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**S.C. Supreme Court**

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

APPEAL FROM GREENWOOD COUNTY  
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

Appellate Case No. 2012-212006

Unpublished Opinion No. 2012-UP-081(S.C. Ct.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

William Alvin Hueble, Jr., ..... Petitioner,  
v.  
South Carolina Department of Natural Resources and Eric Randall Vaughn, ..... Defendants,  
Of Whom Eric Randall Vaughn is ..... Respondent.

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INDEX

TABLE OF AUTHORITIES ..... ii

STATEMENT OF ISSUES ON APPEAL .....1

STATEMENT OF THE CASE.....2

FACTS .....3

ARGUMENTS.....12

    I.    THE COURT OF APPEALS SHOULD HAVE  
          DECLARED PETITIONER A “PREVAILING PARTY”  
          PURSUANT TO 42 USC §§ 1983 and 1988.....12

    II.   THE COURT OF APPEALS SHOULD HAVE FOUND  
          THAT NO SPECIAL CIRCUMSTANCES EXISTED TO  
          BAR PETITIONER FROM AN AWARD OF  
          ATTORNEY’S FEES AND/OR COSTS .....22

CONCLUSION.....41

PROOF OF SERVICE.....42

## TABLE OF AUTHORITIES

### Cases

Belton v. State of South Carolina, 339 S.C. 71, 529 S.E.2d 4 (2000).....	passim
Bosley v. Mineral County Commission, 650 F.3d 408 (4 <sup>th</sup> Cir. 2011).....	19
Buckhannon Board & Care Home, Inc. v. West Va. Dept’ of Health and Human Services, 532 U.S. 598, 604; 121 S. Ct. 1835; 149 L. Ed. 2d 855 (2001).....	passim
Buza v. Columbia Lumber Co., 395 P.2d 511, 514 (1964).....	32
Camden v. Hilton, 360 S.C. 164, 600 S.E.2d 88 (Ct. App. 2004).....	29
Cartwright v. Stamper, 7 F.3d 106, 109 (7 <sup>th</sup> Cir. 1993) .....	24
Chambers v. Manning, 169 F.R.D. 5 (D.Conn. 1996) .....	18
Consumers Union v. Va. State Bar, 688 F.2d 218, 222 (4th Cir. 1982) .....	23, 38
Cothran v. Brown, 350 S.C. 352, 360, 566 S.E.2d 548, 553 (2002 .....	13
Denny v. Horton, 131 F.R.D. 659 (M.D.N.C. 1990).....	27
Evans v. Full Circle Productions, Inc., 443 S.E.2d 108 (NC Ct. App. 1994) .....	28
Farrar v Hobby, 506 U.S. 103, 112; 113 S.Ct. 556; 121 L.Ed.2d 494 (1992) .....	passim
Fletcher v City of Fort Wayne, 162 F.3d 975, 978 (7 <sup>th</sup> Cir. 1998).....	13
Fletcher v. City of Fort Wayne, Indiana, 162 F.3d 975 (7 <sup>th</sup> Cir. 1998).....	23, 24, 25, 30
Foster v. Kings Park Central School District, 174 F.R.D. 19, 24 (E.D. NY 1997 .....	18
Fox v. Vice, Op. No. 10-114 (U.S. Supreme Court, decided June 6, 2011) .....	35
Gregg v. Ham, No. 3:08-4040-CMC, 2010 WL 5060583 at 81 n.3 (D.S.C. December 6, 2010) .....	36
Grissom v. The Mills Corporation, 549 F.3d 313 (4 <sup>th</sup> Cir. 2008) .....	passim
Heath v. County of Aiken, 302 S.C. 178, 394 S.E.2d 709 (1990) .....	22, 32
Hensley v. Eckerhart, 461 U.S. 424; 103 S. Ct. 1933; 76 L.Ed.2d 40 (1983) .....	passim
Hertz v. Riebe, 936 P.2d 24 (Wash. Ct. App. 1997) .....	31
Hewitt v. Helms, 482 U.S. 755, at 760-761; 107 S.Ct. 2672; 96 l.Ed.2d 654 (1987) .....	28
Hyde v. Small, 123 F.3d 583 (7 <sup>th</sup> Cir. 1997).....	23, 25, 26
Jamison v. Ford Motor Company, 373 S.C. 248, 644 S.E.2d 755, 766 (Ct. App. 2007).....	39
Johnson v. City of Aiken, 278 F.3d 333, 336 (4th Cir. 2002).....	22

Johnson v. Lafayette Fire Fighters Ass’n, 51 F.3d 726, 731 (7 <sup>th</sup> Cir. 1995).....	24
Kiriakides v. Sch. Dist. of Greenville Cnty., 382 S.C. 8, 20, 675 S.E.2d 439, 445 (2009) .....	22
Maine v. Thiboutot, 448 U.S. 1, 11 (1980) .....	34
McDonnell v. Miller Oil Co., 134 F.3d 638, 640 (4th Cir. 1998).....	13
Monroe v. Pape, 365 U.S. 167, 183 (1961).....	15
Moore v. City of Columbia, 284 S.C. 278, 326 S.E.2d 157 (1985).....	29
Nadeau v. Helgemoe, 581 F.2d 275, 278-279 (1 <sup>st</sup> Cir. 1978) .....	26, 27
Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968) .....	35, 37
Perdue v. Kenny A., Opinion No. 08-970 (U.S. Supreme Court filed April 21, 2010).....	23, 40
Perry v. Bartlett, 231 F.3d 155, 163 (4 <sup>th</sup> Cir. 2000) .....	13
Pigeaud v. McLaren, 699 F.2d 401 (7 <sup>th</sup> Cir. 1983) .....	25
Reinbold v. Evers, 187 F.3d 348, 362 (4th Cir. 1999).....	13
Runnells v. Quinn, 890 A.2d 713 (Maine 2006).....	31
See Gardner v. Newsome Chevrolet-Buick, Inc., 304 S.C.328, 330, 404 S.E.2d 200, 201 (1991) .....	13
Shaw v. Hunt, 154 F.3d 161, 164 (4th Cir. 1998).....	13
Smyth v. Rivero, 282 F.3d 268, 274 (4th Cir. 2002).....	13
Spencer v. South Carolina Tax Commission, 281 S.C. 492, 316 S.E.2d 386 (1984) .....	29
Steinart v. Lanter, 284 S.C. 65, 325 S.E.2d 532 (1985).....	14
Testa v. Village of Mundelein, Ill., 89 F.3d 443 (1996) .....	31
Texas Teachers Assn. v. Garland Independent School District, 489 U.S. 782; 109 S.Ct. 1486; 103 L.Ed.2d 866 (1989) .....	27, 28
Tyler v. Corner Construction Corporation, 167 F.3d 1202 (8 <sup>th</sup> Cir. 1999).....	30, 31
Utility Automation 2000, Inc. v. Choctawatchee Electric Cooperative, Inc., 298 F.3d 1238, 1248 (11 <sup>th</sup> Cir. 2002).....	19
Utility v. Choctawatchee, 298 F.3d 1238, 1244 (11 <sup>th</sup> Cir 1998).....	18
Walsh v Boston Univ., 661 F.Supp.2d 91 (1 <sup>st</sup> Cir. 2009) .....	19
Washington v. Whitaker, 317 S.C. 108, 451 S.E.2d 894 (1995).....	29

Rules

SCACR Rule 220 (b)..... 26  
SCRCP Rule 54(e)(1)..... 13  
SCRCP Rule 68..... passim

Regulations

42 U.S.C. §1983 ..... passim  
42 U.S.C. §1988 ..... passim  
S.C. Ann Code §15-35-400 ..... 14, 17, 29  
S.C. Ann Code §520..... 14, 17  
S.C. Ann Code §530..... 14, 17

**STATEMENT OF ISSUES ON APPEAL**

1. Did the Court of Appeals err in determining that acceptance of a Rule 68 Offer of Judgment was insufficient to obtain prevailing party status under 42 USC §§1983 and 1988?
  
