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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable Michael G. Nettles, Circuit Court Judge

CASE NO. 20-CP-22-00600
CASE NO. 20-CP-22-00601

Sunset Lodge, LLC,Appellant,

v.

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

and

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

v.

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

RECORD ON APPEAL
(Including Stipulation and Certificate of Counsel)
VOL. III of IV

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February 4, 2021 Landowner further separate reply to Town January 29 arguments opposing fee request.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN	)	CIVIL ACTION NO. 2020-CP-22-00600
	)	
Sunset Lodge, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Town of Pawleys Island,	)	
	)	
Defendant.	)	
	)	

PLAINTIFF’S MEMORANDUM IN REPLY TO TOWN’S
OPPOSITION TO PLAINTIFF’S MOTION FOR FEES AND OTHER COSTS
AND
UPDATE OF FEE REQUEST BEYOND 1/24/21

Plaintiff hereby provides Plaintiff’s further, separate, reply to the 1/29/21 memorandum of the Town, which is incorrectly imbedded within the Town’s 1/29/21 “motion to reconsider” the Court’s 1/20/21 Order granting summary judgment in this case. Plaintiff also updates Plaintiff’s 1/25/21 fee petition with information since 10:30 p.m. 1/24/21 and with an estimate going forward to 2/20/21.

Subsequent to the entry of the 1/20/21 Order granting summary judgment, Plaintiff duly filed a separate 1/25/21 motion for expenses including attorney’s fees (hereinafter sometimes “fees”), along with supporting affidavit. This fee petition made a request as of 10:30 p.m. 1/24/21.

The Town has had adequate time to file a separate return.

Instead of doing so, however, in the Town responded in a 1/29/21 motion to “reconsider” the granting of summary judgment. There, the Town also intimates an intention to oppose Plaintiff’s fee motion, even though the fee motion could not be “reconsidered” because the fee motion was nothing the Court had previously considered; it was not presented to nor “considered” by the Court January 20, 2021 or previously because the fee motion had not yet been made and has yet to be determined.

Rather than state an objection to anything contained in the fee motion, the Town requests delay, and the incurring of more fees – by the Town and Plaintiff.

In the wrong document, the Town thus makes requests and announces plans having nothing to do with whether or not the Court should have granted summary judgment. There, the Town outlines excessive plans which will delay both the conclusion of the Town's objections, if any, to the actual summary judgment order, and resolution of Plaintiff's separate and duly filed motion for fees.

The Town proposes the extraordinary measures of delaying rulings or hearings on post-summary judgment wrap-up in the case. This, the Town proposes by having an entire trial on fees. Plaintiff objects.

The Town asserts the legally incorrect proposition that "awarding attorney's fees or expenses cannot be resolved by motion."

The Town proposes that, before the fee trial the Town proposes, the Town engage in discovery and other matters for a period approaching the entire time the overall case – with all its delays by the Town -- has been pending. This proposition comes from the very party who apparently wishes to mount arguments that the time Plaintiff's counsel was forced to spend on this case up to this point was in some way not necessary.

The Town asserts that awarding attorney's fees or expenses would require "an evidentiary hearing" and "presentation of detailed billing records, time sheets, witnesses, affidavits, invoices, and receipts." The Town further proposes "permitting discovery on the issue," so that the fee trial, as well as final ruling on the summary judgment motion, can be delayed for "no less than 120 days, for the parties to conduct discovery relevant to that issue."¹ This unabashed request for delay should be rejected.

¹ Just weeks after this case was commenced, the Town filed a motion to expedite the case, but then shortly thereafter, filed a motion to block discovery from the Town.

The Town does not specify at this point whether the now proposed discovery in preparation for the proposed fee trial is proposed to be mutual and reciprocal, or whether Plaintiff's discovery of the Town's rates, records, detail in recordkeeping, attorney impressions, decisions not to research, decisions not to cite authority, decisions not to state grounds for motions, decisions not to consult

Before reaching these arguments, Plaintiff will address the Town's mischaracterization of the summary judgment hearing and circumstances of the preparation of the Court's Order.

As ostensible background for how the Court's Order came to contain a simple and clear directive about fees which the Town incorrectly argues is "ambiguous,"² the Town for some reason mischaracterizes and misstates the colloquy at the December 4, 2020 hearing.

Contrary to the Town's recital of this background, the Judge, not Plaintiff, brought up the question of fees. Fees are provided for by statute in an action of this nature, and are requested in the Amended Complaint. The Judge, not Plaintiff,³ brought up the issue and the Judge said he would like

before filing motions, decisions to seek continuance or blockage of discovery, etc. would be questioned as not necessary.

Although fee awards are often based on the observations of the judge who was involved in the merits determination, the Town also does not specify whether it would be necessary to depose the Circuit Judge.

² The Court stated quite clearly on the last page of the order at 24, "Any request for fees should be presented by separate petition/motion in this action." This is the statement the Town argues is ambiguous.

³ The Town's insinuation, apparently – whether intended to influence the Circuit Judge, some later reviewing court, a reviewing Town Council, or the press – is that Plaintiff or Plaintiff's attorney lusted after fees, brought up the matter, was offered no encouragement or brushed back, and nevertheless injected the matter into Plaintiff's proposed order, and that the Court accidentally included even mention of fees in the summary judgment order. It is a false insinuation.

This effort to paint a picture of a fee-hungry plaintiff or plaintiff's attorney, to explain away the very real consequences of the litigation, in anticipation of the Town's challenge to a request for a fee award shifting Plaintiff's fees to the Town pursuant to statute, is in keeping with prior false remarks. The Town Attorney falsely stated previously, for perhaps hundreds of the public viewing a live internet-streamed Town Council meeting, that Plaintiff's attorney "took it upon himself to depose the appraiser for 17 hours," when, in truth, the deposition took closer to eight or nine hours over two days under special circumstances.

As appears from Plaintiff's motion for fees and the affidavit submitted, the total fees the three plaintiffs were forced to incur in order to defend their property after being sued by the Town for condemnation could have, under other circumstances, easily run into hundreds of thousands of dollars. This could have been the case if each plaintiff had used separate counsel who started with the facts and law from scratch, and if, as would be likely, each lawyer or firm charged at a higher rate than Plaintiff's attorney. Instead, the three plaintiffs used one attorney at a relatively conservative rate, he acted pro se (for himself) with respect to his own property, and they essentially split the bill into thirds. Then only two thirds of that was sought, by only two of the plaintiffs.

to not address fees in the ruling on summary judgment. He directed that any proposed order granting summary judgment state that a fee application would be handled separately.

That is exactly what Plaintiff put in Plaintiff's proposed order of over 50 pages, and that is exactly what the Judge put in his 24-page Order.

The Judge did not state he would not consider fees, but stated that fees would be considered separately. This is what is stated in the order. Plaintiff thereafter applied for fees and expenses.

In opposing Plaintiff's application, Defendant is incorrect on the law and procedure for award of attorney's fees in South Carolina.

The Judge is granted wide discretion in the procedure and award of attorney's fees.

The decision to award or deny attorneys' fees under a state statute will not be disturbed on appeal absent an abuse of discretion. Layman v. State, 376 S.C. 434, 444, 658 S.E.2d. 320, 325 (2008). "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." Id. "Similarly, the specific amount of attorneys' fees awarded pursuant to a statute authorizing reasonable attorneys' fees is left to the discretion of the trial judge and will not be disturbed absent an abuse of discretion." Id.

On appeal, an award for attorney's fees will be affirmed so long as sufficient evidence in the record supports each factor. Blumberg v. Nealco, Inc., 310 S.C. 492, 427 S.E.2d 659 (1993).

Neither South Carolina law, judicial efficiency, nor common sense require trial courts to engage in encyclopedic exposition when making "specific" factual findings. See Horton v. Jasper Cnty. Sch. Dist., 423 S.C. 325, 330-31, 815 S.E.2d 442 (2018)(finding "general statements" about various factors were "adequately ... specific"); and see Rice v. Multimedia, Inc., 318 S.C. 95, 101-102, 456 S.E.2d 381, ___ - ___ (1995)(finding no abuse of discretion where trial court awarded fees in excess of the verdict and in excess of the agreed contingent fee, where the trial court weighed all six factors in determining the appropriate fee).

Additionally, “no one of the [] factors in itself [is] controlling.” Darden v. Witham, 263 S.C. 183, 194, 209 S.E.2d 42, 46 (1974). The trial court is simply required to take each of the factors into consideration. Darden, 263 S.C. at 194, 209 S.E.2d at 46; see also Baron Data Sys., Inc. v. Loter, 297 S.C. 382, 384, 377 S.E.2d 296 (1989) (upholding award against adverse party in suit under equipment leases with contractual provision for attorney’s fees; agreeing with the trial court’s determination that factor #4 (contingency of the compensation) was “not applicable,” approving the assignment of varying weight to factor #6 (the amount recovered) and sustaining the trial court’s award).

The award is not dependent “upon billing records,” as stated by the Town.

In the instant case, the materials supporting the application for fees and expenses are detailed and extensive. Even where, contrary to the case here, affidavits and records are “somewhat deficient,” the trial court’s determinations of the time spent and the other factors in the case, when based on the trial court’s familiarity with the case and observation of the proceedings and the attorneys, may serve as support for the trial court’s proper consideration of the required factors. See Taylor v. Medenica, 331 S.C. 575, 503 S.E.2d 458 (1998)(affirming fee award in excess of principal judgment where some attorneys kept no contemporaneous time records, some made estimates, and some submitted no estimates).

The court may award more than the rate actually charged.

The award of attorney’s fees is made to the party, not his lawyer. Prevatte v. Asbury Arms, 302 S.C. 413, 396 S.E.2d 642 (Ct.App.1990). When determining the reasonableness of attorney’s fees under a statute mandating the award of attorney fees, the contract between the client and his counsel does not control the determination of a reasonable hourly rate. See Rice v. Multimedia, Inc., 318 S.C. 95, 456 S.E.2d 381 (1995)(affirming a trial court’s award of an amount greater than that due the plaintiff’s attorney under a contingency fee contract); Columbia (S.C.) Teachers Federal Credit Union v. Newsome, 303 S.C. 162, 399 S.E.2d 444 (Ct.App.1990)(affirming

an award of attorney's fees based upon an hourly rate even though agreement with client was contingency-based); see also Ada County Highway District v. Acarrequi, 105 Idaho 873, 673 P.2d 1067 (1983)(holding the court should not automatically adopt the contingent fee or contractual arrangement; instead, the fee awarded may be more or less than that provided by the lawyer-client contract); Lanier v. Moore-Handley, Inc., 575 So. 2d 83 (Ala.1991)(holding a fee arrangement between the client and his attorney is not conclusive evidence of a reasonable attorney fee; therefore, the court affirmed an award which exceeded the agreed upon hourly rate).

Instead, the court should consider the following six factors when determining a reasonable attorney's fee: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services. Blumberg.

Contrary to the Town's assertion, the award is sought and made by motion. The fee award procedure is not a trial and is not part of the trial on the merits.

According to the U.S. Supreme Court, the aim is to achieve a reasonably prompt reasonably fair disposition of the issue, as in the taxing of costs, applying the correct standards. The goal of an attorneys' fees award "is to do rough justice, not to achieve auditing perfection," Fox v. Vice, 523 U.S. 826, ___, 131 S.Ct. 2205, 2216 (2011), and therefore "[a] request for attorneys' fees should not result in a second major litigation," Hensley v. Eckerhart, 461 U.S. 424, 437 (1983).

In the federal courts, protracted proceedings over attorneys' fees "has become a heavy burden on the federal courts. It can turn a simple civil case into two or even more cases—the case on the merits, the case for fees, the case for fees on appeal, the case for fees for proving fees, and so on ad infinitum, or at least ad nauseam." Ustrak v. Fairman, 851 F.2d 983, 987 (7th Cir. 1988)(Posner, J.).

No hearing is necessary.

Provided that there is an opportunity to submit evidence, there is no right to have a hearing on a post-judgment application for attorney's fees. Seabrook Island Property Owners' Association v. Berger, 365 S.C. 234, 616 S.E.2d 431 (Ct. App. 2005). Evidence on motions may be received by affidavit, unless the court directs otherwise. Rule 43(e), SCRPC.

The procedure of determining fee petitions, after a merits determination, on the papers or in a motion hearing after exceptions are duly taken, emulates the procedure for taxing costs under Rule 54 (d), SCRPC, as well as the procedure in the appellate courts. See Rule 222 (d), SCACR.

Avoiding the three-ring circus, or waste of time, of a hearing in which no proper exceptions have even yet been taken going in is within the trial judge's discretion.

Motions are required to state their grounds and the Circuit Court may then hold a hearing on a motion, but is not in all instances required to do so. Order Re Operation of the Trial Courts During the Coronavirus Emergency, No. 2020-12-16-01 states:

(4) Minimizing Hearings on Motions. While the practice has been to conduct hearings on virtually all motions, this may not be possible during this emergency. If, upon reviewing a motion, a judge determines that the motion is without merit, the motion may be denied without waiting for any return or other response from the opposing party or parties. In all other situations except those where a motion may be made on an ex parte basis, a ruling shall not be made until the opposing party or parties have had an opportunity to file a return or other response to the motion. A trial judge may elect not to hold a hearing when the judge determines the motion may readily be decided without further input from the lawyers. If a hearing is held, the hearing shall be conducted in the manner specified by (c)(3) above.

Order Re Operation of the Trial Courts During the Coronavirus Emergency, No. 2020-12-16-01, Para. (c)(4)(S.C. S.Ct. dated December 16, 2020)(page 5 of 21).

Fees may be awarded with no time records whatsoever. See Taylor v. Medenica (affirming fee award in excess of principal judgment where some attorneys kept no contemporaneous time records, some made estimates, and some submitted no estimates).

Since the fees sought here are simply actual fees, or less, incurred on an hourly basis, and not contingent or, except for the future time expected, estimated fees, and since detailed hourly figures are

provided and some of the time, additionally, has not been included, the task is not one requiring an extensive hearing. See Seabrook v. Berger (observing, where the fee sought was “actually incurred,” there was no evidence that the award of same was excessive). See also Taylor v. Medenica (recognizing that trial judge was in a position to judge the amount and quality of work).

Defendant has cited absolutely no case holding that “detailed billing records” are a sine qua non of a fee award. Blumberg states that the “time necessarily devoted to the matter”⁴ is one of the several factors, not the “detailed billing records.” Here, both in the September 11, 2021 hearing of the Town’s motion to dismiss, motion for ten-million-dollar bond, and motion to expedite, and in the December 4, 2020 hearing of Plaintiff’s August 21, 2020 motion for summary judgment, the Town took great interest in whether it could sue Plaintiff again on the same subject matter. The Town did so in October 2020 when it delivered new condemnation notices despite the stay in the instant case, and the Town may well serve others for all Plaintiff knows. The October notices resulted in three additional, still-pending challenge actions. For these and other reasons, there is more than good reason not to publish Plaintiff’s attorney’s detailed billing records.

In the instant case, a relatively frugal fee award had been requested, while explaining the several bases on which a reasonable award could exceed the amount requested by hundreds of thousands of dollars. Accordingly, this Court should deny the Town’s request for delay and request for both parties to incur more fees in the course of extensive arguing over fees.

Since the 1/24/21 date through which Plaintiff calculated its request in Plaintiff’s 1/25/21 fee petition, Plaintiff has incurred further fees and expenses in the case, in, among other things, following up with, responding to, and communicating with the Town’s counsel. A supplement to and

⁴ This Court encourages care and sufficient thoroughness in checking work, complying with the court’s rules, making corrections, and making cogent presentations. Despite efforts in these regards, work is not always 100% efficient or error free. Care and thoroughness, which often save time for the court, and often safeguard a better result, are encouraged, but they also take attorney time. Attorney time devoted to such goals should not be discouraged per se or penalized.

amendment of Plaintiff's previous fee and expense affidavit will be submitted with or shortly after this brief, and will include an estimate of future anticipated fees to conclusion of the case, assuming only a virtual motion hearing on papers, no 120-day-plus delay, no discovery, and no fee trial, and excluding appeal by the Town.

Subject to these assumptions, and reserving the right to amend or supplement, Plaintiff hereby revises to \$50,593.99, Plaintiff's request for award of fees and expenses, through February 20, 2021.⁵

For the foregoing reasons, Plaintiff's revised fee request as stated above should be granted. Pursuant to Order Re Operation of the Trial Courts During the Coronavirus Emergency, No. 2020-12-16-01, Para. (c)(4), the motion should be determined on the papers, now, as the Town has been given adequate opportunity to respond. Plaintiff does not oppose a reasonably prompt hearing of reasonably prompt scope, but respectfully suggests that a "hearing" consisting of carefully considering the filings of the parties without oral presentation is sufficient, and will save everyone time and expense.

Respectfully submitted,

s/M. Baron Stanton

M. Baron Stanton (Bar#7970)

Stanton Law Offices, P.A.

PO Box 245

Columbia, SC 29202

Tel: (803) 929-1484

bstanton@stantonlaw.com

Attorney for Sunset Lodge, LLC

2/5/21

⁵ Additional time of 1.3 hours (10:30 p.m. to 11:45 p.m.) was incurred on 1/24/21, 7.6 on 1/25, 1.0 on 1/26, 2.8 on 1/29, 1.7 on 1/28, 2.1 on 1/29, 2.9 on 1/30, 4.2 on 1/31, 2.9 on 2/1, 5.8 on 2/2, 12.9 on 2/3, and 5 (estimated) on 2/4, for a total of 50.2. Plaintiff estimates an average of 3 hours per day from 2/5 to 2/20, for a total of 45 hours, but based on past experience and the present filings of the Town, this may be way under. The court reporter kindly granted a \$250 customer discount on the deposition expense previously estimated at \$1,500.00, reducing the deposition cost to \$1,339.80, thus allowing a downward adjustment of that cost by \$53.40 per plaintiff. Charging the time at only \$190 per hour, dividing by three, adjusting the deposition cost downward \$53.40, and adding the result to the previous request, the revised request is $\$50,593.99 ((50.2 \times \$190)/3) + (45 \times \$190)/3 - ((\$1,500 - \$1,339.80)/3) + \$44,618.06 = \$50,593.99$.

February 4, 2021 Landowner supplemented fee petition.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN	)	CIVIL ACTION NO. 2020-CP-22-00600
	)	
Sunset Lodge, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Town of Pawleys Island,	)	
	)	
Defendant.	)	
	)	

FIRST SUPPLEMENT TO AND SECOND AMENDMENT OF
AFFIDAVIT OF M. BARON STANTON
RE REASONABLE FEES AND EXPENSES IN CASE,
NOW TO 2/20/21

41. I hereby supplement and amend my Affidavit of 1/24/21, as amended 1/26/21. Additional time has been devoted to the case since 10:30 p.m. 1/24/21, which is where the stated time stopped in the 1/24/21 Affidavit.

42. Additionally, since 1/24/21, the court reporter kindly granted a \$250 customer discount on the deposition expense previously estimated at \$1,500.00 in the 1/24/21 Affidavit, reducing the deposition cost to \$1,339.80, thus allowing a downward adjustment of that cost by \$53.40 per plaintiff.

43. Additionally, I estimate that an average of 3 hours per day from 2/5/21 to 2/20/21, for a total of 45 hours, will be required to conclude this case, but based on past experience and the present filings of the Town, this may be way under. This estimate is with a reservation of right to amend or supplement and assumes only a virtual motion hearing on papers, no 120-day-plus delay, no discovery, and no fee trial, and no appeal by the Town.

Stanton Law Offices, P.A., 1430 Richland Street, P.O. Box 245, Columbia SC 29202 803-929-1484

44. Subject to these assumptions, and reserving the right to amend or supplement, Plaintiff hereby revises to \$50,593.99, Plaintiff's request for award of fees and expenses, through February 20, 2021.¹

45. Accordingly, in addition to the time recounted in paragraph 9 of the 1/24/21 Affidavit, the following time was spent, or where noted, is estimated to be spent:

Time spent, or to be spent, and expenses incurred, or to be incurred, in the matter since 10:30 p.m., 1/24/21, not yet in the billing system, are as follows:

1/24/21	M. Baron Stanton	1.3	hours (10:30 p.m. to 11:45 p.m.)
1/25	"	7.6	"
1/26	"	1.0	"
1/27	"	2.8	"
1/28	"	1.7	"
1/29	"	2.1	"
1/30	"	2.9	"
1/31	"	4.2	"
2/1	"	2.9	"
2/2	"	5.8	"
2/3	"	12.9	"
2/4	"	5.0	" (Estimated)

¹ This results charging the additional time at only \$190 per hour, dividing by three, adjusting the deposition cost downward \$53.40, and adding the result to the previous request. I.e., $(50.2 \times \$190)/3 + (45 \times \$190)/3 - ((\$1,500 - \$1,339.80)/3) + \$44,618.06 = \$50,593.99$.

Stanton Law Offices, P.A., 1430 Richland Street, P.O. Box 245, Columbia SC 29202 803-929-1484

2/5 – 2/20/21

“

45

“ (Estimated at 3 hrs./day)

44. In my opinion, the total fees and out-of-pocket expenses of \$141,109.74 recorded by my office for counsel services through 2/4/21 in connection with the case were reasonable, necessary and required, and the estimate of an additional \$8,550.00 in fees and expenses through 2/20/24, subject to the assumptions stated, is also a reasonable estimate of what will be necessary and required, and a \$50,593.99² or more as of 2/20/21 should be an expense borne by the Defendant Town as required by statute, rather than by Plaintiff.

Pursuant to S.C. Sup. Ct. Order 2020-12-16-01 (regarding emergency procedures in trial courts during COVID-19 pandemic), in lieu of having this affidavit notarized, I certify the foregoing and I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment by contempt.

s/M. Baron Stanton

M. Baron Stanton

Date: 2-5-21

²Namely, a figure which includes one-third of the \$148,599 in recorded and estimated future time charges and includes expenses incurred, but does not include an increase of our rates by up to one-third for actual in-court or hearing time before or after 1-24-21, and does not include any of the 45 hours or more of estimated unrecorded time in May or June 2020 and at other times during the ensuing six months.

February 5, 2021 e-mail notification of February 25, 2021 hearing of Landowner fee petition.

Barry Stanton

From: Courtmail22_DoNotReply@sccourts.org
Sent: Friday, February 5, 2021 12:55 PM
To: Barry Stanton
Cc: jlawrence@gtcounty.org
Subject: Motion "MATFEE-Motion/Attorney Fees/Stanton" for Case "2020CP2200600- Sunset Lodge Llc VS Pawleys Island Town Of" was added to a Motions Roster for 2/25/2021 at 1:30 PM

VIRTUAL COURTROOM. See Motion Roster News for instructions. Per Judge McIntosh, any memorandums must E-Filed by the Friday of the week before the hearing.

The case referenced in this email is scheduled on the Docket. The Docket is available at <http://publicindex.sccourts.org/georgetown/courtrosters/>.

Please VIEW Roster IMPORTANT INFORMATION located on the MOTIONS ROSTER NEWS TAB.

If your case is settled, your motion is "RESOLVED, WITHDRAWN, or MOOT", please notify immediately by submitting correspondence through the E-Filing system. If you have any communication regarding this case, please contact Jennifer Lawrence, CP Court Coordinator @ cpcourtcoordinatorgt@gmail.com ~~~ CONFIDENTIALITY NOTICE ~~~ This message is intended only for the addressee and may contain information that is confidential. If you are not the intended recipient, do not read, copy, retain, or disseminate this message or any attachment. If you have received this message in error, please contact the sender immediately and delete all copies of the message and any attachments.

February 5, 2021 e-mail notification of February 25, 2021 hearing of Town motion for reconsideration.

Barry Stanton

From: Courtmail22_DoNotReply@sccourts.org
Sent: Friday, February 5, 2021 12:55 PM
To: Barry Stanton
Cc: jlawrence@gtcounty.org
Subject: Motion "MAMNMO-Motion/Alter and/or Amend/Durant" for Case "2020CP2200600-Sunset Lodge Llc VS Pawleys Island Town Of" was added to a Motions Roster for 2/25/2021 at 1:30 PM

VIRTUAL COURTROOM. See Motion Roster News for instructions. Per Judge McIntosh, any memorandums must E-Filed by the Friday of the week before the hearing.

The case referenced in this email is scheduled on the Docket. The Docket is available at <http://publicindex.sccourts.org/georgetown/courtrosters/>.

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February 5, 2021 Town brief opposing fee petition.

