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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

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S.C. Supreme Court

Op. 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.

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

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

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

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

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

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

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

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

Ultimately, on November 17 2009, Vaughn and SCDNR jointly served an offer of judgment under Rule 68, SCRCP, for $5,100.00. (R. 13). Hueble accepted that offer of judgment on November 18, 2009. (R. 14). Shortly after the resolution of Hueble's claim, Vaughn settled his counterclaims against Hueble in exchange for the payment of $25,000. The counterclaims were subsequently dismissed. (R. 228-229).

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

Hueble then filed an appeal to the South Carolina Court of Appeals which issued an unpublished per curiam opinion on February 15, 2012, affirming the denial of attorney's fees and costs. A subsequent petition for rehearing was denied.

ARGUMENTS

Following his acceptance of an offer of judgment, the Petitioner William Hueble filed a motion for attorney's fees and costs pursuant to 42 U.S.C. § 1988 against the Respondent Eric Randall Vaughn.[1] In denying that motion, Circuit Court Judge Eugene C. Griffith, Jr. ruled that Hueble did not qualify as a "prevailing party" entitled to attorney's fees and costs under Section 1988. Alternatively, he ruled that, even if Hueble were a "prevailing party," attorney's fees and costs were not recoverable due to special circumstances that rendered such an award unjust. In its per curiam opinion, the South Carolina Court of Appeals found no error of law was committed by Judge Griffith in denying Hueble's request for attorney's fees and costs under 42 U.S.C. § 1988.

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[1] The Petitioner Hueble acknowledges that his claim for attorney's fees and costs under Section 1988 was directed only against Vaughn. In his Amended Complaint, Hueble did not allege a Section 1983 claim against the Defendant South Carolina Department of Natural Resources. (R. 50-52). Moreover, the Defendant SCDNR is not a "person" amenable to suit under 42 U.S.C. § 1983. *See, Will v. Michigan State Police*, 491 U.S. 58 (1989) (United States Supreme Court held that the state is not a "person" amenable to suit under 42 U.S.C. § 1983). Thus, the petition for attorney's fees under 42 U.S.C. § 1988 was filed only against the Respondent Vaughn.

I. The trial court, as affirmed by the Court of Appeals, correctly ruled that the Petitioner William Hueble did not qualify as a "prevailing party" entitled to attorney's fees and costs under Section 1988.

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

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

First, Judge Griffith, as affirmed by the Court of Appeals, ruled that the acceptance of an offer of judgment does not establish that Hueble is a "prevailing party." Hueble argues that Judge Griffith and the Court of Appeals have misapplied *federal* law.[2] Hueble overlooks, however, that the application of Rule 68, SCRCP, is a procedural issue and thus is governed by state law. Hueble filed this action in state court which is governed by the South Carolina Rules of Civil

[2] It is also important to note that federal case law is not unanimous on the "prevailing party" issue. *See, Fletcher v. City of Fort Wayne*, 162 F.3d 975, 977 (7th Cir. 1998)

Procedure, not the Federal Rules of Civil Procedure. Accordingly, Vaughn and SCDNR made their offer of judgment pursuant to Rule 68 of the South Carolina Rules of Civil Procedure. (R. 13). Thus, *all procedural aspects* of this litigation, including the legal effect of the offer of judgment, are governed by state law, not federal law.

The Court of Appeals correctly cited to the controlling case of *Belton v. State of South Carolina*, 339 S.C. 71, 529 S.E.2d 4 (2000), in which this Court explained that an accepted offer of judgment "does not qualify as a 'court award'" under South Carolina law because "there has been no resolution on the merits of the claim." 529 S.E.2d at 5. This Court further explained that an accepted offer of judgment is to be treated as a settlement. This Court expressly held that "[a] case resolved by acceptance of an offer of judgment is considered 'settled.'" 529 S.E.2d at 5, n.4.[3]

("Nothing in Rule 68 supports plaintiffs' position that by accepting a Rule 68 offer they automatically become entitled to attorney's fees").

[3] This Court's ruling in *Belton* makes practical sense as well. If the acceptance of an offer of judgment is not to be treated as a settlement under South Carolina law, as the Petitioner argues, the offer of judgment mechanism could be effectively used to contravene and thwart the statutory processes in place for court approval of death, minor and incapacitated person settlements. *See*, S.C. Code Ann. §§ 15-51-41, 62-5-433 (applying to "settlements"). To avoid court approval, the parties could resolve a case by making and accepting an offer of judgment that would then be entered and be enforceable without any judicial review or intervention. However, that cannot be accomplished under the current status of the law because South Carolina law per *Belton* correctly recognizes that the acceptance of an offer of judgment is in actuality a settlement.