2. Did the Court of Appeals err in determining that special circumstances existed to prevent an award of costs, including attorney's fees, to Petitioner?

## STATEMENT OF THE CASE

On August 30, 2007, William Alvin Hueble, Jr. (“Petitioner”) brought this action alleging violation of his constitutional rights by Eric Vaughn (“Respondent”), an agent of the South Carolina Department of Natural Resources, and related claims.

Petitioner amended his Complaint on October 7, 2009, with Defendants denying the allegations as they had originally and Respondent not only reasserting defamation counterclaims, but adding allegations of abuse of process and intentional affliction [sic] of emotional distress. Petitioner again denied such allegations.

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

A hearing on Petitioner’s Motion for Costs, including attorney’s fees, was held on December 10, 2009. On May 24, 2010 the court filed its Order denying Petitioner’s Motion for Costs and Attorney’s Fees. Petitioner noticed this appeal on June 11, 2010. Oral arguments were heard on January 26, 2012.

On February 15, 2012, the South Carolina Court of Appeals issued a *Per Curiam*, unpublished opinion affirming the trial court’s denial of Petitioner’s Motion for Costs and Fees. (App. p. 2). The Court of Appeals denied Petitioner’s Petition for Rehearing on April 20, 2012. (App. p. 29). The Petition for Writ of Certiorari was filed on June 4,

2012 and, following Respondent's Return and Petitioner's Reply, was granted per Order dated January 16, 2015.

### FACTS

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

Petitioner seeks reversal of those determinations refusing to designate him "prevailing party," entitled to an award of costs, including attorney's fees, following acceptance of an unrestricted offer of judgment in the amount of \$5,100.00, inclusive of

a 42 U.S.C. § 1983 cause of action. This is a novel question of law, directly involving substantial constitutional issues, wherein the Court of Appeals' Per Curiam Opinion arguably conflicts with a decision of the United States Supreme Court, especially as distilled through varying state and federal district court opinions, including those of the Fourth Circuit.

Petitioner William Alvin Hueble, Jr. is a citizen compelled to act as a private attorney general pursuant to § 1983, combating a rogue government official with the Department of Natural Resources who, under color of law, infringed his constitutional rights.

In 2003 and 2004 Petitioner purchased approximately 220 acres of farming/hunting land in Greenwood County for approximately \$490,000. (R. pp. 36-37). During negotiations regarding purchase, the seller(s) suggested that Respondent be allowed to continue hunting the property. (R. p. 36). Subsequent, similar overtures were made thereafter, all of which were rejected. (R. p. 37). During the summer of 2005, Petitioner prepared his first dove field of approximately 15 acres, in compliance with applicable regulations and/or guidelines. However, on opening day of dove season in September of 2005, DNR agents, lead by Respondent, descended upon Petitioner's property. From his knees, Respondent utilized a knife to produce some seeds from the ground, claiming that the presence of even one seed constituted a baited field. When Petitioner eventually realized Respondent was the DNR officer referenced by seller and questioned Respondent regarding the same, Respondent minimized his prior involvement with the property. (R. p. 80, ¶2). During the ensuing discussions, Respondent stated to Petitioner that it was a shame seller had sold the property to Petitioner and that Petitioner

would regret purchasing the property. Respondent later acknowledged he may have said “I hated to see him sell it,” further explaining “it was a nice piece of property, and I had hunted it on occasion.” (R. p.80, ¶2). Eventually, Respondent charged Petitioner with Baiting a Field and cautioned Petitioner not to contest the charge. (R. p.80, ¶2). Though Petitioner believed he had done nothing wrong, he did eventually enter a plea of no contest to the charge, fearful of winning that battle, but losing the war via further harassment. Petitioner hoped that this disposition would satisfy Respondent’s animus. (R. p.80, ¶2).

The subsequent spring of 2006, following the opening day of turkey season, Petitioner became aware that his game cameras had been manipulated. (R. p.80, ¶3). When Petitioner contacted Respondent to discuss this matter, Respondent admitted he and other agents had visited Petitioner’s property, but denied that they had manipulated the cameras. (R. p.80, ¶3). Respondent went on to assert that two food plots, where Petitioner had planted clover seed, constituted baiting. Petitioner was as shocked by these allegations as by those from Respondent’s first visit. Clover seed is miniscule and expensive as compared to traditional “bait” such as corn or sunflower seeds; it is the ensuing clover plant, not the seed, which would potentially serve one day as a turkey attractant. However, Respondent and even a DNR superior stated that if a turkey was liable to eat it, it constituted bait. However, no agent, including Respondent could recall any other person having been charged with baiting turkey via miniscule clover seed. Petitioner of course disagreed with the continued assertions of improprieties on his property and was especially troubled by the continued visitations by Respondent given

his relationship with the former owner and his apparent fondness for the property itself. (R. p.81 ¶1).

Realizing that Respondent's focus on his property and vendetta against him had not abated, Petitioner initiated a complaint with Respondent's superior. In response, Respondent lied regarding both his involvement with the property (R. p81, ¶2) and Petitioner's commission of criminal offenses. Despite establishing to the superior (based upon the superior's reports to Plaintiff) that Respondent had lied to the superior regarding Respondent's long standing relationship with the property (R. p.81, ¶2), no disciplinary action was taken. Rather than concede impropriety on their agent's behalf, DNR dismissed Petitioner's concerns and falsely trumpeted the virtues of Respondent (R. p. 81, ¶2). When Petitioner was later informed that Respondent was threatening to file a defamation suit against Petitioner, Petitioner hired counsel and again sought to have an investigation undertaken by DNR in an attempt to cease the encroachment upon his property and his rights. (R. p. 81, ¶2 – p. 82, ¶1).

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

Following initiation of suit and pursuant to discovery, it was belatedly revealed that, in fact, Respondent had been the subject of a covert DNR investigation prior to DNR's final ruling, which stemmed from complaints to the U.S. Fish and Wildlife

Service. Associates of Respondent's from Ohio, including at least one Ohio DNR agent, were suspected of trapping violations and/or the illegal import of coyote into South Carolina. An anticipated surveillance of aspects of the investigation, relating to alleged shrimping violations by Respondent and an Ohio DNR agent, Allen Wright, was compromised via discussions between personnel from the S.C. DNR and a female for the Ohio version of DMV, effectively ending the active portion of the investigation against Respondent. (R. p. 82, ¶3). Thereafter, in opposition to a direct request from one of the DNR internal investigators, Respondent advised Allen Wright of the investigation, ending that portion of the investigation as well. The follow-up, historical investigation did find irregularities in the trapping paperwork of the Ohio associates of Respondent (although only warning tickets were eventually issued against the Ohio residents by the South Carolina DNR). Moreover, it was discovered that Respondent, while hunting in Ohio in 2006, had purchased an Ohio resident hunting license, utilizing the address of the Ohio DNR associate Wright as his own. (R. p.82, ¶3). Upon information and belief, Wright pled guilty in the United States District Court/Southern District of Ohio in February of 2012 to multiple violations of the Lacey Act, stemming predominantly from his 2006 involvement with Respondent.

<http://www.justice.gov/opa/pr/2012/February/12-enrd-250.html>. In addition, criminal actions against at least five additional members of the Ohio Wildlife Division were brought in regard to the incidents involving Respondent's hunt in Ohio. However, just as combined actions of SC DNR and Ohio DMV personnel compromised the intended surveillance of Respondent and Wright, upon information and belief, the Ohio Inspector General was found by the Ohio Supreme Court to have bungled their investigation of the

additional DNR Defendants by violating their Garrity rights, resulting in dismissal of the charges. Likewise, during the pendency of this lawsuit, the SC DNR revealed no disciplinary action taken as to Respondent. Actions by citizens as a private attorney general are apparently as necessary and in need support as ever.