STATE OF SOUTH CAROLINA	)	IN THE CIRCUIT COURT OF THE
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN	)	CIVIL ACTION NO. 2020-CP-22-00600
	)	
Sunset Lodge, LLC,	)	
	)	DEFENDANT'S INITIAL REPLY
Plaintiff,	)	IN OPPOSITION TO PLAINTIFF'S
v.	)	MOTION FOR EXPENSES INCLUDING
	)	ATTORNEY FEES
Town of Pawleys Island,	)	
	)	(Including Request for Status Conference/
Defendant.	)	Scheduling Order)
	)	

TO: THE HONORABLE MICHAEL G. NETTLES

Defendant Town of Pawleys Island ("Town") hereby submits its Initial Reply in Opposition to Plaintiff's *Motion for Expenses Including Attorney's Fees*. Town opposes Plaintiff's fee petition, including on the grounds that it seeks an award in excess of "the landowner's reasonable costs and litigation expenses incurred [herein]." S.C. Code Ann. § 28-2-510(A) (emphasis added).¹

The Plaintiffs in this and another closely related action (2020-CP-22-0600 and -0601), represented by the same counsel, are currently seeking a combined total expense award of **\$101,187.98** based on proportionate amounts of a total of **737.1 hours** of attorney time averred to have been spent on this and other closely related matters (understood to include 2020-CP-22-0600, -601, -602, -930, -931, and -932) from July 2, 2020 through February 4, 2021 (equating to an **average of 4.7 hours per weekday**, including holidays) and an additional 45 hours said to be anticipated from February 5 through February 20, 2021 (equating to an average of 4.1 hours per weekday). The Plaintiff's attorney fee affidavit provides monthly totals of attorney time but no itemized time information. Defendant asserts that the Plaintiff's request is unreasonable and, at this

¹ Defendant understands that the Court intends to schedule a hearing on the fee petition, and Defendant will submit an additional brief prior to that time. This Initial Reply is submitted to note on the record (i) Defendant's general objection to the reasonableness of the requested award and (ii) the Defendant's request for an appropriate scheduling order.

time, unsupported by itemized documentation of attorney time sufficient to justify any award of attorney's fees.

The Town of Pawleys Island simply seeks a meaningful opportunity to review the substance of Plaintiff's claim, obtain an opposing affidavit if deemed necessary, and respond prior to the Court's determination. Undersigned counsel (William C. Dillard, Jr.) formally appeared on behalf of the Defendant in this matter and five other related challenge actions on February 3, 2021.

Specifically, Town petitions the Court for a status conference and issuance of a scheduling order providing that:

- 1.) The attorney fee motion will be considered at a hearing and determined based on the parties' written submissions, opposing affidavits, if any, and oral arguments;
- 2.) The Plaintiff shall produce to Defendant, within a reasonable specified time, copies of the itemized billing statements referenced in Plaintiff's attorney fee affidavits or otherwise reflected in the requested fee award (reasonably redacted to remove reference to the substance of privileged communications and specific attorney mental impressions); and
- 3.) The motion hearing shall be scheduled for a specified date no earlier than the week of May 3, 2021 (or, in the alternative, no earlier than 60 days after the date specified for Plaintiff's production of itemized billing statements).

Defendant's previously filed Motion to Alter or Amend, filed under the time constraints set forth in Rule 59(e), SCRCP, requested a longer period of time to prepare for the hearing, potentially more robust discovery procedures, and an evidentiary hearing. However, as tentatively discussed with Plaintiff's counsel by telephone on February 2, 2021, undersigned counsel determined after having had more time to review that a less involved procedure, as reflected in the above scheduling proposal, would likely be sufficient to provide the Town an opportunity to respond to the Plaintiff's

fee request.

Rule 11 Certification

To the extent necessary pursuant to Rule 11, SCRCPP, undersigned counsel hereby certifies that he has consulted with opposing counsel prior to filing this request for a scheduling order, was unable despite good faith efforts to resolve the matter and determined that further consultation would serve no useful purpose.

Respectfully submitted,

s/ William C. Dillard, Jr.

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will@belserpa.com
Attorneys for Town of Pawleys Island

Also for Defendant:

N. David DuRant, Sr., Esquire (SCB# 1803)
Norwood D. DuRant, Jr. (SCB #101723)
LAW OFFICES OF N. DAVID DuRANT
AND ASSOCIATES, P.A.
P.O. Box 14722
Surfside Beach, SC 29587
Telephone: (843) 650-7800
Facsimile: (843) 650-8090
Email: ddurant@lawofficesofdurant.com

February 5, 2021

February 9, 2021 Landowner reply to Town February 5 brief opposing fee petition.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN	)	CIVIL ACTION NO. 2020-CP-22-00600
	)	
Sunset Lodge, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Town of Pawleys Island,	)	
	)	
Defendant.	)	
	)	

PLAINTIFF’S 2/8/21 MEMORANDUM IN RESPONSE
TO
2/5/21 SURREPLY OF TOWN (DESIGNATED BY TOWN AS MERE “INTITIAL” REPLY)
TO
PLAINTIFF’S 2/3/21 REPLY AND RETURN IN OPPOSITION
TO
1/29/21 COMBINED MEMORANDUM RE FEES AND MOTION OF TOWN TO RECONSIDER
(DESIGNATED BY TOWN AS DEFENDANT’S ONE MOTION “TO ALTER
OR AMEND JUDGMENT”) IN OPPOSITION
TO
PLAINTIFF’S COMPLETELY SEPARATE
1/25/21 MOTION FOR FEES AND OTHER COSTS

As the actual moving party in Plaintiff’s 1/25/21 fee petition, as supplemented 2/4/2, Plaintiff hereby replies to the Town's recent surreply.

The above five-part title of this responsive memorandum likely dispenses with some of the procedural history of the 1/25/21 fee petition, as supplemented 2/4/2, but actually does not include the parties’ additional e-mails to the Court.

On 1/25/21, promptly following the grant of summary judgment, Plaintiff filed a separate, straightforward, fee petition, supported with an 18-page affidavit.

The affidavit carefully addressed the nature and complexity of the matter, some of the difficult and time-consuming litigation landscape traversed,¹ biographical information on counsel, reasonable rates in the locale, the basis of the fee agreement with the client, the result obtained, and the time spent on the matter, in tenths of hours.

On 2/4/21, after further time and proceedings, Plaintiff supplemented the petition, requesting fees and other expenses of \$50,593.99 or more as of 2/20//21.

Plaintiff just wants Plaintiff's reasonable fees and expenses after an extraordinarily taxing seven months, which is now continuing.

The Court can determine the petition on the papers, or, if the Court desires, by holding a hearing. This can be accomplished fairly promptly.

The fee petition, however, should be determined after first removing the complication of the Town's pending motion to reconsider the summary judgment order against the Town. That motion should be determined first, separately. It can likewise be determined on the papers, without oral argument, or in a hearing if the Court desires.

Delay in determining the separate fee petition should not be allowed to delay the determination of the motion to reconsider the grant of the summary judgment motion. As pointed out in Plaintiff's brief opposing the motion to reconsider, the motion to reconsider states no particular grounds.

Allowing a delay in determining the motion to reconsider so that the Town may engage in discovery on fee disputes in order to create or think of grounds for the separate and independent motion to reconsider should not be allowed.² The imbroglio the Town proposes to generate with

¹ This Court has likely already looked at the lengthy electronic docket sheet in the matter and the actual contents of some of the filings. The filed materials, of course, do not reflect some discovery matters which are not filed, and do not reflect all other work on the case.

² As this Court knows, without prior consultation, the Town also previously and publicly filed a motion to disqualify undersigned counsel "from representing Plaintiff" in this whole case, to which Plaintiff fully responded. The Town thereafter withdrew the motion. The proposed fee wrangling

contest of the fee petition should not be used to influence or delay the determination of the motion to reconsider.

As justification for delay, the Town states that it needs more documentation to assess its position on the fee petition. However, the Town's position on the fee petition is already stated and known.

If "further documentation" of the fee petition – beyond the 18-page affidavit -- is truly needed, not for delay or as a fishing expedition on matters collateral to the fee question, but in order to verify the time that was spent, the documentation could be provided in camera, or in redacted form, but subject to a reasonable protective order.

The Court does not need to enter, as the Town now still suggests in its 2/5/21 surreply, "a scheduling order" and a three-month countdown into the spring to a hearing on the fee petition.

The Town now has three lawyers of record. Two have been in the case from inception.

Notably, in all the conflicting and changing briefing by the Town, the Town does not adhere to, and indicates it does not intend to adhere to, its own statement that the Town "simply seeks a meaningful opportunity to review the substance of Plaintiff's claim." (Town surreply at 2 (emphasis in original).)

The Town does not simply seek to "review." The Town states it seeks to oppose and delay.

The Town seeks a basis on which to do so. The Town states, not that it reserves judgment, but that it does, now, oppose the fee request. However, the Town presently does not articulate a reason for the opposition.

should also not be allowed to create grounds, which do not exist, to support another such motion in the future, in continued litigation the Town intends to pursue.

The Town, in its instant surreply, three times already states that the fee request is “unreasonable.” However, the Town does not identify a single thing that is actually unreasonable about the fee request or that is suspected of being unreasonable.

In response to the Town’s request to review Plaintiff’s private bills, Plaintiff has now carefully redacted, in the instance of only one plaintiff, a copy of the fee agreement and the statements dated 8/5/20, 9/18/20, 10/9/20, 11/18/20 and 1/22/21. It took 2.1 more hours. The fee agreement and the bills for the other one-third-fee-seeking plaintiff are the same. Each plaintiff has a bill for a third of the total recorded³ time spent on the case. One of the three plaintiffs has not requested attorney’s fees.

Now redacted from the bills are matters that are privileged. Additionally redacted are matters that, because of their context in time or context in subject matter, might reveal attorney mental impressions as to their relevance or importance, or as to the relevance or importance of the matters juxtaposed to them.

These include subjects of legal research, subjects of factual review, subjects of consultation with others, subjects of any communications with clients, or occurrence of communication with clients. These also include identities of others consulted, or participating in such consultations, regarding advice, representation, settlement, or factual investigation, i.e., redacted are identities of persons involved in communications other than representatives of the opponent, court personnel, process servers, court reporters, vendors, government workers, etc.

Also redacted are matters which because of context, time of occurrence or subject matter, might be of interest to an opposing party wishing to depose any one of the plaintiffs in this or other currently pending litigation or any additional planned litigation by the Town. Also redacted are such matters an

³ The fee petition addresses other time not recorded, but reasonably estimated, and which is not used in calculating the amount sought. It should be used, if this contest is to continue.

opposing party might use in fishing for a way, again, to create a situation to disqualify and get rid of present counsel for Plaintiff.

Also redacted are details not relevant to determining the bona fide time which was spent on the matter. The bills do show all time which was presented to and approved by the client. These irrelevant details include identity and address of the person receiving the bill, identifying information, account numbers, balances, payments, and other private matters.

Plaintiff submits that the time spent, and a sensible way to divide it, have already been provided on a frugal basis and that the fees can be awarded without a “federal case.” However, if these materials are to be submitted, they could be submitted subject to a protective order providing as follows:

1. Copies will be provided to both the Court and the Town’s new counsel, but will not be filed.
2. The copies will still be considered part of the record at the actual end of the case, because presented to the court, and can be used in any appeal.
3. No disclosure, inadvertent or otherwise, of the bills and fee agreement, or of items within them, shall operate as a waiver of attorney-client privilege or as any erosion of work-product immunity from disclosure.
4. The materials will not be unnecessarily filed in toto. If there are specific items to be referenced, the date of the document and the date of the items may be referenced and quoted or the pages containing the items may be attached as an exhibit. It is assumed that the Court, the Town’s counsel and the plaintiff’s counsel can all “read from the same book.”
5. The materials will be otherwise provided only to persons who work directly for the Town’s new counsel or who have expertise on the reasonableness of attorney’s fees in South Carolina,

as that issue is the sole purpose of disclosure and addressing that issue is the sole use to which the materials may be put.

6. The materials will not be provided to any person, regardless of employment or expertise, not needed for the Town to have its meaningful opportunity for review.

7. The materials will not be used in any deposition, discovery request, motion or questioning at hearing or trial in this or any other case, other than in proceedings in the instant case pertaining directly to the fee award.

8. The Town's new attorney shall maintain a record of all persons to whom the materials are provided and as to each, shall have an electronic or other record of the person's agreement to be bound by the order.

9. When all proceedings in the instant civil action number are final, the materials will be returned or destroyed.

Respectfully submitted,

s/M. Baron Stanton
M. Baron Stanton (Bar#7970)
Stanton Law Offices, P.A.
PO Box 245
Columbia, SC 29202
Tel: (803) 929-1484
bstanton@stantonlaw.com
Attorney for Sunset Lodge, LLC

2/9/21

March 1, 2021 Landowner brief re matters for scheduled March 3 discussion with Court.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN	)	CIVIL ACTION NO. 2020-CP-22-00600
	)	
Sunset Lodge, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Town of Pawleys Island,	)	
	)	
Defendant.	)	
	)	

PLAINTIFF'S MEMORANDUM FOR MARCH 3, 2021 HEARING,
OR ANY CONTINUATION,
RE PLAINTIFF'S
SUGGESTION AND OFFER, IN PLAINTIFF'S
FEBRUARY 8, 2021 BRIEF,
TO PROVIDE DEFENDANT TOWN REDACTED BILLING STATEMENTS
AND REDACTED FEE AGREEMENT UNDER PROTECTIVE ORDER
LIMITING WAIVER, USE AND SHARING

No actual motion is before the Court. However, the Court entered summary judgment in Plaintiff's favor on January 20, 2021. On January 25, 2021, Plaintiff filed a duly supported fee petition pursuant to the operative fee-shifting statute.¹

There has been an extended exchange of briefs and communications regarding the fee petition and requests by the Town for delay. In that exchange, on February 8, 2021, Plaintiff suggested and offered additionally to provide Defendant's counsel, without need of formal discovery request and with waiver of response time, redacted copies of billing statements and the fee agreement, subject to a protective order specifically described by Plaintiff in the brief February 8, 2021 at pages 4-6.

¹ On January 25, 2021, Plaintiff filed a complete fee petition, consisting of a motion for fees, a supporting affidavit, and a proposed order, but at the Town's urging, it is not set for hearing until the spring. By then, Plaintiff will have incurred more fees and the motion will have to be supplemented. Plaintiff has already incurred additional fees.

The parties have sought assistance of the Court on the question of Plaintiff's offer and on Defendant's request for more than what was offered. It is Plaintiff's understanding that this is the purpose of the hearing.

Plaintiff's position is as follows:

1. Plaintiff's January 25, 2021 fee petition is sufficient.
2. If it will expedite things,² Plaintiff offers additionally to provide redacted bills and the fee agreement under a protective order as described herein.

² On January 8, 2021, the Court granted summary judgment.

On January 14, 2021, without prior consultation, the Town filed a motion to disqualify Plaintiff's counsel.

On January 14, 2021, Plaintiff filed a motion to strike the Town's a motion to disqualify Plaintiff's counsel. (On January 26, 2021, Plaintiff additionally briefed opposition to the Town's motion to disqualify, which the Town withdrew without hearing on January 29, 2021.)

On January 20, 2021, the Court filed its formal order granting summary judgment against the Town.

On January 25, 2021, Plaintiff filed the fee petition.

On January 29, 2021, the Town stated within its motion to reconsider the granting of summary judgment, arguments about the fee petition not yet in any way ruled upon by the Court. Therein, the Town requested a delay of "no less than 120 days," so that discovery and a full evidentiary trial on fees could be held.

On February 2, 2021, February 16, 2021 was proposed as the date for hearing on the fee petition submitted pursuant to the fee-shifting statute.

On February 2, 2021, the Town's initial counsel wrote the Court, stating that additional counsel was expected to appear and substitute within about two days, that continuance was requested, and that it was likely the Town would follow up with a requested timeline. The Town's stated basis for deciding to substitute counsel was based on discovery provided December 10, 2020, approximately a month before summary judgment was granted, and almost two months before the Town stated intention to the Court to substitute counsel.

On February 2, 2021, to expedite matters, Plaintiff's counsel informed the Court as follows:

1. Awaiting a substitution and preparation of new counsel for the Town, when the only reason for substitution is a perception that present counsel for the Town may wish to testify at a trial which under the present order will not occur, will cause a tremendous delay for no good reason.

2. I have not stated an intention to call Mr. Durant to testify at trial, I have not asserted that he should disqualify himself or that anyone else should disqualify him, and I consent to new counsel substituting for him at a noncritical time, or entering an additional appearance, and Mr. Durant withdrawing later.

3. I do not object to Mr. Durant, who has been in the case from the beginning and has continued to be since moving to disqualify me nineteen days ago on the grounds he now asserts

is the reason for his own substitution, remaining in, briefing any objection the Town has to our fee petition, or arguing it. There is nothing wrong with that. However, in my estimation, it actually should be decided on the papers.

4. For the reasons stated in our 1-14-21 motion to strike the Town's 1-14-21 now withdrawn motion to disqualify me, and for the further reasons stated in our 1-26-21 memo in opposition to the Town's now withdrawn motion to disqualify me, I don't have any problem with having both Mr. Durant and Mr. Dillard aboard, but I do not see a reason to delay the matter on account of something that has been on the radar for days, weeks or months, but actually has no sudden urgency now.

On February 2, 2021, new additional counsel for the Town informed the Court that the Town wished to seek some written discovery, giving as only an example of such discovery, requests for copies of itemized attorney time.

Counsel for the Town asserted this would be necessary and appropriate in order for the Town to have a meaningful opportunity to respond, including by obtaining an opposing affidavit if deemed necessary. Counsel for the Town thus, in words, revised its recent prior filed request of "not less than 120 days," at this point estimating a need for 90 days of delay. Counsel for the Town stated this period was intended in part to allow time to address any disagreements over the "types of information" to be produced by the Plaintiff relevant to the fee petition.

On February 3, 2021, Plaintiff filed a brief responding to the Town's previously filed "motion to reconsider" summary judgment, in which of the Town argued regarding the matter of fees, which had not yet been considered by the Court in the first place. Plaintiff responded to the Town's request for over four months of additional litigation and delay. Plaintiff argued that what the Town proposed was an extraordinary measure of delaying rulings or hearings on post-summary judgment wrap-up in the case.

Plaintiff argued that by requesting an entire trial on fees, and asserting the legally incorrect proposition that "awarding attorney's fees or expenses cannot be resolved by motion," the Town was unnecessarily delaying the matter.

The Town had proposed that, before the elaborate fee trial the Town proposed, the Town first engage in discovery and other matters for a period approaching the entire time the overall case -- with all its previous delays by the Town -- had been pending. The Town had proposed "permitting discovery on the issue," so that the fee trial, as well as final ruling on the summary judgment motion, could be delayed for "no less than 120 days, for the parties to conduct discovery relevant to that issue."

Plaintiff urged that this unabashed request for further delay be rejected.

On February 3, 2021, the Court offered counsel in the case weeks from which to pick for a hearing on the fee petition, the earliest of which was now no longer the previously offered week of February 16, but was the week of February 22, 2021 and numerous weeks into May were offered as well.

On February 4, 2021, Plaintiff separately responded to the attorney's-fee-related arguments and requests by the Town which the Town had inserted into the Town's January 29, 2021 motion to reconsider the order granting summary judgment against the Town. In the February 4, 2021 brief, Plaintiff cited controlling South Carolina case law and persuasive U.S. Supreme Court and other federal case law for the proposition that there is generally no reason to make a "federal case" out of a fee petition.

On February 8, 2021, in response to a February 5, 2021 filing which was styled as an "Initial Reply Brief" of the Town, Plaintiff stated in its brief that Plaintiff's counsel had already redacted the

3. Rule 1.6, SCRProfCond imposes on an attorney, and therefore reposes in a client, a very broad obligation of the attorney to maintain as confidential, “information relating to the representation.” This obligation and this privacy right are far broader than the narrow realm of attorney-client privilege and work product protection, and extend to financial matters, family and business relationships and affairs, client activities, attorney activities, and other matters relating to the representation, including in some instances even the identity of the client or the subject of representation.

4. Absent a specific mandate in a fee-shifting statute of a different procedure or measure, South Carolina law generally requires a fee award to take into consideration a number of factors,³ and apply a lodestar approach.⁴ Only one of these factors is “the time devoted to the matter.” None of the factors include “spontaneous production of detailed unredacted billing statements.”

billing statements and was prepared to produce them virtually immediately pursuant to a protective order the terms of which were specifically set forth.

On February 17, 2021, in conference with the Court, the Town’s additional new counsel, still without agreement to a protective order, and, therefore, still not in possession of the redacted billing statements which were offered February 8, estimated he may need 45-60 days to review the billing statements, after receiving them.

On February 25, pursuant to the Court’s prior invitation, counsel wrote the Court to request assistance in agreeing on the terms of a protective order.

³ See Blumberg v. Nealco, Inc., 310 S.C. 492, 427 S.E.2d 659 (1993) (setting forth six factors, one of which is “the time necessarily devoted to the matter”).

⁴ See S.C. Dep’t Transp. v. Revels, 411 S.C. 1, 761 S.E. 2d 700 (2014)(holding that under a fee shifting statute that does not set forth a specific other procedure or measure, the proper approach is to determine the number of hours devoted and a reasonable hourly rate, and then consider the other factors to determine a multiplier, possibly to increase the product, without being bound to the rate actually contracted for by the attorney and client); see also Layman v. State, 376 S.C. 434, 658 S.E.2d 320 (2008)(holding generally that a lodestar approach is appropriate under a fee-shifting statute, finding lead counsel’s rate of \$600 per hour to be reasonable, using a chart of “total time spent,” and applying a multiplier of 1.25 to the product of hourly rate and the number of hours determined); see also Sauders v. South Carolina Pub. Serv. Auth., C.A. no. 2:93-3077-23 (D.S.C. Mar. 30, 2011)(applying South Carolina law to recovery of fees under S.C. Code Ann. §28-11-30 for successful inverse condemnation suit, using lodestar approach and imposing multiplier to increase applicable rate beyond lead attorney’s contractual or usual hourly rate of \$600 per hour first multiplied by hundreds of attorney’s “recorded” hours as well as thousands of “estimated” hours, while never once mentioning production of or review of “billing statements”).

5. It is not lightly to be presumed that the South Carolina legislature, largely itself composed of lawyers, has, in enacting fee-shifting provisions in statute law for the purpose of making a litigation party whole, intended that these provisions are only operative at the additional cost of waiving – and inviting extensive inquiry into, use of, and dissemination of -- confidential information relating to the representation. There is no requirement in the operative statute for same.

6. It is also not lightly to be presumed that the South Carolina Supreme Court makes abandonment of an ethical duty and subjection to vulnerability in ongoing litigation a condition of receipt of the protection of such fee-shifting statutes. There is no requirement in South Carolina caselaw for same.⁵

7. When a case is over, dead, and done, some concerns may be allayed, especially if the bills of the particular attorney involved already lack detail. However, the fact that counsel have seen other attorneys or courts, under other circumstances, follow a practice of producing billing materials with or without some intimate details of representation incident to a fee petition does not control. To be clear, Plaintiff's counsel is not looking for assistance in the form of permission to disclose confidences; Plaintiff's counsel is looking for protection from having to unnecessarily disclose any of them at all, including to the Court.

8. Accordingly, the order Plaintiff proposes allows Plaintiff to redact whatever Plaintiff's counsel in good faith believed there was good reason to redact.

⁵ See Layman v. State, 376 S.C. 434, 658 S.E.2d 320 (2008)(applying lodestar approach under a fee-shifting statute, using a chart of “total time spent,” and applying a multiplier of 1.25 to the product of hourly rate and the number of hours determined); see also Sauders v. South Carolina Pub. Serv. Auth., C.A. no. 2:93-3077-23 (D.S.C. Mar. 30, 2011)(applying South Carolina law to recovery of fees under S.C. Code Ann. §28-11-30 for successful inverse condemnation suit, using lodestar approach and imposing multiplier to increase applicable rate beyond lead attorney's contractual or usual hourly rate of \$600 per hour first multiplied by hundreds of attorney's “recorded” hours as well as thousands of “estimated” hours, while never once mentioning production of or review of “billing statements.”); and see Taylor v. Medenica, 331 S.C. 575, 503 S.E.2d 458 (1998)(affirming fee award in excess of principal judgment where some attorneys kept no contemporaneous time records, some made estimates, and some submitted no estimates).

9. Plaintiff's counsel has already redacted the bills. He spent approximately 2.1 additional hours doing so on or about February 8, 2021 and immediately offered them to the Town's counsel under a protective order.

10. To clarify up front, the types of things he contends there is good reason to redact, Plaintiff's counsel listed his reasons for the items redacted.⁶ There has been no dispute of the validity of the reasons offered, only a request by the Town to not agree to them or to their validity.⁷ However, Plaintiff does not want there to be any misperception that the inquiry is limited strictly to attorney-

⁶ To wit:

- a. matters that are privileged;
- b. matters that, because of their context in time or context in subject matter, might reveal attorney mental impressions as to their relevance or importance to the attorney;
- c. matters that, because of their context in time or context in subject matter, might reveal attorney mental impressions as to the relevance or importance of the matters juxtaposed to them;
- d. matters that include subjects of legal research;
- e. matters that include subjects of factual review;
- f. matters that include subjects of consultation with others;
- g. matters that include subjects of any communications with clients;
- h. matters that include the fact of or timing of communication with clients;
- i. matters that include identities of others consulted regarding advice, representation, settlement, or factual investigation, i.e., identities of such persons involved in communications other than representatives of the opponent, court personnel, process servers, court reporters, vendors, government workers, etc.;
- j. matters that include the identities of others participating in consultation regarding advice, representation, settlement, or factual investigation, i.e., identities of such persons involved in communications other than representatives of the opponent, court personnel, process servers, court reporters, vendors, government workers, etc.;
- k. matters which because of context, time of occurrence or subject matter, might be of interest to an opposing party wishing to depose any one of the plaintiffs in these related cases or other currently pending litigation or any additional planned litigation by the Town;
- l. matters an opposing party might use in supporting, or creating new circumstances for, another motion to disqualify present counsel for any of the three plaintiffs; or
- m. matters of detail not relevant to determining the bona fide time which was expended on the matter, such as identity and address of the person receiving the bill, identifying information, account numbers, balances, payments, and other private matters.