In short, under South Carolina law, an accepted offer of judgment is the equivalent of a settlement. The legal effect of an accepted offer of judgment under Rule 68 is a matter of state procedural law, and as a result, the controlling precedent on this issue is supplied by the *Belton* decision and not the Fourth Circuit case law relied upon by Hueble. Hueble, in fact, does acknowledge that "South Carolina procedural rules govern," although he proceeds to nonetheless rely solely on federal case law on this issue. *See*, Petitioner's Brief, p. 12.[4]

Because South Carolina law clearly provides that the acceptance of a Rule 68 offer of judgment is a settlement per *Belton*, the question thus becomes whether settlement is sufficient to confer "prevailing party" status on Hueble. Prior to the Supreme Court's decision in *Buckhannon Board and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598 (2001), many courts

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[4] South Carolina is not alone in treating the acceptance of an offer of judgment as a settlement. For example, in *Belton*, this Court cited with favor the Seventh Circuit case of *Fletcher v. City of Fort Wayne*, 162 F.3d 975 (7th Cir. 1998). In *Fletcher*, which was also cited at length by Judge Griffith in his order in the case at bar, the Seventh Circuit reaffirmed that "a case resolved by acceptance of a Rule 68 offer has been settled." 162. F.3d at 978. Likewise, as an additional example, in *Evans v. Full Circle Productions, Inc.*, 114 N.C. App. 777, 443 S.E.2d 108 (1994), the North Carolina Court of Appeals ruled as follows:

> Where an offer of judgment is accepted by the plaintiff, there is not a "prevailing party" or a "losing party." A purpose of N.C.R.Civ.P 68 is to encourage compromise and avoid lengthy litigation. Because the rationale behind N.C.R.Civ.P 68 is to encourage a voluntary, mutual settlement, both parties may consider themselves prevailing parties. Furthermore, when a case is settled, there is no admission or judgment of liability by defendant.

443 S.E.2d at 110.

believed incorrectly that a settlement or voluntary agreement between the parties was sufficient to give rise to "prevailing party" status under Section 1988. However, in *Buckhannon*, the Supreme Court held that only "enforceable judgments *on the merits* and court-ordered consent decrees create the material alteration of the legal relationship of the parties necessary to permit an award of attorney's fees." 532 U.S. at 604. (Emphasis added). By footnote, the Supreme Court explained that its prior decision in *Maher v. Gagne*, 448 U.S. 122 (1980), should not have been read as allowing "prevailing party" status for a private settlement that is not enforced by a consent decree. *Buckhannon*, 532 U.S. at 604, n.7. The Court ultimately ruled that voluntary conduct by a defendant is not sufficient to allow for the award of attorney's fees under Section 1988. The Court explained that "[a] defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change. Our precedents thus counsel against holding that the term 'prevailing party' authorizes an award of attorney's fees *without* a corresponding alteration in the legal relationship of the parties." 532 U.S. at 605. (Emphasis in original).

In his brief, Hueble treats *Buckhannon* as favorable authority. But Hueble

makes that claim by selective editing and incomplete citations.[5] The Court is urged to review *Buckhannon* carefully. Make no mistake, *Buckhannon* does not hold that the acceptance of an offer of judgment or any private settlement between the parties support "prevailing party" status. To the contrary, the Supreme Court in *Buckhannon* does not even address the legal impact or significance of an acceptance of an offer of judgment. Moreover, the Supreme Court specifically explains that private settlements do not allow for the recovery of attorney's fees and, in fact, pointed out that "[p]rivate settlements do not entail the judicial approval and oversight involved in consent decrees." *Buckhannon*, 532 U.S. at 604, n.7. To the extent any confusion exists as to the holding in *Buckhannon* on the issue of private settlement giving rise to "prevailing party" status, the Court is urged to review the Fourth Circuit's discussion in *Smyth ex rel. Smyth v. Rivero*, 282 F.3d 268 (4th Cir. 2002), where the Court expressly recognized "the *Buckhannon* Court's disapproval of private settlements as a basis for prevailing party status." 282 F.3d at 279. In fact, in *Smyth*, the Fourth Circuit explained that the Supreme Court abandoned its "suggestion" to the contrary in such cases as *Maher v. Gagne*, 448 U.S. 122 (1980), and *Farrar v. Hobby*, 506 U.S. 103 (1992),

