — Respondent

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# FINAL BRIEF OF APPELLANT

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## STATEMENT OF ISSUES ON APPEAL

1 Did the court err in declining to declare the appellant as the prevailing party pursuant to 42 U S C §§ 1983 and 1988?

2 Did the court err in determining that special circumstances existed to prevent an award of costs, including attorney's fees to the appellant?

3 Did the court err in refusing to apply lodestar analysis in determining the reasonable award of costs, including attorney's fees, to be awarded to appellant?

## STATEMENT OF THE CASE

On August 30, 2007, William Alvin Hueble, Jr ("Appellant") brought this action alleging violation of his constitutional rights by Eric Vaughn ("Respondent"), an agent of the South Carolina Department of Natural Resources, and related claims Defendants answered, denying Appellant's claims Respondent filed counterclaims, primarily alleging that Appellant's discussion of his treatment by Respondent to third parties constituted defamation Appellant denied that his truthful discussions regarding the rogue actions of a public official amounted to defamation

Appellant amended his Complaint on October 7, 2009, with Defendants again denying the allegations and Respondent reasserting his defamation counterclaims, as well allegations of abuse of process and intentional affliction [sic] of emotional distress Appellant again denied such allegations

On November 17, 2009, Defendants filed and served an Offer of Judgment, which Appellant accepted on the following day Judgment was entered by the Clerk on November 20, 2009 On December 1, Appellant moved for an award of costs, including attorney's fees per 42 U S C §§1983 and 1988 On December 7, 2009, in direct opposition to Appellant, Appellant's insurance company entered into a confidential agreement with the Respondent which resulted in the dismissal with prejudice of Respondent's counterclaims on December 10, 2009

A hearing on Appellant's Motion for Costs, including attorney's fees, was held on December 10, 2009 On May 24, 2010 the court filed its Order denying Appellant's Motion for Costs and Attorney's Fees Appellant noticed this appeal on June 11, 2010

## FACTS

Appellant's constitutional rights were violated under color of law by Respondent When Appellant complained to DNR and provided evidence of falsehoods and wrongdoing by their agent, DNR declined to take affirmative action DNR instead backed their agent, suggesting there must have been a simple misunderstanding given the supposedly exemplary record of Respondent With the statute of limitations nearing expiration, and in light of Respondent's threat that he would bring a defamation action against Appellant, Appellant determined he had little choice other than to bring suit against both Respondent and DNR to protect his constitutional rights, attempt to regain comfort in the utilization of his real property, and obtain vindication regarding the wrongdoing he had incurred Through the eventual acceptance of Judgment, Appellant achieved those goals However, subsequent, imprudent actions by Appellant's insurance company, the improper publication of a "confidential" agreement reached between Appellant's insurer and Respondent, and the trial court's consideration of such improper actions have conspired to diminish, at present, Appellant's resolution of a disturbing series of events (R p 250 ll 11-25) This appeal is brought to reaffirm Appellant's status as the prevailing party regarding these constitutional claims and to receive an award of reasonable attorney's fees regarding these principled efforts

Having obtained Judgment as to his filed Amended Complaint, Appellant might have expected the facts alleged therein to suffice in describing his proven plight Given the necessity of this appeal, however, and out of an abundance of caution, an additional narrative, as largely referenced in Plaintiff's Memorandum in Opposition to Defendants Motions for Summary Judgment (R pp 79-116), is hereafter supplied

Appellant purchased over 160 acres of farming/hunting land in Greenwood County in 2003 (R p 79 ¶2) During negotiations regarding purchase, the seller(s) suggested to Appellant that he continue to allow a DNR agent to continue hunting the property (R p 79 ¶2) Being more interested in familiarizing himself with the property and the capacity it might withstand from his family and friends, Appellant declined to do so The following April of 2004, the seller(s) reiterated that the DNR agent wished to hunt the property and identified the agent as Respondent ( R p 79, ¶2) Appellant again declined to act upon this request In 2004, Appellant purchased an additional 60 acres of adjoining property (R p 80, ¶1) making his ownership approximately 220 acres at a cost of over $490,000

During the summer of 2005, Appellant prepared his first dove field of approximately 15 acres, in compliance with applicable regulations and/or guidelines On opening day of dove season in September of 2005, DNR agents, lead by Respondent, descended upon Appellant's property From his knees, Respondent utilized a knife to produce some seeds, claiming that the presence of even one seed constituted a baited field (R p 80, ¶2) When Appellant realized Respondent was the DNR officer referenced by seller and questioned Respondent regarding the same, Respondent minimized his prior involvement with the property (R p 80, ¶2) During the ensuing discussions, Respondent stated to Appellant that it was a shame seller had sold the property to Appellant and that Appellant would regret purchasing the property Respondent later acknowledged he may have said "I hated to see him sell it," further explaining "it was a nice piece of property, and I had hunted it on occasion" (R p 80, ¶2) Eventually, Respondent charged Appellant with Baiting a Field and cautioned Appellant not to contest the charge (R p

80, ¶2) Though Appellant believed he had done nothing wrong, he did eventually enter a plea of no contest to the charge, fearful of winning that battle, but losing the war via further harassment Appellant hoped that this disposition would satisfy Respondent's animus (R p 80, ¶2)

The subsequent spring of 2006, following the opening day of turkey season, Appellant became aware that his game cameras had been manipulated When Appellant contacted Respondent to discuss this matter, Respondent admitted he and other agents had visited Appellant's property, but denied that they had manipulated the cameras Respondent went on to assert that two food plots, where Appellant had planted clover seed, constituted baiting Appellant was as shocked by these allegations as by those from Respondent's first visit Clover seed is miniscule and expensive as compared to traditional "bait" such as corn or sunflower seeds, it is the ensuing clover plant, not the seed that would potentially serve one day as a turkey attractant However, Respondent and even a DNR superior stated that if a turkey was liable to eat it, it constituted bait However, no agent, including Respondent could recall any other person having been charged with baiting turkey via miniscule clover seed Appellant of course disagreed with the continued assertions of improprieties on his property and was especially troubled by the continued visitations by Respondent to the property given his relationship with the former owner and his apparent fondness for the property itself (R p 80 ¶2 – p 81 ¶1)

Realizing that Respondent's focus on his property and vendetta against him had not abated, Appellant initiated a complaint with Respondent's superior In response, Respondent lied regarding both his involvement with the property (R p 81 ¶2) and Appellant's commission of criminal offenses Despite establishing to the superior (based

upon the superior's reports to Plaintiff) that Respondent had lied to the superior regarding Respondent's long standing relationship with the property (R p 81, ¶2), no disciplinary action was taken Rather than concede impropriety on their agent's behalf, DNR dismissed Appellant's concerns and falsely trumpeted the virtues of Respondent (R p 81 ¶2) When Appellant was later informed that Respondent was threatening to file a defamation suit against Appellant, Appellant hired counsel and again sought to have an investigation undertaken by DNR in an attempt to cease the encroachment upon his property and his rights (R p 81, ¶2 – p 82, ¶1)

During the subsequent investigation by DNR, it was suggested that Respondent had no other complaints made against him, therefore it was difficult for DNR to accept Appellant's version of events For approximately six months, no decision was rendered Upon request of Appellant's counsel that some decision be made prior the arguable running of the statute of limitations, DNR finally found no impropriety by Respondent The underlying lawsuit by Appellant ensued (R p 82 ¶2)

Pursuant to discovery, it was belatedly revealed that in fact Respondent had been the subject of a covert DNR investigation prior to DNR's final ruling, which stemmed from complaints to the U S Fish and Wildlife Service Associates of Respondent's from Ohio, including at least one Ohio DNR agent, were suspected of trapping violations and/or the illegal import of coyote into the state An anticipated surveillance of aspects of the investigation, relating to alleged shrimping violations by Respondent and an Ohio DNR agent, Allen Wright, was compromised via discussions between personnel from the S C DNR and a female for the Ohio version of DMV, effectively ending the active portion of the investigation against Respondent (R p 82 ¶3) The follow-up, historical

investigation did find irregularities in the trapping paperwork of the Ohio associates of Respondent (warning tickets were eventually issued against the Ohio residents by DNR) Moreover, it was discovered that Respondent, while hunting in Ohio, had purchased an Ohio resident hunting license, utilizing the address of the Ohio DNR associate Wright (R p 82 ¶3)

The additional failure by Respondent to file adequate documentation regarding his depredation trapping as required by law was also discovered In addition, Respondent's sale of turkey calls and his work as a dock builder, both of which represent arguable conflicts of interest and the appearance of impropriety, were instead approved by DNR (R p 82 ¶3 – p 83 ¶1)