⁷ In fact, in the approximately 35 days (as of March 1) since the fee petition was filed, there has also not been any identification by the Town of any particular whatsoever of the 18-page fee affidavit which the Town contends is unreasonable. There has only been an uninformative bald assertion – already -- that the fees sought by Plaintiff are “unreasonable,” and a request for delay. Having retracted in words the initial request for a delay of over four months, the Town, now with three counsel of record, nevertheless continues with steps tending to conduce to that result.

client privilege or work-product protection. Plaintiff's contention is that the Court does not have to see any private, confidential bills and private confidential details at all to be given a reliable account of the number of hours devoted to the matter. Nor does the Town need to see such matters in order to evaluate the 18-page fee petition and supplements for additional time and expenses incurred since then.

11. If after seeing the redacted bills, the Town's counsel has any particular items he contends should not be redacted or which seem to him to be in need of verification beyond the context and wants the matter argued or reviewed, Plaintiff proposes the Town's counsel then work it out with Plaintiff's counsel or ask the judge to review those particular items. This allows Plaintiff to take a position on any definite position actually taken by the Town and take a position on any proposed manner of resolving the matter.

12. To clarify, Plaintiff does not propose that the Judge to be left on his own to develop an advisory opinion by automatically going through months of bills needlessly with no steering, no advocacy, and no ability to ask questions or receive informed answers, to see if there is anything the Town should disagree is confidential. I.e., if there is an issue, the Town is to present it; the Judge does not go looking for it.

13. If a matter arises of ascertaining that the unseen underlying item does match one of the reasons given, after Plaintiff's counsel has assured that it does, it is possible there would be no problem with letting the Judge look at isolated items to see. But if instead, the Town is going to contend that there are only one or two valid reasons to redact something, Plaintiff absolutely objects and certainly does not stipulate to that. Plaintiff also objects to placing wholesale unveiled copies of the bills in the public record, sealed or not, and whether sealed on appeal or not.

14. The parties had a telephone conference with the Court on February 17th, not a hearing. There was a good exchange of information, inclinations and impressions, and there were a few outright clarifications and agreements. However, Plaintiff's counsel's understanding of the call

was that the only thing the Court directed counsel to do was to see if they could agree on a protective order as Plaintiff suggested at the end of Plaintiff's February 8, 2021 brief filed on this matter. The Court made no rulings and directed that if counsel could not come to agreement, to contact the Court for assistance.

15. Not only are there pending matters remaining in the first set of cases (ending 600, 601 and 602), on which summary judgment against the Town was granted, and the second set of cases (ending 930, 931, and 932), but until the Town abandoned its attempt to condemn by filing notices of abandonment in the second set of cases, Plaintiff and the parties in the related cases were threatened by the possibility of yet a third set of cases. Plaintiff needs to confirm that that threat is truly abandoned, among other things.

16. Plaintiff therefore emphasizes that this is not a fee issue being handled after all is final and over with.

17. Plaintiff's counsel wants to treat with extreme care, the serious issue of confidential matters relating to the representation of his clients. They and he are still in litigation until they are not, and until the lack of any further threat is confirmed. The Town's counsel may be able to clarify this for the Court.

18. The matters into which the Town seems determined to inquire are not necessary under South Carolina law to the simple task of determining the time devoted to the case for purposes of a fee award.

19. Plaintiff also wishes to clarify, with all respect to both the Court and opposing counsel, that even if one has full faith in the discretion of opposing counsel, or another party -- or, for that matter, the Court -- that is not a reason to breach confidentiality. Discretion of the recipient is not the test of whether a person's confidential matters should be disclosed or should be required to be disclosed. I.e., they are still confidential matters.

20. In Plaintiff's February 8, 2021 brief, Plaintiff stated that Plaintiff's counsel had gone ahead and prepared redacted copies which were ready to go, and that Plaintiff could provide those in redacted form to both the Town's counsel and the Court right away, under the assurance of a protective order that nothing was waived, nothing would be used for other purposes, and nothing would be shared unnecessarily. Plaintiff still proposes this.

21. In the telephone conference, Plaintiff did go a step further. At that time Plaintiff volunteered that if verification were needed as to why Plaintiff redacted an item and whether the underlying item fit that reason, Plaintiff could supply, for each item, the reasons from the list already set forth in Plaintiff's February 8, 2021 brief, and allow the Court to verify using an unveiled copy.

22. In light of the recent status of the cases, and further research into the problematic nature of in camera review, Plaintiff now submits that this was a step too far.

23. Among other things, once Plaintiff provides a completely unredacted copy, there will be an unrelenting request to get at its contents and, among other things, have mini-trials on each entry, instead of an overall assessment of the Blumberg factors and a lodestar analysis. If Plaintiff were to provide a completely unredacted copy and "let that genie out of the bottle," the confidences would already be disclosed to the Court, unnecessarily, and Plaintiff would not be able to control disclosure of the material. It is reminiscent of sending one's sensitive information to the "Google cloud," but worse.

24. Plaintiff therefore submits that the better approach is simply to redact the copies (as Plaintiff's counsel has already done), submit them to the Court and the Town's counsel in redacted form subject to a protective order, and work from there.

25. If the Town then asserts that the unredacted material is insufficient to verify the time devoted to the matter for purposes of a fee award, the arguments on the matter can be assessed at that time.

26. In redacted form, the bills will still give a very good idea of Plaintiff's counsel's activities on the case, including night and weekend work, and will provide accurate accounting of time and expenses reflected in them.

26. In summary, Plaintiff proposes to redact, and leave redacted, all confidential matters relating to the representation of parties who are still in litigation and which matters Plaintiff asserts are not necessary to determining the time devoted to the case for purposes of a fee award under South Carolina law. Plaintiff just wants Plaintiff's reasonable fees and expenses after an extraordinarily taxing seven months, which is now continuing. The reasonable fees and expenses have already been fairly presented, except for additional fees and expenses incurred afterwards, which continue.

27. The proposed form of the protective order is as follows:

PROTECTIVE ORDER

1. The copies of any materials filed by the Court under this order in sealed form will still be considered part of the record at the actual end of the case, because presented to the Court, and can be used in any appeal, but only under seal. Discretion is nevertheless assumed.

2. No disclosure, inadvertent or otherwise, of the bills and fee agreement addressed herein, or of items within them, shall operate as a waiver of attorney-client privilege or as any erosion of work-product immunity from disclosure, in this case, in any appeal, in any other case or at any other time, or in any related matters.

3. The materials addressed herein will not be unnecessarily filed in toto. If there are specific redacted items to be referenced, the date of the document and the date of the items may be referenced and quoted or the pages containing the items may be attached as an exhibit. It is assumed that the Court, the Town's counsel and the plaintiff's counsel can all "read from the same book" in most instances. To the extent practicable, when materials are filed under seal, only the pages reviewed will be filed.

4. The materials addressed herein will be otherwise provided only to persons who work directly for the Town's new counsel OR who have expertise on the reasonableness of attorney's fees in South Carolina, as that issue is the sole purpose of disclosure and addressing that issue is the sole use to which the materials may be put. To clarify, licensed attorneys who are familiar with the case, including the Town's Town Attorney and other current or former counsel of record in the case meet this qualification, but only if determined to be needed within the spirit of the succeeding paragraph, but no person at the Army Corps of Engineers does.

5. The materials will not be provided to any person, regardless of employment or expertise, not needed for the Town to have its meaningful opportunity for review.

6. Greater than reasonable care shall be taken with respect to any means of storage of the materials or any means of transmission at any time other than in electronically filing using the court's ECF system in the instances permitted in this order. Care in storage includes segregation within more general areas of electronic, paper, or other storage. Care in electronic transmission includes transmission to only one recipient at a time in each instance other than a transmission to the Court, in which case only the Judge and one lawyer for each party shall be included.

7. The materials will not be used in any deposition, discovery request, motion or questioning at hearing or trial in this or any other case, other than in proceedings in the instant case pertaining directly to the fee award.

8. The Town's new attorney shall maintain a record of all persons to whom the materials are provided and as to each, shall have an electronic or other record of the person's agreement to be bound by the order, violation of which is punishable by contempt or other sanction, including sanction of the Town for the violations of others. This record shall be provided to Plaintiff after the fee petition is decided by this Court, without respect to pendency of any appeal.

9. When all proceedings in the instant case bearing this civil action number are final, the materials will be returned or destroyed.

10. Plaintiff will carefully redact as set forth below, in the instance of only one plaintiff out of the three plaintiffs in the three related cases ending 600, 601 and 602, a copy of the plaintiff's private fee agreement and the private billing statements dated 8/5/20, 9/18/20, 10/9/20, 11/18/20 and 1/22/21, and any other available billing statements forming a basis for Plaintiff's claim for attorney's fees.

11. Plaintiff represents that the fee agreement and the bills for the other one-third-fee-seeking plaintiff are the same. Plaintiff represents that the bills for the other plaintiff not currently requesting attorney's fees are the same. Plaintiff represents that each plaintiff in the three related cases receives a bill for a third of the total recorded time spent on the case and that out-of-pocket expenses are virtually the same, with a minor difference or two, such as a motion filing fee. To confirm these representations, Plaintiff will also produce the first and last pages of the billing statements for the other two plaintiffs, redacted in the same manner, and the first and last pages of the fee agreement (and any other pages containing unredacted material) of the other one-third-fee-seeking plaintiff redacted in the same manner.

12. Specifically, Plaintiff may by redaction assert a claim that certain information contained in the billing statements should be protected from disclosure for one of the reasons set forth in Plaintiff's briefs of February 8, 2021 and March 1, 2021.

13. On or before the date four days from entry of this order, identical versions of the redacted bills will be provided to both the Court and the Town's new counsel.

14. However, like other discovery, the redacted bills will not be filed initially. If any of the redacted materials are filed of the Court's initiative or at the request of any party, they will be filed

under seal. As referenced herein, pages of redacted materials containing specific items to be referenced may be attached as an exhibit to a memorandum or other filing and not under seal.

15. The redacted versions and any other materials filed under seal, once filed under seal, will remain under seal as part of the record of the action, including the record in an appeal if some or all of the material is designated for inclusion under seal in the Record on Appeal.

16. Upon request of the Town made within ten days of receipt of the redacted bills, Plaintiff, will, within ten days of the request, provide to the Town, footnoted copies of any redacted entries identified by the Town as the subject of the request. The footnoted copies provided to the Town will, for each redaction which was the subject of the request, expressly state the reason for the redaction in a manner that, without revealing the information itself, will enable counsel for the Town to assess the probable merits of the asserted basis for redaction without destroying the reason for redacting the item in the first place.

17. Upon presentation to the Court on motion in the manner provided herein, of any footnoted items on which any dispute or request for verification remains, the parties may discuss or move for establishment of a manner of resolving the issue.

18. The fee agreement may also be redacted to show only the identity of the client, the basis of the fees or charges, and any contingency or other term affecting the present basis, calculation, or client obligation to pay such fees or charges.

19. If any other or additional similar materials are produced for purposes of the fee petition, they shall be handled in the same manner and be covered by this order.

AND IT IS SO ORDERED.

[End of proposed order]

Respectfully submitted,

s/M. Baron Stanton

M. Baron Stanton (Bar#7970)

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Attorney for Sunset Lodge, LLC

3/1/21

March 1, 2021 Town motion re fee proceedings.

STATE OF SOUTH CAROLINA	)	IN THE CIRCUIT COURT OF THE
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN	)	CIVIL ACTION NO. 2020-CP-22-00600
	)	
Sunset Lodge, LLC,	)	
	)	DEFENDANT’S MOTION FOR A
Plaintiff,	)	PROTECTIVE ORDER FOR
v.	)	PRODUCTION OF DOCUMENTS
	)	RELATING TO PLAINTIFF’S
Town of Pawleys Island,	)	MOTION FOR ATTORNEY FEES
	)	
Defendant.	)	
_____	)	

TO: THE PLAINTIFF ABOVE NAMED AND ITS ATTORNEY, M. BARON STANTON, ESQ.

YOU WILL PLEASE TAKE notice that the Defendant, Town of Pawleys Island (“Town”), by and through its undersigned attorneys, will within ten (10) days after service hereof or as soon thereafter as counsel may be heard, or within a shorter time period, if the Court so allows, move the Court for issuance of an Order (1) requiring that counsel for the Plaintiff produce to counsel for the Town, by no later than March 8, 2021, redacted copies of the attorney-client fee agreement and itemized time statements indicating the asserted basis for each redaction, and at the same time produce unredacted copies to the Court under seal; (2) establishing a procedure for the Court’s review and ruling upon any bases for redaction that may be asserted by the Plaintiff (to include consideration of the Town’s objections to certain proposed redactions as set forth herein); and (3) establishing reasonable confidentiality protections for the Plaintiff as the Court deems appropriate.

A proposed *Protective Order* is attached as **Exhibit A** (consisting of Town’s revisions to a draft proposed order previously received from Plaintiff’s counsel), and the Town hereby petitions that the Order be issued. In support hereof, the Defendant states as follows:

Procedural Background

On January 10, 2021, the Honorable Michael G. Nettles entered an order granting Plaintiff's Motion for Summary Judgment in this condemnation challenge action. Subsequently, on January 25, 2021, Plaintiff filed a Motion for Expenses Including Attorney's Fees along with an attorney affidavit. The Plaintiffs in this and another closely related action (2020-CP-22-0600 and -0601), represented by the same counsel, are currently seeking a combined total fee expense award of \$101,187.98. The Plaintiff's attorney affidavit provided monthly totals of averred attorney time and a discussion of some of the procedural history of the case but did not provide an itemized breakdown of how the averred attorney time was spent.

In the Town's Initial Reply in Opposition to the attorney fee petition, filed February 5, 2021, Town petitioned the Court for issuance of a scheduling order providing, among other things, that the Plaintiff be required to produce "copies of the itemized billing statements referenced in Plaintiff's attorney fee affidavits or otherwise reflected in the requested fee award (reasonably redacted to remove reference to the substance of privileged communications and specific attorney mental impressions)."

In Plaintiff's Memorandum in Response filed February 9, 2021, Plaintiff proposed production of billing statements redacted in a manner that undersigned counsel understands would exceed redaction of the substance of privileged communications and specific attorney mental impressions. Plaintiff's Response also requested a protective order providing certain confidentiality protections. During a telephone status conference on February 17, 2021, Judge Nettles discussed these issues with counsel for the parties and directed counsel to attempt to craft a proposed consent order consistent with certain instructions from Judge Nettles regarding the terms for confidentiality protections and the redaction and in camera review of billing statements.

Counsel for the parties were unable to agree on the terms of a proposed consent order, and the Court has scheduled a hearing to review these matters on March 3, 2021. By consent of the parties, the hearing on Plaintiff's attorney fee petition has been scheduled for April 14, 2021.

Argument

1.) Consideration of Plaintiff's Attorney Fee Petition Requires Review of Itemized Time Statements and the Fee Agreement

The six factors to be considered in determining an award of attorney fees include "1) [the] nature, extent, and difficulty of the legal services rendered; 2) time and labor devoted to the case; . . . and 6) beneficial results obtained." Blumberg v. Nealco, Inc., 310 S.C. 492, 494, 427 S.E.2d 659, 660 (1993). "When an award of attorney's fees is requested and authorized by contract or statute, the court should make specific findings of fact on the record for each factor[.]" Id. The S.C. Supreme Court has reversed and remanded attorney fee awards when there was a lack of evidence. Id. ("The only evidence which was offered at trial to establish the attorney's fees was [petitioner]'s testimony that the petitioners were seeking reasonable fees."); Sunrise Sav. & Loan Ass'n v. Mariner's Cay Dev. Corp., 295 S.C. 208, 211, 367 S.E.2d 696, 698 (1988) ("The circuit court had before it only an affidavit from [petitioner]'s counsel stating, in conclusory fashion, that the fees were reasonable. Based upon this record, we conclude that the award is unsupported by the evidence.).

Regardless of any specific statutory or other mandate for production of existing itemized time statements in support of an attorney fee petition, it would be difficult if not impossible for the Court and opposing counsel to evaluate the reasonableness of a requested award without such production. Although the Plaintiff seeks an award of attorney fees pursuant to S.C. Code § 28-2-510(A) (relating to condemnation challenge actions), it is worth noting for context that the following subsection, -510(B)(1), which provides a specific attorney fee application procedure for landowners who prevail on the issue of just compensation in a condemnation action, requires "an

itemized statement from an attorney or expert witness representing or appearing at trial in behalf of the landowner stating the fee charged, the basis therefor, the actual time expended, and all actual expenses for which recovery is sought.” There is no reason to assert that the significant fee request in this condemnation challenge action could be meaningfully evaluated without a similar accounting of how attorney time was spent.

Furthermore, the Eminent Domain Procedure Act defines “litigation expenses”, in relevant part, as “the reasonable fees, charges, disbursements, and expenses *necessarily incurred*” § 28-2-30(14) (emphasis added). Review of what was reasonable and “necessarily incurred” in this matter requires consideration of the actual legal work averred to have been performed.

2.) Plaintiff’s Unredacted Invoices and Fee Agreement Should Be Submitted to the Court Without Delay for In Camera Review

Under the timing and circumstances of this matter, the Plaintiff’s unredacted billing statements and fee agreement should be submitted to the Court for in camera review of the necessity of redactions without the need for any further motion on the part of the Town. It is clear based on the parties’ prior filings that there is a fundamental dispute over the scope of what may properly be redacted and that a request by the Town for review is inevitable. The broad scope of redaction proposed by Plaintiff’s counsel could arguably justify redacting virtually any description of work performed in the matter, leaving counsel for the Town with no way of seeking confirmation of the legitimacy of redactions without requesting review by the Court.¹ Furthermore, scheduling considerations also favor in camera review of the unredacted documents without need for specific request by the Town, as the fee petition hearing is scheduled to occur on April 17, 2021.

¹ For example, Plaintiff’s proposed redactions include the following: “Also redacted are matters which because of context, time of occurrence or subject matter, might be of interest to an opposing party wishing to depose any one of the plaintiffs in this or other currently pending litigation or any additional planned litigation by the Town. Also redacted are such matters an opposing party might use in fishing for a way, again, to create a situation to disqualify and get rid of present counsel for Plaintiff.” (February 9, 2021 *Response* of Plaintiff, pp. 5 – 6).

The S.C. Supreme Court has outlined the general procedure for a Court's review of material claimed to be subject to privilege or other protection as follows:

[A] trial court should not require the disclosure of attorney client communications to other parties without first determining whether the communications are privileged by inquiring into all the facts and circumstances of the communication. Further, if necessary to determine the application of the privilege, the trial judge may consider, in camera, the questions sought to be asked and the responses which are contended to be subject to the privilege. In the event such in camera hearing is necessary, the trial judge shall limit attendance as required to ensure protection of the communication in the event it is found to be entitled to the protection of the privilege.

Tucker v. Honda of S.C. Mfg., Inc., 354 S.C. 574, 578, 582 S.E.2d 405, 407 (2003). In this matter, unredacted documents submitted under seal should be treated as part of the record for appropriate use in any appeal if necessary.

Significantly, unless undersigned counsel is mistaken, the Court previously informed counsel for the parties during a February 17, 2021 telephone status conference that review of the time statements should be handled in this general manner.

3.) Plaintiff's Itemized Time Statements Should Be Redacted Only for Privileged Communications and Specific Attorney Mental Impressions

In order to provide the Court and counsel for the Town a meaningful basis for review of the attorney fee petition, the time statements should be redacted only to remove the substance of privileged attorney-client communications and specific attorney mental impressions. Town asserts that, as a general matter, attorney time slips and itemized billing statements typically need not include much if any such protected information, as the purpose of these records is simply to document the general nature of the legal work performed and invoice fees for the same. Unless the time entries for some unusual reason recite the substance (and not merely the occurrence or general subject matter) of privileged communications regarding a legal matter, the information is not subject to protection on the basis of attorney-client privilege in the context of a fee petition.

The S.C. Supreme Court has clarified the parameters of the attorney-client privilege:

The attorney-client privilege has long been recognized in this State. The privilege is based upon a public policy that the best interest of society is served by promoting a relationship between the attorney and the client whereby utmost confidence in the continuing secrecy of all confidential disclosures made by the client within the relationship is maintained. . . . Generally, the party asserting the privilege must raise it. State v. Love, S.C., 271 S.E.2d 110 (1980). Many jurisdictions strictly construe the privilege. 81 Am.Jur.2d Witnesses § 174, at 210. The reasoning behind the strict construction is that evidence excluded under the privilege is not necessarily incompetent. See generally, McCormick, Handbook of the Law of Evidence, §§ 87, et seq. (2d Ed. 1972). **We agree that the privilege must be tailored to protect only confidences disclosed within the relationship.**

The essential elements giving rise to the privilege were stated by Wigmore to be: “(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.” 8 Wigmore, Evidence § 2292 (McNaughton rev. 1961)

State v. Doster, 276 S.C. 647, 650, 284 S.E.2d 218, 219-20 (1981) (emphasis added).

Significantly, “[n]ot every communication within the attorney and client relationship is privileged. The public policy protecting confidential communications must be balanced against the public interest in the proper administration of justice.” Id. at 651, 284 S.E.2d at 220. South Carolina case law concerning review of attorney fee awards has made it clear that the proper administration of justice requires evidence of the reasonableness of fees sufficient to provide a basis for specific findings of fact for each of the relevant factors. See Blumberg, supra; Sunrise Sav. & Loan Ass'n, supra.

Likewise, protection of the specific mental impressions of counsel is justified but, as a general matter, should not require much if any redaction of itemized time statements produced as

evidence in support of a petition for attorney fees. By way of close analogy, Rule 26 of the South Carolina Rules of Civil Procedure, applying specifically to discovery of trial preparation materials, provides that “the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.” Rule 26(b)(3), SCRCPP. Here, in the aftermath of a summary judgment ruling in favor of the Plaintiff, the “mental impressions, conclusions, opinions [and] legal theories” of Plaintiff’s counsel have already been made abundantly clear through the oral arguments and voluminous filings submitted to the Court, including the 57-page *Complaint*, the 61-page *Amended Complaint*, and the 50-page *Memorandum in Support of Motion for Summary Judgment*.

Absent unusual circumstances identified in the course of the Court’s in camera evaluation, it is difficult to conceive how, for example, a general reference to the timing and subject of legal research would further alert counsel for the Town to the mental impressions of Plaintiff’s counsel or otherwise prejudice the Plaintiff. Returning to the related provisions of Rule 26(b), in defending the fee petition counsel for the Town clearly “has substantial need of the materials in the preparation of his case” and is unable “to obtain the substantial equivalent of the materials by other means.” Rule 26(b)(3), SCRCPP.

4.) Town Objects to Certain Asserted Bases for Redaction

Based on information included in the Plaintiff’s February 9, 2021 *Response* and a more recently circulated proposed protective order, counsel for Town understands that the Plaintiff intends to assert certain bases for redaction (set forth below in italicized text) to which Town objects. Town asserts that, while Plaintiff should be required to initially produce to counsel for Town only redacted copies of time statements indicating the asserted basis for each redaction, the Court upon its in camera review should reject redactions made on the following bases:

- I. *(b.) matters that, because of their context in time or context in subject matter, might reveal attorney mental impressions as to their relevance or importance to the attorney; (c.) matters that, because of their context in time or context in subject matter, might reveal attorney mental impressions as to the relevance or importance of the matters juxtaposed to them[.]*

These asserted bases for redaction are inherently speculative and open-ended as to what “might” be revealed, could be interpreted to justify redaction of virtually any description of how attorney time was spent, and exceed any legitimate basis for protection of specific attorney mental impressions, conclusions, opinions, or legal theories.

- II. *(d.) matters that include subjects of legal research; (e.) matters that include subjects of factual review; (f.) matters that include subjects of consultation with others; (g.) matters that include subjects of any communications with clients; (h.) matters that include the fact of or timing of communication with clients[.]*

These asserted bases for redaction exceed any legitimate basis for protection of the substance of specific privileged communications or mental impressions (as opposed to the subject, timing or occurrence of research, consultation, communications, and other work). An assertion of privilege or other protection must of necessity provide the opposing party with sufficient information to understand the basis of the claimed protection. *See, e.g.*, Rule 26(b)(5), SCRCP (“When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing the information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.”). Disclosure of the occurrence, timing, and general subject matter of efforts on the part of the attorney is important in consideration of a fee petition, which involves consideration of the reasonableness and necessity of such work.

- III. *(i.) matters that include identities of others consulted regarding advice, representation, settlement, or factual investigation, i.e., identities of such persons involved in communications other than representatives of the opponent, court personnel, process servers, court reporters, vendors, government workers, etc.; (j.) matters that include the identities of others participating in consultation regarding advice, representation, settlement, or factual investigation, i.e., identities of such persons involved in communications other than representatives of the opponent, court personnel, process servers, court reporters, vendors, government workers, etc.[.]*

These asserted bases for redaction bear no relationship to any issue of privilege, work product protection, or other basis for protection and, as with other proposed redactions, relate to the reasonableness and necessity of attorney time averred to have been devoted to this matter.

