THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
R. Kirk Griffin, Circuit Court Judge

Supreme Court Case No. 2021-000472

Court of Appeals Case No. 2021-000343

Lower Court Case No. 2020-CP-40-04063

South Carolina Public Interest Foundation and John Crangle, individually and on behalf of all others similarly situated, ... Appellants,

v.

Alan Wilson, Attorney General for the State of South Carolina, Willoughby & Hoefer, P.A., and Davidson, Wren & DeMasters, P.A.,..... Respondents.

INITIAL BRIEF OF RESPONDENT WILLOUGHBY & HOEFER, P.A.

John S. Simmons, S.C. Bar No. 10260
SIMMONS LAW FIRM, LLC
1711 Pickens Street
Columbia, South Carolina 29201
(803) 779-4600

Gerald Malloy, S.C. Bar No. 12033
MALLOY LAW FIRM
Post Office Box 1200
Hartsville, South Carolina 29551
(843) 339-3000

J. Todd Rutherford, S.C. Bar No. 12097
RUTHERFORD LAW FIRM, LLC
2113 Park Street
Columbia, South Carolina 29201
(803) 256-3003

Attorneys for Respondent Willoughby & Hoefer, P.A.

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INTRODUCTION

After more than four and a half years of litigation against the Federal Government across a number of Federal fora, Respondent Alan Wilson, Attorney General for the State of South Carolina, executed a settlement agreement related to the State's claims against the U.S. Department of Energy (DOE) and the United States of America relating to the mixed oxide fuel fabrication facility (MOX Facility) at the Savannah River Site (SRS), which was the result of the litigation efforts of the Attorney General's litigation team, which included Respondents Willoughby & Hoefer, P.A. (W&H) and Davidson, Wren & DeMasters, P.A. (DW&D, and together with W&H, the Respondent Law Firms). That settlement secured the largest single upfront monetary recovery ever on behalf of the State—$600 Million—in addition to significant other monetary and non-monetary legally binding contractual commitments from the Federal Government inuring to the State's benefit going forward.

Appellants South Carolina Public Interest Foundation and John Crangle (collectively, the Appellants) were not involved in that litigation in any way, shape, or form. They did not challenge the Respondent Law Firms' retention agreements—which provided for a contingency fee arrangement requiring the Respondent Law Firms to bear all financial risk on behalf of the State—until success had been assured and money flowed. Only after the Respondent Law Firms' efforts on behalf of the State succeeded in achieving an extraordinary and just result, fulfilling the terms of their contractual engagement, did Appellants then seek to insert themselves into this matter, publicly casting stones and disparaging the work and result in which they played no part, all for the sole purpose of obtaining a portion of the fees earned by and paid to the Respondent Law Firms based upon a factually meritless and legally non-justiciable contention that a violation of the South Carolina Rules of Professional Conduct (Rules) has occurred.

In the action underlying this appeal, Appellants challenged the amount of attorneys' fees paid to the Respondent Law Firms pursuant to a valid and enforceable contract with the South Carolina Attorney General and in accordance with the expenditure laws enacted by the South Carolina General Assembly. The circuit court correctly applied the precedent of this Court and dismissed the case because Appellants lacked standing, rejecting Appellants' attempt to conjure some new form of standing for their politically-motivated "money grab."

This Court should reject Appellants' gambit as well and affirm the order of the circuit court dismissing this case because Appellants' lack of standing is now the law of the case and, in any event, was correctly determined by the circuit court. This appeal also should result in affirmance because, as additional sustaining grounds, Appellants' claims in this case are frivolous and fail on their face as a matter of law for myriad reasons.

COUNTER STATEMENT OF ISSUES ON APPEAL

1. Should the dismissal of Appellants' action be affirmed because Appellants failed to appeal the circuit court's order finding that Appellants lack standing, thus rendering that finding the law of the case?

2. Did the circuit court properly dismiss Appellants' claims challenging the fulfillment of the Attorney General's contractual obligation to the Respondent Law Firms for lack of standing where the attorneys' fees were paid consistent with the terms of their litigation retention agreement with the State, such contractual payment was approved by the Attorney General, the Executive Budget Office of the Department of Administration, the State Comptroller General, and the State Treasurer, and where Appellants were not parties to the litigation retention agreement and did absolutely nothing to advance the State's interests in the multiple lawsuits against the Federal Government brought by the Respondent Law Firms?

3. Should the circuit court be affirmed on the additional sustaining grounds that Appellants' claims challenging the payment of attorneys' fees to the Respondent Law Firms (a) are moot, (b) present non-justiciable political questions, and (c) fail to state facts sufficient to constitute a cause of action?

COUNTER STATEMENT OF THE CASE

Appellants instituted the action underlying this appeal in the Richland County Court of Commons Pleas on September 25, 2020, against the State Attorney General. **(R. pp.)** (Complaint). Several days later, upon learning that the State had paid the Respondent Law Firms the fee to which they were contractually entitled, Appellants filed an amended complaint adding claims against the Respondent Law Firms. **(R. pp.)** (Amended Complaint). In the Amended Complaint, Appellants raised various arguments regarding the payment of attorneys' fees to the Respondent Law Firms pursuant to the litigation retention agreement entered into between the Attorney General and the Respondent Law Firms. **(*Id.*)**. Appellants also filed a motion for temporary restraining order and preliminary injunction. **(R. pp.)**.