Through discovery, Respondent eventually admitted that he and other agents had manipulated Appellant's game camera In addition, they also entered his barn and manipulated, opened and accessed equipment and other personal items Appellant was provided copies of written responses by Respondent to Appellant's initial DNR complaint where Respondent falsely accused Appellant in the winter of 2004 with having baited ponds, stating "[t]here was a feeder throwing pelletized food in the water on one pond and cracked corn and wheat in another shallow water pond " Respondent claimed that the alleged bait was "documented," but such was never produced Respondent also described alleged feeding practices that he observed (which were legal) as being baiting, suggested that he continually found "illegal practices" on Appellant's farm and accused Appellant of providing false information to his superior officer Appellant submitted that such allegations were created by Respondent to provide an explanation for his focus upon Appellant and his land other than Respondent's prior relationship to the land In fact,

Appellant had not even purchased the described feeder at the time alleged, later producing the cancelled check used to purchase the feeder, dated months following the allegations by Respondent (R p 83 ¶2) (R p 102)

In response to Appellant's second DNR complaint Respondent prepared additional written statement(s), describing Appellant's legal feeding practices as baiting, falsely alleging duck baiting being documented in Plaintiff's ponds during the 2004-2005 waterfowl season, generally alleged that he observed illegal activity on Appellant's property nearly every time he made a visit and accused Appellant of providing false information to his superior officer Additionally, as discovered during the deposition of Respondent's ex-wife, Respondent had shared with her information regarding Appellant's complaints against Respondent, falsely claiming them to be lies She specifically recalled the allegation of Respondent wanting to purchase the property, claiming such could not have occurred However, whether he could have afforded it or not, the ex-wife was unaware that Respondent was audibly recorded stating to Appellant that he indeed had looked at the property when it came on the market Moreover, Respondent had apparently been involved in multiple land deals with other business associates (R p 83 ¶3 – p 84 ¶1) (R pp 104-116)

In essence, DNR "officially" supported and encouraged Respondent's continual perversion of the law while allowing the threat of improper sanctions to deprive Appellant of the use and enjoyment of his property Such actions directly related to Appellant's failure to grant Respondent hunting privileges to Appellant's property as requested on Respondent's behalf In conjunction with the stated belief by DNR agents that they have the unfettered right to enter Appellant's property at any time, to enter any

structure thereon, including Appellant's barn and manipulate any piece of personal property located on the property in any manner they so desire (R p 84 ¶2), Vaughn and other agents of DNR acknowledged visiting or flying over Appellant's property approximately twenty times in less than two years Appellant was resolute in his efforts to defend, preserve, and restore his rights Thankfully, the filing of suit ceased and abated the actions of Respondent and DNR as to Appellant and his property However, when Defendants refused to sign an acknowledgment of wrongdoing, which would merely have formalized many of the admissions made during depositions, the obtainment of judgment was reestablished as the vehicle of vindication Given that Appellant maintained ownership of his property and the constitutional violations did not encompass physical injury, Appellant conceded throughout the suit that monetary damages might be deemed moderate When Defendants finally offered judgment in the amount of $5,100, Appellant accepted, acknowledging that judgment via verdict might not exceed such amount and as with such verdict, reasonable attorney's fees could be expected to be awarded given Appellant's prevailing party status Had Defendants made the same offer of judgment from the outset, the complained of costs and fees could have largely been avoided (R p 244 ll 8-14) Of course neither Defendant, with defense costs being borne by the efforts of the public, including Appellant, seemed to have much incentive to consider such measures It is submitted that such disparity in "power" is the hallmark of §1983 cases and the primary purpose for the fee shifting provision that is the subject of this appeal

## ARGUMENTS

**I Because appellant's obtainment of judgment as to all causes of action, including 42 U S C §1983, constituted a material change in the relationship between appellant and respondent and established the necessary judicial imprimatur, the Court's determination that appellant was not the prevailing party was in error**

Appellant's claims under 42 U S C §1983 were the sole reason for the consideration of costs, including attorney's fees "Every person who, under color of [law] subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured " 42 U S C §1983 §1983 provides civil redress, damages and injunctive relief, for deprivation of virtually any constitutional right if the deprivation is "under color of state law," which means [m]isue of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law " Monroe v Pape, 365 U S 167, 183 (1961)

"In any action or proceeding to enforce a provision of sections 1983 the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs " 42 U S C §1988(b)

"Black's Law Dictionary 1145 (7th ed 1999) defines a "prevailing party" as [a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded " Buckhannon Board & Care Home, Inc v West Va Dept' of Health and Human Services, 532 U S 598, 604, 121 S Ct 1835, 149 L Ed 2d 855 (2001)

"A party in whose favor a judgment is rendered, regardless of the amount of damages awarded ' "is a "prevailing party" for purposes of the various federal fee-shifting statutes " Grissom v The Mills Corporation, 549 F 3d 313, 318 (4th Cir 2008)

Even "a plaintiff who wins nominal damages is a prevailing party under 1988 " Farrar v Hobby, 506 U S 103, 112, 113 S Ct 556, 121 L Ed 2d 494 (1992) Here, Appellant obtained Judgment 5100 times greater than the "nominal" damages obtained by the Plaintiff in Farrar, id Defendants offered that Judgment be taken against them as to ALL causes of action, without any specific reservation and such was accepted by Appellant Judgment has been entered pursuant to the varying statutes and rules relating to Judgment Rolls, Abstracts of Judgment, Record of the Case, etc §§15-35-400, 520 and 530 and Rules 54 and 68, SCRCP Upon such recording of the Judgment, Res Judicata attached to Appellant's causes of action, including §1983, there should be no argument in contravention Though Appellant denies he received mere nominal damages, even if he had, he should properly have been deemed prevailing party by the trial court

To the extent the Order suggest ambiguity in the offer of judgment in not specifying the §1983 claim, such should inure to the benefit of Appellant "With respect to offers of judgment, "a defendant should state his intentions clearly, and any failure to do so will be at his peril "" Foster v Kings Park Central School District, 174 F R D 19, 24 (E D NY 1997) (citing Chambers v Manning, 169 F R D 5 (D Conn 1996)) "Rule 68 requires that the responsibility for clarity and precision in the offer must reside with the offeror any ambiguity in the terms of an offer must be resolved against the drafter " Utility v Choctawhatchee, 298 F 3d 1238, 1244 (11th Cir 1998) Accordingly, any

suggestion by the Order that Appellant did not obtain Judgment as to the §1983 cause of action due to the lack of specificity should be found erroneous

The Court's Order curiously ignores the established U S Supreme Court decisions of Farrar, 506 U S 103 (1992) and Buckhannon, 532 U S 598 (2001) Farrar, from 1992, established that EVEN when that Plaintiff received only a technical and de minimis victory, a pronouncement that one of six defendants had violated a constitutional right for a nominal award of $1 00 when Plaintiff had sought damages of $17 million and had well over $300,000 in attorney's fees and costs, Plaintiff WAS STILL the prevailing party

"Rule 68 judgment represents a judicially sanctioned change in the relationship between the parties [an] accepted offer of judgment made pursuant to Rule 68 has [the] necessary judicial imprimatur per Buckhannon "in the crucial sense that it is an enforceable judgment against the defendant"" Grissom, 549 F 3d 313 at 319 (4th Cir 2008)

The Court's determination herein that Appellant was not the prevailing party as required under 42 U S C §1988 was in error

**II Because appellant was the prevailing party per 42 U S C §§1983 and 1988, the Court's determination that special circumstances existed to prevent an award of costs, including attorney's fees, was in error**

It is submitted that the Court erred when it determined that "even if Plaintiff were found to technically be the prevailing party, the existence of special circumstances prevents the award of attorney's fees " (R p 6 ¶2) The Court's analysis thereafter, in seeking to justify its declaration, finds no support from any case which compares the amount of the petitioned for fees against the award received Nor does any cited case

attempt to correlate and/or equate a Plaintiff's judgment obtained for §1983 and related claims to a subsequent settlement on a counterclaim by an opposing party

It is urged that due consideration be given not only to the case critique to follow but also for the position Appellant had achieved upon his entry of Judgment and submission for costs, including attorney's fees At that point, Judgment had been entered as to all of Appellant's causes of action, all of which related to Appellant's complaints of constitutional violations by Respondent, an agent of DNR Moreover, having obtained such Judgment, there was little reason to believe there could be ANY value to Respondent's counterclaims, which, coming from a public official, who admitted that Appellant believed the truth of what he said, had seemingly no value from the outset Could there really be any argument that Appellant had committed Abuse of Process when he had obtained Judgment as to all causes of action? The fact that Appellant's insurer, in the face of Appellant's noted opposition (R p 272 ll 9 – 15), thereafter proceeded to enter into a supposedly confidential settlement agreement, should not provide the basis, as it apparently has, to undermine the Appellant's efforts In fact, proper consideration of such betrayal further exposes the injustice suffered by Appellant, initially by Respondent, then by his insurer, but additionally so by the introduction of the "confidential" agreement, and the Court's consideration and reliance thereon