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[5] As one example, Hueble cites to Justice Ginsburg's dissent without providing her full quote. The full citation actually confirms that "court-approved settlements" such as consent decrees, provide the necessary judicial *imprimatur*, but private settlements do not. *Buckhannon*, 532 U.S. at 622.

the latter of which "characterized *Maher* as allowing attorney's fees award for private settlement." *Smyth*, 282 F.3d at 279. This is important for the Court to recognize given Hueble's misplaced reliance on *Farrar* as well.

Likewise, the Fourth Circuit in *Smyth* recognized that the same suggestion in its own decision in *S-1 & S-2 ex rel. Parents P-1 & P-2 v. State Board of Education of North Carolina*, 21 F.3d 49 (4th Cir. 1994), is no longer correct and that a private settlement does not support "prevailing party" status. Nonetheless, on page 15 of Petitioner's Brief, Hueble suggests that the Supreme Court in *Buckhannon* affirmed a "previous determination" of the Fourth Circuit that a private settlement supports "prevailing party" status. A review of *Buckhannon* reveals Hueble's mischaracterization. The reference in *Buckhannon* on which Hueble relies actually is a cite to the *S-1* case, but *Buckhannon* does not "affirm" any suggestion in *S-1* that a private settlement may support "prevailing party" status. *See*, *Buckhannon*, 532 U.S. at 602. The Court is thus urged to carefully scrutinize Hueble's citations for accuracy.

Hueble's reliance on two Fourth Circuit decisions is also misplaced. In *Bosley v. Mineral County Commission*, 650 F.3d 408 (4th Cir. 2011), the Fourth Circuit did not even discuss whether the plaintiff who accepted an offer of judgment is a "prevailing party" because that issue was not raised. Furthermore, reliance on *Grissom v. The Mills Corp.*, 549 F.3d 313 (4th Cir. 2008), overlooks the fact that

South Carolina construes Rule 68 differently from its federal counterpart. State law governs on this issue, and the *Belton* case is controlling. Further, the validity of such cases as *Bosley* and *Grissom* should nonetheless be questioned. *Buckhannon* explicitly requires "enforceable judgments *on the merits*." 532 U.S. at 604. (Emphasis added). Yet, an accepted offer of judgment, by no definition, is a judgment *on the merits*. With an offer of judgment, such as in the present case, there is no judicial determination of the merits. This remains a critical point missed by the Fourth Circuit. A settlement, as explained by the *Buckhannon* Court, is a voluntary change in conduct by a defendant without any *judicial* decision on the merits, and as such, it cannot give rise to "prevailing party" status for any of the settling parties.[6] Thus, under *Belton* and *Buckhannon*, Hueble, as a settling party, does not qualify as a "prevailing party" entitled to attorney's fees and costs under Section 1988, and the Court of Appeals was correct in affirming that ruling.[7]

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[6] The Supreme Court in *Buckhannon* allows for "prevailing party" status in the context of a consent decree where the court reviews the agreed settlement terms and adopts those by court order. Importantly, a consent decree which is court approved will always involve prospective relief and not simply the payment of damages, as in the present case. It is the court's adoption and agreement to enforce the settlement terms that provides the necessary judicial *imprimatur* per *Buckhannon* to give rise to "prevailing party" status. A private settlement, as in the case at bar, is completely different.

[7] The previous conclusion that Hueble does not qualify as a "prevailing party" under Section 1988 is further evident because there has been no adjudication of his Section 1983 claim. Hueble asserted numerous state law claims against Vaughn and a single federal claim. Hueble also asserted numerous state law claims against SCDNR. The offer of judgment was inclusive of all claims and cannot be read as an admission of liability on the Section 1983 claim

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

It is important to recognize that Judge Griffith found that Hueble did not qualify as a "prevailing party" on two separate and independent bases. First as discussed above, he ruled that the acceptance of an offer of judgment does not establish that Hueble is a "prevailing party." This issue is discussed above. Second, Judge Griffith concluded that Hueble is not a "prevailing party" because the parties had competing claims and both settled. This ruling was also affirmed by the per curiam opinion of the Court of Appeals. Yet, neither in his Petition for Writ of Certiorari nor in his current brief to this Court does Hueble actually challenge this alternative ruling.