- IV. *(k.) matters which because of context, time of occurrence or subject matter, might be of interest to an opposing party wishing to depose any one of the plaintiffs in these related cases or other currently pending litigation or any additional planned litigation by the Town; (l.) matters an opposing party might use in supporting, or creating new circumstances for, another motion to disqualify present counsel for any of the three plaintiffs[.]*

These asserted bases for redaction are inherently speculative and open-ended as to what “might be of interest”, could be interpreted to justify redaction of virtually any description of how attorney time was spent, and exceed any legitimate basis for protection of specific privileged communications or attorney mental impressions, conclusions, opinions, or legal theories.

As to other pending litigation, on February 10, 2021, the Town filed a *Notice of Abandonment of Condemnation Action* in a related challenge action involving the Plaintiff.

- V. *(m.) matters of detail not relevant to determining the bona fide time which was expended on the matter, such as identity and address of the person receiving the bill [. . .]*

The identity of the person receiving the bill is relevant to confirmation that the claimed fees were actually invoiced to the Plaintiff, and this information should not be redacted.

5.) Town Consents to Reasonable Confidentiality Protections

While Town takes the position that confidentiality protections are unnecessary, based upon the request of Plaintiff and prior guidance from the Court the Town is willing to consent to reasonable confidentiality provisions as set forth in the attached proposed order.

Rule 11 Certification

Pursuant to Rule 11, SCRCF, undersigned counsel hereby certifies that he has consulted with opposing counsel prior to filing this motion, was unable despite good faith efforts to resolve the matter and determined that further consultation would serve no useful purpose.

Respectfully submitted,

s/ William C. Dillard, Jr.
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Attorneys for Town of Pawleys Island

March 1, 2021

March 2, 2021 Landowner brief and objection re Town March 1 motion.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN	)	CIVIL ACTION NO. 2020-CP-22-00600
	)	
Sunset Lodge, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Town of Pawleys Island,	)	
	)	
Defendant.	)	
	)	

PLAINTIFF'S OBJECTION TO HEARING THE TOWN'S
LATE-FILED MARCH 1, 2021 MOTION ON MARCH 3, 2021

Plaintiff objects to hearing the Town's late-filed March 1, 2020 motion on March 3, 2021.

Plaintiff requests that the March 3, 2021 hearing be postponed entirely and that any properly presented matter be taken up after the Court rules on the Town's pending motion for reconsideration.

In the alternative, Plaintiff requests that the hearing time be used exclusively for scheduling and that no substantive relief of any kind be considered or ruled upon.

FURTHER DISCUSSION AND BASIS OF OBJECTION

Ordinarily, a full ten days' notice is required for motions, and this is before adding five days when applicable under Rule 6 and applicable electronic filing rules and COVID pandemic emergency orders. A request to the Court for an order is to be made by motion.

As notice to the Court, and as due-process notice to the other party, motions, when actually filed, are required to state with particularity, the facts asserted to afford the relief requested, and the specific relief that is requested. Rule 7(b), SCRCF. Ordinarily, the party making a motion opens and closes the argument.

Plaintiff's counsel has been eager to accommodate and to expedite matters, but has had other work to do in completely unrelated matters, and personal plans and affairs to attend to including a

tenant's backed up septic tank from the almost catastrophic rainfall in recent weeks and attempted attendance at an outdoor 45-year annual event which requires planning.

The March 3, 2021 hearing was an attempt to expedite and streamline things.¹ It was scheduled by agreement without the full notice period, but was not scheduled for a motion to be filed afterward by the Town, two days before hearing.

The genesis of the hearing was the Town's inclusion, a month earlier, of matters pertaining to Plaintiff's fee petition in the Town's January 29, 2021 motion for reconsideration. The subject of the motion for reconsideration, however, was not reconsideration of fees, but reconsideration of the order granting summary judgment. The Court had not considered or made any ruling upon fees or the fee petition.

The Town had not filed a brief opposing the fee petition, had not served any discovery pertaining to the fee petition, no discovery pertaining to fees, therefore, had been responded to, the Town had filed no motion to compel, and Plaintiff had not filed a motion for a protective order.

Thus, the Town simply started making requests in the middle of a brief on another matter.

¹ Last week, counsel waived ten-day notice to have a hearing Wednesday, March 3, 2021, further to what was merely discussed on the phone on February 17. The Town now characterizes the phone conference as if it were a hearing (with no motion pending) with rulings, and recounts the asserted rulings with the caveat that they are "unless counsel is mistaken."

Plaintiff's counsel ascertained that the hearing was to consider Plaintiff's offer to speed the matter up by voluntarily producing materials subject to protective order and to consider the terms of that protective order. In waiving notice, Plaintiff's counsel made the effort to clarify the purpose of the hearing because: no formal discovery from the Town had been authorized; none had been served; none, therefore, had been responded to or objected to; no motion to compel had been made; and no motion for protective order by Plaintiff had yet been made.

The purpose of the hearing was, thus, not for Plaintiff to be ordered to do anything pursuant to a motion not pending, and not for a ruling on a motion of the Town not in existence at the time of scheduling the hearing, to be filed two days before the hearing. Plaintiff does not waive notice for that.

In this January 29 filing by the Town at the end of the case, the Town made a startling request for a delay of over four months.

Whether this delay was for other purposes is not completely clear. Other communications referenced the Town's election, only at the end of the case, to get new or additional counsel, and his need to come up to speed while Plaintiff waited. The Town's motion for reconsideration stated no actual particular factual grounds, but an intent to file other materials later. The stated purpose for the delay was to engage in discovery and other matters pertaining to the fee petition, so that after over four more months, the Town could then commence a full blown trial over Plaintiff's request for fees.

Plaintiff's pending, duly filed request for fees was addressed solely to the fees for opposing a condemnation action riddled with defects and other troubling features, while simultaneously opposing a second similarly but more profoundly flawed condemnation action by the Town on the same subject while the first condemnation action was still pending.

Numerous briefs and other exchanges occurred regarding the Town's request for delay. They were extensive and expensive.

To expedite matters, Plaintiff offered to produce to the Town, without prior discovery request and without the normally allotted time for compliance with or objection to such a request, redacted billing statements and a redacted fee agreement, subject to a protective order. It is Plaintiff who requests protection under Rule 26, not the Town.

After briefing and other exchanges, the parties agreed to have a hearing on short notice to consider the terms of the protective order to govern the materials offered.

Two days before the hearing, the Town has filed a Motion for Protective Order for Production of Documents Relating to Plaintiff's Motion for Attorney's Fees.

Plaintiff objects to hearing it without notice.

In it, the Town now takes actual positions, where it has taken none before, and includes citations to inapposite cases and to the one inapplicable subsection of three subsections of a statute. The Town does not need a protective order and has no reason to move for one. Plaintiff does, if Plaintiff is going to offer the materials, for which there has been no discovery request and no opportunity to respond in an organized manner.

The Town also misses the point of Rule 26. The provisions of Rule 26(c), SCRCP, allowing a party to request a protective order “which justice requires to protect a party from annoyance, embarrassment, oppression, or undue burden by expense,” is not limited to protecting attorney-client privilege or work product materials. The Town ignores this, and only now presents the matter as if the only issues are attorney-client privilege and work product protection, and then addresses privilege alone, ignoring the very broad protections of work product.

For the reason of needing to respond in an orderly, due-process manner to these and other matters not yet even fully reviewed, Plaintiff objects to hearing the Town’s late filed motion. Plaintiff respectfully requests the hearing altogether be rescheduled for after the hearing of the pending motion to reconsider. Plaintiff additionally respectfully suggests that the Town should withdraw its motion, that Plaintiff should withdraw its offer of the materials entirely, and that the need for any protective order at all be obviated, until and unless the Town requests materials in the prescribed fashion.

Respectfully submitted,

s/M. Baron Stanton
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bstanton@stantonlaw.com
Attorney for Sunset Lodge, LLC

3/2/21

March 3, 2021 Town motion for protection from discovery, with 1/15/21 notice of depo.
of Fabbri as exhibit.

STATE OF SOUTH CAROLINA	)	IN THE CIRCUIT COURT OF THE
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN	)	CIVIL ACTION NO. 2020-CP-22-00600
	)	
	)	
Sunset Lodge, LLC,	)	
	)	DEFENDANT’S MOTION FOR
Plaintiff,	)	PROTECTIVE ORDER
v.	)	REGARDING DISCOVERY
	)	
Town of Pawleys Island,	)	
	)	
Defendant.	)	
_____	)	

TO: THE PLAINTIFF ABOVE NAMED AND ITS ATTORNEY, M. BARON STANTON, ESQ.

YOU WILL PLEASE TAKE notice that the Defendant, Town of Pawleys Island (“Town”), by and through its undersigned attorneys, will move this Court the tenth (10th) day after service hereof, or as soon thereafter as counsel may be heard, for issuance of a Protective Order relieving Town of any obligation to participate in certain discovery in this action, on the general ground that the Court’s January 20, 2021 issuance of an order granting summary judgment in favor of Town renders such discovery moot, unnecessary, and unduly burdensome and expensive unless and until after such time as the summary judgment order may be altered or amended so as to allow the action to proceed to trial on the merits. Because Plaintiff has declined to stipulate to withdrawal of such discovery, Town seeks an Order providing the following relief from discovery initiated by Plaintiff:

- 1.) Quashing the *Plaintiff’s Notice of Deposition of Mr. [Ryan] Fabbri*¹ (Exhibit A) and any additional notice as may be served for such deposition prior to the Court’s ruling on this motion, and relieving the Town and intended deponent of any obligation to comply with

¹ The *Notice of Deposition* references a deposition to take place on February 19, 2021. However, by written agreement of counsel, this date was extended to March 5, 2021, subject to reservation of Town’s right to object to the taking of the deposition.

the same.

This relief is requested on the grounds that **(a)** as set forth above, the Court has granted summary judgment in favor of the Plaintiff and, unless and until after such time as the summary judgment order may be altered or amended so as to allow the action to proceed to trial on the merits, the discovery sought is moot, unnecessary and inappropriate; **(b)** such discovery would be unreasonably burdensome and expensive taking into account the needs of the case, Rule 26(a), SCRCPP; and **(c)** such protection is necessary to protect Town from entirely unnecessary burden and expense in this action, Rule 26(c), SCRCPP.

Rule 11 Certification

Pursuant to Rule 11, SCRCPP, undersigned counsel hereby certifies that he attempted to consult with opposing counsel to resolve the issues underlying this motion prior to filing the motion and determined that further consultation would serve no useful purpose.

Respectfully submitted,

s/ William C. Dillard, Jr.
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Attorneys for Town of Pawleys Island

March 3, 2021

EXHIBIT A

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN	)	CIVIL ACTION NO. 2020-CP-22-00600
	)	
Sunset Lodge, LLC,	)	
	)	PLAINTIFF'S
Plaintiff,	)	NOTICE OF DEPOSITION
	)	OF MR. FABBRI
v.	)	
	)	
Town of Pawleys Island,	)	
	)	
Defendant.	)	
	)	
	)	

TO THE TOWN OF PAWLEYS ISLAND AND ITS COUNSEL: Please take notice:

Pursuant to Rule 30 of the South Carolina Rules of Civil Procedure, Plaintiff will take the deposition of Ryan Fabbri 10:00 a.m. on Friday, February 19, 2021 at the offices of the undersigned. The deposition will continue from hour to hour, or day to day, until completion. The deposition will be recorded by stenographic and sound means and taken pursuant to the South Carolina Rules of Civil Procedure before a disinterested person authorized by law to administer oaths. If the deposition is commenced but not completed, it will be continued from time to time as agreed by the parties or pursuant to court order until completed, without further notice. If the deposition is rescheduled by agreement as to time or place after the initial notice, no further notice will be sent, and the original notice, as modified, will remain in effect.

s/M. Baron Stanton

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Attorney for Sunset Lodge, LLC

1/15/21

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN	)	CIVIL ACTION NO. 2020-CP-22-00600
Sunset Lodge, LLC,	)	
Plaintiff,	)	CERTIFICATE OF
	)	SERVICE
v.	)	
Town of Pawleys Island,	)	
Defendant.	)	
	)	
	)	

The undersigned does hereby certify that the undersigned has this date served the foregoing by causing a copy thereof to be e-mailed as indicated in the attached e-mail copy pursuant to S.C. Sup. Ct. Ord. 2020-04-22-01, to the address indicated below:

ddurant@lawofficesofdurant.com
(N. David DuRant, Sr., Esquire)

s/M. Baron Stanton
M. Baron Stanton

Date: 1/15/21

March 5, 2021 Challenge II case Town motion to dismiss, referenced in Dillard 3/5/21 e-mail to the Court.

STATE OF SOUTH CAROLINA	)	IN THE CIRCUIT COURT OF THE
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN	)	CIVIL ACTION NO. 2020-CP-22-00930
	)	
	)	
M. Baron Stanton,	)	
	)	DEFENDANT'S
Plaintiff,	)	MOTION TO DISMISS
v.	)	
	)	
Town of Pawleys Island,	)	
	)	
Defendant.	)	
_____	)	

TO: THE PLAINTIFF ABOVE NAMED AND ITS ATTORNEY, M. BARON STANTON, ESQ.

YOU WILL PLEASE TAKE notice that the Defendant, Town of Pawleys Island ("Town"), by and through its undersigned attorneys, will move this Court the tenth (10th) day after service hereof, or as soon thereafter as counsel may be heard, for issuance of an Order dismissing this action, without prejudice, on the general ground that the Town's February 10, 2021 filing of a *Notice of Abandonment of Condemnation Action* relating to a Condemnation Notice delivered to the Plaintiff on or about October 15, 2020 (referenced in the Amended Complaint in this action as the "New Notice"), renders this condemnation challenge action entirely moot.¹ More specifically, based on the Plaintiff's refusal to stipulate to dismissal of this matter even subject to an opportunity to assert any claim Plaintiff may have for litigation expenses, Town seeks dismissal of the action on the following grounds:

- 1.) The single cause of action asserted by the Plaintiff, a challenge to a condemnation action pursuant to S.C. Code Ann. § 28-2-470, has been rendered entirely moot by Town's filing of

¹ Plaintiff alleges on page 58, Paragraph 372 of the *Amended Complaint* that "[t]he Court should quash, strike and dismiss the New Notice forthwith, thus allowing the dismissal of the instant challenge action after awarding litigation expenses to Plaintiff." The New Notice has now been formally abandoned and withdrawn.

the *Notice of Abandonment of Condemnation Action*, which is also attached as an exhibit to Town's *Answer to the Amended Complaint*. As the subject Condemnation Notice has been abandoned and withdrawn, any condemnation action it initiated has been extinguished and therefore warrants no further challenge. *See, e.g.*, S.C. Code Ann. §§ 28-2-30(5), 28-2-470. Accordingly, based on the pleadings, there is no remaining issue of fact raised by the Amended Complaint that would entitle plaintiff to judgment if resolved in Plaintiff's favor, and Town is entitled to judgment on the pleadings dismissing the action pursuant to Rule 12(c), SCRCP.

- 2.) To the extent that the Amended Complaint may seek to challenge or otherwise obtain relief in relation to a separate prior condemnation notice and condemnation action, another action (referenced in the Amended Complaint as the "Existing Challenge Action") is already pending between the same parties for the same claim, and this present action should be dismissed pursuant to SCRCP 12(b)(8).

The requested dismissal is intended to be without prejudice to any right the Plaintiff may have to assert a claim to reasonable attorney fees, litigation expenses, and costs in this action pursuant to § 28-2-510(C). Accordingly, Town stipulates to inclusion in the Order of Dismissal of terms providing that:

- (a) Delivery of the Condemnation Notice referenced as the "New Notice" in the Amended Complaint constituted service of the same and commencement of a condemnation action within the meaning of the Eminent Domain Procedure Act, and Town's filing of the *Notice of Abandonment* constituted an abandonment and withdrawal of such Condemnation Notice and action; and

(b) Plaintiff may assert any claim it may have herein to reasonable attorney fees, litigation expenses, and costs as part of this action within a reasonable specified time or, in the alternative, in the separately pending “Existing Condemnation Action” referenced in the Amended Complaint.

Based on the foregoing, the Defendant respectfully requests that the Court dismiss this action without prejudice as set forth above. This motion may be supported by a memorandum of law, as well as the South Carolina Rules of Civil Procedure, and oral arguments by counsel.

Rule 11 Certification

Although not required pursuant to Rule 11, SCRCP, undersigned counsel hereby certifies that he has consulted with opposing counsel prior to filing this motion in a good faith attempt to resolve the matter herein.

Respectfully submitted,

s/ William C. Dillard, Jr.
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Attorneys for Town of Pawleys Island

March 5, 2021

March 17, 2021 Landowner brief re fee-related proceedings, with attached potential protective order.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN	)	CIVIL ACTION NO. 2020-CP-22-00600
	)	
Sunset Lodge, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Town of Pawleys Island,	)	
	)	
Defendant.	)	
	)	

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO
THE TOWN'S MARCH 1, 2021 MOTION FOR A PROTECTIVE ORDER
FOR PLAINTIFF AND FOR DISCOVERY FIRST
REQUESTED IN SAME MOTION

Before the Court is the Town's effort to avoid or delay paying litigation expenses after unsuccessfully suing three of its citizens, each twice.

The Town has filed a March 1, 2020 motion requesting an order pursuant to Rule 26, SCRPC protecting Plaintiff from discovery the Town has not yet served. However, the Town requests that the subject discovery also be ordered as a result of the Town's requests made in the same motion.

This discovery which the Town requests by motion – and which the Town seeks to prescribe the protection for -- relates to several months of completely private billing statements between Plaintiff's attorney and Plaintiff, and the completely private fee agreement between Plaintiff's attorney and Plaintiff. The Town incorrectly asserts that there is no way for the Town to respond to Plaintiff's pending fee petition without intruding into these materials.

Plaintiff hereby opposes the motion. Respectfully, if discovery is sought by the Town from Plaintiff, Plaintiff should first be able to make Plaintiff's own objections to the relevance, necessity or reasonableness of the discovery sought, and have the Court first consider those objections. Plaintiff should also be able to make Plaintiff's own motion for an order protecting Plaintiff from the discovery sought, and have the Court consider that request. That is what Plaintiff will do herein.

Among other things, the information and materials sought are highly confidential and the discovery sought in this manner is completely unnecessary and should be denied. It cannot be lightly presumed that the last forty years of South Carolina law concerning fee applications requires routine disregard and breach of Rule 1.6 of the South Carolina Rules of Professional Conduct.

In the alternative that any of the material is provided by Plaintiff, it should first be provided by Plaintiff only in highly redacted form, subject to a protective order as proposed by Plaintiff, not as proposed by the Town, and if the Town thereafter has a motion or discovery request to make, the Town should make it only then.

Why the Town did not accept Plaintiff's February 8 offer to at least look first at carefully redacted bills provided as early as February 9 subject to a protective order has only now become apparent.

Plaintiff just wants Plaintiff's reasonable fees and expenses after an extraordinarily taxing eight months, which is now continuing. Plaintiff did not object to providing even some unnecessary materials if they could be provided carefully and responsibly, with adequate protection and precaution, and not casually and imprudently.

The whole subject of the Town's current motion now also requires a substantial procedural reset.

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GENERAL BACKGROUND OF THE MATTER BEFORE THE COURT

The Court granted summary judgment against the Town on January 20, 2021. Plaintiff filed a fee petition January 25, 2021. On January 29, 2021, Town filed a motion to reconsider the January 20, 2021 order granting summary judgment. Therein, the Town sought delay, and even though the subject order was not a ruling on fees, the Town began referring only generally to a future desire to conduct discovery into Plaintiff’s private fee matters and “detailed billing records.”

Notably, this is not the first request by the Town for delay, nor the first expression of interest by the Town in intruding into the relationship between Plaintiff’s attorney and Plaintiff.

There has been an exchange of various briefings or communications with the Court which preceded and followed the Town's January 29, 2021 request for delay. In these exchanges, Plaintiff has provided the Court briefing on numerous incorrect, general, unsupported assertions by the Town as to the correct procedure, as to the facts, and as to the substantive law. These incorrect assertions still have a bearing on the instant matter.

These included:

- an incorrect assertion that Plaintiff's counsel should be required to withdraw from all representation of Plaintiff after summary judgment was granted;
- an incorrect assertion, only much later, coupled with a request for delay, that the Town's counsel needed to withdraw from the case on the same basis;
- an incorrect assertion that a simple statement in the summary judgment order that "any fee application should be handled separately" was "ambiguous";
- an incorrect assertion that the Town needed well over four months of delay in order to address Plaintiff's fee petition;
- an incorrect assertion that under South Carolina law, a fee petition by the prevailing party under a fee-shifting statute "cannot be resolved by motion";
- an incorrect assertion that the Town needed full-blown discovery followed by a full-blown fee trial – an assertion it appears is likely to be followed at some point by an equally incorrect assertion that the fees chargeable to such an exercise are not included in the total fees sought by the prevailing party; and
- an incorrect assertion, unaccompanied by citation, that determining a fee award under a fee-shifting statute in South Carolina turns upon "documenting the appropriate billable hours."

After briefing by Plaintiff, the Town has retreated from some of these incorrect assertions in whole or in part. The Town still has not made a formal Rule 34 discovery request. The Town has, however,

recently made the March 1 motion. The recent March 1 motion now states actual, and new, positions advocated by the Town, with citation of putative authority.

After making previous bald and broad assertions, requests for advisory opinion from the Court, or requests for general assistance from the Court, the Town now clarifies its intentions.¹ The Town's alarming position has vaporized any comfort Plaintiff would have had with a broader conditional and limited waiver.

The Town had never before clearly disclosed its intention. That intention appears to be that, after making pointed changes to the reasonable protective order offered by Plaintiff, and after waiting for Plaintiff to provide, on a limited and ostensibly protected basis, only some redacted records of hours spent, the Town definitely already intends to seek more and more confidential information and delay, and to argue that nothing could be withheld that did not satisfy strict requirements for attorney-client privilege. This is not the basis on which Plaintiff offered to expedite the matter.

That is, in its March 1 motion, the Town now definitely asserts that Plaintiff should breach Rule 1.6 by handing the Court all of Plaintiff's unredacted private billing statements in camera, that Plaintiff should have no other protection from this discovery request than what the Town proposes, and that Plaintiff should be required to perform a time-consuming mini-briefing on each and every redacted item.

¹ In the previous conflicting and changing briefing by the Town, the Town already did not adhere to, and indicated it did not intend to adhere to, its own statement that the Town "simply seeks a meaningful opportunity to review the substance of Plaintiff's claim." (Town February 5, 2021 surreply at 2 (emphasis in original).)

The Town does not simply seek to "review." The Town now openly seeks to pry, oppose, divide and delay.

The Town stated elsewhere in its same February 5, 2021 surreply, not that it reserved judgment and simply seeks to verify, but that it did, already, oppose the fee request. However, to date, the Town has not articulated a reason for the opposition.

The Town, in its February 5, 2021 surreply, three times stated that the fee request is "unreasonable." However, the Town has not identified a single thing that is actually unreasonable about the fee request or that is suspected of being unreasonable.

In this proposed mini-briefing, the Town now contends that Plaintiff may not protect all or most matters that are confidential under Rule 1.6, SCRProfCond.

Now the Town contends that Plaintiff must prove attorney-client privilege or else lose all confidentiality. Plaintiff's concern in the matter at hand is not confined to privilege or work product protection.

The Town contends that simultaneously with this mini-briefing, Plaintiff must also give the Town a big peek at substantial information enabling the Town to determine whether to seek a hearing on the applicability of "privilege" to each item. If the unnecessary materials are to be provided at all, the sole question should, rather, be the facial reasonableness of the redactions made by Plaintiff. The exercise at hand should not be transformed into the wrong inquiry on the wrong question and devolve sheerly into a privilege review.

The assertions in the Town's motion are incorrect and any authority cited for them is inapposite. The Town's requests should be rejected.

DISCUSSION

I. Summary of Argument

A. The Town is either completely unaware of or completely misses the point of an attorney's ethical duties and a client's expectations under Rule 1.6 of the South Carolina Rules of Professional Conduct. The Town ignores the fact that procedures for fee applications take these considerations into account, and do not require routine disregard of Rule 1.6.

B. Relying only on its own broad, general statements, the Town still never addresses with any citation of authority, the actual necessity or lack of necessity of the materials under South Carolina law. The Town still completely misapprehends what is necessary and what is unnecessary under South Carolina law in determining a fee award under the applicable fee-shifting statute.

C. The Town also completely misunderstands the purpose and scope of Rule 26, SCRCP regarding the scope of permissible discovery, the ability of the court to deny or limit discovery, and protective orders. The rule is not confined to matters of privilege.

D. Additionally, when a simple protective order and redacted materials would suffice, the Town completely fails to weigh the necessity, and prematurity, of in camera review, and fails to account for procedural uncertainties, impracticalities, unintended consequences,² and cumbersome and expensive implications inherent in in camera review of documents, both when in the trial-level court and when the subject is on appeal.

E. While, as discussed herein, the client confidences which are entitled to protection against needless disclosure extend vastly beyond attorney-client privilege and attorney-impression/work product protection, the Town also largely ignores attorney impression/work product protection and erroneously seems to assert that attorney impression/work product protection is no different from attorney-client privilege.

II. Further Specific Background

² For example, in Chaudhry v. Gallerizzo, 174 F.3d 394 at ___ n. 4 (4th Cir. 1999), the court noted that the subject materials previously had been reviewed in camera by another district court judge who subsequently recused himself.