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

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

producing the cancelled check used to purchase the feeder, dated months following the allegations by Respondent. (R. p.83, ¶2)(R. p. 102).

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

In essence, DNR "officially" supported and encouraged Respondent's continual perversion of the law while allowing the threat of improper sanctions to deprive Petitioner of the use and enjoyment of his property. Such actions directly related to Petitioner's failure to grant Respondent hunting privileges to Petitioner's property as requested on Respondent's behalf. Vaughn and other agents of DNR acknowledged visiting or flying over Petitioner's property approximately twenty times in less than two years. In conjunction with the stated belief by DNR agents that they have the unfettered

right to enter Petitioner's property at any time, to enter any structure thereon, including Petitioner's barn and manipulate any piece of personal property located on the property in any manner they so desire (R. p. 84, ¶2), Petitioner was resolute in his efforts to defend, preserve, and restore his rights. Thankfully, the filing of suit ceased and abated the actions of Respondent and DNR as to Petitioner and his property. However, when Defendants refused to sign an acknowledgment of wrongdoing, which would merely have formalized many of the admissions made during depositions, the obtainment of judgment was reestablished as the vehicle of vindication. Given that Petitioner maintained ownership of his property and the constitutional violations did not encompass physical injury, Petitioner conceded throughout the suit that monetary damages might be deemed moderate. When Defendants finally offered judgment in the amount of \$5,100 on November 17, 2009, Petitioner accepted the following day, acknowledging that judgment via verdict might not exceed such amount and as with such a verdict, reasonable costs, including attorney's fees, could be expected to be awarded given Petitioner's prevailing party status.

It is urged that primary consideration be given of Petitioner's position upon his entry of judgment on November 20, 2009. At that point, judgment had been entered as to all of Petitioner's causes of action, all of which related to Petitioner's complaints of constitutional violations by Respondent, an agent of DNR. Moreover, having obtained such judgment, there was little reason to believe there could be ANY value to Respondent's counterclaims which, coming from a public official who admitted that Petitioner believed the truth of what he said, had seemingly no value from the outset. Could there really be any argument that Petitioner had committed Abuse of Process when

he had obtained judgment as to all causes of action? There was no basis to suspect that Petitioner would not be declared prevailing party and receive an award of appropriate costs when, on December 1, 2009, Petitioner moved for an award of costs, including reasonable attorney's fees, pursuant to 42 U.S.C. §§ 1983 and 1988. (R. at 117). The fact that Petitioner's insurer, in the face of Petitioner's noted opposition (R. p. 272 ll. 9 – 15), thereafter proceeded to enter into a supposedly confidential settlement agreement on December 7, 2009, should not provide the basis, as it apparently has, to undermine the Petitioner's efforts. In fact, proper consideration of such betrayal further exposes the injustice levied upon Petitioner: initially by Respondent, then by his insurer, but additionally so by referencing the "confidential" agreement in the Memorandum filed by Defendants immediately before the scheduled hearing on costs, initiating the consideration and eventual reliance thereon by the court; all of which have conspired to diminish Petitioner's resolution of a disturbing series of events. (R. p. 250, ll.11-25).

Had Defendants made the same offer of judgment from the outset, the complained of costs and fees could have largely been avoided. (R. p. 244, ll.8-14). Of course neither Defendant, with defense costs being borne by the efforts of the public, including Petitioner, seemed to have much incentive to consider such measures. It is submitted that such disparity in "power" is the hallmark of §1983 cases and the primary purpose for the fee shifting provision that is the subject of this appeal.

## ARGUMENTS

### **I. THE COURT OF APPEALS SHOULD HAVE DECLARED PETITIONER A “PREVAILING PARTY” PURSUANT TO 42 USC §§ 1983 and 1988**

Petitioner urges reversal of the Court of Appeals’ Per Curiam Opinion, especially given the novelty of this issue and in light of alternative state and federal determinations to the contrary, including those of the U. S. Supreme Court.

Petitioner’s suit pursuant to 42 U.S.C. § 1983 was not undertaken lightly. Rather, it constituted an unfortunate necessity to combat the rogue possessor of a gun and badge, protected by an agency that finds no impropriety with officers bringing and/or threatening charges against landowners whose property they could not purchase and whose overtures for the allowance of hunting rights on the same are ignored. Only through such litigation, and the discovery related therein, was Petitioner able to further corroborate and at least temporarily diffuse respondent’s transgressions. Per the applicable federal case law, Petitioner and his personal counsel had every right to expect that acceptance of the Offer of Judgment would result in the designation of prevailing party status and an award of costs<sup>1</sup> and some proper analysis and determination of an award of attorney’s fees.

The trial court order consistently held that, having accepted an Offer of Judgment, Petitioner was not a prevailing party as required by 42 U.S.C. § 1988 and that costs, including attorney’s fees, should therefore not be awarded. (R. pp. 6, 8 and 12). While it is agreed that South Carolina procedural rules govern, the prevailing party determination necessarily requires consideration of federal statutes and case law. Being the only party to have obtained a legally enforceable judgment, Petitioner was the sole party entitled to move for costs as allowed per judgment, which could include “reasonable attorney’s fees

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<sup>1</sup>Filing and service fees at the very least, though a more substantial award is warranted given the approximate \$15,000 in costs (R. p. 136).

. . . . under **any statute.**” Rule 54(e)(1), SCRCF (emphasis added). The statute at issue is 42 U.S.C. §1988, which allows an award of attorney’s fees, in this instance, for parties prevailing on claims pursuant to 42 U.S.C. §1983.

Because our courts have not spoken on this issue, we may seek guidance from federal cases. See *Gardner v. Newsome Chevrolet-Buick, Inc.*, 304 S.C.328, 330, 404 S.E.2d 200, 201 (1991) (“Since our Rules of Procedure are based on the Federal Rules, where there is no South Carolina law, we look to the construction placed on the Federal Rules of Civil Procedure.”)

Cothran v. Brown, 350 S.C. 352, 360, 566 S.E.2d 548, 553 (2002).

The designation of a party as a prevailing party is a legal determination, which is reviewed *de novo*. Grissom v. The Mills Corporation, 549 F.3d 313 (4<sup>th</sup> Cir. 2008); See Smyth v. Rivero, 282 F.3d 268, 274 (4<sup>th</sup> Cir. 2002); Perry v. Bartlett, 231 F.3d 155, 163 (4<sup>th</sup> Cir. 2000); Reinbold v. Evers, 187 F.3d 348, 362 (4<sup>th</sup> Cir. 1999); Shaw v. Hunt, 154 F.3d 161, 164 (4<sup>th</sup> Cir. 1998); McDonnell v. Miller Oil Co., 134 F.3d 638, 640 (4<sup>th</sup> Cir. 1998).

Ignoring the leading cases of Buckhannon Board & Care Home, Inc. v. West Va. Dept’ of Health and Human Services, 532 U.S. 598, 604; 121 S. Ct. 1835; 149 L. Ed. 2d 855 (2001) and Grissom v. The Mills Corporation, 549 F.3d 313, 318 (4<sup>th</sup> Cir. 2008), the trial court order instead relied upon a footnote in Belton v. State of South Carolina, 339 S.C. 71, 529 S.E.2d 4 (2000) which states that a case resolved by acceptance of an offer of judgment per Federal Rule 68 is considered “settled.” Though the footnote accurately paraphrases a closing statement in Fletcher v City of Fort Wayne, 162 F.3d 975, 978 (7<sup>th</sup> Cir. 1998), the reference was unnecessary dicta given that the Whistleblower Act at issue specifically required a court or jury award for the obtainment of attorney’s fees and an accepted offer of judgment was objectively neither. Therefore, any “settlement” prior to

a court or jury award, including a Rule 68 Offer of Judgment, was admittedly an insufficient basis upon which attorney's fees could be awarded. However, this Court limited its holding in Belton to cases brought "under the former Whistleblower Act." Id. at 73, 524 S.E.2d at 5. This Court applied state law in Belton because a *state* statute allowed for the award of attorney's fees. See id. at 72, 529 S.E.2d at 4 (analyzing whether attorney's fees should have been awarded under 1988 S.C. Act No. 354). Because Petitioner's case is not brought pursuant to that Act, or any other state law for that matter, this Court's holding in Belton is inapplicable. Neither Belton nor any other S.C. case has considered whether the acceptance of a Rule 68 Offer of Judgment confers prevailing party status upon a §1983 plaintiff. Accordingly, the more significant holding in Belton is the reminder that "a statute allowing attorney's fees is in derogation of common law and must be strictly construed." Belton v. State of South Carolina, 339 S.C. 71, 529 S.E.2d 4, 5 (2000, citing Steinart v. Lanter, 284 S.C. 65, 325 S.E.2d 532 (1985)).