"It is now axiomatic that plaintiffs who prevail in actions brought under section 1983 are entitled to attorney's fees unless special circumstances would render such an award unjust, and the discretion of a district court in deciding whether to award such fees to a prevailing party is narrowly limited " Consumers Union of United States, Inc v Virginia State Bar, 688 F 2d 218, 222 (4th Cir 1982) Here, it is respectfully submitted

that no "special circumstances" exist to render such an award unjust None of the cases cited by the court appropriately support the decisions denying Appellant's status as prevailing party and denying costs and fees Addressing these cases chronologically as referenced in the Order, their lack of support is glaring

The Plaintiffs in Fletcher v City of Fort Wayne, Indiana, 162 F 3d 975 (7th Cir 1998) did accept Offers of Judgment and were ultimately denied fees and costs The case does also state "[a] compromise for less than the costs of defense is a good working definition of a nuisance value settlement " However, that quote goes on to state the qualification "unless as in Hyde the stakes of the case are themselves small " Such is the distinction lost by the "analysis" in the Order herein The comparison of the verdict is not to be as against those costs and fees referenced in a Plaintiff's petition, the analysis should be of the judgment received, in relation to the demands and the nature of the case

Here, putting aside the eventual costs and fees amassed on Appellant's behalf, the events suffered and endured by Appellant must be considered Appellant is a citizen property owner who asserted 1) that he was propositioned by the former owner of his property to allow Respondent, an agent of the SC DNR, to continue hunting Appellant's property as Respondent had done in the past, 2) when Appellant did not consent to continued use of his land by Respondent, Respondent improperly charged Appellant with a violation of law and warned Appellant not to contest the charge, resulting in a "no contest" conviction, 3) thereafter, Respondent visited Appellant's property and structures numerous times and threatened Appellant with additional prosecution, falsely accusing Appellant of numerous other hunting and/or land use violations, 4) accordingly, Appellant was unable to adequately enjoy his property due to Respondent's false

accusations, improper visitations to Appellant's land, and unconstitutional entry into Appellant's structures and personal property When Respondent's agency refused to acknowledge the impropriety of Respondent's conduct, Appellant was compelled to file suit to combat the violation of his constitutional rights as well as to reclaim comfort in utilizing and enjoying the hunting property for which he had made substantial personal investment Ultimately, Appellant was able to obtain Judgment of $5,100 against this rogue officer and his agency on all causes of action, including under 42 U S C §1983 There is no "technical" or "de minimis" nature to the Judgment obtained by Appellant

Even the trial court's cited cases remind that "a Plaintiff who recovers only nominal damages technically 'prevails '" Fletcher, 162 F 3d at 976, citing Farrar, 506 U S 103 (1992) However, "a judge has discretion to withhold fees when damages are tiny in relation to the **claim"** (not the subsequent petition for costs and fees) Fletcher, 162 F 3d at 976, citing Johnson v Lafayette Fire Fighters Ass'n, 51 F 3d 726, 731 (7th Cir 1995), Cartwright v Stamper, 7 F 3d 106, 109 (7th Cir 1993) The Indiana Plaintiffs in Fletcher, which precedes Buckhannon, 532 U S 598 (2001), had placed values on their claims of $150,000 (Fletcher) and $30,000 (Johnson) When they later accepted Offers of Judgment of $2,500 and $5,000, the court's determination in denying fees was to conduct a comparison of the initial demands with what was ultimately received In regard to these initial demands, Fletcher even states "now Plaintiffs want us to dismiss this as puffery, but why should we reward them for this convenient change of position?" Applying such analysis to this case, in conjunction with Appellant's offer to settle for nothing given an appropriate acknowledgment, Fletcher SUPPORTS the position that Appellant is a prevailing party and that reasonable attorneys fees and costs should be awarded In fact,

in regard to the Plaintiffs Fletcher and Johnson, as well as those in the Fisher and Pigeaud cases, which are cited in support (Pigeaud v McLaren, 699 F 2d 401 (7th Cir 1983), Fisher v Kelly, 105 F 3d 350 (7th Cir 1997)), the Offers of Judgment included disclaimers of liability by the Defendants Tellingly, the Fletcher opinion also states "[b]ut a Plaintiff with a small claim who achieves complete recovery is entitled to fees, see Hyde v Small, 123 F 3d 583 (7th Cir 1997), because civil rights laws entitle victims of petty violations to relief The cumulative effect of minor transgressions is considerable, yet they would not be deterred if fees were unavailable " Fletcher, 162 F 3d at 976 Though Respondent's violations against Appellant were troubling and onerous to him, Appellant understood that, having retained full ownership of his land, it might be difficult for a jury to find more than a few thousand dollars in damages for the grief he had suffered Nonetheless, the principle of combating the pervasive tyranny being exerted against Appellant was necessary and worthy Moreover, without such effort, Appellant was unable to fully utilize his property, for which he had made a substantial personal investment

The sentiments espoused by the Hyde v Small opinion are more akin to the present case than Fletcher With Appellant herein obtaining a Judgment ten times greater than Plaintiff Hyde, it therefore supports the designation of Appellant as prevailing party, entitled to consideration of reasonable attorney's fees Appellant obtained judgment regarding each of his causes of action, including under §1983 He obtained more monetarily than was even demanded, and such was obtained without any reservation of liability by the Defendants The Order makes numerous references to the statement by Appellant's counsel that the case "is not about the money " In fact, Appellant PROVED

the case was not about the money when he offered resolution through a simple acknowledgment of wrongdoing The fact that Defendants rejected such a resolution, leaving obtainment of Judgment as Appellant's recourse, should not inure to Respondent's benefit It is quite a perversion that Appellant's good faith efforts to resolve this matter are instead utilized as a basis to deny Appellant's status as prevailing party and deprive him an appropriate award of costs, including reasonable attorney's fees

Hensley v Eckerhart, 461 U S 424, 103 S Ct 1933, 76 L Ed 2d 40 (1983) merely reiterates that ""plaintiffs may be considered prevailing parties for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit "" Id at 433, quoting Nadeau v Helgemoe, 581 F 2d 275, 278-279 (1st Cir 1978) Accordingly, where that Plaintiff had prevailed on five of the six causes of action brought, the sole question was whether the court properly refused to eliminate those portions of the hours devoted to the unsuccessful claim Not surprisingly, Hensley questions whether the unsuccessful claim was distinct in all respect from the successful claims and therefore should have been excluded rather than approved Factually, given that Appellant herein obtained judgment on all claims brought, Hensley v Eckerhart hardly supports the Order of the court

Likewise, Denny v Horton, 131 F R D 659 (M D N C 1990) is wholly inapplicable In that case, Plaintiff prisoner rejected a $5,000 Offer of Judgment, and was later awarded a single dollar in damages That is the very scenario which compelled Appellant herein to accept his Offer of Judgment and then proceed as prevailing party with the consideration of the reasonable attorney fee to be awarded It is submitted that Denny v Horton dictated the additional $100 increase in the Appellant's offer, such that

an eventual verdict of $5,000 would have arguably prevented Appellant from certain of his fees and costs as prevailing party

In Texas Teachers Assn v Garland Independent School District, 489 U S 782, 109 S Ct 1486, 103 L Ed 2d 866 (1989) the U S Supreme Court clarified a prevailing party's status when less than all causes of action were successful Accordingly, Garland is distinguishable from the case herein, where judgment has been obtained by Appellant as to all causes of action "If the plaintiff has succeeded on 'any significant issue in litigation which achieved some of the benefit the parties sought in bringing suit,' the plaintiff has crossed the threshold to a fee award of some kind [a]t a minimum, to be considered a prevailing party within the meaning of 1988, the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant " Garland, 489 U S 782 at 791-792, quoting Nadeau v Helgemoe, 581 F 2d 275, at 278-279 (1st Cir 1978) and Hewitt v Helms, 482 U S 755, at 760-761, 107 S Ct 2672, 96 l Ed 2d 654 (1987) As discussed ad nauseum, the obtainment of Judgment alone constitutes resolution which changes the legal relationship between Appellant and Respondent Nothing within Garland suggests that the obtainment of judgment on all causes of action in the amount of $5,100 00 would be considered purely technical or de minimis

> The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute Where such a change has occurred, the degree of the plaintiff's overall success goes to the reasonableness of the award under Hensley, not to the availability of a fee award veil non
>
> Garland, 489 U S 782 at 792-793

Subsequent opinions by the Supreme Court acknowledge that the obtainment of an enforceable judgment is the very type of "material alteration of the legal relationship of the parties" referenced in Garland, 489 U S 782 (1989) *See* Buckhannon 532 U S 598 (2001)

Moreover, despite the assertions in the Order that there had been no effect on the behavior of the Defendants towards the Appellant, Defendants conceded on numerous occasions that which Appellant already suspected, the mere filing of the lawsuit had ceased Respondent's otherwise numerous visits to Appellant's property