On October 1, 2020, the Honorable Alison Renee Lee issued an *Ex Parte* Temporary Restraining Order but scheduled and then conducted a hearing on the motion for preliminary injunction on October 7, 2020. At the close of the hearing, Judge Lee extended the Temporary Restraining Order an additional seven days while she considered the arguments and information advanced by the parties. **(R. pp.)** (Form 4 Order Extending TRO). On October 14, 2020, Judge Lee denied the motion for preliminary injunction and dissolved the extended Temporary Restraining Order based on two independent determinations: first, that Appellants lacked standing; and second, that Appellants had not demonstrated that they met the legal standards for the issuance of a preliminary injunction. **(R. pp.)** (Order Denying Plaintiffs' Motion for Preliminary Injunction Order (October 14 Order)). Appellants subsequently filed a motion to reconsider the October 14 Order, which Judge Lee denied on December 17, 2020. **(R. pp.)** (Order Denying Plaintiffs' Motion to Alter or Amend (December 17 Order)).

On October 20, 2020, W&H and DW&D filed and served motions to dismiss seeking dismissal pursuant to Rules 12(b)(1) and 12(b)(6), SCRCP, on the grounds that Appellants lacked standing and failed to state facts sufficient to constitute a cause of action against the Respondents. **(R. pp.)**. The Attorney General filed his own motion to dismiss on October 27, 2020, seeking dismissal on similar grounds. **(R. pp.)**. On January 26, 2021, the Honorable R. Kirk Griffin conducted a hearing on the motions to dismiss. On February 12, 2021, Judge Griffin sent the parties a letter announcing his decision to grant the motions to dismiss stating, in part, "[t]he Court finds that Circuit Court Judge Alison Lee's order dated October 14, 2020 is dispositive as to the issue of standing." **(R. pp.)**. On March 5, 2021, Judge Griffin issued a formal order dismissing the Amended Complaint on the basis that Judge Lee's prior findings that Appellants lacked standing were dispositive. **(R. pp.)** (Order Granting Motions to Dismiss (March 5 Order)) ("Judge Lee's findings are dispositive and require dismissal"). Judge Griffin also concurred with and restated Judge Lee's analysis and findings in the alternative. **(*Id.*)**. Appellants filed their Notice of Appeal with the Court of Appeals on March 29, 2021, appealing only from Judge Griffin's March 5 Order.[1] **(R. pp.)**. By order dated July 6, 2021, the appeal was certified for review by this Court.

FACTUAL BACKGROUND

It is important for this Court to know at the outset how this lawsuit came to pass. In the action underlying this appeal, Appellants challenged the payment of attorneys' fees to private attorneys as required by contract, fees that were earned through the prosecution of four cases in

[1] On May 5, 2021, Respondents filed with the Court of Appeals a Motion to Dismiss this appeal on the grounds that Judge Lee's unappealed finding that Appellants lack standing is the law of the case and, therefore, no justiciable controversy exists. By order dated June 8, 2021, the Court of Appeals denied the Motion to Dismiss but provided that nothing prevented the parties from addressing the arguments raised in the Motion to Dismiss in their briefs. Appellants have addressed this issue in their brief. Br. of Appellants at 26-28.

three separate Federal trial courts, three separate Federal Courts of Appeal, and a petition to the United States Supreme Court, all of which contributed to and culminated in the ultimate settlement of a case filed by the State of South Carolina in the Court of Federal Claims.

In March of 2014, after the Congressional delegation and then-Governor Nikki Haley asked the Attorney General to explore any legal avenues the State might have to address the pending injustice to the State through the shuttering of the MOX Facility at SRS, the Respondent Law Firms (or their predecessors) were hired to file an action in the District Court of South Carolina on behalf of the State to protect South Carolina's interests with respect to the MOX Facility. **(R. pp.)** (Sept. 16, 2020 Ltr. to The Honorable W. Jeffrey Young, Chief Deputy Attorney General, p.1). After the filing of a complaint on behalf of the State on March 18, 2014, followed by a motion for summary judgment on April 14, on April 30, DOE capitulated and directed the contractor to continue the MOX Facility construction, a significant win for South Carolina and the many citizens working there. **(*Id.*)**.

However, the State understood the war was far from over. In particular, DOE had a pending statutory deadline of January 1, 2016, to remove one metric ton of defense plutonium from South Carolina. Remaining engaged and following the associated issues with the MOX Facility, the Respondent Law Firms developed a comprehensive strategy focusing on litigation with DOE and briefed the Governor's Office and the Attorney General regarding that proposed and recommended strategy, which included a draft complaint prepared by the Respondent Law Firms. **(*Id.*)**. This strategy included a multi-front approach that would assert claims for injunctive relief seeking the removal of the weapons-grade plutonium, while simultaneously advancing monetary claims against the Federal Government seeking to apply legal and financial pressure against it in an effort to incentivize continuation of the MOX Facility or removal of the material from the State.

With political overtures by South Carolina having been rebuffed, and DOE missing the January 1, 2016 statutory deadline, then-Governor Haley sent another letter to the Attorney General on January 26, 2016, transmitting a formal request that the Attorney General's office once again initiate litigation on behalf of the State of South Carolina against DOE. **(*Id.* at 1-2)**. The Attorney General hired the Respondent Law Firms to implement the comprehensive strategy that they had developed, including representing the State in litigation against the Federal Government related to the MOX Facility at SRS. The litigation retention agreement, as amended (Litigation Retention Agreement), with the Respondent Law Firms provided for a contingency fee arrangement tailored to the demands of this unique and specialized situation. The Litigation Retention Agreement provided that the Respondent Law Firms would assume 100% of the financial risk involved in the litigation, requiring them to advance all costs and work the hours necessary to execute the complex legal strategy in consideration of the contractual contingency fee, if successful. **(R. pp.)** (Litigation Retention Agreement). The State bore no risk under this arrangement; if the comprehensive strategy was successful, then the Respondent Law Firms would be paid according to the terms of the contract. If the strategy was unsuccessful, the Respondent Law Firms could not seek reimbursement or payment for either their costs or the time worked on behalf of the State.