The attempt to legalistically label all accepted offers of judgment "settlements" contravenes our rules of civil procedure and our statutes, which plainly equate an accepted offer of judgment to a judgment. See Rules 54, 68, SCRCP; §§15-35-400, 520 and §530 S.C. Code of Laws. Such a label also dismissively undermines worthy, reasonable and admirable bases of the offer of judgment procedure, wherein the parties are encouraged for the sake of efficiency and judicial economy to avoid trial if an expected judgment can be reached beforehand, the acceptance of which is equivalent to judgment rendered via fact finders as to enforceability, public recordation and finality of result.

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

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

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

prevailing party methods, a “material alteration” in the legal relationship of the parties is the overall prerequisite to prevailing party status and the award of attorney’s fees.

The Buckhannon concurring opinion states: “[t]he Court today concludes that a party cannot be deemed to have prevailed, for purposes of fee-shifting statutes such as 42 U.S.C. §§ 1988, 3613(c)(2) (1994 ed. and Supp. V), unless there has been an enforceable “alteration of the legal relationship of the parties.” That is the normal meaning of “prevailing party” in litigation, and there is no proper basis for departing from that normal meaning.” Buckhannon, 532 U.S. 598, 622, 121 S.Ct. 1835, 1849 (2001).

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

Nowhere in Buckhannon (including Respondent’s previously cited footnote 7) is there any suggestion that the obtaining of judgment would not suffice for the determination of prevailing party status.<sup>2</sup>

“Black’s Law Dictionary 1145 (7<sup>th</sup>ed. 1999 defines a “prevailing party” as [a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded . . . .” Buckhannon, 532 U.S. 598, 604 (2001).

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<sup>2</sup> Per Respondent’s theory, even if the accepted offer of judgment were for \$5.1million, Petitioner would be incapable of achieving prevailing party status.

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

Even “a plaintiff who wins nominal damages is a prevailing party under 1988.” Farrar v Hobby, 506 U.S. 103, 112; 113 S.Ct. 556; 121 L.Ed.2d 494 (1992) (cited in Buckhannon 532 U.S. 598, 604. “No material alteration of the legal relationship between the parties occurs until the plaintiff becomes entitled to enforce a judgment . . . . A judgment for damages in any amount, whether compensatory or nominal, modifies the defendant’s behavior for the plaintiff’s benefit by forcing the defendant to pay an amount of money he otherwise would not pay.” Id. at 113 (1992 Farrar established that EVEN when that Plaintiff received only a technical and de minimis victory (a pronouncement that one of six defendants had violated a constitutional right for a nominal award of \$1.00 when Plaintiff had sought damages of \$17 million and had well over \$300,000 in attorney’s fees and costs nearly a quarter century earlier), Plaintiff WAS STILL the prevailing party.

Here, Petitioner obtained Judgment 5100 times greater than the “nominal” damages obtained by the Plaintiff in Farrar. Defendants offered that Judgment be taken against them as to ALL causes of action, without any specific reservation and such was accepted by Petitioner (R.p.6, ¶1). Judgment has been entered pursuant to the varying statutes and rules relating to Judgment Rolls, Abstracts of Judgment, Record of the Case, etc. §§15-35-400, 520 and 530 and Rules 54 and 68, SCRCF. Upon such recording of the Judgment, Res Judicata attached to Petitioner’s causes of action, including §1983 there

should be no argument in contravention. Though Petitioner denies he received mere nominal damages, even if he had, he should have been deemed the prevailing party.

To the extent the trial court order suggest ambiguity because the offer of judgment does not specify the §1983 claim, such should inure to the benefit of Petitioner. “With respect to offers of judgment, ‘a defendant should state his intentions clearly, and any failure to do so will be at his peril.’” Foster v. Kings Park Central School District, 174 F.R.D. 19, 24 (E.D. NY 1997 (citing Chambers v. Manning, 169 F.R.D. 5 (D.Conn. 1996) requires that the responsibility for clarity and precision in the offer must reside with the offeror. . . . any ambiguity in the terms of an offer must be resolved against the drafter . . . .” Utility v. Choctawhatchee, 298 F.3d 1238, 1244 (11<sup>th</sup> Cir 1998). Any suggestion that Petitioner did not obtain Judgment as to the §1983 cause of action due to the lack of specificity should be found erroneous.

Unfortunately, the trial court order curiously ignored and omitted reference to Petitioner’s offered opinions of Buckhannon,<sup>3</sup> and Grissom; the Court of Appeals ignored their impact. While the Per Curiam Opinion does at least cite Grissom and Buckhannon, it perversely and erroneously crafts the citations to support affirmation of the trial court’s erroneous order. Moreover, it then erroneously cites Belton to again assert “[a] case resolved by acceptance of an offer of judgment is considered settled.” The import of Buckhannon has been misapprehended and/or overlooked. Such misapprehension is further illuminated through the Grissom decision, of which the Honorable William B. Traxler was a panel participant and wherein the Plaintiff accepted an offer of judgment.<sup>4</sup>

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<sup>3</sup> Buckhannon contains ample reference to Farrar, 506 U.S. 103 (1992).

<sup>4</sup> Though differences exist between State and Federal Rule 68, their aims of judicial economy are wholly consistent and both constitute final Judgment.

The following elementary explanation is provided mere paragraphs after the Per Curium Opinion's referenced Grissom cite:

Such judgment created a material alteration of the legal relationship between Plaintiff and Defendant by imposing upon Defendant a legally enforceable obligation to pay Plaintiff . . . . "Rule 68 judgment represents a judicially sanctioned change in the relationship between the parties." . . . [T]here is judicial imprimatur on the change in that the district court has the inherent power to compel Defendant to satisfy such judgment. . . . **[an] accepted offer of judgment made pursuant to Rule 68 has [the] necessary judicial imprimatur per *Buckhannon* "in the crucial sense that it is an enforceable judgment against the defendant."**

Grissom, 549 F.3d 313 at 319 (4<sup>th</sup> Cir 2008) citing Utility Automation 2000, Inc. v. Choctawatchee Electric Cooperative, Inc., 298 F.3d 1238, 1248 (11<sup>th</sup> Cir. 2002 (emphasis added)).

Bosley v. Mineral County Commission, 650 F.3d 408 (4<sup>th</sup> Cir. 2011) subsequently provides further illumination. This opinion, in which Chief Judge Traxler concurred, reiterates that the acceptance of an Offer of Judgment confers prevailing party status and consideration of costs and fees.<sup>5</sup> Respondent has suggested that Bosley is inapplicable because there is no discussion or raising of the issue as to whether the plaintiff who accepted an offer of judgment is the prevailing party. This of course is the point that the Petitioner would ask this Court to recognize: that it was unquestioned that the plaintiff who accepted the offer of judgment was a prevailing party per 42 U.S.C. §1988. Additional supporting language explains the difficulties offerees such as Petitioner face when presented with vague and/or ambiguous Offers of Judgment and the necessity of such terms being strictly construed against the offeror; all the while distinguishing Offers of Judgment from settlement discussions

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<sup>5</sup> See also Walsh v Boston Univ., 661 F.Supp.2d 91 (1<sup>st</sup> Cir. 2009)(Rule 68 judgment satisfies Buckhannon).