Evans v Full Circle Productions, Inc , 443 S E 2d 108 (NC Ct App 1994) is an Unfair Trade Practices suit brought in Small Claims Court in North Carolina regarding a dating referral service and has absolutely nothing to do with §1983 or §1988 determinations regarding prevailing party and the award of reasonable fees and costs This State law Unfair Trade Practices' claim utilizes a wholly distinct procedure and therefore has no relevance to the determination of prevailing party status and the award of reasonable attorneys fees under §1983 and §1988

Though now over 26 years old, at least Spencer v South Carolina Tax Commission, 281 S C 492, 316 S E 2d 386 (1984) is a South Carolina case However, it concerns the payment of 1980 South Carolina income tax returns under protest and the legal action initiated for a refund The order itself acknowledges that the Spencer trial court did not even address the §1983 claim Moreover, regarding reference that state courts are not required to consider §1983 actions, there have been numerous subsequent decisions by our courts relating to §1983 actions *See* Washington v Whitaker, 317 S C 108, 451 S E 2d 894 (1995), Moore v City of Columbia, 284 S C 278, 326 S E 2d 157

(1985), Stanley v Kirkpatrick, 357 S C 169, 592 S E 2d 296 (2004), Camden v Hilton, 360 S C 164, 600 S E 2d 88 (Ct App 2004) Moreover, Judgment has actually been rendered on behalf of the Appellant on his §1983 claim Spencer provides no appropriate support for the Order of the trial court

Belton v State of South Carolina, 339 S C 71, 529 S E 2d 4 (2000) is another South Carolina case which actually was decided within the past decade, though more than five years before passage of S C Code Ann §15-35-400, and the present Rule 68, SCRCP However, the Belton case does not concern §1983 or §1988 and is therefore inapplicable to the matter at hand It does deal with an Offer of Judgment that was accepted and whether such entitled the Plaintiffs to attorney's fees under the statute applicable therein Under that statute, a former version of the Whistleblower Act, reasonable attorney's fees could be awarded following any court or jury award Given that the statute allowing attorneys fees is in derogation of the common law and must be strictly construed, the Court determined that an Offer of Judgment was not akin to a "court or jury award " Interestingly, the plaintiff in Belton did still receive pre-judgment interest and costs Here, Appellant's costs were approximately $15,000 00 (Plaintiff's Bill of Costs) Both Belton and Fletcher precede subsequent cases from the U S Supreme Court which recognize the distinction between a judgment and a settlement and confirm that §1988 fee-shifting statutes (unlike the Whistleblower Act) do NOT require "resolution on the merits of the claim" by either the Court or a jury

Tyler v Corner Construction Corporation, 167 F 3d 1202 (8th Cir 1999) is a South Dakota case that actually does deal with §1983 and §1988 However, the plaintiff in that case rejected an offer of settlement for $4,500 that would have required him to

waive attorneys fees and costs before later accepting an offer of $17,500 that reserved the question of attorneys fees to the trial court Seemingly lost on the trial court is the distinction between the settlement agreement reached by Tyler and the judgment obtained by the Appellant herein Tyler's settlement agreement actually contained a statement that the defendants did not admit that Mr Tyler had stated a claim cognizable under §1983 and that they merely desired to settle the suit without the expense and uncertainty of a trial The opinion then goes on to point out the mistakes made by the trial court in the Tyler case which the trial court in the present case attempts to follow via its Order Namely, the Tyler trial court had determined, despite the settlement of $17,500, that Mr Tyler was not a prevailing party The trial court then misapplied notions regarding the settlement being affected by the "dint of nuisance and the threat of expense" Citing Farrar, 506 U S 103 (1992), the opinion in Tyler acknowledged that in fact Mr Tyler was "a prevailing party" While the opinion does thereafter discuss nuisance settlements and frivolous and groundless suits, nothing in the opinion suggests a belief by that appellate court that such would have existed in the case herein, where Judgment has been obtained The Tyler case was admittedly remanded for trial court determination as whether it could reasonably deny an award of attorney's fees under the facts of the case in spite of Plaintiff being a prevailing party While no subsequent opinion exists, correspondence with counsel for appellant Tyler confirms that appellant ultimately received attorney's fees well in excess of his $17,500 settlement Unlike the Tyler settlement agreement with a specific denial of liability, Appellant herein obtained judgment on all counts, including the §1983 claim Tyler v Corner Construction

Company does not support the determination by the trial court and instead supports the opposite result

Likewise, the final trio of cases referenced in the Order are lacking in support Testa v Village of Mundelein, Ill , 89 F 3d 443 (1996) is a case in which the plaintiff was denied its §1983 claim by a jury and only awarded $1,500 on a related malicious prosecution claim Such is clearly distinct from Appellant's judgment as to all counts, including §1983 for over three times the amount Hertz v Riebe, 936 P 2d 24 (Wash Ct App 1997) is a real estate matter concerning a contract action brought in Small Claims Court in the State of Washington Of note, however, is its reference of a prevailing party as "the party in whose favor final judgment is rendered " As reminded ad nauseam only the Appellant has received a final judgment in the matter at hand Likewise, and tellingly, Runnells v Quinn, 890 A 2d 713 (Maine 2006), referenced in the Order as being "most analogous to the present case," is a contract-based civil dispute between a general contractor and a homeowner regarding numerous claims and counterclaims, NONE of which involve §1983 or §1988, with BOTH parties having received judgment after a jury trial in the State of Maine

Appellant fully agrees that no cause of action exists against SCDNR entitling recovery of attorney's fees and never affirmatively suggested otherwise Therefore, the rationale for requesting that DNR's counsel prepare the eventual Order is uncertain None of the cited cases provides appropriate support for the trial court's decision

## III Because appellant was the prevailing party per 42 U S C §§1983 and 1988, an award of reasonable attorney's fees pursuant to lodestar analysis was appropriate, therefore, the court committed error in its refusal to award costs, including attorney's fees and in its citation of cases as support

Rather than deny costs, including attorney's fees, the trial court should have affirmed Appellant's status as prevailing party and proceeded with an analysis of the reasonable costs, including attorney's fees to be awarded

> The general rule in our legal system is that each party must pay its own attorney's fees and expenses, see Hensley v Eckerhart, 461 U S 424, 429 (1983), but Congress enacted 42 U S C §1988 in order to ensure that federal rights are adequately enforced Section 1988 provides that a prevailing party in certain civil rights actions may recover "a reasonable attorney's fee as part of the costs " Unfortunately, the statute does not explain what Congress meant by a "reasonable" fee, and therefore the task of identifying an appropriate methodology for determining a "reasonable" fee was left for the courts
>
> One possible method was set out in Johnson v Georgia Highway Express, Inc , 488 F 2d 714, 717–719 (5th Cir 1974), which listed 12 factors that a court should consider in determining a reasonable fee This method, however, "gave very little actual guidance to district courts Setting attorney's fees by reference to a series of sometimes subjective factors placed unlimited discretion in trial judges and produced disparate results " Delaware Valley I, supra, at 546
>
> An alternative, the lodestar approach, was pioneered by the Third Circuit in Lindy Bros Builders, Inc of Philadelphia v American Radiator & Standard Sanitary Corp , 487 F 2d 161 (1973), appeal after remand, 540 F 2d 102 (1976), and "achieved dominance in the federal courts" after our decision in Hensley Gisbrecht v Barnhart, 535 U S 789, 801 (2002) "Since that time, '[t]he "lodestar" figure has, as its name suggests, become the guiding light of our fee-shifting jurisprudence '" *Ibid* (quoting Dague, 505 U S 557 (1992), supra, at 562)
>
> Although the lodestar method is not perfect, it has several important virtues First, in accordance with our understanding of the aim of fee-shifting statutes, the lodestar looks to "the prevailing market rates in the relevant community " Blum v Stenson, 465 U S 886, 895 (1984) Developed after the practice of hourly billing had become widespread, see Gisbrecht, supra, at 801, the lodestar method produces an award that *roughly* approximates the fee that the prevailing attorney would have received if he or she had been representing a paying client who was billed by the hour in a comparable case Second, the lodestar method is readily administrable, *see* Dague, 505 U S , at 566, *see also* Buckhannon Board & Care Home, Inc v West Virginia Dept of Health and Human

> Resources, 532 U S 598, 609 (2001), and unlike the Johnson approach, the lodestar calculation is "objective," Hensley, supra, at 433, and thus cabins the discretion of trial judges, permits meaningful judicial review, and produces reasonably predictable results
>
> Perdue v Kenny A , Opinion No 08-970 (U S Supreme Court filed April 21, 2010)(footnotes omitted)