The Respondent Law Firms filed a complaint on behalf of the State against the Federal Government in Federal District Court in South Carolina seeking the removal of one metric ton of weapons-grade plutonium from South Carolina and payment of the economic and impact assistance monies pursuant to 50 U.S.C.A. § 2566. **(R. pp.)** (Sept. 16, 2020 Ltr. to The Honorable W Jeffrey Young, Chief Deputy Attorney General, p.2). After substantial briefing and argument on multiple issues and motions, the District Court issued several orders (1) dismissing the

economic and impact assistance payment (monetary) claim for lack of jurisdiction and directing the claim to be made in the United States Court of Federal Claims as the proper forum, and (2) granting the State's injunctive relief claim and ordering the Federal Government to remove one metric ton of weapons-grade plutonium from the State. **(*Id.*)**. On February 2, 2018, the Federal Government appealed the judgment to the Court of Appeals for the Fourth Circuit. *Id*. After briefing and argument, on October 26, 2018, the Fourth Circuit affirmed the order requiring removal within two years (*i.e*., by December 31, 2019). **(*Id.*)**.

On November 30, 2018, the State of Nevada filed a lawsuit in the Federal District Court in Nevada against the Federal Government seeking to prevent the relocation of weapons-grade plutonium from South Carolina to Nevada. **(*Id.*)**. This was a significant issue, as there are less than a handful of sites in the United States capable of storing weapons-grade plutonium, and if Nevada was successful, the Federal Government could attempt to use that as the basis for an "impossibility" defense or other tactic to delay the removal of the one metric ton from South Carolina and to avoid future removal obligations. It was imperative that South Carolina protect its interest in the removal, and W&H—at the Attorney General's directions—represented the State in intervening in the Nevada case. **(*Id.*)**. Nevada then sought a preliminary injunction to halt the shipment of the plutonium to Nevada from SRS and indicated that if the weapons-grade plutonium had left SRS, it could be returned. **(*Id.*)**. The court held an evidentiary hearing on January 30, 2019, and thereafter denied the motion for a preliminary injunction to stop the defense plutonium shipment, another win for South Carolina. **(*Id.*)**. Nevada then appealed to the Ninth Circuit Court of Appeals on February 4, 2019. **(*Id.*)**. After briefing at the Ninth Circuit, the court dismissed the

appeal as moot on August 13, 2019.[2] In December 2019, South Carolina's participation in the case ended with certain concessions, and the entire case was resolved in a settlement between Nevada and DOE shortly thereafter in 2020. **(*Id.* at 2-3)**.

Further, South Carolina learned in mid-2018 that the Federal Government was taking active steps to halt construction of the MOX Facility and planned to terminate the program. **(*Id.*)**. Once the construction was halted, there would be no turning back. In consultation with South Carolina's Congressional delegation and Governor, the strategy was developed for South Carolina to seek and obtain a preliminary injunction in order to defend South Carolina's position regarding the continuation of construction of the MOX Facility and maintenance of the status quo, which would provide the Governor an opportunity to zealously advocate to the Trump Administration for the MOX Facility to remain open. **(*Id.*)**. W&H again moved expeditiously on behalf of South Carolina, filing a complaint and requesting a preliminary injunction on May 25, 2018, in the Federal District Court in South Carolina. **(*Id.*)**. On June 7, 2018, the court granted the preliminary injunction and ordered the Federal Government to continue constructing the MOX Facility. **(*Id.*)**.

The Federal Government then appealed the injunction regarding the continuation of the MOX Facility construction to the Court of Appeals for the Fourth Circuit. **(*Id.*)**. During this time, political efforts were made to obtain a solution that, unfortunately, never materialized and, on October 26, 2018, the Fourth Circuit ruled against South Carolina. **(*Id.*)**. The Federal Government quickly terminated the MOX Facility construction, justifying South Carolina's efforts to try and

[2] Notably, on August 7, 2019, DOE notified the court that the one metric ton of plutonium had been removed from SRS. One-half metric ton was placed in Nevada and the other half was placed in Texas.

maintain the status quo, which had achieved temporary success and benefited hundreds of workers in the State.[3]

Continuing the effort to obtain the economic and impact assistance payments, South Carolina filed its first complaint in the Court of Federal Claims on August 7, 2017, seeking to recover $100 million, and amended the complaint in 2018 seeking an additional $100 million. **(R. pp.)** (Sept. 16, 2020 Ltr. to The Honorable W Jeffrey Young, Chief Deputy Attorney General, p.3). These claims were consolidated and briefing ensued. After unsuccessful settlement discussions, on August 20, 2019, the Court of Federal Claims ruled against the State, finding the lack of an appropriation by Congress to be fatal to South Carolina's claims for the economic and impact assistance payments. **(*Id.*)**.