Accordingly, per Rule 54, SCRCF; 42 U.S.C §§ 1983 and 1988; Buckhannon and Grissom; no matter the route of analysis, Petitioner's obtainment of a legally enforceable judgment established the necessary judicial imprimatur for Petitioner's designation as prevailing party. Even the designation as "prevailing party" is of import in actions undertaken to combat infringement of constitutional rights; the wrongful deprivation of the same should be deemed erroneous as a matter of law.

The Court of Appeals was presented with a novel question: whether a §1983 plaintiff's acceptance of an Offer of Judgment affords prevailing party status and therefore eligibility for an award of costs, including attorney's fees. The failure by the Per Curiam Opinion to even address the trial court's erroneous rejection of prevailing party status is of extreme importance to all plaintiffs who undertake the noble burden of "fighting city hall." There can hardly be a more important circumstance than when a citizen, as a private attorney general, combats a rogue government official who, under color of law, infringes their constitutional rights. The Court of Appeals' decision undermines the substantial constitutional protections established by 42 U.S.C. §§1983 and 1988 and thwarts all notion of judicial economy encouraged by Rule 68. Such determination begs the question (of import to all parties and practitioners, especially those involved in matters with fee shifting provisions): is an offer of judgment a judgment? Given the novelty of this issue, the substantial constitutional issues involved and the conflict with Buckhannon as distilled through Grissom and the other referenced matters, it is urged that reliance upon Belton be deemed erroneous. Thwarting the very aim of 42 U.S.C. §§1983 and 1988, as well as Rule 68, it is urged that the decisions of the Trial Court and Court of Appeals be deemed in error and reversed. Obtainment of

judgment as to §1983 pursuant to an offer of judgment should constitute prevailing party status.

## II. THE COURT OF APPEALS SHOULD HAVE FOUND THAT NO SPECIAL CIRCUMSTANCES EXISTED TO BAR PETITIONER FROM AN AWARD OF ATTORNEY'S FEES AND/OR COSTS

The trial court order, erroneously refusing to confer prevailing party status, nonetheless attempts to provide an alternative and/or advisory opinion as to why “special circumstances” would prevent any award of costs and/or attorney’s fees. While the Court of Appeals’ Per Curiam Opinion affirmed the declination of an award of fees and costs and referenced how such a decision might gain support, no “point distinctly stated in the case which is necessary to the decision of the appeal and fairly arising upon the record of the court” is stated in writing, nor is an actual reason given for the court’s decision preserved. Rule 220 (b), SCACR.

Courts review an award or denial of attorney’s fees for an abuse of discretion. Johnson v. City of Aiken, 278 F.3d 333, 336 (4th Cir. 2002); Heath v. County of Aiken, 302 S.C. 178, 394 S.E.2d 709 (1990). An abuse of discretion occurs when a trial court’s conclusions are “controlled by an error of law or based on unsupported factual conclusions.” Kiriakides v. Sch. Dist. of Greenville Cnty., 382 S.C. 8, 20, 675 S.E.2d 439, 445 (2009). It is submitted that the trial court committed an abuse of discretion amounting to legal error when it determined that “even if Plaintiff were found to technically be the prevailing party, the existence of special circumstances prevents the award of attorney’s fees.” (R. p. 6 ¶2). As earlier stated, the mere failure to confer prevailing party status and award at least minimal costs is error requiring reversal.

“It is now axiomatic that plaintiffs who prevail in actions brought under section 1983 are entitled to attorney's fees unless special circumstances would render such an award unjust, and the discretion of a district court in deciding whether to award such fees to a prevailing party is **narrowly limited**.” Consumers Union v. Va. State Bar, 688 F.2d

218, 222 (4th Cir. 1982)(emphasis added). No such narrow limitation has been appropriately expressed. None of the reasons set forth by the trial court find support in any relevant case. Each and every case cited by the trial court is either inapplicable; in conflict with more appropriate, subsequent opinions; or instead **supports** an award of reasonable attorney's fees upon consideration of the lodestar factors referenced in Perdue v. Kenny A., Opinion No. 08-970 (U.S. Supreme Court filed April 21, 2010). Addressing these cases chronologically as referenced in the trial court order, their lack of support is glaring, amounting to an abuse of discretion.

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

Here, putting aside the eventual costs and fees amassed on Petitioner's behalf, the events suffered and endured by Petitioner must be considered. Petitioner is a citizen property owner who asserted: 1) that he was propositioned by the former owner of his property to allow Respondent, an agent of the SC DNR, to continue hunting Petitioner's property as Respondent had done in the past; 2) when Petitioner did not consent to continued use of his land by Respondent, Respondent improperly charged Petitioner with

a violation of law and warned Petitioner not to contest the charge, resulting in a “no contest” conviction; 3) thereafter, Respondent visited Petitioner’s property and structures numerous times and threatened Petitioner with additional prosecution, falsely accusing Petitioner of numerous other hunting and/or land use violations; 4) accordingly, Petitioner was unable to adequately enjoy his property due to Respondent’s false accusations, improper visitations to Petitioner’s land, and unconstitutional entry into Petitioner’s structures and personal property. When Respondent’s agency refused to acknowledge the impropriety of Respondent’s conduct, Petitioner was compelled to file suit to combat the violation of his constitutional rights as well as to reclaim comfort in utilizing and enjoying the hunting property for which he had made substantial personal investment. Ultimately, Petitioner was able to obtain Judgment of \$5,100 against this rogue officer and his agency on all causes of action asserted, including under 42 U.S.C. §1983. There is no “technical” or “de minimis” nature to the Judgment obtained by Petitioner.

Even the trial court’s cited cases remind that “a Plaintiff who recovers only nominal damages technically ‘prevails.’” Fletcher, 162 F 3d at 976, citing Farrar, 506 U.S. 103 (1992). However, “a judge has discretion to withhold fees when damages are tiny in relation to the **claim**.<sup>6</sup>” Fletcher, 162 F.3d at 976, citing Johnson v. Lafayette Fire Fighters Ass’n, 51 F.3d 726, 731 (7<sup>th</sup> Cir. 1995); Cartwright v. Stamper, 7 F.3d 106, 109 (7<sup>th</sup> Cir. 1993)(emphasis added. The Indiana Plaintiffs in Fletcher (which preceded Buckhannon, 532 U.S. 598 (2001), had placed values on their claims of \$150,000 (Fletcher) and \$30,000 (Johnson). When they later accepted Offers of Judgment of \$2,500 and \$5,000, the court’s determination in denying fees was to conduct a

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<sup>6</sup> Comparison is to the claim, NOT the subsequent petition for costs and fees.

comparison of the initial demands with what was ultimately received. In regard to these initial demands, Fletcher even states “now Plaintiffs want us to dismiss this as puffery, but why should we reward them for this convenient change of position?” Applying such analysis to this case, in conjunction with Petitioner’s offer to settle for nothing given an appropriate acknowledgment, Fletcher SUPPORTS the position that Petitioner is a prevailing party and that reasonable attorney’s fees and costs should be awarded. In fact, in regard to the Plaintiffs Fletcher and Johnson, as well as those in the Fisher and Pigeaud cases, which are cited in support (Pigeaud v. McLaren, 699 F.2d 401 (7<sup>th</sup> Cir. 1983); Fisher v. Kelly, 105 F.3d 350 (7<sup>th</sup> Cir. 1997)), their Offers of Judgment included disclaimers of liability by the Defendants. Tellingly, the Fletcher opinion also states: “[b]ut a Plaintiff with a small claim who achieves complete recovery is entitled to fees, see Hyde v. Small, 123 F.3d 583 (7<sup>th</sup> Cir. 1997), because civil rights laws entitle victims of petty violations to relief. The cumulative effect of minor transgressions is considerable, yet they would not be deterred if fees were unavailable.” Fletcher, 162 F.3d at 976 Though Respondent’s violations against Petitioner were troubling and onerous to him, Petitioner understood that, having retained full ownership of his land, it might be difficult for a jury to find more than a few thousand dollars in damages for the grief he had suffered. Nonetheless, the principle of combating the pervasive tyranny being exerted against Petitioner was necessary and worthy. Moreover, without such effort, Petitioner was unable to fully utilize his property, for which he had made a substantial personal investment.