This note more than merely suggests the numerous reasons why in camera review is not a harmless, thoughtless, panacea.

A la “Luke, I am your father,” the judge may be exposed to reasons outside the case that the judge and the parties would never have known would disqualify the judge and which, but for the in camera review, never would have and never should have disqualified judge. The judge may be exposed to information about the case itself or one or the other of the parties that thereafter makes the judge’s participation inadvisable, when there would have been no problem absent such review.

Numerous other issues could be envisioned. Another is the contrast between simply conducting in camera review to determine whether a discrete e-mail or memorandum is privileged, and conducting in camera review in judgment of months of billing statements which are recorded as a rolling narrative in a telegraphic style. If the judge has a question about the judge’s automotive repair bill at the dealership, the judge – not being the person with his hands down in the engine and not being familiar with the bill -- asks the person performing the service to explain the bill before passing judgment on its meaning, necessity or propriety. If the judge is doing this in camera, whom does the judge ask? If he asks no one, the judge may do one party or the other a disservice.

A. Plaintiff filed a complete and sufficient fee petition, with the exception of needing supplementation for further fees and expenses incurred subsequent to the petition.

On January 20, 2021, the Court filed its 24-page order granting summary judgment in favor of Plaintiff.

On January 25, 2021, Plaintiff duly filed a fee petition for fees as of January 24, 2021. The petition consisted of (i) a motion, (ii) an 18-page affidavit, and (iii) a proposed order. Among other things,³ the affidavit contained an itemized statement, by month, in tenths of hours, of the time incurred, the person incurring the time, the rate, and the dollar amount requested.

As discussed further herein in conjunction with South Carolina law on the subject, the petition was sufficient. Further, the Town's requests are unnecessary, if not completely irrelevant.

The request for fees was addressed to the fees incurred in Plaintiff's action opposing a condemnation suit by the Town against Plaintiff. The condemnation attempt by the Town had been challenged by Plaintiff as an action riddled with defects and other clearly and extensively alleged troubling features.

The fee petition included fees for simultaneously opposing a second, similarly, but more profoundly, flawed condemnation suit brought by the Town against Plaintiff on the same subject while

³ The affidavit carefully addressed the nature and complexity of the matter, some of the difficult and time-consuming litigation landscape traversed, biographical information on counsel, reasonable rates in the locale, the basis of the fee agreement with the client, the result obtained, and the time spent on the matter, in tenths of hours. Outside of the affidavit, this Court has likely already looked at the lengthy electronic docket sheet in the matter and the actual contents of some of the filings. The filed materials, of course, do not reflect some discovery matters which are not filed, and do not reflect all other work on the case.

the first condemnation action was still pending.⁴ An estimate of the amount of these fees was also provided.⁵ The fees requested in the petition were not for any other subject or action.

The fee petition conservatively presented the requested fee. The Town had brought not one, but three, condemnation suits initially, before compounding these three suits with three more. In addition to the suit against Plaintiff, the Town had initially brought substantially similar condemnation suits against two other landowners. Each of the three landowners, as plaintiff, challenged the Town's substantially similar condemnation attempt against that plaintiff. Instead of each plaintiff hiring separate lawyers or law firms at high rates, all three were represented by one lawyer at a relatively modest rate, who was also a landowner and plaintiff in one of the cases.

Plaintiff's fee petition in the instant case reduced the total time of the one lawyer to one third of the time spent. However, only Plaintiff and one other plaintiff submitted fee petitions. The other plaintiff, who is also undersigned counsel, did not submit a request for fees. Thus, the Town's total exposure for fees in the three cases under this scenario is likely less than two-thirds of one-third (i.e., two-ninths) of what the exposure may have been if the three landowner plaintiffs had been separately represented at higher rates. I.e., under the other scenario, the Town could well have ended up facing total fee requests of over \$550,000.00 for suing three of its citizens.

On January 29, 2021, the Town filed a motion for reconsideration of the summary judgment order, also requesting, among other things, a delay. The delay of the case and pending motions for

⁴ Both in the September 11, 2021 hearing of the Town's unsuccessful motion to dismiss, motion for ten-million-dollar bond, and motion to expedite, and in the December 4, 2020 hearing of Plaintiff's successful August 21, 2020 motion for summary judgment, the Town took great interest in whether it could sue Plaintiff again on the same subject matter. The Town did so in October 2020 when it delivered new condemnation notices despite the stay in the instant case, and the Town may well serve others for all Plaintiff knows. The October notices resulted in three additional, still-pending challenge actions with case numbers ending in 930, 931 and 932.

⁵ Plaintiff is now preparing a separate fee petition in the other action, clearly separating the fees already incurred in the first action.

over four additional months was stated to be for the purpose of extensive contest of the pending fee petition, which had not been ruled upon in the summary judgment order.⁶

After further proceedings ensued, on February 4, 2021, Plaintiff supplemented the fee petition with additional time incurred, and updated the request for fees and other expenses to \$50,593.99 or more as of February 20, 2021.⁷

Numerous briefs and other exchanges occurred regarding the Town's January 29, 2021 request for delay and the matters referenced in it.⁸

⁶ Whether this requested delay was for purposes other than contesting the fee is not completely clear.

The stated purpose for the delay was to engage in discovery and other matters pertaining to the fee petition for over four more months and then commence a full blown trial over Plaintiff's request for fees, while ignoring the additional fees Plaintiff would incur as a result and additionally tax to the Town.

However, the request was made in conjunction with the Town's motion for reconsideration, in which the Town stated an intent to file other supporting materials later. Plaintiff has already objected to the motion for reconsideration as lacking any real notice of the factual grounds or specific legal arguments to support it. Plaintiff has also objected in advance to the Town using the time following the filing of the motion for reconsideration to develop or think of grounds to support it.

Other communications with the Court had referenced other reasons for delay, i.e., the Town's election, only at the end of the case, to get new or additional counsel, and his need to come up to speed while Plaintiff waited. Plaintiff objected to this reason for delay on February 2, 2021.

⁷ The petition will now need to be supplemented again.

⁸ On February 2, 2021, February 16, 2021 was proposed as the date for hearing on the fee petition submitted pursuant to the fee-shifting statute.

On February 2, 2021, the Town's initial counsel wrote the Court, stating that additional counsel was expected to appear and substitute within about two days, that continuance was requested, and that it was likely the Town would follow up with a requested timeline.

On February 2, 2021, to expedite matters, Plaintiff's counsel informed the Court, among other things, that Plaintiff's counsel did not object to Mr. Durant, who has been in the case from the beginning and has continued to be since moving to disqualify Plaintiff's counsel nineteen days earlier on the inapplicable grounds Mr. Durant now asserted were the reason for his own substitution, remaining in, briefing any objection the Town has to Plaintiff's fee petition, or arguing it. Plaintiff's counsel added that there was nothing wrong with that.

On February 2, 2021, new additional counsel for the Town informed the Court that the Town wished to seek some written discovery, giving as only an example of such discovery, requests for copies of itemized attorney time.

On February 3, 2021, Plaintiff filed a brief responding to the requests for delay in the Town's previously filed "motion to reconsider" summary judgment.

In that exchange, on February 8, 2021, in order to expedite a resolution, Plaintiff suggested and offered additionally to provide Defendant's counsel, without need of formal discovery request and with waiver of response time, redacted copies of billing statements and the fee agreement, subject to a protective order specifically described by Plaintiff in the brief February 8, 2021 at pages 4-6.

On March 1, 2021, the Town filed the instant motion, requesting a different order purporting to protect Plaintiff from discovery.

Therein, without prior formal discovery request, the Town also requests that Plaintiff simply be ordered to produce private billing statements and private fee agreements under certain conditions, including breaching Rule 1.6 and showing all these private matters to the Court at the onset under a protective order requested by and dictated by the Town.

B. The Town's approach to discovery and the fee petition would deny an orderly consideration of both, and requires a substantial procedural reset.

On February 3, 2021, the Court offered counsel in the case weeks from which to pick for a hearing on the fee petition, the earliest of which was now no longer the previously offered week of February 16, but was the week of February 22, 2021 and numerous weeks well into the spring were offered as well.

On February 4, 2021, Plaintiff separately responded to the attorney's-fee-related arguments and requests by the Town which the Town had inserted into the Town's January 29, 2021 motion to reconsider the order granting summary judgment.

On February 5, 2021 the Town filed an "Initial Reply Brief" of the Town.

On February 8, 2021, in response, Plaintiff stated in its brief that in order to try to expedite the matter, Plaintiff's counsel had already redacted the available billing statements and was prepared to produce them virtually immediately pursuant to a protective order the terms of which were specifically set forth.

On February 17, 2021, in conference with the Court, the Town's additional new counsel, still without agreeing to the protective order proposed by Plaintiff, and, therefore, still not in possession of the redacted billing statements which were offered February 8, estimated he may need 45-60 days to review the billing statements, after receiving them.

On February 25, pursuant to the Court's prior invitation, counsel for the Town wrote the Court to request assistance in agreeing on the terms of a protective order.

On March 1, 2021, the Town filed the subject motion, requesting a protective order for Plaintiff, and asking the Court to order production of billing statements and the fee agreement, for neither of which had there been prior Rule 34 discovery request.

Respectfully, the Town's motion attempts to turn the procedure on its head. The Town seeks to bypass the orderly process. Ordinarily, this process requires the following:

- (1) the Town obtaining leave to pursue discovery if leave is needed;
- (2) the Town actually propounding the discovery under Rule 34 and giving Plaintiff sufficient time to respond; and
- (3) the Town then acting on any response by Plaintiff, including any request by Plaintiff, not the Town, for a protective order under Rule 26.

Plaintiff will attempt herein, to straighten that process out and condense any parts of it which can be expedited without further prejudice to Plaintiff.

C. To set the record straight, contrary to the Town's contentions in the hearing on March 3, 2021, until March 1, 2021, the Town had served no prior rule 34 request for production of billing statements, and had made no prior motion for their production.

Asking for something in a brief is neither a Rule 34 request, nor a motion. The Town inserted into its January 29, 2021 motion to reconsider summary judgment, only the following broad, vague argument to support an unabashed request for a delay of over four months. By the following argument, the Town sought to delay the determination of Plaintiff's fee petition and to delay the determination of the Town's own pending motion to reconsider the grant of summary judgment:

[T]he issue of awarding attorney's fees or expenses cannot be resolved by motion and would require an evidentiary hearing as well as presentation of detailed billing records, time sheets, witnesses, affidavits, invoices, and receipts. The Order dated January 20, 2021 is ambiguous as to the award of attorney's fees and costs, and Defendant requests that it be amended to indicate that the Court has not considered any Motion for Fees and Costs and is permitting discovery on the issue as well as a separate evidentiary hearing. The Defendant respectfully submits that the Plaintiff bears the burden of establishing any entitlement to fees and costs and documenting the appropriate billable hours.

In its January 29, 2021 motion, the Town followed this argument with a request for the following relief:

Defendant respectfully requests the Court to reconsider, alter and/or amend its Order dated January 20, 2021 to clarify the issue of fees and costs; deny the Plaintiff's Motion for Summary Judgment and directing the parties to complete pretrial matters; require that, in the event the

Court deems it appropriate to consider any motion by Plaintiff for attorney fees and costs, an evidentiary hearing be scheduled for the same after a reasonable opportunity, and no less than 120 days, for the parties to conduct discovery relevant to that issue; and, for such other relief and remedies that the Court may deem just and proper under the circumstances.

This was, thus, not a request for production of billing records. This was also not a motion with grounds and particularity that they be produced.

This was, rather, first, an incorrect statement of South Carolina law regarding whether fee awards are handled by motion. Plaintiff subsequently briefed the issue. This was also an incorrect assertion that the Court's order granting summary judgment was vague in stating that any request for fees would be handled separately.⁹ Plaintiff subsequently briefed the issue. This was also a request – made in the middle of a motion to reconsider a different matter – to engage in discovery and have a fee trial. Plaintiff subsequently briefed the issue. This was also an argument that Plaintiff is the author of and bears the burden on Plaintiff's fee petition.

Now, in its March 1, 2021 “Motion for a Protective Order for Production of Documents,” the Town, having made no actual prior discovery request under Rule 34, has requested an “Order (1) requiring that counsel for the Plaintiff produce to counsel for the Town, by no later than March 8, 2021, redacted copies of the attorney-client fee agreement and itemized time statements indicating the asserted basis for each redaction, and at the same time produce unredacted copies to the Court under seal.”

D. Now that the Town has actually made a request for production in its March 1, 2021 motion, Plaintiff objects and requests that the bases of Plaintiff's objections first be considered.

Treating the Town's March 1, 2021 motion as a Rule 34 request for the described item and waiving the usual 35 day response time afforded to the recipient of such a request under Rule 34, Plaintiff objects on numerous related bases.

⁹ The motion also inaccurately recounted that Plaintiff, rather than the Court, had brought up the matter of fees in the summary judgment hearing, and inaccurately implied that Plaintiff had then persisted and injected the matter of fees into a proposed order, stating that any fee request should be made by separate motion. This was, rather, exactly as instructed by the Court.

As discussed further herein, the request is for unnecessary materials. These unnecessary materials are also private materials.

The materials requested are neither necessary nor required for a fee petition in a successful challenge action under South Carolina law. The request is also for materials irrelevant under the standard of the incorrect statutory subsection recited by the Town in its motion.¹⁰

Because it is an unnecessary request for materials which are private and confidential (including some which are also privileged or work product protected), the request also unnecessarily complicates and drives up the cost of the litigation and unreasonably burdens Plaintiff.

Because the request seeks information highly private and confidential on the one hand, and unnecessary on the other hand, while also being very tedious and time-consuming to present and protect in altered or unaltered form, the request is also a request causing “annoyance, embarrassment, oppression, undue burden, and undue expense” as described in Rule 26.

The discovery sought is “unreasonably burdensome and expensive taking into account the needs of the case,” as contemplated by Rule 26.

Accordingly, the request to the Court for an order requiring production of the materials should be denied in its entirety.

In the alternative, the Court should enter a protective order – proposed by Plaintiff – substantially limiting the scope of what is to be produced and governing the production in the manner set forth herein.

As more particularly described herein, if Plaintiff produces any billing statements, they should be provided with the following protection:

(i) they should not be produced to the Court before the Court rules on the motion for reconsideration;

¹⁰ The applicable and inapplicable subsections, and the standards under each are discussed infra.

(ii) they should be produced in only in redacted form, and not be supplied to the Court or any other party in unredacted form;

(iii) they should be redacted to remove matters Plaintiff deems particularly private and confidential, especially within the context of past and other pending motions in the case, of related litigation, and of threatened litigation;

(iv) they should be redacted to show only information sufficient to state the time devoted to the case and the general nature of the activities on which the time was spent;

(v) they should be produced under circumstances which will not require disclosure of unredacted private and confidential information to the Judge or judges of this Court or the judge or judges of any appellate court, and which therefore will not require Plaintiff to try to devise and pursue precautions to protect against, among other things, unveiling without Plaintiff's consent at any later stage, including the Circuit Court changing its mind on a determination of confidentiality, an appellate court refusing to allow sealed records in the record on appeal, an appellate court disagreeing with a Circuit Court determination to protect confidentiality, etc.;

(vi) they should be produced under circumstances which will protect against use for other purposes;

(vii) they should be produced under circumstances which will protect against sharing, publication, or negligence in handling or storing; and

(viii) they should be produced under circumstances which will protect against waiver.

The actual terms of such an order are submitted by Plaintiff herein as "Exhibit 1."

E. The fee petition should be determined after first removing the complication of the Town's pending motion to reconsider the summary judgment order against the Town.

The Town's skeletal motion to reconsider should be determined first, separately. It can likewise be determined on the papers, without oral argument, or in a hearing if the Court desires.

Allowing a delay in determining the motion to reconsider so that the Town may engage in discovery on fee disputes in order to create or think of grounds for the separate and independent motion to reconsider should not be allowed.¹¹ The imbroglio the Town has generated with contest of the fee petition should not be used to influence or delay the determination of the motion to reconsider.

As justification for delay, the Town states that it needs more documentation to assess its position on the fee petition. However, the Town has already stated that it opposes the requested fee as “unreasonable” and simply does not yet know why. As discussed herein, “documentation” is not a requirement under South Carolina law.

If “further documentation” of the fee petition – beyond the 18-page affidavit -- is truly needed, not for delay or as a fishing expedition on matters collateral to the fee question, but in order to “verify” the time that was spent, the Town could have obtained further documentation on February 8, 2021, as Plaintiff offered.

II. Argument

A. The Town is either completely unaware of or completely misses the point of an attorney’s ethical duties and a client’s expectations under Rule 1.6 of the South Carolina Rules of Professional Conduct.

The Town’s request completely ignores Rule 1.6, SCRProfCond and the intrusiveness of unnecessarily prying into private matters having a bearing on Plaintiff’s attorney’s representation of Plaintiff. This is particularly concerning when:

(i) the Court has not ruled on matters having nothing to do with the fee (e.g., reconsideration of summary judgment and possible remaining discovery relating to the merits of the condemnation attempt by the Town);

¹¹ As this Court knows, without prior consultation, the Town also previously and publicly filed a motion to disqualify undersigned counsel “from representing Plaintiff” in this whole case, to which Plaintiff fully responded. The Town thereafter withdrew the motion. The proposed fee wrangling should also not be allowed to create grounds, which do not exist, to support another such motion in the future, in continued litigation the Town intends to pursue.

(ii) there is a second related case still pending;

(iii) there is yet a third case threatened;

(iv) the Town has already once tried to make tactical, rather than ethical, use of Rules of Professional Responsibility to, baselessly, and without prior consultation, attempt to disqualify the counsel for the Town's adversary; and

(v) the Town has a history of using the press, its own website, public meetings, social media, gossip to neighbors, or even shouting from golf carts in the street to others to publicize things about the case, about Plaintiff, about Plaintiff's property, and about Plaintiff's counsel.

Rule 1.6, SCRProfCond imposes on an attorney, and therefore reposes in a client, a very broad obligation of the attorney to maintain as confidential, "information relating to the representation."¹²

This obligation and this privacy right are far broader than the narrow realm of attorney-client privilege and work product protection. Rule 1.6, SCRProfCond, com. 3 ("The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source").

The obligation and right extend to financial matters, family and business relationships and affairs, client activities, attorney activities, and other matters relating to the representation, including in some instances even the identity of the client or the subject of representation. Confidential matters include those that could be embarrassing to the client, those that could be detrimental to the client, and those personal matters that the client just plain does not want shared – for whatever reason or no reason -- with the opponent, with the court, with court personnel, with the public, with a publicly accessible (or hackable) database or communications system, or with even the most discreet and limited third parties.

¹² State rules of professional conduct are not binding on practice in federal courts considering fee applications, although they are frequently used, adapted or incorporated for guidance.

It bears mentioning that even if one has full faith in the discretion of opposing counsel, or another party -- or, for that matter, the Court -- that is not a reason to casually breach confidentiality.

Discretion of the recipient is not the test. It is not the test of whether a person's confidential matters should be disclosed, or whether those matters should be required to be disclosed. They are still confidential matters. See, e.g., Rule 1.6, SCRProfCond com 6 (describing instance in which lawyer should not disclose client confidential information to lawyer within the same firm), and see 98 Formal Ethics Opinion 10 (N.C. State Bar, July 16, 1998)(disapproving of disclosing lawyer bills to third-party bill-auditing firm for insurance company).

“A lawyer’s ethical obligation of confidentiality is not limited to privileged information.” Ethics Opinion 1198 (New York State Bar Ass’n, Jun. 22, 2020)(construing Rule 1.6, N.Y. Rules of Professional Conduct); and see Rule 1.6, SCRProfCond, com. 3. While Rule 1.6(b) contains permissive exceptions to the duty of confidentiality, “[p]aragraph (b) does not mandate any disclosures.” Opinion 1198; and see Rule 1.6, SCRProfCond, com. 19 (“Paragraph (b) permits but does not require disclosure of information relating to a client’s representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(7)”).

Further, where counsel is presented with an order or a law asserted to require disclosure, the lawyer should assert on behalf of the client, nonfrivolous arguments for protection against disclosure including but not limited to arguments as to the validity of the basis for requiring disclosure in the first place. Opinion 1198; and see Rule 1.6, SCRProfCond, com. 17.

In the event of an adverse ruling, the lawyer must consider the possibility of an appeal or further challenge. Opinion 1198; and see Rule 1.6, SCRProfCond, com. 7. Thus, even a lawyer faced with a court order requiring the disclosure of client confidential information is “still faced with complex, critical and fact-intensive questions on how to respond.” Opinion 1198 (citing Formal

Opinion 473, American Bar Association Standing Committee on Ethics and Professional Responsibility (2016)).

In camera review is a helpful tool if properly adapted to the duties of the lawyer, the consequences to and wishes of the client, the risks of in camera review, and the needs of the case. In camera review is not a fix-all. It is not a blank check.

In camera review is still a disclosure of confidential information. It is more troubling when it is not necessary, is not yet necessary or involves review of more than is necessary.

In camera review also exposes the judge to information which the judge, the disclosing party, or the seeking party might be better off with the judge not having.

In camera review, although assumed to initially assure nondisclosure, also lets the cat out of the bag in the sense that the attorney may then lose control of subsequent disclosures of the information with which he may disagree.¹³ In short, in camera review should not be lightly volunteered or ordered when it can be avoided.

In camera review comes with concurrent and later procedural issues which sometimes receive little attention, and quite aside from such questions, it is nevertheless, also, a disclosure to a third party to be evaluated under Rule 1.6.

In a proper case, the lawyer may himself in fact seek in camera review; however, “in the alternative, ‘the lawyer may ethically decide not to comply immediately with the court’s order. Instead, the lawyer may test the validity of the order by appealing.’” Opinion 1198 (citing Ethics Opinion 1057, New York State Bar Ass’n, 2015).

What makes the most sense for all parties and the court is to be conservative and to try to avoid all procedural and ethical quagmires and avoid answering every single legal question about the

¹³ See, e.g., Ex parte Capital U-Drive-It, Inc., 369 S.C. 1, 630 S.E.2d 464 (2006) (affirming the Family Court’s ruling unsealing a divorce file so a party in subsequent fraud litigation against one of the divorcees could examine certain financial documents filed in the divorce proceeding).

propriety of disclosing or not disclosing the information if the case does not call for it. See e.g., Rule 1.6, SCRProfCond, com. 17 (“Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure”). This might be accomplished, for example, by the practice in South Carolina of the adverse party not unnecessarily or impractically requesting confidential information in the first place, and the court not requiring disclosure of the requested information when it is not really necessary.

This might also be accomplished, only in a proper case, by waiving confidentiality of some or all of the information and providing it. Such a proper case might be the case when not only is the case over and done with, but also when:

- all related and future threatened litigation is concluded;
- the opponent has not in the past attempted to make tactical, rather than ethical, use of Rules of Professional Conduct to disqualify counsel;
- the requesting party has not in the past used the local press or the requesting party’s own website or social media to publicize details of the matter or even personal information about the resisting party;
- discovery, including through depositions, of information pertaining to alleged false, fraudulent, conspiratorial or abusive practices of the party requesting the confidential information has been completed and has not been evaded;
- the requesting party has actually responded fairly and forthrightly to the substance of the discretely stated purely factual allegations in the pending related case; and
- there are no other pending motions in the present or related cases.

These conditions are not satisfied in the instant case. South Carolina law concerning fee applications does not include a requirement that confidentiality under Rule 1.6 be breached or waived in order for one to receive the benefit of the fee-shifting statute.

B. To understand the lack of necessity and nonessential nature of the Town’s request requires a comprehensive understanding of attorney’s fees awards in South Carolina, rather than mere assumptions and bald assertions made by the Town.

1. Controlling case law and statutory law over the last 40 years show that the discovery sought by the Town is unnecessary and that there is no implied waiver of Rule 1.6 merely as a result of seeking rights conferred by statute.

Absent a specific mandate in a fee-shifting statute of a different procedure or measure, South Carolina law generally requires a fee award to take into consideration a number of factors. See Blumberg v. Nealco, Inc., 310 S.C. 492, 427 S.E.2d 659 (1993) (setting forth six factors, one of which is “the time necessarily devoted to the matter”). Only one of these factors is “the time necessarily devoted to the matter.” None of the factors include “spontaneous production of detailed unredacted private billing statements sent between the attorney and the client.”

Absent a specific mandate in a fee-shifting statute of a different procedure or measure, South Carolina law generally requires the court to apply a lodestar approach in calculating the fee, and that lodestar approach does not require “billing statements” between the attorney and client or a review of “billable hours.” See S.C. Dep’t Transp. v. Revels, 411 S.C. 1, 761 S.E. 2d 700 (2014).

In Revels, the court held that, unless the applicable fee-shifting statute sets forth a specific other procedure or measure, the proper approach is to determine the number of hours devoted and a reasonable hourly rate, and then consider the other factors to determine a multiplier, possibly to increase the product, without being bound to the rate actually contracted for by the attorney and client.

In Revels, the court held that the applicable statute in that case, S.C. Code Ann. §28-2-510(B)(1), did set forth a specific method or measure and that, accordingly, the method or measure, rather than the lodestar approach, should be followed. In the instant case, a different statute, S.C. Code

Ann. §28-2-510(A),¹⁴ is applicable, and, in contrast, does not set forth the method or measure.