The Respondent Law Firms, on behalf of South Carolina, appealed that decision to the Court of Appeals for the Federal Circuit. **(*Id.*)**. Beginning in January 2020, additional discussions were held between the respective counsel for DOE and the State, which were more promising and over months developed into a workable framework for possible resolution. While the political representatives of South Carolina were updated on the progress of these discussions, these talks were led by South Carolina's legal counsel, including the Attorney General and W&H. **(*Id.*)**. Oral argument was held on May 5, 2020, in the Federal Circuit, following which settlement discussions recommenced in earnest. **(*Id.*)**. Accordingly, the case was stayed pending additional settlement discussions. After several additional productive meetings, settlement discussions culminated in an agreement in principle reached on July 1, 2020, subject to further approvals and consultation

[3] It is worth reiterating that none of the foregoing lawsuits seeking injunctive relief had a monetary or damages component, meaning that, although W&H agreed to take on these actions on behalf of the State under the Litigation Retention Agreement, as amended, those actions did not provide an avenue for a corresponding increase in the possibility of damages to the State on which an attorneys' fee would be based.

with stakeholders including, on South Carolina's side, its political representatives. Governor McMaster, Senator Graham, and Congressman Wilson each indicated approval and acceptance of the agreement in principle. **(*Id.* at 3-4)**.

On August 28, 2020, a settlement agreement was executed providing for a payment of $600 million from the Federal Government's litigation "Judgment Fund,"[4] representing four years of accrued payments owed to the State, along with prepayment of two additional years according to the terms and conditions of the agreement. **(R. pp.)** (Settlement Agreement). On information and belief, it is the largest single upfront recovery ever by the State. The settlement further provided the Federal Government with a grace period to comply with an obligation to remove additional weapons-grade plutonium from the State while still maintaining the ability of the State to force removal[5] and receive additional payments[6] should the Federal Government not comply.[7] **(*Id.*)**. The Federal Government submitted the settlement payment to the State, and the agreement for voluntary dismissal was jointly filed by the State and the Federal Government with the Federal

[4] The Judgment Fund is a permanent, indefinite appropriation of the Federal Government which is available to pay judicially- and administratively-ordered monetary awards against the United States, including amounts owed under compromise agreements negotiated by the DOJ in settlement of claims arising under actual or imminent litigation under appropriate circumstances. 31 C.F.R. § 256.1. The Respondent Law Firms' idea to seek payment out of the Judgment Fund allowed payment to the State without reducing the operating budget for SRS, *see* n. 6 *infra*, and without the need for a specific appropriation from Congress.

[5] The 15-year removal period for the remaining 9.5 metric tons of weapons-grade plutonium–an amount that is now known and was declassified as a result of the litigation–was calculated by multiplying 9.5 times the 19 months it took to remove the one metric ton DOE was ordered to remove.

[6] The rationale for the grace period on payment was that the source of funds for the economic and impact assistance payments changes beginning in 2022 from "available appropriations" to "funds available to the Secretary," which likely meant that any payments to the State would have to be made from the appropriated operating budget for SRS, which would be detrimental to SRS's operations and contrary to the State's desire to improve, rather than impair, missions at SRS.

[7] The additional payments could be up to $1.5 billion if the Federal Government fails to honor its contractual commitment to South Carolina in the settlement agreement.

Circuit on September 29, 2020. **(R. pp.)** (Agreement to Voluntary Dismissal of Appeal [wherein DOJ agreed and stipulated as a condition of dismissal that "[t]he settlement agreement dated August 28, 2020, incorporated herein by reference, required, amongst other terms, the United States to make an immediate payment to the State of South Carolina**, inclusive of amounts for interest and the State's attorneys' fees and other costs, which are reimbursed and awarded from payment of the settlement amount**, and the State shall have no further claim against the United States for such fees and costs."] (Emphasis added)).

For the fees in the litigation against the Federal Government, the Litigation Retention Agreement between the Attorney General and the Respondent Law Firms—which was first entered into in 2016 and was later amended to account for the additional litigation matters that were requested of W&H to be brought on behalf of the State—utilizes a decreasing percentage scale based on the amount of the recovery for two cases and flat percentages of recovery for two other cases. Based on the amount of the settlement negotiated with DOE, the attorneys' fees under the agreement, including costs and expenses, are $75,000,000. These fees represent 12.5% of the upfront settlement amount recovered on behalf of the State by the Respondent Law Firms.[8]

Following receipt of the settlement amount from the Federal Government, the State Attorney General approved payment of the attorneys' fees owed to the Respondent Law Firms pursuant to the Litigation Retention Agreement. **(R. pp.)** (Oct. 1, 2020 Affidavit of Kimberly Buckley, Finance Director for the Office of Attorney General (filed with the circuit court on Oct.

[8] The 12.5% contingency is calculated against the immediate cash settlement payment and does not allocate any of the fees to the additional benefits the Respondent Law Firms secured on behalf of the State for the removal of one metric ton of plutonium and the agreement to remove 9.5 additional metric tons or pay the State the additional sum of $1.5 billion. In other words, should the State receive additional payments from the Federal Government under the terms of the settlement, the Respondent Law Firms will receive no additional compensation under the Litigation Retention Agreement; nevertheless, these benefits are significant, real, and measurable.

6, 2020)). The payment was approved by the Executive Budget Office (EBO) of the Department of Administration and was thereafter authorized by the Comptroller General and Treasurer in the normal course. **(*Id.*)**. The State then made a wire transfer to W&H for $75 million for the attorneys' fees and costs owed under the Litigation Retention Agreement and as contemplated by the dismissal filed in the Federal Circuit. **(*Id.*)**.

STANDARD OF REVIEW

In reviewing a motion to dismiss, this Court applies the same standard of review as the trial court. *Carolina Park Associates, LLC v. Marino*, 732 S.E.2d 876, 878, 400 S.C. 1, 6 (2012); *Doe v. Marion,* 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). Dismissal is proper and should be affirmed unless "the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory." *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 753 S.E.2d 846, 850, 407 S.C. 67, 75 (2014).