Perhaps the closest the Order comes to analyzing the petitioned for fees is a comment referencing the extensive discovery undertaken, "much of which Defendants argue was unnecessary, and informed Plaintiff's counsel of this fact" (R p 5 ¶2) Admittedly, extensive discovery was undertaken, as was necessary given the numerous involved witnesses and the ever expanding disclosures regarding Respondent's activities, all in contravention to DNR's initial portrait of Respondent as a model agent However, the ONLY Defense motion filed, seeking to limit discovery, was one for protection and/or to quash Appellant's deposition notice of the DNR Director Thereafter, Appellant was forced to expend time and resources responding to this motion, which sought to prevent Appellant from deposing the Director of the defendant agency, who was the ultimate supervisor over Respondent Of course, following the filing of memoranda in opposition and the subsequent hearing before the court, Appellant prevailed on this motion (See Order denying Motion to Quash) The only reference to consideration of the actual legal work performed should have supported an award of fees

As asserted in its original petition, Appellant submits that a reasonable hourly rate might even exceed that charged herein Alternatively, Appellant acknowledges that the trial court might not deem all hours reflected in the petition as appropriate Yes, much time and effort was spent BEFORE suit, attempting to avoid litigation Additionally, numerous causes of action existed and insurance issues were addressed However,

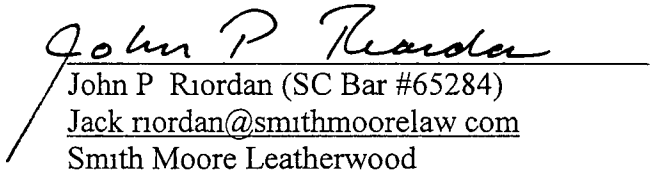
Appellant, through counsel's affidavit, submits that all such activity was initiated by the wrongdoing perpetrated against him and/or in conjunction with his subsequent actions related thereto It is submitted that improper concern was given to comparison of the Judgment obtained and the petitioned for fees and costs Nearly a quarter of a century ago the U S Supreme Court stated **"[w]e reject the proposition that fee awards under 1988 should necessarily be proportionate to the amount of damages a civil rights plaintiff actually recovers** " Riverside v Rivera, 477 U S 561 (1986) (emphasis added) In upholding attorneys fees of $245,456 25 based upon a damages award of $33,350 00, the Supreme Court reminded that "a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms " Id at 574 "Congress expressly recognized that a plaintiff who obtains relief in a civil rights lawsuit"' does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest importance " Id at 575, citing House Report, at 2 (quoting Newman v Piggie Park Enterprises, Inc , 390 U S 400, 402 (1968)) "Congress enacted 1988 specifically to enable plaintiffs to enforce the civil rights laws even where the amount of damages at stake would not otherwise make it feasible for them to do so " Rivera, 477 U S at 577 "In order to ensure that lawyers would be willing to represent persons with legitimate civil rights grievances, Congress determined that it would be necessary to compensate lawyers for all time reasonably expended on a case Id at 578 Here, reasonable costs, including attorney's fees are warranted

Such "private attorney general" protections against tyranny remain necessary, the absence of which will "have a chilling effect on not only Mr Hueble but on every citizen in our state " (R p 245 l 19- p 246, l 2)

## CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court by declaring Appellant prevailing party and remand with instruction to disregard consideration of any independent, confidential settlement and determine the reasonable costs, including attorney's fees to be awarded through application of the lodestar analysis

Respectfully submitted,



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January 13, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM GREENWOOD COUNTY
Eugene C. Griffith, Jr., Circuit Court Judge

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Case No. 2007-CP-24-1056

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William Alvin Hueble, Jr.,

Appellant,

v.

South Carolina Department of Natural Resources and Eric Randall Vaughn,

Defendants,

Of whom, Eric Randall Vaughn is

Respondent.

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# BRIEF OF RESPONDENT

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## STATEMENT OF THE CASE

This is an appeal from the denial of a motion for attorney's fees and costs filed by the Appellant William A Hueble, Jr Hueble brought an action against the Respondent Eric Randall Vaughn and the South Carolina Department of Natural Resources ("SCDNR") Vaughn was an officer employed by SCDNR

In his Complaint filed August 30, 2007, Hueble alleged several state law causes of action against Vaughn, including claims for nuisance, trespass, outrage, invasion of privacy, and civil conspiracy Hueble also alleged several claims pursuant to the Tort Claims Act against SCDNR He pled a single cause of action pursuant to 42 U S C § 1983 against Vaughn alone alleging violations of his federal constitutional rights to due process and equal protection (R 17-31)

These causes of action arose out of actions taken by Vaughn in his role as a law enforcement officer with SCDNR In particular, during September 2005, on the opening day of dove season, Vaughn and other SCDNR officers discovered seed on Hueble's property which constituted a baited field Hueble was charged with and ultimately pled no contest to the charge of baiting a field

In answering the Complaint, Vaughn alleged several counterclaims against Hueble including claims for slander, libel, abuse of process and intentional infliction of emotional distress

Later, the Hueble filed an Amended Complaint which added state law claims for slander and libel against Vaughn In his Amended Complaint, Hueble expanded the federal constitutional claim to include an alleged violation of his Fourth Amendment rights (R 50-52) In answering, Vaughn reasserted his previous counterclaims (R 65-69)

In both the Complaint and the Amended Complaint, Hueble pled a claim for attorney's fees pursuant to 42 U S C § 1988 (R 31, 52)

The Defendants moved for summary judgment which was heard and taken under advisement by Circuit Court Judge Eugene C Griffith, Jr on October 15, 2010 At Judge Griffith's urging, the parties explored a possible settlement The Defendants offered Hueble $5,000 and a letter agreeing that Vaughn would contact a supervisor before entering Hueble's property unless there was an emergency situation Hueble countered with a proposed statement that required the Defendants to acknowledge wrongdoing, which was not acceptable (R 230)

Ultimately, on November 17 2009, Vaughn and SCDNR jointly served an offer of judgment under Rule 68, SCRCP, for $5,100 00 (R 13) Hueble accepted that offer of judgment on November 18, 2009 (R 14) Shortly after the resolution of Hueble's claim, Vaughn settled his counterclaims against Hueble in exchange for the payment of $25,000 The counterclaims were subsequently dismissed (R 228-229)

On November 30, 2009, Hueble filed a motion for attorney's fees and costs pursuant to Rule 54(d) and 42 U S C § 1988 Hueble sought fees and costs in excess of $150,000 (R 117-128) That motion was heard by Judge Griffith on December 10, 2009 (R 239-279) By order filed May 24, 2010, Judge Griffith denied Hueble's request for attorney's fees and costs (R 5-12) This appeal followed

## ARGUMENTS

Following his acceptance of an offer of judgment, the Appellant William Hueble filed a motion for attorney's fees and costs pursuant to 42 U S C § 1988 against the Respondent Eric Randall Vaughn [1] In denying that motion, Circuit Court Judge Eugene C Griffith, Jr ruled that Hueble did not qualify as a "prevailing party" entitled to attorney's fees and costs under Section 1988 Alternatively, he ruled that, even if Hueble were a "prevailing party," attorney's fees and costs were not recoverable due to special circumstances that rendered such an award unjust On appeal, Hueble challenges these rulings

### I The trial court correctly ruled that the Appellant William Hueble did not qualify as a "prevailing party" entitled to attorney's fees and costs under Section 1988

As an initial ruling, Judge Griffith determined that the Appellant Hueble was not a "prevailing party" who is entitled to attorney's fees and costs under Section 1988 or Rule 54(d), SCRCP Judge Griffith's ruling was correct on two separate and independent bases

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[1] The Appellant Hueble acknowledges that his claim for attorney's fees and costs under Section 1988 was directed only against Vaughn In his Amended Complaint, Hueble did not allege a Section 1983 claim against the Defendant South Carolina Department of Natural Resources (R 50-52)

### A In accordance with South Carolina law, an accepted offer of judgment is not an adjudication on the merits but rather a settlement However, Section 1988 jurisprudence holds that a settling party is not a "prevailing party" entitled to recover attorney's fees

Judge Griffith ruled that the acceptance of an offer of judgment does not establish that Hueble is a "prevailing party " Relying on exclusively federal case law, Hueble argues that an accepted offer of judgment under Rule 68 automatically confers "prevailing party" status Vaughn disagrees [2]

It is important to recognize that Hueble filed this action in state court which is governed by the South Carolina Rules of Civil Procedure, not the Federal Rules of Civil Procedure Accordingly, Vaughn and SCDNR made their offer of judgment pursuant to Rule 68 of the South Carolina Rules of Civil Procedure (R 13) Thus, all procedural aspects of this litigation, including the legal effect of the offer of judgment, are governed by state law, not federal law