Accordingly, Hueble's appeal on the "prevailing party" issue may be resolved by the "two-issue" rule. In *Jones v. Lott*, 387 S.C. 339, 692 S.E.2d 900 (2010), this Court explained the two-issue rule as follows: "where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case." 692 S.E.2d at 903. *See also*, *Folkens v. Hunt*, 290 S.C. 194, 348 S.E.2d 839,

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against Vaughn, which would thereby give rise to liability under Section 1988 for attorney's fees. Indeed, under South Carolina law as explained in *Belton*, an accepted offer of judgment cannot be construed as an admission of liability on any claim because it is not a resolution on the merits.

845 (Ct. App. 1986) ("[a]n alternative ruling of a lower court that is not excepted to constitutes a basis for affirming the lower court and is not reviewable on appeal").[8]

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

Based on the settlements reached by the parties, Judge Griffith correctly determined that neither party was the "prevailing party" and that attorney's fees should not be awarded. There is no case law in South Carolina that addresses this scenario in a civil context, absent a specific statutory framework such as the mechanic's lien statutes. Likewise, there are no cases from other jurisdictions

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[8] Rule 242(d)(2), SCACR, provides that "[o]nly those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court." Rule 242(d)(2), SCACR. *See also, Camp v. Springs Mortgage Corp.*, 310 S.C. 514, 426 S.E.2d 304 (1993) (issue not preserved for appeal where the petitioner did not raise the issue in its petition for rehearing). Here, the Petitioner did not challenge this alternative ruling on the "prevailing party" issue in his petition for rehearing in the Court of Appeals, and on that additional basis, the issue cannot be litigated in this Court and should therefore result in an affirmance under the two-issue rule.

addressing whether one party may be considered a "prevailing party" under Section 1988 where both parties recover or "prevail" on competing claims for monetary relief. This case appears to be entirely novel in that respect.

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

In a related context, this Court ruled in *Heath v. County of Aiken*, 302 S.C. 178, 394 S.E.2d 709 (1990), that "[a] court determines the prevailing party by evaluating the degree of success obtained." 394 S.E.2d at 711. In the case at bar, there was no adjudication on the merits of any claims or counterclaims. The parties voluntarily resolved those claims, and hence, it cannot be said that Hueble prevailed and Vaughn did not. At best, a comparison of the monetary recoveries

by both parties would suggest that if anyone prevailed, it was Vaughn. But at any rate, there is no basis for determining under the present circumstances that Hueble qualifies as a "prevailing party" in this litigation and thus is entitled to costs under Rule 54(d), SCRCP, including attorney's fees. If Hueble is not entitled to recover costs under Rule 54(d), then he is clearly not entitled to recover under Section 1988.[9]

In short, Judge Griffith's ruling, as affirmed by the Court of Appeals, that Hueble is not a "prevailing party" entitled to recover under Section 1988 should be affirmed on this additional basis – a basis that Hueble has not even challenged on appeal.

II. The trial court, as affirmed by the Court of Appeals, did not abuse its discretion in ruling that even if the Petitioner William Hueble were a "prevailing party," attorney's fees and costs were not recoverable due to special circumstances that rendered such an award unjust.

In addition to ruling that the Petitioner William Hueble does not qualify as a "prevailing party," Judge Griffith also ruled that, even if Hueble were a "prevailing party," attorney's fees and costs are not recoverable due to special circumstances that rendered such an award unjust. In *Hensley v. Eckerhart*, 461 U.S. 424 (1983),

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

the United States Supreme Court held that "a prevailing plaintiff should ordinarily recover an attorney's fee *unless special circumstances render such an award unjust.*" 461 U.S. at 429. (Emphasis added).

In its per curiam decision, the Court of Appeals cited the case of *Gregg v. Ham*, 2010 WL 5060583 (D.S.C. 2010), for the proposition that "[a]s the prevailing party, [p]laintiff is *eligible* for, rather than *entitled* to, an award of attorney's fees." 2010 WL 5060583 at, *1 n.3. (Emphasis added). Thus, a plaintiff must first qualify as a "prevailing party" in order to claim attorney's fees under Section 1988; however, even if a plaintiff is a "prevailing party," he is not automatically *entitled* to fees. Where special circumstances exist, an award of fees may be deemed unjust and thus be denied.[10]