ARGUMENT

1. This appeal should be dismissed because Appellants did not appeal from Judge's Lee's order denying Appellants' motion for preliminary injunction, which order Judge Griffin found to be dispositive on the issue of Appellants' lack of standing, rendering it the law of the case.

In the October 14 Order and the December 17 Order, Judge Lee made the specific finding that Appellants did not have standing to pursue any of their claims against Respondents. **(R. p.)** (October 14 Order at 14 ("After hearing the issues and arguments of counsel and considering the materials submitted, this Court finds Plaintiffs lack standing…")); **(R. p.)** (December 17 Order at 2 ("This Court properly ruled Plaintiffs lack standing in this matter.")). This finding was made independent of her determination that Appellants had failed to satisfy their burden for the issuance of a preliminary injunction; rather, it was made as a threshold determination of justiciability of the

underlying claims. **(*Id.*)**. Appellants did not identify in or attach to their Notice of Appeal either of Judge Lee's orders (they only identified and attached Judge Griffin's March 5 Order), and the time period within which Appellants could have appealed them has expired.[9] *See* Rule 203, SCACR (providing, in part, that a party intending to appeal from the Court of Common Pleas shall serve a notice of appeal within 30 days of receipt of written notice of entry of the order or judgment and that the notice of appeal "***shall*** be accompanied by… [a] copy of the order(s) and judgment(s) to be challenged on appeal" (Emphasis added)). Because Appellants have not appealed either the October 14 Order or the December 17 Order, Judge Lee's conclusion that Appellants lack standing is the law of the case. *See ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (holding that an unappealed ruling is law of the case). In addition, Appellants have not challenged or identified in their brief as an issue in this case Judge Griffin's ruling that he did not have the power to reverse or modify Judge Lee's findings that Appellants lacked standing.[10] **(R. p.)** (March 5 Order at 4-5) ("'It is settled [law] that one circuit judge does not have the power to review, modify, affirm or reverse the findings of another circuit judge.'") (quoting *State ex rel. Medlock v. Love Shop, Ltd*., 286 S.C. 486, 334 S.E.2d 528 (1985)). Judge Griffin's ruling in this regard, therefore, is also now law of the case. *ML-Lee Acquisition*, 327 S.C. at 241, 489 S.E.2d at 472.

"A threshold inquiry for any court is a determination of justiciability, i.e., whether the litigation presents an active case or controversy." *See Peoples Fed. Sav. & Loan Ass'n v. Res. Plan. Corp.*, 358 S.C. 460, 477, 596 S.E.2d 51, 60 (2004) (quoting *Lennon v. S.C. Coastal Council*, 330

[9] Also, Appellants did not appeal from the October 14 Order and the December 17 Order within thirty (30) days of the issuance of the December 17 Order.

[10] Rather, Appellants only contend that Judge Lee's findings are not law of the case, which is, of course, a separate and distinct issue than whether Judge Griffin's rulings were correct.

S.C. 414, 415, 498 S.E.2d 906, 906 (Ct. App. 1998)); *Jowers v. S.C. Dep't of Health & Env't Control*, 423 S.C. 343, 353, 815 S.E.2d 446, 451 (2018) ("Our courts will not address the merits of any case unless it presents a justiciable controversy."). The concept of justiciability includes the doctrine of standing. *Jackson v. State*, 331 S.C. 486, 490 n.2, 489 S.E.2d 915, 917 n.2 (1997). "No justiciable controversy is presented unless the plaintiff has standing to maintain the action." *Lennon*, 330 S.C. at 415, 498 S.E.2d at 906 (quoting *Brock v. Bennett,* 313 S.C. 513, 519, 443 S.E.2d 409, 413 (Ct. App. 1994)). Because it is the law of the case that Appellants do not have standing in this matter, there is no justiciable controversy, and this appeal must be dismissed.

This straightforward and inescapable conclusion is not altered because the Appellants have appealed from Judge Griffin's March 5 Order dismissing Appellants' Amended Complaint. In his order, Judge Griffin recognized that Judge Lee's findings that Appellants lacked standing were "dispositive and require[d] dismissal." **(R. p.)** (March 5 Order at 4-5). But, critically, an appeal of Judge Griffin's order is not also an appeal of Judge Lee's orders.[11] Two prior decisions—one by this Court and one by the Court of Appeals—confirm this.

In *Bakala v. Bakala*, 352 S.C. 612, 576 S.E.2d 156 (2003), this Court considered the appeal of an order of a family court judge denying a motion to quash a bench warrant. The appellant had filed a motion to quash, which had been denied by the family court on the basis that the court lacked jurisdiction to grant the motion. Several months later, the appellant moved for the same relief from another family court judge. The second family court judge denied the motion for the same reason (lack of jurisdiction) as the first family court judge. Pertinent here, the appellant ***only*** appealed the order of the second family court judge. On appeal, this Court agreed with the appellant

[11] And, again, while Appellants appealed from Judge Griffin's order, they have not challenged Judge Griffin's ruling that he did not have the power to reverse or modify Judge Lee's findings that Appellants lacked standing.

that the family court erred in finding that it lacked jurisdiction to quash the bench warrant but held that the second motion to quash was properly denied because the second family court judge "could not overrule the prior order" of the first judge and the first judge's "unappealed ruling finding no jurisdiction [was] therefore the law of the case." *Bakala*, 352 S.C. at 631-32, 576 S.E.2d at 166 (Internal citations omitted).