In the leading case of *Belton v State of South Carolina*, 339 S C 71, 529 S E 2d 4 (2000), the South Carolina Supreme Court explained that an accepted offer of judgment "does not qualify as a 'court award'" under South Carolina law because "there has been no resolution on the merits of the claim " 529 S E 2d at 5

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[2] Federal case law is not fully supportive on this point *See*, *Fletcher v City of Fort Wayne*, 162 F 3d 975, 977 (7th Cir 1998) ("Nothing in Rule 68 supports plaintiffs' position that by accepting a Rule 68 offer they automatically become entitled to attorney's fees")

The Court further explained that an accepted offer of judgment is to be treated as a settlement The Court held that "[a] case resolved by acceptance of an offer of judgment is considered 'settled'" 529 S E 2d at 5, n 4 In short, under South Carolina law, an accepted offer of judgment is the equivalent of a settlement

The Supreme Court in *Belton* cited with favor the Seventh Circuit case of *Fletcher v City of Fort Wayne*, 162 F 3d 975 (7th Cir 1998) In *Fletcher*, which was also cited at length by Judge Griffith in his order in the case at bar, the Seventh Circuit reaffirmed that "a case resolved by acceptance of a Rule 68 offer has been settled " 162 F 3d at 978

Because South Carolina law clearly provides that the acceptance of a Rule 68 offer of judgment is a settlement, the question becomes whether a settlement is sufficient to confer "prevailing party" status on Hueble Prior to the Supreme Court's decision in *Buckhannon Board and Care Home, Inc v West Virginia Dept of Health and Human Resources*, 532 U S 598 (2001), many courts believed incorrectly that a settlement or voluntary agreement between the parties was sufficient to give rise to "prevailing party" status under Section 1988 However, in *Buckhannon*, the Supreme Court held that only "enforceable judgments *on the merits* and court-ordered consent decrees create the material alteration of the legal relationship of the parties necessary to permit an award of attorney's fees " 532 U S at 604 (Emphasis added) By footnote, the Supreme Court explained that its

prior decision in *Maher v Gagne*, 448 U S 122 (1980), should not have been read as allowing "prevailing party" status for a private settlement that is not enforced by a consent decree *Buckhannon*, 532 U S at 604, n 7 The Court ultimately ruled that voluntary conduct by a defendant is not sufficient to allow for the award of attorney's fees under Section 1988 The Court explained that "[a] defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change Our precedents thus counsel against holding that the term 'prevailing party' authorizes an award of attorney's fees *without* a corresponding alteration in the legal relationship of the parties " 532 U S at 605 (Emphasis in original)

Hueble, nonetheless, relies on a Fourth Circuit opinion that holds that an accepted offer of judgment "has necessary judicial imprimatur per *Buckhannon* " *See*, *Grissom v The Mills Corp* , 549 F 3d 313, 319 (4th Cir 2008) However, *Buckhannon* explicitly requires "enforceable judgments *on the merits* " 532 U S at 604 (Emphasis added) Yet, an accepted offer of judgment, by no definition, is a judgment *on the merits* With an offer of judgment, such as in the present case, there is no judicial determination of the merits This is a critical point missed by the Fourth Circuit in *Grissom*

Moreover, it is very important to recognize that the *Grissom* Court was applying Rule 68 of the Federal Rules of Civil Procedure and was *not* applying

South Carolina law or South Carolina's version of Rule 68 As mentioned above, the legal effect or significance of an accepted offer of judgment under Rule 68, SCRCP, is to be governed by state law, not federal law In *Belton*, the South Carolina Supreme Court has clearly spoken – an accepted offer of judgment is not "court action" -- it is not a resolution on the merits Instead, a case resolved by acceptance of an offer of judgment is a settlement under South Carolina law *Belton v State of South Carolina*, 339 S C 71, 529 S E 2d 4, 5 (2000) Yet, a settlement, as explained by the *Buckhannon* Court, is a voluntary change in conduct by a defendant without any *judicial* decision on the merits, and as such, it cannot give rise to "prevailing party" status for any of the settling parties Thus, under *Belton* and *Buckhannon*, Hueble, as a settling party, does not qualify as a "prevailing party" entitled to attorney's fees and costs under Section 1988 [3]

[3] The previous conclusion that Hueble does not qualify as a "prevailing party" under Section 1988 is further evident because there has been no adjudication of his Section 1983 claim Hueble asserted numerous state law claims against Vaughn and a single federal claim Hueble also asserted numerous state law claims against SCDNR The offer of judgment was inclusive of all claims and cannot be read as an admission of liability on the Section 1983 claim against Vaughn, which would thereby give rise to liability under Section 1988 for attorney's fees Indeed, under South Carolina law as explained in *Belton*, an accepted offer of judgment cannot be construed as an admission of liability on any claim because it is not a resolution on the merits

### B The Appellant Hueble is not a "prevailing party" because he and the Respondent Vaughn had competing causes of action on which both recovered and in fact Vaughn recovered a significantly greater amount

As Judge Griffith recognized, Hueble and Vaughn had competing claims for monetary relief While Hueble alleged various state and federal claims against Vaughn, Vaughn also alleged counterclaims for slander, libel, abuse of process and intentional infliction of emotional distress (R 65-69) Shortly after accepting the offer of judgment from SCDNR and Vaughn, Hueble entered into a settlement of the counterclaims with Vaughn requiring payment of $25,000 to Vaughn Therefore, through their respective settlements, both litigants recovered monetarily Vaughn's recovery far exceeded Hueble's recovery Vaughn received almost five times the amount that Hueble did

Based on the settlements reached by the parties, Judge Griffith correctly determined that neither party was the "prevailing party" and that attorney's fees should not be awarded There is no case law in South Carolina that addresses this scenario in a civil context, absent a specific statutory framework such as the mechanic's lien statutes Likewise, there are no cases from other jurisdictions addressing whether one party may be considered a "prevailing party" under Section 1988 where both parties recover or "prevail" on competing claims for monetary relief This case appears to be entirely novel in that respect

Nonetheless, Judge Griffith was correct in relying on authority from other jurisdictions where the parties to a civil action both succeed on claims for monetary relief As the cases cited point out, many courts have ruled that where a plaintiff has recovered on his complaint and the defendant has recovered on his counterclaim, there is either no "prevailing party" or the "prevailing party" is the party who received the "net judgment" or the highest amount recovered by the parties *See generally, Who is the "Successful Party" or "Prevailing Party" for Purposes of Awarding Costs Where Both Parties Prevail on Affirmative Claims*," 66 A L R 3d 1115 (2010) Applying those two primary rules to the case at bar, it is clear that Hueble does not qualify as a "prevailing party" in this litigation under either rule

In a related context, the South Carolina Supreme Court ruled in *Heath v County of Aiken*, 302 S C 178, 394 S E 2d 709 (1990), that "[a] court determines the prevailing party by evaluating the degree of success obtained " 394 S E 2d at 711 In the case at bar, there was no adjudication on the merits of any claims or counterclaims The parties voluntarily resolved those claims, and hence, it cannot be said that Hueble prevailed and Vaughn did not At best, a comparison of the monetary recoveries by both parties would suggest that if anyone prevailed, it was Vaughn But at any rate, there is no basis for determining under the present circumstances that Hueble qualifies as a "prevailing party" in this litigation and

thus is entitled to costs under Rule 54(d), SCRCP, including attorney's fees If Hueble is not entitled to recover costs under Rule 54(d), then he is clearly not entitled to recover under Section 1988 [4] In short, Judge Griffith's ruling that Hueble is not a "prevailing party" entitled to recover under Section 1988 should be affirmed on this additional basis

## II The trial court did not abuse its discretion in ruling that even if the Appellant William Hueble were a "prevailing party," attorney's fees and costs were not recoverable due to special circumstances that rendered such an award unjust

In addition to ruling that the Appellant William Hueble does not qualify as a "prevailing party," Judge Griffith also ruled that, even if Hueble were a "prevailing party," attorney's fees and costs are not recoverable due to special circumstances that rendered such an award unjust In *Hensley v Eckerhart*, 461 U S 424 (1983), the United States Supreme Court held that "a prevailing plaintiff should ordinarily recover an attorney's fee *unless special circumstances render such an award unjust* " 461 U S at 429 (Emphasis added)

In the present case, Judge Griffith found that an award of attorney's fees to Hueble would be unjust for three principal reasons First, he determined that the

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[4] Section 1988(b) provides that in federal civil rights actions, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee *as part of the costs* " 42 U S C § 1988(b) (Emphasis added)

settlement of Vaughn's counterclaims by Hueble, which allowed both parties to recover on competing claims, did not entitle him to attorney's fees Second, he ruled that the offer of judgment of $5,100 was a nuisance-value settlement and did not constitute a level of success as would justify an attorney's fees award Third, he concluded that Hueble did not obtain the desired result from this litigation because he settled for a nominal monetary recovery alone