The sentiments espoused by the Hyde v. Small opinion are more akin to the present case than Fletcher. With Petitioner herein obtaining a Judgment ten times greater

than Plaintiff Hyde, it therefore supports the designation of Petitioner as prevailing party, entitled to consideration of reasonable attorney's fees. Petitioner obtained judgment regarding each of his causes of action, including under §1983. He obtained more monetarily than was even demanded, and such was obtained without any reservation of liability by the Defendants. The trial court order makes numerous references to the statement by Petitioner's counsel that the case "is not about the money." In fact, Petitioner PROVED the case was not about the money when he offered resolution through a simple acknowledgment of wrongdoing. The fact that Defendants rejected such a resolution, leaving obtainment of Judgment as Petitioner's sole recourse, should not inure to Respondent's benefit. It is quite a perversion that Petitioner's good faith efforts to resolve this matter are instead utilized as a basis to deny Petitioner's status as prevailing party and deprive him an appropriate award of costs, including reasonable attorney's fees. Obtainment of the judgment in and of itself, along with the expected prevailing party designation, was in fact a desired and substantial resolution. Only through the erroneous determinations by the trial court and Court of Appeals are Petitioner's honorable efforts undermined.

Hensley v. Eckerhart, 461 U.S. 424; 103 S. Ct. 1933; 76 L.Ed.2d 40 (1983) merely reiterates that "plaintiffs may be considered prevailing parties for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit." Id. at 433, quoting Nadeau v. Helgemoe, 581 F.2d 275, 278-279 (1<sup>st</sup> Cir. 1978). Accordingly, where that Plaintiff had prevailed on five of the six causes of action brought, the sole question was whether the court properly refused to eliminate those portions of the hours devoted to the unsuccessful claim. Not

surprisingly, Hensley questions whether the unsuccessful claim was distinct in all respect from the successful claims and therefore should have been excluded rather than approved. Factually, given that Petitioner herein obtained judgment on all claims brought, Hensley v. Eckerhart hardly supports the Order of the court.

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

In Texas Teachers Assn. v. Garland Independent School District, 489 U.S. 782; 109 S.Ct. 1486; 103 L.Ed.2d 866 (1989) the U.S. Supreme Court clarified a prevailing party's status when less than all causes of action were successful. Accordingly, Garland is distinguishable from the case herein, where judgment has been obtained by Petitioner as to all causes of action. "If the plaintiff has succeeded on 'any significant issue in litigation which achieved some of the benefit the parties sought in bringing suit,' the plaintiff has crossed the threshold to a fee award of some kind. . . . [a]t a minimum, to be considered a prevailing party within the meaning of 1988, the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant." Garland, 489 U.S. 782 at 791-792 quoting Nadeau v. Helgemoe, 581 F.2d 275, at 278-279 (1<sup>st</sup> Cir. 1978) and Hewitt v. Helms, 482 U.S. 755, at 760-761; 107

S.Ct. 2672; 96 1.Ed.2d 654 (1987). As discussed ad nauseum, the obtainment of Judgment alone constitutes resolution which changes the legal relationship between Petitioner and Respondent. Nothing within Garland suggests that the obtainment of judgment on all causes of action in the amount of \$5,100.00 would be considered purely technical or de minimis.

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

Garland, 489 U.S. 782 at 792-793 (1989)

Subsequent opinions by the Supreme Court and U.S. District Court for the Fourth Circuit acknowledge that the obtainment of an enforceable judgment is the very type of "material alteration of the legal relationship of the parties" referenced in Garland See Buckhannon and Grissom Supra.

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

Evans v. Full Circle Productions, Inc., 443 S.E.2d 108 (NC Ct. App. 1994) is an Unfair Trade Practices suit brought in Small Claims Court in North Carolina regarding a dating referral service and has absolutely nothing to do with §1983 or §1988 determinations regarding prevailing party and the award of reasonable fees and costs. This State law Unfair Trade Practices' claim utilizes a wholly distinct procedure and

therefore has no relevance to the determination of prevailing party status and the award of reasonable attorney's fees under §1983 and §1988.

Though now over 30 years old, at least Spencer v. South Carolina Tax Commission, 281 S.C. 492, 316 S.E.2d 386 (1984) is a South Carolina case. However, it concerns the payment of 1980 South Carolina income tax returns under protest and the legal action initiated for a refund. The order itself acknowledges that the Spencer trial court did not even address the §1983 claim. Regarding reference that state courts are not required to consider §1983 actions, there have been numerous subsequent decisions by our courts relating to §1983 actions. See Washington v. Whitaker, 317 S.C. 108, 451 S.E.2d 894 (1995); Moore v. City of Columbia, 284 S.C. 278, 326 S.E.2d 157 (1985); Stanley v. Kirkpatrick, 357 S.C. 169, 592 S.E.2d 296 (2004); Camden v. Hilton, 360 S.C. 164, 600 S.E.2d 88 (Ct. App. 2004). Moreover, Judgment has actually been rendered on behalf of the Petitioner on his §1983 claim. Spencer provides no appropriate support for the trial court order.

Belton v. State of South Carolina, 339 S.C.71, 529 S.E.2d 4 (2000) was decided more than five years before passage of S.C. Code Ann. §15-35-400, and the present Rule 68, SCRPC. However, the Belton case does not concern §1983 or §1988 and is therefore inapplicable to the matter at hand. It does deal with an Offer of Judgment that was accepted and whether such entitled the Plaintiffs to attorney's fees under the statute applicable therein. Under that statute, a former version of the Whistleblower Act, reasonable attorney's fees could be awarded following any court or jury award. Given that the statute allowing attorneys fees is in derogation of the common law and must be strictly construed, the Court determined that an Offer of Judgment was not akin to a

“court or jury award.” Interestingly, the plaintiff in Belton did still receive pre-judgment interest and costs. Here, Petitioner’s costs were approximately \$15,000.00 (R. p. 136). Perversely, Respondent supports the Belton Court’s reference to Fletcher, a U.S. Court of Appeals for the Seventh Circuit case from 1998, but wishes this Court to ignore the more recent, post-Buckhannon opinions from the U.S. Court of Appeals for the Fourth Circuit, which recognize the distinction between a judgment and a settlement and confirm that accepted offers of judgment confer prevailing party status in §§1983 and 1988 fee-shifting cases.

Tyler v. Corner Construction Corporation, 167 F.3d 1202 (8<sup>th</sup> Cir. 1999) is a South Dakota case that actually does deal with §1983. However, the plaintiff in that case rejected an offer of settlement for \$4,500 that would have required him to waive attorneys fees and costs before later accepting an offer of \$17,500 that reserved the question of attorneys fees to the trial court. Unfortunately, the trial court order fails to recognize the distinction between the settlement agreement reached by Tyler and the judgment obtained by the Petitioner herein. Tyler’s settlement agreement actually contained a statement that the defendants denied that Mr. Tyler had stated a claim cognizable under §1983 and that they merely desired to settle the suit without the expense and uncertainty of a trial. The opinion then goes on to point out the mistakes made by the trial court in the Tyler case which the trial court in the present case attempts to follow via its order. Namely, the Tyler trial court had determined, despite the settlement of \$17,500, that Mr. Tyler was not a prevailing party. The trial court then misapplied notions regarding the settlement being affected by the “dint of nuisance and the threat of expense.” Citing Farrar, 506 U.S. 103 (1992) the opinion in Tyler acknowledged that in

fact Mr. Tyler was “a prevailing party.” While the opinion does thereafter discuss nuisance settlements and frivolous and groundless suits, nothing in the opinion suggests a belief by that appellate court that such would have existed in the case herein, where Judgment has been obtained. The Tyler case was admittedly remanded for trial court determination as to whether it could reasonably deny an award of attorney’s fees under the facts of the case in spite of Plaintiff being a prevailing party. While no subsequent opinion exists, correspondence with counsel for petitioner Tyler confirms that petitioner ultimately received attorney’s fees well in excess of his \$17,500 settlement. Unlike the Tyler settlement agreement with a specific denial of liability, Petitioner herein obtained judgment on all counts, including the §1983 claim. Tyler does not support the determination by the trial court and instead supports the opposite result.