In the present case, Judge Griffith found that an award of attorney's fees to Hueble would be unjust for three principal reasons. First, he determined that the settlement of Vaughn's counterclaims by Hueble, which allowed both parties to

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[10] In his brief, however, Hueble cites repeatedly to the dissenting opinion of Justice Brennan as establishing the controlling authority. *See*, Petitioner's Brief, pp. 37-38. One example is particularly misleading. Hueble cites to the following: "although it is an abuse of discretion to deny fees entirely to any plaintiff who has crossed the 'prevailing party' threshold ..." *See*, Petitioner's Brief, p. 38. That is not a holding of the United States Supreme Court, and in fact, Justice Brennan is actually describing Eighth Circuit case law rather than his own opinion in making that statement. But, the fact remains that statement – which is presented to this Court as the controlling law – is not. *Eckerhart*, in fact, stands for the proposition that a prevailing party is *not* always entitled to an award of attorney's fees. Consequently, it is not automatically an abuse of discretion to deny attorney's fees to a prevailing party. "Special circumstances" may indeed warrant doing just that – which is what Judge Griffith concluded in this very case.

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

The standard of review for Judge Griffith's rulings in this regard is an abuse of discretion standard. It is well settled that an award of attorney's fees under Section 1988 is reviewed for an abuse of discretion. *See*, *Johnson v. City of Aiken*, 278 F.3d 333, 336 (4th Cir. 2002). *See also*, *Heath v. County of Aiken*, 302 S.C. 178, 394 S.E.2d 709 (1990) (applying abuse of discretion standard of review for attorney's fees claim under state law). "An abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions." *Kiriakides v. School Dist. of Greenville County*, 382 S.C. 8, 675 S.E.2d 439, 445 (2009). "[U]nder the abuse of discretion standard the reviewing court is obligated to give great deference to the trial court's judgment." *Jamison v. Ford Motor Co.*, 373 S.C. 248, 644 S.E.2d 755, 766 (Ct. App. 2007).[11]

While Hueble ostensibly disputes Judge Griffith's finding of special

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[11] Hueble has agreed that the abuse of discretion standard is the correct standard of review. *See*, Petitioner's Brief, p. 22.

circumstances necessary to decline to award attorney's fees, he does not demonstrate that Judge Griffith actually abused his discretion in so ruling. Hueble only presents arguments as to why this Court should disagree with those rulings or have a difference of opinion. The standard of review, however, is not *de novo*, and as a result, Hueble has not met his burden.

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

Importantly, Hueble has not presented any authority from any jurisdiction where a court has held that consideration of the monetary recoveries by both parties on competing claims was not an appropriate consideration in determining whether an award of attorney's fees to one party was justified or otherwise would be unjust. In other words, Hueble has presented no case in the context of Section

1988 or otherwise that rejects the application of the "net recovery" rule or some variation thereof where there are recoveries on competing claims by the parties.

In fact, as mentioned above, this Court has engaged in weighing the comparative success by the competing parties in assessing an attorney's fees claim under Section 15-77-300. *See*, *Heath v. County of Aiken*, 302 S.C. 178, 394 S.E.2d 709 (1990). In that case, this Court awarded fees in favor of the party which succeeded on a "majority of issues." 394 S.E.2d at 712. In effect, an assessment of the comparative success by the competing parties was a valid consideration whereby Judge Griffith within his discretion determined that an award of attorney's fees by Hueble would be unjust. No error of law or abuse of discretion in that regard has been shown.[12]

In addition, Judge Griffith ruled that the offer of judgment of $5,100 was a nuisance-value settlement and did not constitute the degree of success as would justify an attorney's fees award. Hueble has not shown that this ruling was an abuse of discretion. In fact, Hueble spends much of his brief describing the cases cited by Judge Griffith but fails to focus on the "special circumstances" as found. In so doing, Hueble repeatedly returns to his "prevailing party" argument rather

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[12] Hueble argues that Judge Griffith should not have placed any weight on the settlement of Vaughn's counterclaims because that was done at the insistence of Hueble's insurance carrier. That argument is meritless. The monies paid for the settlement on both sides were paid by insurers for the benefit of the parties. Hueble cannot deny the benefit that he received from the settlement and from resolving Vaughn's counterclaims against him.

than directly addressing whether Judge Griffith's finding of special circumstances constitutes an error of law.