Therefore, pursuant to Revels and its predecessor cases, the lodestar approach of Layman v. State, 376 S.C. 434, 658 S.E.2d 320 (2008) and Sauders v. South Carolina Pub. Serv. Auth., C.A. no. 2:93-3077-23 (D.S.C. Mar. 30, 2011) is required.

This approach does not call for “billing statements.”

Even if Plaintiff’s fee petition were considered under the inapplicable §28-2-510(B)(1), the petition would be sufficient. Section 28-2-510(B)(1) refers to an itemized statement being prepared and submitted to the court. The statute does not refer to a copy of the lawyer’s existing private statement to the client. The statement to be prepared and submitted is required to set forth as items, the persons providing services, the hours devoted, the rate, and the charge. The fee petition of Plaintiff is such an itemized statement to the court.

In Layman, the court held generally that a lodestar approach is appropriate and required under a fee-shifting statute. The court found lead counsel’s rate of \$600 per hour to be reasonable in 2008, using a chart of “total time spent,” and applied a multiplier of 1.25 to the product of the hourly rate and the number of hours determined. No requirement that counsel breach Rule 1.6, SCRProfConduct was

¹⁴ S.C. Code Ann. §2-28-510(B)(1) is a “may award” statute with one set of concerns, whereas S.C. Code Ann. §28-2-510(A) is a “must award” statute with a different set of concerns.

In its March 1 motion, the Town includes citation to the inapplicable subsection of three different subsections of the statute which addresses attorney’s fees in three different cases under a condemnation action.

In Revels (citing with approval, Sauders v. South Carolina Pub. Serv. Auth., C.A. no. 2:93-3077-23 (D.S.C. Mar. 30, 2011)), the court considered differences in procedure and standards dictated by different statutory provisions. In Revels, the court considered a discretionary fee award to the prevailing landowner in a condemnation action in chief, under S.C. Code Ann. §28-2-510(B)(1), as opposed to a mandatory award to a successful landowner in a challenge action under S.C. Code Ann. §28-2-510(A), or a mandatory award under to a landowner under S.C. Code Ann. §28-2-510(A)(as in Kiriakades v. School District of Greenville County, 382 S.C. 8, 675 S.E.2d 439 (2009)) after abandonment of the condemnation effort by the condemnor, or a mandatory award to a successful landowner in an inverse condemnation action under S.C. Code Ann. §28-11-30 (as in Sauders), or a somewhat discretionary award to a successful litigant against the government under the South Carolina Equal Access to Justice Act after a determination that the state employee retirement system’s position was “without substantial justification (as in Layman v. State, 376 S.C. 434, 658 S.E.2d 320 (2008)).

imposed as a condition of the prevailing party receiving the benefit of the applicable fee-shifting statute.

Similarly, in Sauders (cited with approval in Revels), the court applied South Carolina law to recovery of fees under S.C. Code Ann. §28-11-30 for a successful inverse condemnation suit. The court used the lodestar approach and imposed a multiplier to increase the fee after multiplying the lead attorney's contractual or usual hourly rate of \$600 per hour in 2011 by the sum of hundreds of the attorney's "recorded" hours and thousands of additional "estimated" hours. The court never once mentioned production of or review of "billing statements."

In Darden v. Witham, 263 S.C. 183, 209 S.E.2d 42 (1974), the court took the usual multiple factors into account and used an estimate of 750 hours of work to award a fee which worked out to \$233.33 per hour in 1975. The court never once mentioned "billing statements" as a condition of the prevailing party availing herself of the fee-shifting statute.

Thus, the leading South Carolina cases explaining or requiring the lodestar calculation use as one component of the calculation, "the number of hours devoted" or the "total time spent," and do not include a step involving line-by-line microscopic analysis and armchair judgments on the activities in private bills between the attorney and the client.

These cases do not include or even imply a requirement of "spontaneous production of detailed unredacted or redacted private billing statements sent between the attorney and the client," and the Town has cited no cases which do in support of its bald assertions.

Implied waiver or required breach of a lawyer's duties under Rule 1.6 merely as a result of seeking rights conferred by statute is an unacceptable conclusion.

Fee-shifting provisions enacted into statute law by the Legislature are for the purpose of making a litigation party whole. It is not lightly to be presumed that the South Carolina legislature, largely itself composed of lawyers, has, in enacting fee-shifting provisions for such a purpose, intended

that these provisions are only operative at the additional cost of waiving – and inviting extensive inquiry into, use of, and dissemination of -- confidential information relating to the representation. There is no requirement in the operative statute for same.

It is also not lightly to be presumed that the South Carolina Supreme Court makes abandonment of an ethical duty, needless disclosure of personal and other private information, and subjection to vulnerability in ongoing litigation a condition of receipt of the protection of such fee-shifting statutes.

There is no requirement in South Carolina caselaw for same. See Taylor v. Medenica, 331 S.C. 575, 503 S.E.2d 458 (1998)(affirming fee award in excess of principal judgment where some attorneys kept no contemporaneous time records, some made estimates, and some submitted no estimates); see Layman v. State, 376 S.C. 434, 658 S.E.2d 320 (2008)(applying lodestar approach under a fee-shifting statute, using a chart of “total time spent,” and applying a multiplier of 1.25 to the product of hourly rate and the number of hours determined); and see Kiriakades v. School District of Greenville County, 382 S.C. 8, 675 S.E.2d 439 (2009).

In Kiriakades, the court considered the existence, but not the amount, of “fees incurred.” The court held that for a fee application under S.C. Code Ann. §28-2-510(C), which requires the government to pay fees incurred by a landowner upon the condemnor abandoning condemnation and abandoning condemned property, the absence of a time-keeping fee agreement did not control. The court also held that the absence of occurrence of the contingency entitling the lawyer to payment under the contingent fee agreement did not defeat attorney’s expectation of payment, did not mean that fees were not “incurred,” and did not defeat the plaintiff landowner’s claim for fees which had been awarded. See also Sauders (applying South Carolina law to recovery of fees under S.C. Code Ann. §28-11-30 for successful inverse condemnation suit, using lodestar approach and imposing multiplier to increase applicable rate beyond lead attorney’s contractual or usual hourly rate of \$600 per hour first

multiplied by hundreds of attorney’s “recorded” hours as well as thousands of “estimated” hours, while never once mentioning production of or review of “billing statements.”); and see Revels, (holding that under a fee-shifting statute that does not set forth a specific other procedure or measure, the proper approach is to determine the number of hours devoted and a reasonable hourly rate, and then consider the other factors to determine a multiplier, possibly to increase the product, without being bound to the rate actually contracted for by the attorney and client).

Even though extensively examining both the method and measure for assessing attorney’s fees under a fee-shifting statute and all referring to fees based on time, neither Medenica, nor Layman, nor Sauders, nor Revels calls for examination of the actual private bills between the attorney and client.

None of these cases requires a disclosure of these materials to the opponent, to the Court or to the world.

Certainly none of these lead controlling cases calls for any Monday-morning quarterback to conduct a line-by-line scrutiny and only partially informed assessment of activities of the prevailing attorneys.¹⁵ Compare, for example, Sauders, in which the court awarded hourly fees at an enhanced hourly rate for thousands of estimated hours of prevailing counsel. The losing inverse condemnor contended that an expense – not fees – incurred by the plaintiffs in building an entire model home as an item of evidence, landscaping the premises and staging a party at the premises, was excessive. Prevailing counsel was not called upon to provide in-depth analysis and exposition of the decision to incur the expense, and commented that the exhibit was “innovative.” The attorney time spent on design and construction of the house was not even mentioned. The court overruled the losing party’s

¹⁵ What would happen if they did? The prevailing attorney would then be required either to live with the unfair or uninformed or mistaken adverse assessment, or to argue and explain litigation decisions, difficulties, thought processes or further details, thus disclosing even more confidential, if not privileged, information.

objection with little discussion, but did note that the amount of the charges for a round trip from South Carolina to Virginia and returning the next day on the lawyer's own private plane was too high.

Indeed, the attorney-client contract controls neither whether a fee is awarded nor the amount of the award. Revels, 411 S.C. at 12; Sauders; Kiriakades; Layman; Medenica; Rice v. Multimedia, Inc., 318 S.C. 95, 456 S.E.2d 381 (1995)(affirming a trial court's award of an amount greater than that due the plaintiff's attorney under a contingency fee contract); Columbia (S.C.) Teachers Federal Credit Union v. Newsome, 303 S.C. 162, 399 S.E.2d 444 (Ct.App.1990)(affirming an award of attorney's fees based upon an hourly rate even though agreement with client was contingency-based); see also Ada County Highway District v. Acarrequi, 105 Idaho 873, 673 P.2d 1067 (1983)(holding the court should not automatically adopt the contingent fee or contractual arrangement; instead, the fee awarded may be more or less than that provided by the lawyer-client contract); Lanier v. Moore-Handley, Inc., 575 So. 2d 83 (Ala.1991)(holding a fee arrangement between the client and his attorney is not conclusive evidence of a reasonable attorney fee; therefore, the court affirmed an award which exceeded the agreed upon hourly rate).

Because the attorney-client contract does not control the fee determination, there is little reason for the intrusion and rigmarole of examining activities on an attorney-client bill not voluntarily submitted – something no reported South Carolina case engages in.

It would be an absurd result and a sad and absurd rule, to hold that an attorney and client may preserve the privacy of the dealings between them more efficiently and effectively, only by adopting a contingent fee arrangement and having the attorney keep no time and remit no bill.

Where a court has been concerned with the question of whether the time was spent on the case at all, or with segregation of work on completely unrelated claims in the same action not covered by the applicable fee statute, the court is usually able to make a reasonable assessment of this question by being familiar with the court file and the progress of the case, receiving estimates, or being given the

actual time by the lawyer. In no instance has there been discovery intrusion into records not volunteered by the lawyer.

In Layman, there was some concern only with whether time was spent only on the matter for which fees were sought and on matters fairly intertwined with it; the concern was not, however, with the wisdom of spending the time or with the total quantum of time. The court used its own familiarity with the case as a guide. The court made a flat reduction, in an abundance of caution, of 3% of time spent where there was affirmative presence of unrelated claims or nonintertwined matters. Id. 658 S.E.2d at 333 (focusing on “actual amount of work performed,” not on whether the work should have been performed).

In Sauders, there was a similar concern. The court reduced thousands of hours of estimated time not recorded in any matter by a flat 3% out of a concern for unrelatedness and nonintertwinedness, rather than out of any concern for lack of necessity or doubt as to accuracy of estimation. In Revels, the court applied a fee award methodology prescribed under the particular statute applicable to the award, and focused only on “actual time expended,” not the wisdom of spending the time.

It would make no sense and would set a horrible precedent to subject an attorney and the attorney’s client to more intrusive, expensive, harassing and delaying discovery simply because the attorney actually did conscientiously keep detailed records in the manner recommended by ethical practitioners and risk managers.

2. The Judge is granted wide discretion in the procedure and award of attorney’s fees.

The decision to award or deny attorneys’ fees under a state statute will not be disturbed on appeal absent an abuse of discretion. Layman. “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.” Id. “Similarly, the specific amount of attorneys’ fees awarded pursuant to a

statute authorizing reasonable attorneys' fees is left to the discretion of the trial judge and will not be disturbed absent an abuse of discretion." Id.

3. On appeal, an award for attorney's fees will be affirmed so long as sufficient evidence in the record supports each factor.

Sufficient evidence in a fee petition has been described as evidence on the findings made on the applicable factors, but never as all conceivable evidence. See Blumberg v. Nealco, Inc., 310 S.C. 492, 427 S.E.2d 659 (1993).

Neither South Carolina law, judicial efficiency, nor common sense require trial courts to engage in encyclopedic exposition when making "specific" factual findings. See Horton v. Jasper Cnty. Sch. Dist., 423 S.C. 325, 330-31, 815 S.E.2d 442 (2018)(finding "general statements" about various factors were "adequately ... specific"); and see Rice v. Multimedia, Inc., 318 S.C. 95, 101-102, 456 S.E.2d 381, ____-____ (1995)(finding no abuse of discretion where trial court awarded fees in excess of the verdict and in excess of the agreed contingent fee, where the trial court weighed all six factors in determining the appropriate fee).

4. Additionally, "no one of the [] factors in itself [is] controlling."

The trial court is simply required to take each of the factors into consideration. Darden v. Witham, 263 S.C. 183, 194, 209 S.E.2d 42, 46 (1974)(employing attorney estimate of 750 hours as the sole basis for number of hours); see also Baron Data Sys., Inc. v. Loter, 297 S.C. 382, 384, 377 S.E.2d 296 (1989) (upholding award against adverse party in suit under equipment leases with contractual provision for attorney's fees; agreeing with the trial court's determination that factor #4 (contingency of the compensation) was "not applicable," approving the assignment of varying weight to factor #6 (the amount recovered) and sustaining the trial court's award).

5. The award is not dependent "upon billing records" or "documenting the appropriate billable hours," as stated by the Town.

In the instant case, the already submitted materials supporting the application for fees and expenses are detailed and extensive. Even where, contrary to the case here, affidavits and records are “somewhat deficient,” the trial court’s determinations of the time spent and the other factors in the case, when based on the trial court’s familiarity with the case and observation of the proceedings and the attorneys, may serve as support for the trial court’s proper consideration of the required factors. See Taylor v. Medenica, 331 S.C. 575, 503 S.E.2d 458 (1998)(affirming fee award in excess of principal judgment where some attorneys kept no contemporaneous time records, some made estimates, and some submitted no estimates); see also Sauders (accepting counsel’s estimate of thousands of hours spent and agreeing that “[i]t is not appropriate for the Court to reject believable testimony of responsible attorneys”).

6. The court may award more than the rate actually charged.

The award of attorney's fees is made to the party, not his lawyer. Prevatte v. Asbury Arms, 302 S.C. 413, 396 S.E.2d 642 (Ct.App.1990).

When determining the reasonableness of attorney's fees under a statute mandating the award of attorney fees, the contract between the client and his counsel does not control the determination of a reasonable hourly rate. Revels, 411 S.C. at 12; Sauders; Kiriakades; Layman; Medenica; see Rice v. Multimedia, Inc., 318 S.C. 95, 456 S.E.2d 381 (1995)(affirming a trial court's award of an amount greater than that due the plaintiff’s attorney under a contingency fee contract); Columbia (S.C.) Teachers Federal Credit Union v. Newsome, 303 S.C. 162, 399 S.E.2d 444 (Ct.App.1990)(affirming an award of attorney's fees based upon an hourly rate even though agreement with client was contingency-based); see also Ada County Highway District v. Acarrequi, 105 Idaho 873, 673 P.2d 1067 (1983)(holding the court should not automatically adopt the contingent fee or contractual arrangement; instead, the fee awarded may be more or less than that provided by the lawyer-client contract); and see Lanier v. Moore-Handley, Inc., 575 So. 2d

83 (Ala.1991)(holding a fee arrangement between the client and his attorney is not conclusive evidence of a reasonable attorney fee; therefore, the court affirmed an award which exceeded the agreed upon hourly rate).

Instead of being controlled by the attorney-client contract, to set the fees, the court should consider the following six factors when determining a reasonable attorney's fee: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services. Blumberg.

7. Contrary to the Town's earlier assertion, the award is sought and made by motion. The fee award procedure is not a trial and is not part of the trial on the merits.

According to the U.S. Supreme Court, the aim is to achieve a reasonably prompt reasonably fair disposition of the issue, as in the taxing of costs, applying the correct standards. The goal of an attorneys' fees award "is to do rough justice, not to achieve auditing perfection," Fox v. Vice, 523 U.S. 826, ___, 131 S.Ct. 2205, 2216 (2011), and therefore "[a] request for attorneys' fees should not result in a second major litigation," Hensley v. Eckerhart, 461 U.S. 424, 437 (1983).

In the federal courts, protracted proceedings over attorneys' fees "has become a heavy burden on the federal courts. It can turn a simple civil case into two or even more cases—the case on the merits, the case for fees, the case for fees on appeal, the case for fees for proving fees, and so on ad infinitum, or at least ad nauseam." Ustrak v. Fairman, 851 F.2d 983, 987 (7th Cir. 1988)(Posner, J.).

8. No hearing is necessary.

The Court can determine the petition on the papers, or, if the Court desires, by holding a hearing. This can be accomplished fairly promptly.

Provided that there is an opportunity to submit evidence, there is no right to have a hearing on a post-judgment application for attorney's fees. Seabrook Island Property Owners' Association v.

Berger, 365 S.C. 234, 616 S.E.2d 431 (Ct. App. 2005). Evidence on motions may be received by affidavit, unless the court directs otherwise. Rule 43(e), SCRCPP.

The procedure of determining fee petitions, after a merits determination, on the papers or in a motion hearing after exceptions are duly taken, emulates the procedure for taxing costs under Rule 54 (d), SCRCPP, as well as the procedure in the appellate courts. See Rule 222 (d), SCACR.

Avoiding the three-ring circus, or waste of time, of a hearing in which no proper exceptions have even yet been taken going in is within the trial judge's discretion.

Motions are required to state their grounds and the Circuit Court may then hold a hearing on a motion, but is not in all instances required to do so. Order Re Operation of the Trial Courts During the Coronavirus Emergency, No. 2020-12-16-01 states:

(4) Minimizing Hearings on Motions. While the practice has been to conduct hearings on virtually all motions, this may not be possible during this emergency. If, upon reviewing a motion, a judge determines that the motion is without merit, the motion may be denied without waiting for any return or other response from the opposing party or parties. In all other situations except those where a motion may be made on an ex parte basis, a ruling shall not be made until the opposing party or parties have had an opportunity to file a return or other response to the motion. A trial judge may elect not to hold a hearing when the judge determines the motion may readily be decided without further input from the lawyers. If a hearing is held, the hearing shall be conducted in the manner specified by (c)(3) above.

Order Re Operation of the Trial Courts During the Coronavirus Emergency, No. 2020-12-16-01, Para. (c)(4)(S.C. S.Ct. dated December 16, 2020)(page 5 of 21).

9. Fees may be awarded with no time records whatsoever.

In Taylor v. Medenica, the court affirmed a fee award in excess of the principal judgment, where some attorneys kept no contemporaneous time records, some made estimates, and some submitted no estimates.

Since the fees sought here are simply actual fees, or less, incurred on an hourly basis, and not contingent or, except for the future time expected, estimated fees, and since detailed hourly figures are provided and some of the time, additionally, has not been included, the task is not one requiring an

extensive hearing. See Seabrook v. Berger (observing, where the fee sought was “actually incurred,” there was no evidence that the award of same was excessive). See also Taylor v. Medenica (recognizing that trial judge was in a position to judge the amount and quality of work).

Defendant has cited absolutely no case holding that “detailed billing records” are a sine qua non of a fee award, or that client confidential information of the successful party can be invaded perfunctorily by the unsuccessful party upon the prevailing party applying for a fee award. Blumberg states that the “time necessarily devoted to the matter”¹⁶ is one of the several factors, not the “detailed billing records.”

In the instant case, Plaintiff has requested a relatively frugal fee award, while explaining the several bases on which a reasonable award could exceed the amount requested by hundreds of thousands of dollars. Accordingly, this Court should deny the Town’s request for delay and the Town’s request for both parties to incur more fees in the course of extensive arguing over fees.

C. The Town also completely misunderstands the purpose and scope of Rule 26, SCRCP regarding the scope of permissible discovery, the ability of the court to deny or limit discovery, and protective orders.

The Town misses the point of Rule 26. The rule gives the Court broad discretion to deny or limit discovery. Rule 26 is not limited to questions of privilege and procedures for privilege review.

It should be obvious that it is not the Town which would need a protective order if materials were produced. The Town has no reason to move for a protective order other than to present one which is inadequate and defeasible.

¹⁶ This Court encourages care and sufficient thoroughness in checking work, complying with the court’s rules, making corrections, and making cogent presentations. Despite efforts in these regards, work is not always 100% efficient or error free. Care and thoroughness, which often save time for the court, and often safeguard a better result, are encouraged, but they also take attorney time. Attorney time devoted to such goals should not be discouraged per se or penalized.

Plaintiff has Plaintiff's own reasons to request a protective order if Plaintiff is going to offer the materials or if the Court is going to order them produced. The Town has abjectly ignored these reasons.

The provisions of Rule 26(c), SCRCP allow a party to request a protective order "which justice requires to protect a party from annoyance, embarrassment, oppression, or undue burden by expense." Justice requires the protection requested by Plaintiff. Rule 26 is not limited to protecting attorney-client privilege or work product materials.

In its motion, the Town erroneously presents the purpose of a protective order as if it is limited to preserving privilege. The Town has avoided the broader question of confidentiality and lack of necessity in all previous exchanges on the subject and has sought to eliminate references to broadly confidential matters in any proposed protective order.

The Town states with no authority that the only issues are attorney-client privilege and work product protection. At the root of this argument is the Town's own mere declaration that in order for the Town or the Court to determine how many hours were necessary for the attorney to represent Plaintiff, it is necessary for the Town to assess on a granular level, all activities of Plaintiff's attorney in representing Plaintiff. However, this basis for argument is incorrect as a matter of South Carolina law. Accordingly, the Town's argument that nothing should be protected from disclosure except strictly attorney-client privileged and work-product immune materials fails. As discussed further below, the Town also does not accurately describe to the Court even the full protections of the attorney-client privilege and work product protection.

The Town misses the whole point of a Rule 26 protective order and its allowed scope. Plaintiff does not want there to be any misperception that the inquiry is limited strictly to attorney-client privilege or work-product protection: the Court does not have to see any private, confidential bills and private confidential details at all to be given a reliable account of the number of hours devoted to the

matter. Nor does the Town need to see such matters in order to evaluate the 18-page fee petition and supplements for additional time and expenses incurred since then.

- D. A simple protective order and redacted materials would suffice; the Town completely fails to weigh the necessity, and prematurity, of in camera review, and fails to account for procedural uncertainties, impracticalities, unintended consequences, and cumbersome and expensive implications inherent in in camera review of documents, both when in the trial-level court and when the subject is on appeal.**

If after seeing the redacted bills, the Town's counsel has any particular items he contends should not be redacted or which seem to him to be in need of verification beyond the context and wants the matter argued or reviewed, Plaintiff proposes the Town's counsel then work it out with Plaintiff's counsel or ask the judge to review those particular items in redacted form.

This allows Plaintiff notice and the ability to take and advocate a position on any definite position actually taken by the Town, and allows Plaintiff to take a position on any proposed manner of resolving the matter. As noted in the footnote above on the subject of in camera review and in the discussion of Rule 1.6, SCRProfCond in this brief about the problems and pitfalls of this tool, when not carefully employed to the minimum extent necessary, in camera review should not be employed perfunctorily and may create more problems than it solves, unnecessarily invade matters confidential under Rule 1.6, and do more injustice than justice.

To clarify, Plaintiff proposes that the Judge not to be left on his own, in a worse than ex parte situation, to develop an advisory opinion by automatically going through months of unredacted bills needlessly with no steering, no advocacy, and no ability to ask questions or receive informed answers, all for the purpose of seeing whether he thinks there is anything the Town should disagree is confidential. I.e., if there is an issue, the Town is to present it; the Judge does not go looking for it.

If a matter arises of ascertaining that the unseen underlying item does match one of the reasons given, after Plaintiff's counsel has assured that it does, it is possible there would be no problem with letting the Judge look at isolated items to see. But if instead, the Town is going to contend that there

are only one or two valid reasons to redact something, Plaintiff absolutely objects and certainly does not stipulate to that.

Plaintiff also objects to placing wholesale unveiled copies of the bills in the public record, sealed or not, and whether sealed on appeal or not.

Not only are there pending matters remaining in the first set of cases (ending 600, 601 and 602), on which summary judgment against the Town was granted, and the second set of cases (ending 930, 931, and 932), but until the Town abandoned its attempt to condemn by filing notices of abandonment in the second set of cases, Plaintiff and the parties in the related cases were threatened by the possibility of yet a third set of cases. Plaintiff needs to confirm that that threat is truly abandoned, among other things.

Plaintiff therefore emphasizes that this is not a fee issue being handled after all is final and over with.

Plaintiff's counsel wants to treat with extreme care, the serious issue of confidential matters relating to the representation of his clients. They and he are still in litigation until they are not, and until the lack of any further threat is confirmed. The Town's counsel may be able to clarify this for the Court.

The matters into which the Town seems determined to inquire are not necessary under South Carolina law to the simple task of determining the time devoted to the case for purposes of a fee award.

Nevertheless, in Plaintiff's February 8, 2021 brief, Plaintiff stated that Plaintiff's counsel had gone ahead and prepared redacted copies which were ready to go, and that Plaintiff could provide those in redacted form to both the Town's counsel and the Court right away, under the assurance of a protective order that nothing was waived, nothing would be used for other purposes, and nothing would be shared unnecessarily. However, in light of the recent status of the cases, and the problematic nature of in camera review, it is a step too far, and certainly a step that is premature, to get into

providing wholesale unredacted private billing statements to the Court. The next thing would be the Town's inevitable contention that it is unfair for the Court to look at the bills without the Town being able to peruse the bills. Neither currently needs to look at unredacted bills to act on the fee petition.

In redacted form, the bills will still give a very good idea of Plaintiff's counsel's general activities on the case, including night and weekend work, and will provide accurate accounting of time and expenses reflected in them.