The standard of review for Judge Griffith's rulings in this regard is an abuse of discretion standard It is well settled that an award of attorney's fees under Section 1988 is reviewed for an abuse of discretion *See, Johnson v City of Aiken*, 278 F 3d 333, 336 (4th Cir 2002) *See also, Heath v County of Aiken*, 302 S C 178, 394 S E 2d 709 (1990) (applying abuse of discretion standard of review for attorney's fees claim under state law) "An abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions " *Kiriakides v School Dist of Greenville County*, 382 S C 8, 675 S E 2d 439, 445 (2009) "[U]nder the abuse of discretion standard the reviewing court is obligated to give great deference to the trial court's judgment " *Jamison v Ford Motor Co* , 373 S C 248, 644 S E 2d 755, 766 (Ct App 2007)

While Hueble disputes Judge Griffith's finding of special circumstances necessary to decline to award attorney's fees, he does not argue or demonstrate that

Judge Griffith actually abused his discretion in so ruling Hueble only presents arguments as to why this Court should disagree with those rulings or have a difference of opinion The standard of review, however, is not *de novo*, and as a result, Hueble has not met his burden

As mentioned, Judge Griffith ruled that the settlement by the parties of all claims and counterclaims constitutes special circumstances that warrant the denial of attorney's fees He determined that Hueble settled Vaughn's counterclaims for a total of $25,000, which was almost five times more that Hueble received for resolving his state law and federal claims against both Vaughn and SCDNR The fact that both parties resolved all of their competing claims with both parties receiving monetary recoveries does not warrant one party – Hueble – supplementing his recovery by the recovery of attorney's fees Judge Griffith's determination in this regard is entirely within the discretion conferred on a trial judge and does not represent an error of law or any abuse of that discretion Hueble has not presented any authority from any jurisdiction where a court has held that consideration of the monetary recoveries by both parties on competing claims was not an appropriate consideration in determining whether an award of attorney's fees to one party was justified [5]

[5] Hueble argues that Judge Griffith should not have placed any weight on the settlement of Vaughn's counterclaims because that was done at the insistence of Hueble's insurance carrier That argument is meritless The monies paid for the settlement on both sides

In addition, Judge Griffith had ruled that the offer of judgment of $5,100 was a nuisance-value settlement and did not constitute the degree of success as would justify an attorney's fees award Hueble has not shown that this ruling was an abuse of discretion In fact, Hueble spends a majority of his brief discussing the cases cited by Judge Griffith but fails to focus on why or why not "special circumstances" have not been demonstrated At any rate, Judge Griffith was well within his discretion in concluding that the $5,100 amount paid to Hueble was mere nuisance-value, which was defined by the Seventh Circuit as "[a] compromise for less than the costs of defense " *Fletcher v City of Fort Wayne*, 162 F 3d 975, 976 (7th Cir 1998) In fact, Judge Griffith made the following findings which are uncontradicted and unchallenged on appeal

> [In the present case] the Defendants anticipated defense costs well in excess of $5,100 if this case were to go forward to trial The parties stated that there were additional depositions scheduled, extensive motions in limine were anticipated, and the trial was estimated to take four or five days The $5,100 offered to resolve this case was clearly less than the costs of defense which is the definition of nuisance-value settlement

(R 9) As indicated, these findings are not challenged by Hueble The expense of this litigation is not denied by him nor can it be, particularly given the fees he allegedly incurred and is seeking to recover

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were paid by insurers for the benefit of the parties Hueble cannot deny the benefit that he received from the settlement and from resolving Vaughn's counterclaims against him

Judge Griffith's ruling based on the nuisance-value of the $5,100 recovery is fully supported by the case of *Fletcher v City of Fort Wayne*, 162 F 3d 975, 976 (7th Cir 1998), which as mentioned above has been cited favorably by the South Carolina Supreme Court *See*, *Belton v State of South Carolina*, 339 S C 71, 529 S E 2d 4, 5 (2000) In *Fletcher*, the Seventh Circuit concluded that "[t]he district judge did not abuse his discretion in concluding that these settlements [of $2,500 and $5,000] reflected only nuisance value, so the plaintiffs were not entitled to attorneys' fees " 162 F 3d at 978 *See also*, *Tyler v Corner Construction Corp* , 167 F 3d 1202, 1206 (8th Cir 1999) (nuisance settlement represents a special circumstance that would render an attorney's fees award unjust)

The same is true here Hueble, in fact, has not shown that the full value or a fair value of his suit is $5,100 It is illogical to believe that Hueble incurred in excess of $150,000 in attorney's fees and costs on a case where he was seeking to recover only $5,100 In short, the fact that the case settled for $5,100 supports Judge Griffith's conclusion that Hueble accepted a nuisance-value settlement and did not achieve the success necessary to merit an award of attorney's fees

This conclusion is further supported by the fact that Hueble obtained no recovery other than monetary relief To the extent that Hueble claims that this case was "not about the money," he has still not achieved any success in the litigation It is without dispute that Hueble received only monetary relief in resolution of the

litigation While he sought injunctive relief in his Amended Complaint, no such relief was granted, and any alleged voluntary cessation of conduct by Vaughn, as may be asserted by Hueble, is immaterial because the "catalyst" theory as a basis for an award of attorney's fees was rejected by the United States Supreme Court in *Buckhannon*

In sum, Judge Griffith's finding that Hueble's recovery was "trivial" and "nominal" is supported by the record and has not been shown to be an abuse of discretion [6] Because the Hueble's recovery was *de minimis*, Judge Griffith acted within his broad discretion in concluding that an award of attorney's fees under Section 1988 would be unjust under the circumstances

## III The Appellant William Hueble's third issue on appeal is at best premature Because the trial court concluded that Hueble was not entitled to recover any attorney's fees, it was not necessary for the court to address the reasonableness of the fees claimed

As a third issue on appeal, the Appellant Hueble contends that Judge Griffith erred in failing to award reasonable attorney's fees using the lodestar analysis This issue on appeal is at best premature

Judge Griffith did not refuse to apply the lodestar standard He simply

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[6] At the hearing, Hueble's counsel conceded that his recovery of $5,100 was "modest" although he denies that the recovery may be considered "nominal " (R 247)

declined to award any attorney's fees under Section 1988 because Hueble was not a "prevailing party" and because an award of attorney's fees was unjust under the circumstances Judge Griffith did not reach the issue raised in Hueble's third issue on appeal Because Judge Griffith concluded that Hueble was not entitled to recover any attorney's fees, it was not necessary to address the reasonableness of the fees claimed

Ultimately, if this Court were to reverse Judge Griffith's order and find that Hueble is a "prevailing party" and is entitled to an award of attorney's fees, it will be necessary for this Court to remand to the trial court for a determination of the fees to be reasonably and appropriately awarded Hueble himself recognizes that, given the posture of this case, this Court cannot make an award of any specific sum of attorney's fees and that a remand is necessary In the "Conclusion" section of his brief, Hueble requests a remand to "determine the reasonable costs, including attorney's fees to be awarded through application of the lodestar analysis " *See*, Appellant's Brief, p 26 Thus, there is no need for the Court to even address the third issue on appeal

## CONCLUSION

Based on the foregoing discussion and analysis, the Respondent Eric Randall Vaughn respectfully requests that this Court affirm the order of Circuit Court Judge Eugene C Griffith, Jr , filed May 24, 2010, denying the Appellant's motion for attorney's fees and costs under Rule 54(d) and 42 U S C § 1988

Respectfully submitted,

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## CERTIFICATE OF COUNSEL

The undersigned counsel for the Respondent Eric Randall Vaughn certifies that the Final Brief of Respondent complies with Rule 211(b), SCACR

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The undersigned counsel for the Respondent Eric Randall Vaughn certifies that the Final Brief of Respondent complies with the Supreme Court's Order of August 13, 2007, regarding personal identifiers and sensitive information

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The undersigned employee of Davidson & Lindemann, P A , attorneys for the Respondent, does hereby certify that service of the **Brief of Respondent** was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 18th day of January 2011

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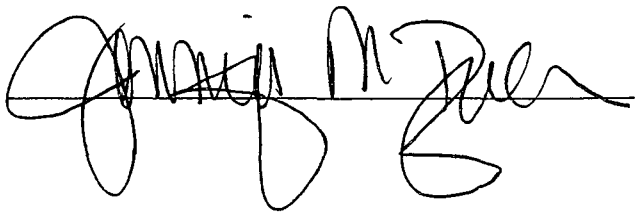

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM GREENWOOD COUNTY

Court of Common Pleas

Eugene C Griffith, Jr , Circuit Court Judge

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Case No 2007-CP-24-1056

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William Alvin Hueble, Jr , Appellant,

v

South Carolina Department of Natural Resources and
Eric Randall Vaughn, Defendants,

Of Whom Eric Randall Vaughn is Respondent

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**FINAL REPLY BRIEF OF APPELLANT**