Likewise, the final trio of cases referenced in the trial court order are lacking in support. Testa v. Village of Mundelein, Ill., 89 F.3d 443 (1996) is a case in which the plaintiff was denied its §1983 claim by a jury and only awarded \$1,500 on a related malicious prosecution claim. Such is clearly distinct from Petitioner’s judgment as to all counts, including §1983 for over three times the amount. Hertz v. Riebe, 936 P.2d 24 (Wash. Ct. App. 1997) is a real estate matter concerning a contract action brought in Small Claims Court in the State of Washington. Of note, however, is its reference of a prevailing party as “the party in whose favor final judgment is rendered.” As reminded ad nauseam only the Petitioner has received a final judgment in the matter at hand. Likewise, and tellingly, Runnells v. Quinn, 890 A.2d 713 (Maine 2006), referenced in the trial court order as being “most analogous to the present case,” is a contract-based civil dispute between a general contractor and a homeowner regarding numerous claims and

counterclaims, NONE of which involve §1983 or §1988, with BOTH parties having received judgment after a jury trial in the State of Maine.

Respondent suggested support from Heath v. County of Aiken, 302 S.C. 178, 394 S.E.2d 709 (1990) and its comment that “[a] court determines the prevailing party by evaluating the degree of success obtained.” Id. at 711. However, the immediate preceding paragraph states that “[a] prevailing party has been defined as: [t]he one who successfully prosecutes the action . . . [and] is the one in whose favor the decision or verdict is rendered and judgment entered.” Id. at 711 (citing Buza v. Columbia Lumber Co., 395 P.2d 511, 514 (1964)). Only Petitioner obtained an entered judgment.

Petitioner fully agrees that no cause of action exists against SC DNR entitling recovery of attorney’s fees and never affirmatively suggested otherwise. Therefore, the rationale for requesting that DNR’s counsel prepare the eventual trial court order is uncertain.

In the same manner that a victim can expect a bully’s assaults to cease only upon fighting back, the simple initiation of suit in this matter “affected the behavior of defendants” by curtailing the harassment and infringement on Petitioner’s property and constitutional rights. In accord with all infringement upon the rights and property of others, the transgressions are liable to continue until confronted with resistance. With an investment in property of well over a half million dollars, the preservation of the same via initiation of suit by Petitioner brought value, independent of the eventual award of Judgment. At least thus far, worthy and substantial “changes in the behavior” received from respondent have been achieved. Though respondent may still regret his inability to purchase Petitioner’s property and continue his hunts upon it, his efforts which infringed

upon Petitioner's enjoyment of the same have ceased. However, given the erroneous rulings by the trial court and the Court of Appeals, it is feared that respondent may be emboldened and that harassment may resume if the adverse rulings continue or are affirmed. The attempt to define Petitioner's objectives in such a manner as to find "special circumstances" or justify rejection as prevailing party is not supported by the record.

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

In groping for nonexistent support, the trial court order states "the Plaintiff has failed to show he recovered on the §1983 claim" (R. p. 8); this, in direct contrast to the earlier acknowledgement of the order that "defendants offered to settle with plaintiff **on all his claims, both federal and state**, for \$5,100[,] . . . **plaintiff accepted this offer . . .**" (R. p. 6)(emphasis added). This proposed rationale of a "special circumstance" is violative of the order's own findings; facts for which this Court could take judicial notice: that Judgment exists as to the Complaint filed by Petitioner.

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

circumstances” relates to respondent’s “settlement agreement” with Petitioner’s insurance company.

No cited case attempts to correlate and/or equate a Plaintiff’s judgment obtained per §1983 and related claims to a subsequent settlement on a counterclaim by an opposing party – especially when the actual settlement agreement itself was not made a part of the record. The Per Curiam Opinion appropriately makes no mention whatsoever of respondent’s “settlement agreement.” Any knowledge of such “settlement” exists only through the improper publication of the same, in opposition to the supposed “confidentiality” of the agreement. It could have been a simple matter in this instance for the Court of Appeals to specifically note that consideration by the trial court of the “settlement agreement,” the precise terms of which are absent from the Record on Appeal, was in error.

While Petitioner remains puzzled by the unnecessary actions of his insurer, consideration should be given to the expectation that Petitioner’s ultimate recovery would exceed the amounts provided by the insurer. As is often the case in §1983 litigation, vindication of civil rights and that message to the offending legal authority is of import, such that a reasonable fee may well exceed the prevailing plaintiff’s base recovery. “Congress viewed the fees authorized by 1988 as “an integral part of the remedies necessary to obtain” compliance with 1983. S. Rep. No. 94-1011, p. 5 (1976)” Maine v. Thiboutot, 448 U.S. 1, 11 (1980). “When a plaintiff succeeds in remedying a civil rights violation . . . he serves “as a ‘private attorney general,’ vindicating a policy that Congress considered of the highest priority.” Fox v. Vice, Op. No. 10-114 (U.S. Supreme Court,

decided June 6, 2011) (quoting Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968)).

Even if an appropriate settlement agreement had been properly introduced, Petitioner denies that consideration of the same would necessarily be appropriate in regard to §§1983 and 1988 fee determinations. Moreover, there can be little validity of a “comparison” between a Judgment entered on the record and a supposedly confidential settlement agreement resulting in dismissal of counterclaims. Respondent’s settlement agreement would necessarily encompass the entirety of any recovery by respondent. To compare this final award with the first portion of the expected overall award to be received by Petitioner is erroneous. This is especially so when Petitioner maintains a recorded Judgment against respondent, but was NOT a party to the “settlement agreement.”

Nothing suggests that the private, confidential settlement reached between Respondent and Petitioner’s insurance company, which specifically memorialized Petitioner’s denial of wrongdoing and opposition to said settlement, could ever confer prevailing party status upon Respondent, even if he had somehow brought a §1983 claim and consideration thereof was deemed appropriate. Such “agreement” was created against the specific objection of Petitioner and his personal counsel and was wholly unnecessary, initially due to the spurious claims of respondent, and more so following the entry of Judgment.

In arguing the propriety of recovery comparison, Respondent has referenced 66 A.L.R.1115 in earlier briefings, suggesting a 2010 publication date. However, this article was originally drafted in 1975, a year before the passage of §1988, and is of no avail

given the circumstances regarding the respective resolution of the claims of the parties. Comparison was inappropriate where, per the public recordations, Petitioner obtained a recorded Judgment and Respondent obtained a recorded dismissal with prejudice.

Though the Court of Appeals' per curiam opinion references Hensley v. Eckerhart, 461 U.S. 424, 429 (1983) and Gregg v. Ham, No. 3:08-4040-CMC, 2010 WL 5060583 at 81 n.3 (D.S.C. December 6, 2010) to remind that prevailing plaintiffs are eligible for, rather than entitled to, an award of attorney's fees and that some special circumstance might exist to render an award of costs and/or fees unjust, no actual basis for such applications is provided. Moreover, as with most cases raised by the trial court, neither Hensley nor Ham suggest support for the total denial of costs and or attorney's fees to a party such as Petitioner, who recovered over 5000 times the "nominal" damages necessary for designation as prevailing party upon recovery as to all causes of action, including §1983.<sup>7</sup> The Per Curiam Opinion footnote cite from Ham states "that a prevailing party is eligible for, rather than entitled to, an award of attorney's fees." Of course, Ham merely dealt with fees actually awarded and whether the entirety of the award for the prevailing party was justified. Reliance on Ham might better suggest that, having obtained roughly one-sixth the recovery, an appropriately proportional award of attorney's fees to Petitioner might be a reasonable reward. Nothing in Ham suggests "special circumstances" justify the outright denial of an award of costs and/or fees.