In summary, Plaintiff proposes either to entirely deny the discovery sought by the Town or to redact, and leave redacted, all confidential matters relating to the representation of parties who are still in litigation and which matters Plaintiff asserts are not necessary to determining the time devoted to the case for purposes of a fee award under South Carolina law.

If the latter approach is taken, the proposed form of the protective order is attached as "Exhibit 1."

- E. Although the Town's argument that nonessential and highly private information should only be protected if privileged or work-product protected is erroneous, the Town also fails to recognize the breadth of the attorney-client privilege and attorney impression/work product protection, and this would unnecessarily lead to yet further litigation, expense and delay.**

The Town virtually omits all discussion of the very broad protection of attorney impressions and other "work product" and skims presumptuously over attorney-client issues based on its speculations that the bills it has not seen do not include the detail all attorneys are encouraged to provide to a client.

Bills, ledgers, statements and time records that reveal the client's motive in seeking representation, litigation strategy, or specific nature of the services rendered, such as specific legal issues researched, are privileged communications and are protected from disclosure. Chaudhry v. Gallerizzo, 174 F.3d 394, 402 (4th Cir. 1999)(applying, presumably, federal common law of privilege in claim based on federal substantive law).

In Chaudhry, in also considering the discoverability of a research memorandum, the Court further recognized with respect to work-product protection: “[a]n attorney’s thoughts are inviolate, . . . and courts should proceed cautiously when requested to adopt a rule that would have an inhibitive effect on an attorney’s freedom to express and record his mental impressions and opinions without fear of having these impressions and opinions used against the client.” 174 F.3d at __ (internal quotation marks and citation omitted).

Finding that “Appellants fail to establish even the minimal required showing of a substantial need for the materials” and that “[i]ndeed, they advance no compelling arguments toward that end,” the court determined the materials were not discoverable. Id.

South Carolina has long recognized the robust protections afforded by the attorney-client privilege. See State v. James, 34 S.C. 49, 57, 12 S.E. 657, 660 (1891) (“[T]he rule of evidence which holds as inviolable, professional communications between attorney and client, is one of the most important, and in all forms must be maintained in all its integrity.”); see also Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (“The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law.”) (citing 8 J. Wigmore, Evidence § 2290 (McNaughton rev. 1961)).

The attorney-client privilege also applies to communications originating from the lawyer, Floyd v. Floyd, __ S.C. __, __, 615 S.E.2d 465, 484 (2005), but is said to do so only if that communication is based on confidential information provided by the client. Id. Once the attorney has been engaged and has received information in confidence from the client for purposes of the representation, there obviously must be protection of ongoing advice, status reports, updates on activities, news of discoveries and communication of impressions of the attorney to the client about the matter on which the attorney represents the client.

The attorney-client privilege protects not only correspondence between a lawyer and

client; it also protects the attorney's entire file from disclosure. See Pankiw v. Fed. Ins. Co., No. 1:04-CV-2334, 2006 U.S. Dist. LEXIS 35400, at *23–24 (N.D. Ohio, May 31, 2006) (ruling a lawyer's "file in its entirety is privileged under both the attorney-client privilege and the work product doctrine"); Thomas E. Spain, The Attorney-client Privilege and the Work Product Doctrine: A Practitioner's Guide, 900 (3d ed. 2013) ("A third party's attempt to discover the lawyer's files implicates attorney-client privilege issues, fact work product issues, opinion work product issues, and possible opinion work product protection for compilations of intrinsically non-protected documents.") (citations omitted).

The fact that some of the documents or entries in a file or compilation would not, on their own, be privileged—e.g., in the case of a file, pleadings, court orders, hearing transcripts, etc.—does not salvage a request's overbreadth and overreach. A demand for the production of an attorney's entire private client bill may violate the attorney-client privilege and, if so, must yield to that privilege.

A lawyer's bill may also be protected by the attorney work product doctrine. Like the attorney-client privilege, the protection afforded by the work product doctrine is well established:

[I]t is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. . . . This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

Hickman v. Taylor, 329 U.S. 495, 510–11 (1947) (recognizing a privilege for materials gathered by or prepared by an attorney for use in litigation or in anticipation of litigation); see also Tobaccoville USA, Inc. v. McMaster, 387 S.C. 287, 294, 692 S.E.2d 526, 530 (2010) ("The attorney work product doctrine protects from discovery documents prepared in anticipation of litigation, unless a substantial need can be shown by the requesting party.") (citations omitted).

Similar to the attorney-client privilege, the work product doctrine strives to protect representation-related information from being disclosed to an opposing party. The doctrine's purpose is to shield from discovery those documents prepared in anticipation of, or during, litigation — that is, unless a substantial need can be shown by the requesting party. Rule 26(b)(3), SCRCP states:

Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for the trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

This doctrine can be found in South Carolina Rule of Civil Procedure 26(b)(3), Tobaccoville, and its federal counterpart, Federal Rule of Civil Procedure 26(b)(3).

The jurisprudence of Rule 26(b)(3) divides “work product” into two parts: one is absolutely immune from discovery (or “pure”); the other only qualifiedly immune. Nat'l Union Fire Ins. Co. v. Murray Sheet Metal Co., 967 F.2d 980, 983-84 (4th Cir. 1992). The pure work product of an attorney insofar as it involves mental impressions, conclusions, opinions, or legal theories concerning the litigation is absolutely immune to the same extent as an attorney-client communication. Id. at 984.

Like the attorney-client privilege, the protection afforded by the work product doctrine is not limited to legal memoranda outlining a lawyer's analysis, arguments, or strategies; rather, the work product doctrine may protect the attorney's entire file, document, series of documents, or other compilation including otherwise non-privileged information contained therein. See Restatement (Third) of Law Governing Lawyers § 87 cmt. f (2000) (“A compilation or distillation of non-work-product materials can itself be work product.”).

This protection shields the documents from production in future litigation as well. Id. § 87 cmt. j (“Work product prepared in anticipation of litigation remains protected in all future litigation.”); Thomas E. Spain, The Attorney-client Privilege and the Work Product Doctrine: A Practitioner’s Guide, 1150 (3d ed. 2013) (noting that “documents prepared ‘in anticipation of litigation are protected from disclosure even in subsequent actions.’”) (citations omitted); Portland Pipe Line Corporation v. City of South Portland, 2:15-cv-00054-JAW, 2017 U.S. Dist. LEXIS 135704 (D. Me. Aug. 14, 2017); In re Abilify Aripiprazole Prods. Liab. Litig., Case No. 3:16-md-2734, 2017 U.S. Dist. LEXIS 213493 (N.D. Fla. Dec. 29, 2017).

The protection afforded by the work-product doctrine is “broader than the attorney-client privilege.” United States v. Nobles, 422 U.S. 225, 238 n.11 (1975).

Although South Carolina’s courts have not had occasion to consider whether an attorney’s client file is protected in toto by the work product doctrine, courts of other jurisdictions which have analyzed the issue have concluded an attorney’s entire client file is protected by the work product doctrine. See, e.g., Pankiw v. Fed. Ins. Co., No. 1:04-CV-2334, 2006 U.S. Dist. LEXIS 35400, at *23–24 (N.D. Ohio, May 31, 2006) (ruling a lawyer’s “file in its entirety is privileged under both the attorney-client privilege and the work product doctrine”); State ex rel. Curry v. Walker, 873 S.W.2d 379 (Tex. 1994) (holding the work product privilege applied to an entire litigation file, and not only to documents that, considered individually, were attorney work product); National Union Fire Ins. Co. v. Valdez, 863 S.W.2d 458 (Tex. 1993) (same); In re National Lloyds Ins. Co., 532 S.W.3d 794 (Tex. 2017) (“We therefore hold that requests for production of all billing invoices, payment logs, payment ledgers, payment summaries, documents showing flat rates, and audits invade the zone of work-product protection”).

The principle involved is that in a compilation of materials or information by an attorney, considered in compiled form, the information included and the manner in which the information is

compiled, sequenced, referred to, and organized, as well as the juxtaposition of the materials, information and recorded activities – spatially and temporally – all reflect to some degree, the attorney’s decisions, thoughts and impressions.

In short, the Town’s request that the Court order production of entire unredacted bills to the Court and entire bills to the Town redacted only to remove only strictly privileged matters as defined by the Town ignores the attorney work product doctrine and is unreasonable for that additional reason.

CONCLUSION

The bills are private and confidential and protected under Rule 1.6. It is not legally or practically necessary for the Town to have the bills and it is not necessary or advisable for the Court to have them.

The Town’s request for automatic and unguided wholesale review of months of private bills in camera at the onset perfunctorily ignores the prematurity of, and lack of protection in, having the Court review materials that Plaintiff otherwise has the right to keep confidential from the Court.

The time spent, and a sensible way to divide it, have already been provided on a frugal basis in accordance with South Carolina law, and the fees can be awarded without a “federal case.” However, if these materials are to be submitted, they could be submitted subject to a protective order as outlined in Exhibit 1 hereto.

The Town once proposed that, before the fee trial the Town proposed, the Town engage in discovery and other matters for a period approaching the entire time the overall case had been pending, even with all the delays in the case by the Town.¹⁷ This proposition came from the very party who

¹⁷ Just weeks after this case was commenced, the Town filed a motion to expedite the case, but then shortly thereafter, filed a motion to block discovery from the Town and ignored discovery without having received a ruling. As will appear from the case file, when the Town did not ignore discovery entirely, it seldom furnished responses to written discovery or replies to requests for scheduling on time. When it did respond to written discovery, it responded incompletely, often repetitively. The Town moved to continue the hearing of Plaintiff’s summary judgment motion. After summary

apparently wishes to mount arguments that the time Plaintiff's counsel was forced to spend on this case up to this point was in some way not necessary. Without denial of the Town's motion, the Town will be well on its way to achieving the four month delay the Town sought from the beginning.

Plaintiff proposes either to entirely deny the discovery sought by the Town or to redact, and leave redacted, all confidential matters relating to the representation of parties who are still in litigation and which matters Plaintiff asserts are not necessary to determining the time devoted to the case for purposes of a fee award under South Carolina law.

If the latter approach is taken, the proposed form of the protective order is attached as "Exhibit 1." The Town's motion should be denied.

Respectfully submitted,

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3/17/21

judgment was granted, and Plaintiff rejected the Town's motion to disqualify Plaintiff's counsel, the Town announced it would add new counsel, and before even doing so, requested delay.

When mentioning a desire for over four months' delay to conduct fee discovery, the Town did not specify whether the proposed discovery was proposed to be mutual and reciprocal. If the instant discovery is allowed with no prior Rule 34 request, it would be proper to order disclosure to Plaintiff on the same basis and timetable, of the Town's counsel's rates, records, and detail in recordkeeping, including attorney impressions, decisions not to research, decisions not to cite authority, decisions not to state grounds for motions, decisions not to consult before filing motions, decisions to seek continuance or blockage of discovery, etc.

Exhibit A to Plaintiff's March 17, 2021 Memorandum
– Plaintiff's Conditionally Proposed Terms of Protective Order

PROTECTIVE ORDER

1. The copies of any materials filed by the Court under this order in sealed form will still be considered part of the record at the actual end of the case, because presented to the Court, and can be used in any appeal, but only under seal. Discretion is nevertheless assumed.

2. No disclosure, inadvertent or otherwise, of the bills and fee agreement addressed herein, or of items within them, shall operate as a waiver of attorney-client privilege or as any erosion of work-product immunity from disclosure, in this case, in any appeal, in any other case or at any other time, or in any related matters.

3. The materials addressed herein will not be unnecessarily filed in toto. If there are specific redacted items to be referenced, the date of the document and the date of the items may be referenced and quoted or the pages containing the items may be attached as an exhibit. It is assumed that the Court, the Town's counsel and the plaintiff's counsel can all "read from the same book" in most instances. To the extent practicable, when materials are filed under seal, only the pages reviewed will be filed.

4. The materials addressed herein will be otherwise provided only to persons who work directly for the Town's new counsel OR who have expertise on the reasonableness of attorney's fees in South Carolina, as that issue is the sole purpose of disclosure and addressing that issue is the sole use to which the materials may be put. To clarify, licensed attorneys who are familiar with the case, including the Town's Town Attorney and other current or former counsel of record in the case meet this qualification, but only if determined to be needed within the spirit of the succeeding paragraph, but no person at the Army Corps of Engineers does.

5. The materials will not be provided to any person, regardless of employment or expertise, not needed for the Town to have its meaningful opportunity for review.

6. Greater than reasonable care shall be taken with respect to any means of storage of the materials or any means of transmission at any time other than in electronically filing using the court's ECF system in the instances permitted in this order. Care in storage includes segregation within more general areas of electronic, paper, or other storage. Care in electronic transmission includes transmission to only one recipient at a time in each instance other than a transmission to the Court, in which case only the Judge and one lawyer for each party shall be included.

7. The materials will not be used in any deposition, discovery request, motion or questioning at hearing or trial in this or any other case, other than in proceedings in the instant case pertaining directly to the fee award.

8. The Town's new attorney shall maintain a record of all persons to whom the materials are provided and as to each, shall have an electronic or other record of the person's agreement to be bound by the order, violation of which is punishable by contempt or other sanction, including sanction of the Town for the violations of others. This record shall be provided to Plaintiff after the fee petition is decided by this Court, without respect to pendency of any appeal, or shall be provided sooner on demand in the event reasonable suspicion of breach is articulated.

9. When all proceedings in the instant case bearing this civil action number are final, the materials will be returned or destroyed.

10. Plaintiff will carefully redact as set forth below, in the instance of only one plaintiff out of the three plaintiffs in the three related cases ending 600, 601 and 602, a copy of the plaintiff's private fee agreement and the private billing statements dated 8/5/20, 9/18/20, 10/9/20, 11/18/20 and 1/22/21, and any other available billing statements forming a basis for Plaintiff's claim for attorney's fees.

11. Plaintiff represents that the fee agreement and the bills for the other one-third-fee-seeking plaintiff are the same. Plaintiff represents that the bills for the other plaintiff not currently requesting attorney's fees are the same. Plaintiff represents that each plaintiff in the three related cases receives a bill for a third of the total recorded time spent on the case and that out-of-pocket expenses are virtually the same, with a minor difference or two, such as a motion filing fee. To confirm these representations, Plaintiff will also produce the first and last pages of the billing statements for the other two plaintiffs, redacted in the same manner, and the first and last pages of the fee agreement (and any other pages containing unredacted material) of the other one-third-fee-seeking plaintiff redacted in the same manner.

12. Specifically, Plaintiff may by redaction assert a claim that certain information contained in the billing statements should be protected from disclosure for one of the reasons set forth in Plaintiff's briefs of February 8, 2021, March 1, 2021 and March 17, 2021.

13. On or before the date four days from the later of entry of this order or entry of this Court's order ruling on the Town's motion for reconsideration of the grant of summary judgment against the Town, identical versions of the redacted bills will be provided to both the Court and the Town's new counsel.

14. However, like other discovery, the redacted bills will not be filed initially. If any of the redacted materials are filed of the Court's initiative or at the request of any party, they will be filed under seal. As referenced herein, pages of redacted materials containing specific items to be referenced may be attached as an exhibit to a memorandum or other filing and not under seal.

15. The redacted versions and any other materials filed under seal, once filed under seal, will remain under seal as part of the record of the action, including the record in an appeal if some or all of the material is designated for inclusion under seal in the Record on Appeal.

16. Upon request of the Town made within ten days of receipt of the redacted bills, Plaintiff, will, within ten days of the request, provide to the Town, footnoted copies of any redacted entries identified by the Town as the subject of the request. The footnoted copies provided to the Town will, for each redaction which was the subject of the request, expressly state the reason for the redaction in a manner that, without revealing the information itself, will enable counsel for the Town to assess the probable merits of the asserted basis for redaction without destroying the reason for redacting the item in the first place.

17. Upon presentation to the Court on motion in the manner provided herein, of any footnoted items on which any dispute or request for verification remains, the parties may discuss or move for establishment of a manner of resolving the issue.

18. The fee agreement may also be redacted to show only the identity of the client, the basis of the fees or charges, and any contingency or other term affecting the present basis, calculation, or client obligation to pay such fees or charges.

19. If any other or additional similar materials are produced for purposes of the fee petition, they shall be handled in the same manner and be covered by this order.

AND IT IS SO ORDERED.

[End of proposed order]

March 17, 2021 Town brief in support of motion to reconsider summary judgment.

STATE OF SOUTH CAROLINA	)	IN THE CIRCUIT COURT OF THE
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN	)	CIVIL ACTION NO. 2020-CP-22-00600
	)	
Sunset Lodge, LLC,	)	
	)	DEFENDANT’S MEMORANDUM
Plaintiff,	)	IN SUPPORT OF THE MOTION
v.	)	TO ALTER OR AMEND JUDGMENT
	)	
Town of Pawleys Island,	)	
	)	
Defendant.	)	
_____	)	

The Defendant, TOWN OF PAWLEYS ISLAND (“Town”), hereby submits the following Memorandum in Support of its Rule 59(e) Motion to Alter or Amend the Court’s January 20, 2021 Order granting summary judgment. Identical memoranda are being filed in the “Sunset Lodge” (2020-CP-22-0600), “Beattie” (2020-CP-22-0601), and “Stanton” (2020-CP-22-0602) cases. In addition to the arguments set forth below regarding the substantive basis for the Order and the relief granted therein, to the extent the plaintiff seeks an award of attorney fees in this action the Town further craves reference to the authorities and arguments set forth in its March 1, 2021 *Motion for Protective Order for Production of Documents Relating to Plaintiff’s Motion for Attorney Fees* in the Sunset Lodge and Beattie cases in support of its request for amendment of the Order to provide for production of billing records and a procedural framework for the fee petition.

1.) The summary judgment Order should be amended to grant Town leave to amend its Condemnation Notice to address the procedural matters discussed in the Order

The Town respectfully asserts that the Order should be amended to provide that the Court declines at this time to dismiss the Condemnation Notice and, instead, grants leave to the Town to amend the Notice and condemnation initiation procedure to address the issues discussed in the Order. This proposal was first raised in the Town’s November 24, 2020 *Memorandum in*

Opposition to Plaintiff's Motion for Summary Judgment, which stated on page 9 that “[t]he Court, if it deems necessary, may order the Town to serve an amended notice to cure the defect (if any).” The S.C. Supreme Court has made it clear that deficiencies in a condemnation notice may be properly addressed by an amendment in lieu of outright dismissal of the condemnation proceedings.

In Hill v. York Cty. Nat. Gas Auth., 384 S.C. 483, 682 S.E.2d 809 (2009), the Court considered whether a natural gas authority was empowered to condemn property for certain purposes under a particular legislative enactment (“Act 193”). The Court reviewed the legislative intent of Act 193 and determined that the condemnor was acting within its statutory authority. However, the condemnation notice incorrectly referred to a different legislative provision as the source of authority for the condemnation. Although the Eminent Domain Procedure Act requires that a condemnation notice must include “a reference to the condemnor's legal authority to take the property”, § 28-2-280(c)(4), the Court declined the landowners’ request that the case be dismissed on that basis. As the Court explained,

Landowners' final challenge concerns the trial court's failure to dismiss the condemnation proceedings based on the incorrect statutory authority referenced in the original condemnation notices. The trial court ruled that the Authority's “failure to cite the proper statutory authority in the Notice of Condemnation may be appropriately redressed by an amendment to the notice.” We observe that no party was prejudiced by the reference to the incorrect statutory reference, for all parties were well aware of the central dispute concerning legislative intent in Act 193.

Hill at 491, 682 S.E.2d at 813. *See also* 29A C.J.S. Eminent Domain § 314 (citing Hill for the proposition that “a defect in the notice is not a ground for dismissal of the condemnation action where there was no prejudice to the landowners.”).

The S. C. Court of Appeals, in an opinion later reversed on other grounds, took a similar approach after finding deficiencies in a condemnor’s utility corridor route analysis. As the Court

explained, “[t]he parties have not cited any reported South Carolina case in which a planned condemnation was permanently enjoined by a court because the court found the condemning authority abused its discretion in the selection of a chosen route. . . . We vacate this portion of the master's decision and remand with instructions that the master direct Santee Cooper to re-evaluate its proposed route and the alternate routes proposed by Southern.” S. Dev. Land & Golf Co. v. S.C. Pub. Serv. Auth., 305 S.C. 507, 514 – 16, 409 S.E.2d 428, 432 – 434 (Ct. App. 1991), *aff'd* in part, *rev'd* in part, 311 S.C. 29, 426 S.E.2d 748 (1993).

In the case at hand, the Court should amend its summary judgment Order to remove the ruling that “the defects in the way the Town went about initiating and pursuing its condemnation action require the action to be invalidated, dismissed, and prohibited . . . [t]he Town’s Condemnation Notice is quashed and the action commenced by it is hereby declared ended without prejudice[.]” (pp. 23 – 24). Instead, the Court should specifically grant Town leave to amend the Condemnation Notice and implement a process to address the issues discussed in the Order regarding initiation of the condemnation and service of the Condemnation Notice.

Like the landowners in Hill, the plaintiff in this case would not be prejudiced by amendment of the Condemnation Notice and associated initiation procedure. The plaintiff has been aware of what the Town seeks to acquire for approximately two years. In February 2019, the Town initiated its efforts to engage in negotiation with the plaintiff for acquisition of an easement in the form required by the Corps.¹ (Fabbri Affidavit ¶ 5 [Exh. A to Town’s 11/24/2020 Memo. in Opp.]). Subsequently, the May 18, 2020 Town Council Resolution made it clear that Council’s intention

¹ Even if the plaintiff subjectively believes that the Town’s efforts to negotiate were not “reasonable and diligent” as contemplated in § 28-2-70(B), the same statute provides that failure to meet that standard is “not a defense to a condemnation action.” The record appears to be devoid of any indication that there was a dispute over the amount of compensation; instead the disputed issue was the scope of the easement.

was to authorize condemnation of an easement as required by the Corps.² (Exh. B to Town's 11/24/2020 Memo. in Opp.). The October 12, 2020 Town Council Resolution made this even more clear by attaching the specific language to be included in the description of the easement. (Exh. B). As in Hill, all parties have long been aware of the nature of the "central dispute."

Moreover, while the plaintiff has the right to assert objections to the condemnation initiation procedure employed by the Town, it is clear in this matter that these procedural objections were only raised because of the underlying substantive objections to the scope of the easement Town seeks to acquire. The claims at the heart of the plaintiff's challenge action include the following:

- (a) That a "[v]ague, indeterminate, remote future 'need' after possibly more than 22 years is beyond the pale." (Order, p. 12 (reciting plaintiff's claims));
- (b) "Excessive scope is proven by the completed project no matter when an easement might be needed in the remote future." (Order, p. 12 (reciting plaintiff's claims));
- (c) "Certain features in the condemnation papers have already been agreed to be unnecessary and in some cases have been removed for others as unnecessary." (Order, p. 12 (reciting plaintiff's claims)); and
- (d) "[T]he history of the Town's attempts to obtain the easements . . . is rife with, if not fraud and bad faith, then with an abuse of discretion." (Plaintiff's Motion for Summary Judgment, p. 2).

None of these claims challenging the Town's right to condemn the easements were addressed in the Order. The Court specifically stated that it "[did] not find it appropriate to address Plaintiff's claims that the Town acted in fraud, bad faith, or related claims." (Order p.12, fn.4).

The plaintiff's interest in having these issues adjudicated would not be prejudiced in any way by amendment of the summary judgment Order to grant the Town leave to amend the

² For example, the May 18, 2020 Resolution stated that its purpose was to authorize acquisition of the "necessary easements" for the Corps.

Condemnation Notice and initiation procedure. To the contrary, with these substantive issues outstanding and undetermined, both parties would be prejudiced by the potential need to engage in a lengthy appeal of the current Order (particularly in the event of any associated attorney fee award) before these substantive issues are revisited for a final determination of the Town's power to condemn the easements sought to be acquired. *See, e.g.*, S.C. Code Ann. § 28-2-470 ("All proceedings under the Condemnation Notice are automatically stayed until the disposition of the action, if any, unless the landowner and the condemnor consent otherwise.").

Amendment of the Order to grant Town leave to amend the Condemnation Notice and the associated condemnation initiation procedure would also defer the question of attorney fees until the true end of the matter, when a court adjudicates the plaintiff's underlying substantive objections and makes a determination of whether "the condemnor has no right to take all or part of any landowner's property." S.C. Code Ann. § 28-2-510(A). To provide context as to the preliminary nature of the issues addressed in the Order and any associated attorney fees, it should be noted that the plaintiff filed its Motion for Summary Judgment on August 21, 2020, at the earliest possible opportunity exactly 31 days after the date the challenge action Complaint was filed (indicating that plaintiff's counsel already believed at that time that there were good grounds to support the motion). Deferral of the question of attorney fees would also address the plaintiff's stated concerns about producing billing records prior to determination of the underlying substantive questions.

The Court has broad authority to provide the Town an opportunity to address the issues discussed in the Order so that the parties may proceed to a trial on the substantive challenge questions. "[A] summary judgment motion, when granted, constitutes the final determination of all the issues that exist between the parties." Brandt v. Gooding, 368 S.C. 618, 625, 630 S.E.2d 259, 262 (2006), disapproved on other grounds in later proceedings, 636 F.3d 124 (4th Cir. 2011).