Similarly, in *McAleese v. McAleese*, 309 S.C. 548, 424 S.E. 2d 558 (Ct. App. 1992), the Court of Appeals also considered an appeal from a family court order. As described by the Court of Appeals in its opinion, the "appealed order" had found that two prior orders "were dispositive of the issues presented by the pleadings of this case." *McAleese*, 309 S.C. at 550, 424 S.E. 2d 559. As in this case, the appellant in *McAleese* did not appeal the two prior orders. In affirming, the Court of Appeals held that because the two prior orders were not appealed, they constituted the law of the case. *Id*. at 551, 424 S.E. 2d at 559-60.

In short, to challenge the finding that they lacked standing to pursue their claims against Respondents, Appellants needed to appeal from and challenge Judge Lee's October 14 and December 17 Orders, which were dispositive as to that issue. They failed to do so and, therefore, the law of the case is that Appellants lack standing.

In their brief, Appellants do not—because they cannot—dispute that they failed to appeal Judge Lee's orders but rather contend that Judge Lee's rulings were somehow "not binding" because her orders were issued in the context of resolving a preliminary injunction.[12] Br. of

[12] Appellants contend this Court's decision in *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 743 S.E.2d 778 (2013), supports their claim that Judge Lee's finding of lack of standing is not the law of the case. But, in fact, the opposite is true. In *Shirley's Iron Works*, this Court stated that the doctrine of the law of the case applies to an unappealed "order or ruling which finally determines a substantial right." *Id*. at 573, 743 S.E.2d at 785 (quoting *Weil v. Weil,* 299 S.C. 84, 89, 382 S.E.2d 471, 473 (Ct. App. 1989)). Here, Judge Lee's ruling "finally determine[d] a substantial right" because (1) a party's standing is a substantial right; and (2) her ruling could not

Appellant at 26. The obvious and fatal deficiency of this contention is that Judge Lee specifically stated that her ruling on the legal issue of Appellants' standing was separate and apart from her determination that Appellants did not meet the legal standards for issuance of a preliminary injunction. *See* **(R. pp.)** (December 17 Order (holding that "[Appellants]' standing and request for preliminary injunction ***are separate issues***," and that "[t]he question of standing had to be determined" and "[Appellants'] lack of standing … could have ended [the inquiry]") (Emphasis added)).

Contrary to Appellants' unsupported claims, *see* Br. of Appellant at 26-27, Judge Lee's findings and conclusions were not made in the context of determining whether Appellants had a "likelihood of success on the merits" under the preliminary injunction standard. Judge Lee did not limit her finding that Appellants lacked standing to the request for preliminary injunction. Rather, Judge Lee ruled—separate from her determination that Appellants failed to meet their burden for entitlement to a preliminary injunction—that Appellants lacked standing to pursue any of their claims against Respondents. **(R. p.)** (October 14 Order at 14 ("[T]his Court finds Plaintiffs lack standing ***and*** have failed to meet their burden for a Preliminary Injunction in this matter.") (Emphasis added)); **(R. p.)** (December 17 Order at 2 ("This Court properly ruled Plaintiffs lack standing ***in this matter***.") (Emphasis added)).

Therefore, because Appellants' lack of standing is the law of the case, this appeal should be denied and the dismissal of this case should be affirmed.

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be overruled by another judge. *See id*. ("This State has a long-standing rule that one judge of the same court cannot overrule another."). Moreover, if a party does not have standing to maintain any of its claims, then the party has no lawful means by which to maintain the litigation itself.

2. Even if the law of the case does not bar the appeal, the circuit court should be affirmed because Appellants lack standing.

As the United States Supreme Court has emphasized, the increasing demand for judicial attention and intervention on most every conceivable perceived grievance "has not eliminated the basic principle that to invoke judicial power the claimant must have a "personal stake in the outcome," or a "particular, concrete injury," or "a direct injury"; in short, something more than "generalized grievances." *U.S. v. Richardson*, 418 U.S. 166, 179-80 (1974). "Few exercises of the judicial power are more likely to undermine public confidence in the neutrality and integrity of the Judiciary than one which casts the Court in the role of a Council of Revision, conferring on itself the power to invalidate laws at the behest of anyone who disagrees with them." *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 145-46 (2011). For that reason, "courts must be more careful to insist on the formal rules of standing, not less so." *Id*. at 146; *see S.C. Pub. Interest Found. v. S.C. Dep't of Transp.*, 421 S.C. 110, 117, 804 S.E.2d 854, 858 (2017) *(*"A plaintiff must have standing to institute an action."); *Blandon v. Coleman*, 285 S.C. 472, 475, 330 S.E.2d 298, 299 (1985) ("Standing to sue is a fundamental requirement in instituting an action."); *Joytime Distribs. & Amusement Co., Inc. v. State*, 338 S.C. 634, 639, 528 S.E.2d 647, 649 (1999) (same).

"Under our current jurisprudence, there are three ways in which a party can acquire this fundamental threshold of standing: (1) by statute; (2) through what is called "constitutional standing"; and (3) under the public importance exception." *Bodman v. State*, 403 S.C. 60, 66–67, 742 S.E.2d 363, 366 (2013) (citing *ATC S., Inc. v. Charleston Cnty.,* 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008)). There is no assertion in this case of statutory or constitutional standing,[13] so

[13] In any event, Appellants do not have constitutional standing because they have not alleged and cannot allege an injury in fact. *Commander Health Care Facilities, Inc. v. S.C. Dep't of Health & Env't Control*, 370 S.C. 296, 301, 634 S.E.2d 664, 666 (Ct. App. 2006) ("Constitutional standing requires, at a minimum, that the party bringing the action sustain a direct injury or the immediate danger a direct injury will be sustained."). Appellants are not parties to the contract between the

Appellants are left to assert the "public importance" exception.[14] The circuit court correctly ruled that they did not meet—and cannot meet—their burden demonstrating this exception applies.