Finally, in an apparent attempt to reiterate the long standing nature of "special circumstances" which might exist to affect an attorney fee award, the Per Curiam Opinion quotes Hensley v. Eckerhart, 462 U.S. 424 (1983). In doing so, it is clear that

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<sup>7</sup> Farrar v. Hobby, 506 U.S. 103, 113 S.Ct. 556, 121 L.E2d 494 (1992)(Judgment for even \$1.00 sufficient for prevailing party status.)

the Per Curiam Opinion misapprehends and/or overlooks the extensive explanation in Eckerhart of the purpose of 42 U.S.C. §1988. Given the trial court's award of an exceptional amount of fees, the U.S. Supreme Court in Eckerhart discussed whether the trial court was required to more thoroughly justify the reasonableness of the fee given that approximately seventy to eighty percent of the attorney time in the case was spent on the sole constitutional violation out of six for which success was not obtained. The citation just preceding the Per Curiam Opinion cite states: "[t]he purpose of §1988 is to ensure "effective access to the judicial process," for persons with civil rights grievances." Eckerhart at 429. The Per Curiam Opinion's cite actually is a quote from Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968) for which our recently departed and esteemed Jurist, the Honorable Matthew J. Perry, served as an attorney on behalf of the wronged plaintiff. In obtaining an injunction as to racial discrimination at Piggie Park's restaurants and sandwich shops, but no monetary damages, Judge Perry's client acted as a "private attorney general" for whom attorney's fees were deemed appropriate. That opinion in Eckerhart by Justice Brennan, with whom Justices Marshall, Blackmon and Stevens joined, concurring in part and dissenting in part, highlights the entire rationale behind §1988 and its history up to that point, all of which stand in support of some reasonable attorney's fee being awarded to Petitioner.

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

defendants bear the full burden of paying for enforcement of their civil rights obligations.

Eckerhart, 462 U.S. at 444-446 (1983).<sup>8</sup>

Though Eckerhart acknowledged that special circumstances might exist when an award would be “unjust” even if the plaintiff prevailed, it reminded that the matter was left “to the discretion of the judge, **guided of course by the case law interpreting similar attorney’s fees provisions.**” Id. at 447 (emphasis added). As referenced previously, even in the year prior to Eckerhart it was noted that “[i]t is now axiomatic that plaintiffs who prevail in actions brought under section 1983 are entitled to attorney’s fees unless special circumstances would render such an award unjust, and the discretion of the district court in deciding whether to award such fees to prevailing party is **narrowly limited.**” Consumers Union, 688 F. 2d at 222 (4<sup>th</sup> Cir. 1982) (R. p. 118) (emphasis added). Eckerhart further states that “the Senate report specifies that fee awards under §1988 should be equivalent to fees ‘in other types of equally complex federal litigation, such as anti-trust cases and **not be reduced because the rights involved may be non-pecuniary in nature. . . . Congress did not intend fees in civil rights cases, unlike most private-law litigation, to depend on obtaining relief with substantial monetary value.**” Eckerhart, at 447-448 (emphasis added).

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

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<sup>8</sup> Petitioner acknowledges that Buckhannon eliminated “the catalyst theory,” yet the Congressional intent of attorney fee awards remains applicable.

Accordingly, much like the trial court order, the cases cited by the Per Curiam Opinion actually support an award of costs and/or attorney's fees rather than erroneously suggesting "special circumstances" which justify outright denial.

Respondent's cited the Jamison case on appeal, noting that "under the abuse of discretion standard, the reviewing court is obligated to give great deference to the trial court's judgment." Jamison v. Ford Motor Company, 373 S.C. 248, 644 S.E.2d 755, 766 (Ct. App. 2007). However, in further discussing discovery matters, the Jamison opinion more importantly notes that "**the failure to weigh the required factors demonstrates a failure to exercise discretion and amounts to an abuse of discretion.**" Id. at 767. (emphasis added). The failure to consider lodestar analysis constituted a failure to weigh the required factors, demonstrating a failure to exercise discretion, amounting to an abuse of discretion.

Whether based upon the comparison of outcomes, the designation of Petitioner's Judgment as a nuisance-value settlement, or the conclusion that Petitioner did not obtain the desired result of the litigation due to a nominal monetary recovery, Petitioner's analyses in all prior submissions within the record adequately argue, challenge and demonstrate actual abuse of discretion in finding and/or affirming that special circumstances existed to render an award of costs and/or fees unjust. It is the cursory, conclusory rulings of the trial court and the Court of Appeals, in disregard of the cited cases themselves, which evidence the errors of law and unsupported factual conclusions, all of which necessitate reversal.

Who is to police the police? How may citizens adequately "fight City Hall" and combat government officials who abuse their constitutional rights? How is tyranny,

incremental or otherwise, to be opposed? Here, Petitioner civilly and responsibly utilized those means supposedly created for such redress. Petitioner obtained judgment of greater than \$5,000.00 as to all causes of action alleged, the obtainment of which should have objectively rendered any counterclaims worthless. Nonetheless, while making no mention of the most appropriate decisions of the United States' Supreme Court and U.S. Court of Appeals for the Fourth Circuit which address such matters, the trial court determined the Petitioner was not a prevailing party. Then, reiterating that even a technical designation of Petitioner as prevailing party was declined, the trial court attempted to assert that special circumstances existed to prevent ANY award of costs and/or fees. Given that none of the cases cited by the trial court or the affirming Court of Appeals factually support the proposition that such recovery would bar prevailing party designation or the award of ANY costs and/or fees, the abuse of discretion amounting to an error of law is manifest.

The Court of Appeals Per Curiam Opinion undermines §1983 just as the violation of constitutional rights undermines the very liberty that our legal system exists to uphold. Reversal is urged to ensure Petitioner and all citizens of South Carolina can be assured their noble efforts to combat tyranny will be appropriately recognized and rewarded. Petitioner should be deemed prevailing party and instruction should be given that an amount of costs, including attorney's fees, be determined utilizing lodestar analysis, as referenced in Perdue v. Kenny A., Opinion No. 08-970 (U.S. Supreme Court filed April 21, 2010) (Final Brief of Appellant, pp. 23-26).

**CONCLUSION**

For the reasons stated, this Court should reverse the determinations of the trial court and Court of Appeals by declaring Petitioner prevailing party, remand with instructions to disregard consideration of any independent, confidential settlement, determine no special circumstances exist to deprive an award of costs and then determine the applicable and reasonable costs, including attorney's fees, to be awarded through application of lodestar analysis.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM GREENWOOD COUNTY  
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

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Appellate Case No. 2012-212006

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

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William Alvin Hueble, Jr., .....Petitioner,  
v.  
South Carolina Department of Natural Resources and Eric Randall Vaughn,.....Defendants,  
Of Whom Eric Randall Vaughn is..... Respondent.

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PROOF OF SERVICE

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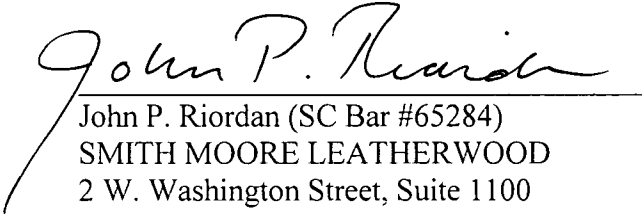
The undersigned certifies that on the 12<sup>th</sup> day of February, he caused to be served the Brief of Petitioner on counsel for Respondent and Defendant DNR by regular U.S. mail, copies of the same addressed to:

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