In this case, a number of important issues, and in particular the full scope of the substantive dispute between the parties regarding Town's power to condemn the easements, has not yet been adjudicated. Town asserts that, assuming the Court is not willing to otherwise amend its rulings regarding the procedure used to initiate condemnation, this would be an appropriate occasion for application of Rule 56(d), which provides as follows:

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It may thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

Thus, in amending its Order the Court could exercise its discretion to include similar rulings regarding the procedure used to initiate the condemnation but also recognize that the case has not been fully adjudicated on the motion and grant the Town leave to address the issues discussed by the Court with an amended Condemnation Notice and initiation procedure.

2.) Additional bases to alter or amend the Summary Judgment Order

a. The Court should alter or amend its finding regarding "completion" of the beach renourishment (ref. Order p. 9)

The Order, on page 9, cites to the Stanton Affidavit and states that "the Town proceeded to complete the actual overall renourishment without the involvement of the Corps. . . . The renourishment is done." However, as set forth in the affidavit of the Town Administrator, additional components of the initial work, specifically, planting sea oats and installing sand fences, have yet to be performed and are proposed to be completed by the Corps as part of the "Partnership Project." (Fabbri Affidavit ¶ 7). The Order should be altered or amended to acknowledge there is

evidence in the record that, in addition to future periodic renourishments and storm damage repairs, the sea oat planting and sand fence installation have not yet been performed.

b. There is evidence that the Town Council relied on legitimate criteria for a rational decision-making process (ref. Order p. 13 – 14)

The Order should be amended to remove the statements that “there is no evidence that Town Council knew and understood the language of the easement which was later described in the Condemnation Notice” and that “Town Council failed to establish legitimate criteria for a “rational decision-making process which is supported by facts’ with respect to numerous material features Plaintiff had objected to.” (Order p. 13). The affidavit of the Town Administrator provides evidence that Corps involvement in the beach renourishment “Partnership Project” would ultimately bring in many millions of dollars in federal funds to renourish and repair the Town’s beach, (Fabbri Affidavit ¶ 7, 9); that the Corps required certain easement terms as a condition precedent to its participation, (Fabbri Affidavit ¶ 5, 8, 11(vii)); and that the Town only moved forward with pursuing condemnation after years of discussing the project and relevant easement requirements with the Corps, (Fabbri Affidavit ¶ 4 – 8). Accordingly, there is at the very least a question of fact as to the Town’s and Town Council’s knowledge and consideration of the terms of the easements sought to be condemned, and the Order should be amended to remove the referenced statements as a basis for any entry of summary judgment.

c. There is evidence that the scope of the easement described in the Condemnation Notice was authorized by the Town Council Resolution (ref. Order pp. 13 – 14, 22 – 23)

As the Court notes in its Order, the text and easement diagrams of the Sunset Lodge and Beattie Condemnation Notices refer only to condemnation of a “beach renourishment easement”. (Order pp. 22 – 23; Stanton “Affidavit of Condemnation Notice and Associated Papers First Served” Exh. B, C). The language providing for certain specific easement terms the plaintiff finds

objectionable was included not in the text of the Condemnation Notice itself, but instead in “a separate granting document” attached to it when it was served. (Order p. 23). Accordingly, based on the analysis in the Order, there does not appear to be a basis to conclude that the Sunset Lodge and Beattie Condemnation Notices (or appraisals, for that matter) exceeded the scope of the May 18, 2020 Town Council Resolution authorizing condemnation of an easement for beach renourishment.

Furthermore, even the Stanton Condemnation Notice, which includes in its text more specific terms regarding the scope of the easement sought to be acquired, (Stanton “Affidavit of Condemnation Notice and Associated Papers First Served” Exh. A), does not exceed the scope of the May 2020 authorizing resolution. The Resolution made it clear that Council’s intention was to authorize condemnation of an easement as required by the Corps.³ (Exh. B to Town’s 11/24/2020 Memo. in Opp.). The Town Administrator confirmed as much in his affidavit. (Fabbri Affidavit ¶ 8, 11(vii)).

Accordingly, the Order should be amended to remove the holding that the Condemnation Notice exceeded the scope of what was authorized in the May 18, 2020, Town Council Resolution. At most, as discussed above, the Court should grant Town an opportunity to amend the Condemnation Notice and initiation procedure in order to address any such issue regarding the scope of the Condemnation Notice relative to the authorizing resolution.

d. South Carolina law does not require strict compliance with procedural requirements in the Eminent Domain Procedures Act (ref. Order pp. 14 – 17)

The Order includes a discussion of case law from other jurisdictions imposing a requirement of strict compliance with procedural requirements in pursuing a condemnation.

³ For example, the May 18, 2020 Resolution stated that its purpose was to authorize acquisition of the “necessary easements” for the Corps.

However, it does not appear that South Carolina's appellate courts have ever imposed such a requirement. Despite the fact that the General Assembly included in the Act a specific section setting forth its legislative intent, § 28-2-20, no strict compliance is statutorily imposed. In fact, the S.C. Supreme Court opinion that appears to come the closest to addressing this issue indicates that strict compliance with procedural requirements is not required, at least absent some prejudice to the landowner. See Hill, supra. Accordingly, the Order should be amended to state there is no requirement for strict compliance with procedural requirements under the Eminent Domain Procedure Act.

e. The appraisal prepared on behalf of Town satisfied the requirements of the Act (ref. Order pp. 17 – 21)

The Eminent Domain Procedure Act does not include, and has not been interpreted by South Carolina's appellate courts to include, any requirement than a pre-condemnation appraisal must be adjudicated to be "bona fide", "accurate", or "fair" to preclude a successful challenge action. Instead, the Act simply states that "the condemnor shall cause the property to be appraised to determine the amount that would constitute just compensation for its taking", § 28-2-70(A). The Act defines an appraisal as "an opinion as to the value of compensation payable for property, prepared by or under the direction of an individual qualified by knowledge, skill, experience, training, or education to express an opinion as to the value of the compensation." § 28-2-30(2).

There is no evidence to support any finding that the appraisals in this action fail to satisfy the very basic requirements set forth in the Act. The appropriate forum for a landowner to contest the fairness and accuracy of an appraisal is in the underlying condemnation proceedings to litigate the amount of just compensation. The approach applied in the Order, which requires a Court to analyze the discrete terms of a condemned easement in order to determine whether an appraisal is "bona fide", would invite landowners to initiate challenge actions to contest appraisals believed to

be inaccurate. This would in fact be contrary to the so-called “quick take” procedure employed in the Act, which allows a condemnor to take possession of the property and move forward with important public projects after the condemnation notice is filed. § 28-2-90.

Here, the appraiser appraised, in general terms, acquisition of a beach renourishment easement as authorized by Town Council and set forth in the Condemnation Notice. Consideration of whether the appraisal considered the full scope of the burdens imposed by the easement is a matter of just compensation and does not implicate the authority of the Town to condemn. That is particularly the case where, as here, there is clearly no prejudice to a plaintiff who was going to challenge the substantive basis of the Town’s authority to condemn regardless of what the appraisal said. The Town sufficiently fulfilled the requirement to obtain a pre-condemnation appraisal, and the Court’s Order should be amended accordingly.

f. The Act does not prohibit service of an appraisal simultaneously with the Condemnation Notice (ref. Order pp. 18, 22 – 23)

As set forth above, South Carolina law does not require strict compliance with condemnation procedural requirements in the absence of prejudice to the landowner. It follows from this that, particularly in a situation where a landowner clearly intends to pursue other grounds for a challenge action and suffers no prejudice based on the timing of the appraisal submission, any failure to provide the appraisal literally “before” service of the condemnation notice does not constitute an abuse of discretion or any other basis for a challenge. The record and pleadings demonstrate that, at a minimum, Town fulfilled its duty to substantially comply with the Act’s requirement to provide the pre-condemnation appraisal and that the plaintiff has suffered no prejudice whatsoever as a result of any deviation from strict compliance. The Court’s Order should be amended accordingly.

g. There was no actionable failure by the Town to engage in pre-condemnation negotiation (ref. Order pp. 17 – 21)

At the outset, the Act simply does not require any attempt at negotiation after the appraisal is provided. These two procedural matters are stated separately and without any chronological link in the Act. *See* § 28-2-70(A), (B). Often, as the record and pleadings clearly indicate occurred here, a condemnor will engage in an extended period of negotiation of the acquisition before going to the trouble and expense of obtaining an appraisal.

Furthermore, the Act plainly states that any failure to engage in negotiation is “not a defense to a condemnation action.” § 28-2-70(B). Even if that were not the case, the record demonstrates that Town, at a minimum, substantially complied with the negotiation requirement and that there has been no prejudice to the plaintiff. (Fabbri Affidavit ¶ 5, 10). Plaintiff has made no showing of any actionable failure to engage in negotiation, and the Court’s Order should be amended accordingly.

Conclusion

In conclusion, the Defendant Town of Pawleys Island respectfully requests that the Court alter or amend its Order granting summary judgment as set forth in Town’s motion and herein and to allow the action to proceed to a trial on the merits of the parties’ dispute.

[Attorney signature to follow]

Respectfully submitted,

s/ William C. Dillard, Jr.
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Also for Defendant:

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March 17, 2021

March 18, 2021 Landowner brief opposing Town motion to reconsider.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN	)	CIVIL ACTION NO. 2020-CP-22-00600
	)	
Sunset Lodge, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Town of Pawleys Island,	)	
	)	
Defendant.	)	
	)	

PLAINTIFF’S PARTIAL MEMORANDUM IN OBJECTION TO
AND IN OPPOSITION TO
THE TOWN’S MARCH 17, 2021 MEMORANDUM SUBMITTED BY
THE TOWN IN SUPPORT OF THE TOWN’S JANUARY 29, 2021 MOTION FOR
RECONSIDERATION

The Town has filed a March 17, 2021 memorandum in support of a January 29, 2021 motion to reconsider a January 20, 2021 ruling on Plaintiff’s August 21, 2020 motion for summary judgment.

Plaintiff objects.

Plaintiff had no meaningful notice of the actual grounds for the motion for reconsideration. Plaintiff so stated in a promptly filed return to the motion. There was not even an attempt by the Town to supplement or amend its motion.

The motion provided no notice of the arguments now made by the Town, and Plaintiff does not have time to adequately and fully respond to the brief of the Town filed yesterday. Plaintiff barely has time to provide the instant extemporaneous response.

The January 29 motion to reconsider does not comply with Rule 7(b), SCRCP and therefore does not constitute a motion. Arguments made in the Town’s March 17 brief are on matters not raised in the January 29 motion and therefore are not raised, not preserved, not properly before the Court, and not presented with adequate notice to Plaintiff. They are presented prejudicially late.

If the Court does not deny the motion from the bench or beforehand, Plaintiff needs a meaningful opportunity to respond.

FURTHER PARTIAL DISCUSSION

All courts have recognized that condemnation of a person's property is a grave and serious business.

Holding the landowner and the status of the landowner's property hostage and requiring sustained defensive expensive litigation while the condemnor tries again and again to get by with something that is still fundamentally wrong is not contemplated by the South Carolina Eminent Domain Procedures Act, enacted in 1987.

Contrary to the Town's present implications, the Town has not merely failed through one scrivener's error or harmless oversight to comply with a minor clerical requirement. The Town has, among other things, fundamentally and incurably failed to comply with jurisdictional requirements which are elements of establishing the right to condemn.

Within the overall context of the statutory scheme, the steps required in the statutes are designed to protect the landowner and prevent the very things the Town has engaged in. The Town has in many cases "failed" in these matters either recklessly or deliberately, and repeatedly.

While not required for success of the challenge action, this was duly established in the prior summary judgment procedure.

The Town's efforts in its brief to excuse its numerous fundamental failures by referring to them, rather, as "substantial compliance," should be rejected. It was proper to dismiss the condemnation action which is the subject of this challenge action and the Town's motion to reconsider should be denied in every respect.

The Town has had since at least as early as September 11, 2020 – at which time the Court heard argument of the Town's motions to dismiss, to require a ten million dollar bond, and to expedite the

case -- in which to research the “request for leave to amend” arguments the Court ruled against then. These arguments are now made again a day and a half before a hearing. The transcript of the September hearing should be ordered, particularly surrounding the colloquy in which the Town’s counsel asked the Court, essentially, “Your Honor, look at my notice and tell me what is wrong with it.”

The Town has had a nearly equal amount of time to then give both Plaintiff and the Court fair notice of intent to repeat the previously rejected arguments and to present these arguments and to seek anything in them that is sought.

In these arguments, the Town now cites only two cases as authority. One was a South Carolina Court of Appeals case which was subsequently overruled by the South Carolina Supreme Court, and the other was a case in which the defect the landowner complained of was only one thing, was little more than a clerical error or a reference to the wrong enabling legislation, rather than a deliberate substantive failure to perform a condition precedent, accompanied by less than honest dealings and a false certification in the condemnation notice itself.

To opposing counsel’s credit, these differences are either stated or alluded to. A few more differences follow. The Court of Appeals case, S. Dev. Land & Golf Co. v. S.C. Pub. Serv. Auth., 305 S.C. 507, 409 S.E.2d 428 (Ct. App. 1991), involved only a vague appellate remedy of “remand to reconsider,” not, as implied by the Town, a remand to amend or allow amendment. The Court of Appeals made no ruling and provided no guidance on what might be resolved, permitted or ruled on in the lower court after remand, or what procedure would be followed. If, as was likely, the property to be condemned changed as a result of the condemnor performing the proper consideration for which the matter was remanded, for example, the appraisal would have to be done over and a new condemnation action would have to be instituted. If the condemnor dropped the condemnation as a result, no new action would be required. S. Dev. Land & Golf Co. (Ct. App. 1991) was then reversed by the S.C.

Supreme Court specifically on the remedy. The S.C. Supreme Court recognized a different and additional problem with the condemnation and the condemnor's actions. See S. Dev. Land & Golf Co. v. S.C. Pub. Serv. Auth., 311 S.C. 29, 426 S.E.2d 748 (1993).

The South Carolina Supreme Court agreed that, as in the instant case, the condemnor had failed to conduct any factor-weighting analysis and thus, the condemnation was not properly brought. However, the S.C. Supreme Court held that there was no need for remand and that not only should the condemnation action be dismissed, but that it should be permanently barred from re-institution, because the condemnor had previously represented that there would be no need for an easement on the landowner's property.

Undersigned counsel's previous research on the topic of amendment across the country, under variegated statutes and procedures for condemnation, revealed no good authority for the Town's renewed proposition that it should be able to futilely attempt to "amend" its errors while Plaintiff stands by at Plaintiff's expense, enduring a proceeding that should not have been brought in the first place. Undersigned counsel recalls one case in another jurisdiction in which the condemnor, after having its first condemnation attempt dismissed for failure to properly describe the easement, made a mistake in its second action in which the easement was properly described, but the condemnor mistakenly cited the wrong enabling statute in the notice or failed to cite both applicable statutes in the same notice or something to similar effect. If the Court desires further analysis, Plaintiff should be given adequate opportunity to provide it.

Whatever is not new in the Town's March 17 brief is a re-hash without notice. I.e., no notice of the items to be re-hashed was provided in the Town's motion to reconsider served on Plaintiff within ten days of the summary judgment order, back when the matter had been recently fully argued and freshly decided.

Plaintiff filed a summary judgment motion on August 21, 2020, along with a detailed affidavit of carefully checked undisputed facts. In late November, a little before the December 4 hearing, the Town filed an opposing affidavit which raised virtually no dispute of the facts in the August affidavit, which were material to the motion.

Plaintiff has long enough been on the receiving end of lack of notice and lack of proper procedure. In the events leading to the condemnation attempt, and in the litigation, there has been prejudicial surprise, lack of notice, late acting, and deliberate decision to proceed contrary to due process and fairness, if not also contrary to rule or statute.

Where Plaintiff has sought to proceed properly, the Town has sought to proceed improperly or with delay in nearly every facet of this matter from the beginning, all to the great delay, expense and prejudice of Plaintiff. It is time for it to be ended.

It is still an undisputed fact that in 2019, with foreknowledge, on short notice to all landowners, the Town requested easements without disclosing in advance what would be inserted in them.

It is still an undisputed fact that the Town submitted a falsely procured consolidated appraisal of 109 properties to the Corps of Engineers in order to induce approval of a federal project. The appraisal was limited to the appraisal of easements. One hundred and nine easements were appraised. The appraisal was falsely procured because it is an undisputed fact that, although the Town had the information, the Town withheld and did not submit to the appraiser, the terms of the easement to be appraised.

It is still an undisputed fact that, before the renourishment work was started or completed, Plaintiff offered an easement, but not exactly the easement the Town first requested.

It is still an undisputed fact that the Town decided that the easement offered by Plaintiff was not the exact interest in property the Town sought and would not be accepted.

It is still an undisputed fact that from the onset, the Town actor in charge has been acutely aware of the importance of the precise terms of the easement and that those terms are the material defining term of the exact interest in property that the Town seeks.

It is still an undisputed fact that that the Town agreed with one or more landowners to change the easement in one or more particulars and to accept easements thus containing some mitigation of the terms and scope of the easement initially requested. (The easement initially requested is hereinafter referred to as the “Unmitigated Easement.”)

It is still an undisputed fact that the Town decided in 2019 to not wait for Corps of Engineers participation in the project, and declared publicly that no easements would be necessary.

It is still an undisputed fact that between October 2019 and March 2020, the Town completed 100% of the renourishment work, i.e., of putting sand on the beach, and did so without asking Plaintiff again for an easement.

It is still an undisputed fact that the Town Council, either through ignorance or complicity, voted in May 2020 to condemn “an easement” on the basis that certain landowners “would not grant an easement,” and did so without any consideration or weighing of the controversial precise terms of the easement to be condemned and thus also did so with no definition of the exact interest in property to be condemned, other than, generically, an easement to put sand on the beach.

It is still an undisputed fact that the Town thereafter procured an appraisal while again withholding from the appraiser the precise terms of the easement to be appraised. The appraisal was procured in this manner for purposes of making an offer to the landowner and avoiding condemnation. The appraisal obtained in this manner was obtained knowingly, without defining the exact interest in property which was appraised, and thus also without accurately describing the property.

It is still an undisputed fact that by manipulating the appraisal, and thus, the amount of the appraisal, the Town also manipulated the amount the Town was required to pay into court at the outset

of the condemnation proceeding, and therefore paid in the wrong amount, failing to adequately protect Plaintiff; this is the same Town which now balks at paying litigation expenses.

It is still an undisputed fact that the Town failed to furnish the appraisal to the landowner before commencing the condemnation action.

It is still an undisputed fact that even if the Town had furnished the fraudulently obtained appraisal before commencing the condemnation action, the Town still would have failed to provide the required appraisal before commencing the condemnation action.

It is still an undisputed fact that the Town falsely stated in the condemnation notice which was used to commence the condemnation action that the appraisal had been furnished before commencing the condemnation action. This was no scrivener's error.

It is still an undisputed fact that the Town failed to furnish the appraisal even at the time of commencing the condemnation action.

It is still an undisputed fact that after the Town commenced the condemnation action, all three landowners had to request, if not demand, a copy of the appraisal.

It is still an undisputed fact that the appraisal does not in fact take into account numerous details of the requested easement as to which the chief Town actor was acutely aware there was controversy and disagreement.

It is still an undisputed fact that if the three landowners had not filed a challenge action, they would have been forced -- with no valid prior offer to purchase, and with an incorrect amount paid into court by the Town -- to defend a condemnation action in which only limited issues could be considered.

It is still an undisputed fact that, had the landowners proceeded to defend such a condemnation action, the exact interest in property being condemned would have been different from the exact

interest in property which had been appraised and which had formed the jurisdictional basis for the right to condemn in the first place.

It is still an undisputed fact that with respect to two of the landowners, their condemnation notices were for easements the precise features of which were not the same as the precise features of the easement sought from another landowner, thus showing, as a matter of law, a lack of necessity for all of the features included.

It is still an undisputed fact that, with respect to one of the landowners, within the space of about a week of suing him, the Town (the same Town which now argues again that it should be able to amend) changed, or sought to change, its condemnation notice twice, the last time making changes in the easement terms adverse to the landowner, and changing them back to those of the Unmitigated Easement.

It is still an undisputed fact that Notice contained falsities.

The foregoing are only some of the facts which are still undisputed.

When Plaintiff filed the instant action to challenge the ability of the Town to condemn the interest in property described in the notice, the Town filed a motion to dismiss. But, providing no notice, did not file a brief or supporting materials at the time.

While first action was pending, the Town (the same Town which now argues again that it should be able to amend) commenced a second condemnation action. The Town got that one wrong, too, and it was with new falsehoods and not just with scrivener's errors. The Town has only recently withdrawn it, but only after Plaintiff was put to the time and expense of filing an action challenging it. The Town has never answered directly and intelligibly the very specific allegations of the challenge complaint and amended complaint, instead evading forthright responses to damning facts by stating various things the Town "craves reference to."

The Town's motion for reconsideration did not set forth grounds sufficient to allow Plaintiff adequate notice and time to fully argue against the brief filed yesterday and to fully argue for denial of the motion. If Plaintiff has not addressed any matter argued by the Town, Plaintiff requests to address it at hearing or in subsequent brief.

The Court adequately and thoroughly considered summary judgment the first time and did not overlook any salient principle of law or item of fact.

The Town's motion should be denied.

Respectfully submitted,

s/M. Baron Stanton
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PO Box 245
Columbia, SC 29202
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bstanton@stantonlaw.com
Attorney for Sunset Lodge, LLC

3/18/21

March 25, 2021 e-mail notice of April 1, 2021 hearing of Town 3-1-21 motion to require Landowner production of billing materials under protective order.

Barry Stanton

From: Courtmail22_DoNotReply@sccourts.org
Sent: Thursday, March 25, 2021 9:15 AM
To: Barry Stanton
Cc: jlawrence@gtcounty.org
Subject: Motion "99MDDE-Mot Protect Ord Prod Doc Relating Mot for Att Fees/Dillard" for Case "2020CP2200600- Sunset Lodge Llc VS Pawleys Island Town Of" was added to a Motions Roster for 4/1/2021 at 1:30 PM

REMINDER!!! REMINDER!!! "IN-PERSON" Hearings.
See Motion Roster News for Important Information and instructions.
The case referenced in this email is scheduled on the Docket. The Docket is available at <http://publicindex.sccourts.org/georgetown/courtrosters/>.
Please VIEW Roster IMPORTANT INFORMATION located on the MOTIONS ROSTER NEWS TAB.

If your case is settled, your motion is "RESOLVED, WITHDRAWN, or MOOT", please notify immediately by submitting correspondence through the E-Filing system. If you have any communication regarding this case, please contact Lucinda LeSane, CP Supervisor @ cpcourtcoordinatorgt@gmail.com or (843) 545-3228.

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March 25, 2021 e-mail notice of April 1, 2021 hearing of Town 3-3-21 motion for protection from discovery.

## Barry Stanton

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**From:** Courtmail22\_DoNotReply@sccourts.org  
**Sent:** Thursday, March 25, 2021 9:15 AM  
**To:** Barry Stanton  
**Cc:** jlawrence@gtcounty.org  
**Subject:** Motion "MPROTE-Motion/Protection from Discovery/Dillard" for Case "2020CP2200600- Sunset Lodge Llc VS Pawleys Island Town Of" was added to a Motions Roster for 4/1/2021 at 1:30 PM

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STIPULATION TO SUFFICIENCY OF ONE REPRESENTATIVE COPY OF EACH DESIGNATED PAPER FROM ONE OF THE THREE CASES, TO INCLUDE LESS THAN ALL MATERIAL ORIGINALLY DESIGNATED, AND TO ABILITY OF ANY PARTY TO SUPPLEMENT THE RECORD WITH COPIES FROM THE OTHER TWO CASES IN THE EVENT THE PARTY DEEMS NECESSARY

The parties stipulate that reference to a paper in this Challenge I action, or reference to a paper in the subsequent Challenge II action, be taken as an accurate reference to the corresponding substantially similar or identical papers and passages in the other two Challenge I or Challenge II actions. The parties stipulate to including in the Record on Appeal, less than all the material previously designated, to wit, including, where substantially identical in all three actions, one designated representative pleading, order, or other paper from one Challenge action rather than all three. The parties stipulate that either party may later supplement the record with the separate additional counterpart of such an item from the other two Challenge actions if that party deems it desirable to do so.

SO STIPULATED:

s/M. Baron Stanton
M. Baron Stanton
Attorney for Appellants

s/William C. Dillard, Jr.
William C. Dillard, Jr.
Attorney for Respondent

Certificate of Counsel

The undersigned hereby certifies that this Record on Appeal contains all material proposed to be included by any of the parties, and no other material.

RECEIVED
Aug 28 2023
SC Court of Appeals

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ATTORNEY FOR APPELLANTS
SUNSET LODGE, LLC AND
FRANKLIN D. BEATTIE, AS TRUSTEE

Date: August 28, 2023

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable Michael G. Nettles, Circuit Court Judge

CASE NO. 20-CP-22-00600
CASE NO. 20-CP-22-00601

Sunset Lodge, LLC,Appellant,

v.

Town of Pawleys Island,Respondent.

and

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

v.

Town of Pawleys Island,Respondent.

CERTIFICATE OF SERVICE

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

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

s/M. Baron Stanton
M. Baron Stanton

Date: August 28, 2023