A. *Appellants cannot proceed pursuant to the "public importance" exception.*

The "public importance" exception to the general standing requirements allows citizens in some limited instances, which are not present here, to seek judicial resolution of an issue "of such public importance as to require its resolution for future guidance." *Davis v. Richland Cnty. Council,* 372 S.C. 497, 500, 642 S.E.2d 740, 741 (2007). However, this Court has recognized it "must be cautious with this exception, lest it swallow the rule." *Jowers*, 423 S.C. at 360, 815 S.E.2d at 455 (quoting *S.C. Pub. Interest Found. v. S.C. Transp. Infrastructure Bank*, 403 S.C. 640, 646, 744 S.E.2d 521, 524 (2013)). Indeed, "standing cannot be granted to every individual who has a grievance against a public official. Otherwise, public officials would be subject to numerous lawsuits at the expense of both judicial economy and the freedom from frivolous lawsuits." *Sloan v. Sanford*, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004). The general importance of an issue, without more, is insufficient to invoke the exception because "the same may be said of most legislative and executive actions. For a court to relax general standing rules, the matter of

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Respondent Law Firms and the Attorney General, were not involved in the Federal litigation in any way, and have no claim, entitlement, or right to the settlement funds or the attorneys' fees. Likewise, Appellants do not have so-called "taxpayer standing" because Appellants state no specific claim that they have regarding the settlement proceeds and, thus, have no harm arising from their alleged claims that differs from all other taxpayers and residents in the State. *See Bodman*, 403 S.C. at 67, 742 S.E.2d at 366 ("In *ATC*, [this Court] unanimously closed the door to a litigant asserting standing simply by virtue of his status as a taxpayer [asserting harm shared by all taxpayers in the State]….This feature of commonality defeats the constitutional requirement of a concrete and particularized injury.") (quoting *ATC*, 380 S.C. at 198, 669 S.E.2d at 340-41).

[14] Appellants also have argued that they have what they claim is "derivative standing" to pursue claims on behalf of the State. As explained below, there is no such thing and this contention is meritless.

importance must, in the context of the case, be inextricably connected to the public need for court resolution for future guidance." *ATC*, 380 S.C. at 199, 669 S.E.2d at 341.

Appellants essentially assert two claims in this case. First, Appellants assert a claim against the Attorney General alleging that he did not have authority to approve the one-time payment of attorneys' fees for services performed pursuant to the Litigation Retention Agreement, notwithstanding the clear grants of statutory authority to the Attorney General to enter into the Litigation Retention Agreement and hire the Respondent Law Firms. Second, Appellants assert a claim against the Respondent Law Firms alleging that the amount of attorneys' fees owed and paid pursuant to the Litigation Retention Agreement is "unreasonable." There are three primary reasons why the "public importance" exception does not permit the Appellants to proceed with these claims.

First, and most importantly, Appellants have not and cannot meet their burden to show that resolution of its claim "is needed for future guidance." *ATC*, 669 S.E.2d at 341, 380 S.C. at 199 (2008) ("The key to the public importance analysis is whether a resolution is needed for future guidance. It is this concept of 'future guidance' that gives meaning to an issue which transcends a purely private matter and rises to the level of public importance."). Appellants' challenge is to the one-time payment of the attorneys' fees in this particular and unique situation and pursuant to this specific Litigation Retention Agreement. Indeed, Appellants candidly acknowledged before the circuit court that it is because of the "amount of the fee" judicial intervention is purportedly warranted. **(R. p.)** (October 14 Order at 6 ("Plaintiffs acknowledge that it is because of the amount of the fee the statute requires interpretation."). Any determination with respect to this challenge would therefore be entirely limited to the Litigation Retention Agreement and payment for services performed pursuant to this single contract. *See Freemantle v. Preston*, 398 S.C. 186, 194, 728

S.E.2d 40, 44 (2012) (affirming dismissal of citizen's challenge to invalidate public body's payment to former employee pursuant to severance agreement for lack of "public importance" exception standing because such one-time payment did "not necessitate further guidance."). Such a determination would not provide "future guidance" as to any issue of public importance, especially considering that Appellants do not—nor could they—challenge the Attorney General's authority to enter into the Litigation Retention Agreement on behalf of the State.

This conclusion is not changed by Appellants' contention that guidance is needed with respect to other contracts for outside litigation counsel entered into by the Attorney General. Appellants' claims are specific to the Respondent Law Firms' Litigation Retention Agreement and the authority to make the payment in this specific case. This is not a case about the Attorney General's authority to enter into contracts for outside litigation counsel because Appellants do not challenge that authority. Thus, application of the "public importance" exception is inappropriate because applying it here would allow the "exception [to] swallow the rule." *Jowers*, 423 S.C. at 360, 815 S.E.2d at 455. Simply put, allowing Appellants to proceed pursuant to the "public importance" exception to standing in this context would ensure that the courts of this State will routinely be faced with lawsuits challenging government contracts because some one person or another is unhappy with the contract.

A second reason that Appellants cannot demonstrate that the "public importance" exception should apply is because they are seeking to recover damages under a "common fund" theory while purportedly representing taxpayers and the public. Appellants' claim essentially devolves into a statement that the Respondent Law Firms do not deserve to be compensated in the manner in which the State contracted for their services. That assessment apparently does not apply to Appellants, however, because they seek to appear after-the-fact and take any amount of

attorneys' fees not paid to the Respondent Law Firms for themselves. Accordingly, their self-serving claims "directly conflict[ ] with the purpose and spirit of the public importance exception." *Freemantle*, 398 S.C. at 194, 728 S.E.2d at 44.