At any rate, Judge Griffith was well within his discretion in concluding that the $5,100 amount paid to Hueble was mere nuisance-value, which was defined by the Seventh Circuit as "[a] compromise for less than the costs of defense." *Fletcher v. City of Fort Wayne*, 162 F.3d 975, 976 (7th Cir. 1998). In fact, Judge Griffith made the following findings which are uncontradicted and unchallenged on appeal:

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

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

Judge Griffith's ruling based on the nuisance-value of the $5,100 recovery is fully supported by the case of *Fletcher v. City of Fort Wayne*, 162 F.3d 975, 976 (7th Cir. 1998), which as mentioned above has been cited favorably by this Court. *See*, *Belton v. State of South Carolina*, 339 S.C. 71, 529 S.E.2d 4, 5 (2000). In *Fletcher*, the Seventh Circuit concluded that "[t]he district judge did not abuse his

discretion in concluding that these settlements [of $2,500 and $5,000] reflected only nuisance value, so the plaintiffs were not entitled to attorneys' fees." 162 F.3d at 978. *See also, Tyler v. Corner Construction Corp.*, 167 F.3d 1202, 1206 (8th Cir. 1999) (nuisance settlement represents a special circumstance that would render an attorney's fees award unjust).

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

This conclusion is further supported by the fact that Hueble obtained no recovery other than monetary relief. To the extent that Hueble claims that this case was "not about the money," he has still not achieved any success in the litigation. It is without dispute that Hueble received only monetary relief in resolution of the litigation (and much less than Vaughn received on his counterclaims). While he sought injunctive relief in his Amended Complaint, no such relief was granted, and any alleged voluntary cessation of conduct by Vaughn, as may be asserted by Hueble, is immaterial because the "catalyst" theory as a basis for an award of attorney's fees was rejected by the United States Supreme Court in *Buckhannon.*

No prospective relief was offered by Vaughn as part of the settlement nor received by Hueble.[13]

In sum, Judge Griffith's finding that Hueble's recovery was "trivial" and "nominal" is supported by the record and has not been shown to be an abuse of discretion.[14] Because the Hueble's recovery was *de minimis*, Judge Griffith acted within his broad discretion in concluding that an award of attorney's fees under Section 1988 would be unjust under the circumstances. The Court of Appeals was therefore correct to affirm the finding of "special circumstances" which justified the denial of an award of attorney's fees.

CONCLUSION

Based on the foregoing discussion and analysis, the Respondent Eric Randall Vaughn respectfully requests that this Court affirm the decision of the South Carolina

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[13] At the close of his brief, Hueble finally attempts to address an abuse of discretion when he writes: "The failure to consider lodestar analysis constituted a failure to weigh the required factors, demonstrating a failure to exercise discretion, amount [sic] to an abuse of discretion." *See*, Petitioner's Brief, p. 39. However, this argument is illogical. Judge Griffith did not refuse to consider or apply the lodestar test. He simply declined to award any attorney's fees under Section 1988 because Hueble was not a "prevailing party" and because an award of attorney's fees was unjust under the circumstances. Because Judge Griffith concluded that Hueble was not entitled to recover any attorney's fees, it was not necessary for him to apply the lodestar test which is used to make an award of fees. Thus, the failure to apply the lodestar test does not constitute an abuse of discretion related to the "special circumstances" analysis.

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

Court of Appeals and affirm the order of Circuit Court Judge Eugene C. Griffith, Jr., filed May 24, 2010, denying the Petitioner's motion for attorney's fees and costs under Rule 54(d) and 42 U.S.C. § 1988.

Respectfully submitted,

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March 18, 2015

CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Respondent, does hereby certify that service of the **Brief of Respondent** was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 18th day of March 2015:

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RECEIVED
MAR 23 2015
S.C. Supreme Court

The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
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RE: William Alvin Hueble, Jr. v. South Carolina Department of Natural Resources and Eric Randall Vaughn
Supreme Court Number: 2012-212006
Civil Action Number: 2007-CP-24-1056
Claim Number: 37587
Our File Number: 103.8464

Dear Mr. Shearouse:

Please find enclosed for filing the originals and fifteen copies each of the **Brief of Petitioner** in the above referenced matter. Please file the original and return a clocked-in to me in the enclosed envelope.

By copy of this letter, I am serving copies on all counsel of record.

Thank you for your assistance in this matter.

Sincerely,

DAVIDSON & LINDEMANN, P.A.

Andrew F. Lindemann

AFL/jmb
Enclosure

cc: (w/ Enclosure)

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