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## ARGUMENTS

### I No matter the analysis, Appellant's obtainment of an enforceable judgment against Respondent constituted a material change in the relationship of the parties, establishing the necessary judicial imprimatur for Appellant's designation as prevailing party

It is agreed that South Carolina procedural rules govern, however, the prevailing party determination necessarily considers federal statutes and case law Being the only party to have obtained a legally enforceable judgment, Appellant was the sole party entitled to move for costs as allowed per that judgment, which could include "reasonable attorney's fees under any **statute** " Rule 54, SCRCP (emphasis added) The statute at issue is 42 U S C §1988, which allows an award of attorney's fees, in this instance, for parties prevailing on claims pursuant to 42 U S C §1983 Appellant was the only such party

It is not disputed that, upon the facts in Belton, the South Carolina Supreme Court determined that an Offer of Judgment "does not qualify as a court award " However, unlike the §1988 prevailing party statute, the Whistleblower Act at issue in Belton specifically required a "court or jury award" as a prerequisite to attorney's fees Therefore, any "settlement" prior to a court or jury award, including a Rule 68 Offer of Judgment, was admittedly an insufficient basis upon which attorney's fees could be awarded under the Whistleblower Act [1] However, neither Belton nor any other S C case has considered whether the acceptance of a Rule 68 Offer of Judgment confers prevailing party status upon a §1983 plaintiff Accordingly, the more significant holding in Belton is the reminder that "a statute allowing attorney's fees is in derogation of common law and

[1] It is reminded that both prejudgment interest and costs other than attorney s fees were awarded in Belton

must be strictly construed " Belton v State of South Carolina, 339 S C 71, 529 S E 2d 4, 5 (2000), citing Steinart v Lanter, 284 S C 65, 325 S E 2d 532 (1985)

> Because our courts have not spoken on this issue, we may seek guidance from federal cases *See Gardner v Newsome Chevrolet-Buick Inc* , 304 S C 328, 330, 404 S E 2d 200, 201 (1991) ("Since our Rules of Procedure are based on the Federal Rules, where there is no South Carolina law, we look to the construction placed on the Federal Rules of Civil Procedure ") [2]
>
> Cothran v Brown, 350 S C 352, 360, 566 S E 2d 548, 553 (2002)

Fortunately, following the Belton decision, the U S Supreme Court further analyzed "prevailing party" fee shifting statutes through its Buckhannon decision, which primarily determined that the "catalyst theory" was no longer sufficient for fee shifting purposes In so ruling, the Buckhannon majority affirmed the Court of Appeals for the Fourth Circuit, which had previously determined that a "person may not be a 'prevailing party' except by virtue of having obtained an enforceable judgment, consent decree, or settlement giving some of the legal relief sought " Buckhannon Board and Care Home v West Virginia Department of Health and Human Resources, 532 U S 598, 602, 121 S Ct 1835, 1839 (2001) While it is clear that judgments on the merits and settlement agreements enforced through a consent decree are examples of approved prevailing party methods, a "material alteration" in the legal relationship of the parties is the overall prerequisite to prevailing party status and the award of attorney's fees

The Buckhannon concurring opinion states "[t]he Court today concludes that a party cannot be deemed to have prevailed, for purposes of fee-shifting statutes such as 42 U S C §§ 1988, 3613(c)(2) (1994 ed and Supp V), unless there has been an enforceable "alteration of the legal relationship of the parties " That is the normal meaning of

[2] Though admitted differences exist between State and Federal Rule 68 both constitute final Judgment

"prevailing party" in litigation, and there is no proper basis for departing from that normal meaning " Buckhannon, 532 U S 598, 622, 121 S Ct 1835, 1849 (2001)

The Buckhannon dissenting opinion opens by stating "[t]he Court today holds that a plaintiff whose suit prompts the precise relief she seeks does not "prevail" and hence cannot obtain an award of attorney's fees, unless she also secures a court entry memorializing her victory The entry need not be a judgment on the merits Nor need there be any finding of wrongdoing " Buckhannon, 532 U S 598, 622, 121 S Ct 1835, 1849 (2001)

Nowhere in Buckhannon (including Respondent's cited footnote 7) is there any suggestion that the obtaining of judgment would not suffice for the determination of prevailing party status [3] Alternatively, nothing suggests that the private, confidential settlement reached between Respondent and Appellant's insurance company, which specifically memorialized Appellant's denial of wrongdoing and opposition to said settlement, could ever confer prevailing party status upon Respondent, even if he had somehow brought a §1983 claim and consideration thereof was deemed appropriate Respondent's general reference to 66 A L R 1115, which was originally drafted in 1975, a year before the passage of §1988, is of no avail given the circumstances regarding the respective resolution of the claims of the parties Appellant has a recorded Judgment, Respondent has a recorded dismissal with prejudice

To the extent argument remains, the Grissom decision, of which Judge William B Traxler was a panel participant, persuades that acceptance of an offer of judgment pursuant to Rule 68 is sufficient to confer prevailing party status Grissom initially

[3] Per Respondent s theory even if the accepted offer of judgment were for $510 00 Appellant would be incapable of achieving prevailing party status

reminds that "the designation of a party as a prevailing party is a legal determination which we review *de novo* Grissom, 549 F 3d 313, 318 (4th Cir 2008)

Grissom, citing Buckhannon, reiterates "that for a party to be considered a 'prevailing party,' there must be a 'material alteration of the legal relationship of the parties' and there must be 'judicial imprimatur on the change '" Grissom, at 318, citing Buckhannon

Grissom thereafter determines that when judgment was entered pursuant to the Offer of Judgment

> "[s]uch judgment created a material alteration of the legal relationship between Plaintiff and Defendant by imposing upon Defendant a legally enforceable obligation to pay Plaintiff Rule 68 judgment represents a judicially sanctioned change in the relationship between the parties [T]here is judicial imprimatur on the change in that the district court has the inherent power to compel Defendant to satisfy such judgment **[A]ccepted offer of judgment made pursuant to Rule 68 has necessary judicial imprimatur per *Buckhannon* "in the crucial sense that it is an enforceable judgment against the defendant ""**
>
> Grissom, at 319 (4th Cir 2008), citing Utility Automation 2000, Inc v Choctawatchee Electric Cooperative, Inc , 298 F 3d 1238, 1248 (11th Cir 2002) (Emphasis added)

Accordingly, per Rule 54, SCRCP, 42 U S C §§ 1983 and 1988, Buckhannon and Grissom, no matter the route of analysis, Appellant's obtainment of a legally enforceable judgment established the necessary judicial imprimatur for Appellant's designation as prevailing party The rejection of such designation by the trial court was in error

## II The Trial Court's alternative ruling that, even if Appellant were "prevailing party," attorney's fees and costs were not recoverable due to special circumstances, was an abuse of discretion

Appellant does not disagree that the standard of review in regard to an award of attorney's fees is an abuse of discretion standard As noted by Respondent, "an abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions " Kiriakides v School District of Greenville County, 382 S C 8, 675 S E 2d 439, 445 (2009) It is submitted that both circumstances apply in this instance, as detailed by Appellant in its initial brief

In reference to the admission of evidence, the Jamison case does note that "under the abuse of discretion standard, the reviewing court is obligated to give great deference to the trial court's judgment " Jamison v Ford Motor Company, 373 S C 248, 644 S E 2d 755, 766 (Ct App 2007) However, in further discussing discovery matters, the Jamison opinion more importantly notes that "**the failure to weigh the required factors demonstrates a failure to exercise discretion and amounts to an abuse of discretion** " Id at 767 (Emphasis added)

Here, per Appellant's earlier analysis, it is submitted that the trial court's conclusions, resting largely upon Respondent's reporting of an otherwise confidential settlement entered in defiance of Appellant's wishes, as well as the lack of consideration regarding the controlling cases of Buckhannon and Grissom, amounted to an error of law, based on unsupported factual conclusions Moreover, failing to consider lodestar analysis constituted a failure to weigh the required factors, demonstrating a failure to exercise discretion, amounting to an abuse of discretion

## III A reminder that Lodestar Analysis is the proper consideration for an award of attorney's fees is not necessarily premature

Appellant does not disagree with Respondent's assertion that consideration of a reasonable award of attorney's fees is arguably premature However, having definitively ruled that Appellant was not the prevailing party, the trial court's subsequent, alternative and/or advisory ruling declaring the existence of special circumstances preventing an award of attorney's fees was likewise "premature" and/or unnecessary Out of an abundance of caution, Appellant addressed these matters to remind of the proper analysis to be applied Such a reminder is not necessarily premature or inappropriate

## CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court by declaring Appellant prevailing party and remand with instruction to disregard consideration of any independent, confidential settlement and determine the reasonable costs, including attorney's fees to be awarded through application of the lodestar analysis

Respectfully submitted,

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