Finally, the "public importance" exception does not apply to claims against the Respondent Law Firms, which are private entities. The "public importance" exception, by definition, only applies to claims against governmental or public bodies and officials.[15] It does not apply to a contract claim against private entities asserted by a non-party to the contract. Nor do the principles of standing transfer among independent causes of action or defendants. *Daimler Chrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) ("[A] plaintiff must demonstrate standing separately for each form of relief sought." (Internal citations and quotation marks omitted)). Thus, Appellants may not satisfy their burden of standing against the Respondent Law Firms through an assertion of purported public importance standing to challenge the Attorney General's conduct under a wholly independent claim. "[S]tanding is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 (1996). Because there is no South Carolina authority to support a finding of standing under the public importance exception against private litigants, any arguable claim of public importance standing as to the Attorney General, which is disputed, would not satisfy Appellants' burden of standing as to the Respondent Law Firms in any event.

[15] *See, e.g.*, *Sloan v. Dep't of Transp.,* 365 S.C. 299, 618 S.E.2d 876 (2005) (alleged violation of statutory bidding requirements by state agency); *Sloan v. Wilkins,* 362 S.C. 430, 608 S.E.2d 579 (2005) (alleged violation of constitutional requirements for legislation by legislature); *Sloan v. Sanford,* 357 S.C. 431, 593 S.E.2d 470 (2004) (alleged violation of constitutional provisions regarding Governor's role in Air Force Reserve); *Sloan v. Greenville Cnty.,* 356 S.C. 531, 548, 590 S.E.2d 338, 347 (Ct. App. 2003) (alleged violations of county ordinances governing procurement).

Therefore, as the circuit court correctly ruled, Appellants have no legitimate argument that the "public importance" exception permits them to proceed with their claims in this case.[16]

B. *"Derivative standing" does not exist.*

Appellants erroneously contend that they can step into the shoes of the State and challenge a contract that the duly elected Attorney General entered into and upheld. Br. of Appellant at 11 ("Accordingly, Plaintiffs have standing to assert claims on behalf of the State of South Carolina under the facts and circumstances of this case…"). They argue that the 1939 decision in *Ex parte Hart*, 190 S.C. 473, 2 S.E.2d 52 (1939), which allowed a citizen of a county to assert a claim on behalf of that county, should be extended to the State even though it is a sovereign entity. They further analogize their purported claims to that of a shareholder derivative action. As the circuit court correctly recognized, there are many problems with this argument.

First, "a private citizen cannot test the validity of executive or legislative action unless he or she has sustained or will sustain prejudice not common to the public from such action." *Berry v. McLeod*, 328 S.C. 435, 447, 492 S.E.2d 794, 801-02 (Ct. App. 1997) (also rejecting claim to proceed as class action "because there is no claim of injury or damage not common to the public"). Appellants have alleged no injury or damage not common to the public and, thus, cannot proceed with their putative derivative class action. *See Freemantle*, 398 S.C. at 193, 728 S.E.2d at 43 (holding that a "taxpayer lacks constitutional standing when he suffers in some ***indefinite*** way in

[16] Appellants apparently recognize this as their brief lacks any real analysis on this issue and instead consists of a brief summary of a recent decision by this Court, a few conclusory statements, and then string citation of cases (without any discussion). *But see ATC*, 380 S.C. at 199, 669 S.E.2d at 341 ("Yet the very nature of the public importance exception to general standing requirements ***resists a formulaic approach, as each case must turn on "the competing policy concerns"*** as we expressed in *Sloan v. Sanford* [, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004)].") (Emphasis added).

common with people ***generally***.") (Emphasis added and internal quotation marks omitted). Appellants have no discrete injury entitling them to maintain this action.

Second, *Hart* is inapplicable here. *Hart* allowed a county resident to assert a "plain" claim on behalf of a county. *See Hart*, 190 S.C. at 477, 2 S.E.2d at 53. Critical to analyzing that decision is that *Hart* and the few decisions that follow its analysis involve claims with respect to counties, municipalities, and local government entities. *Berry*, 328 S.C. at 447, 492 S.E.2d at 800 (municipality) ("[T]his power cannot normally be controlled or exercised by a taxpayer to bring an action on behalf of a town, unless it is clear that the governmental entity has unjustifiably refused to assert the claim."); *Hart*, 190 S.C. at 477, 2 S.E.2d at 53 (municipality); *see also Newman v. Richland County Historic Preservation Comm'n*, 325 S.C. 79, 480 S.E.2d 72 (1997) (county, city, and county historic preservation commission); *Johnston v. City of Myrtle Beach*, 285 S.C. 453, 454, 330 S.E.2d at 321, 322 (Ct. App. 1985) (municipality) ("Generally, a private citizen cannot test the validity of executive or legislative action unless he or she has sustained or will sustain prejudice not common to the public from such action"). Here, however, Appellants seek to extend *Hart* to allow a derivative suit on behalf of the State—a sovereign entity that is not subject to suit in the same manner as local governments may be.

Third, this Court has recognized that derivative actions are not applicable with respect to government actions by entities such as a historic commission because those entities are in the nature of a "body politic." *Newman*, 325 S.C. at 74, 480 S.E.2d at 74. Which stands to reason because, for the same reasons that Appellants do not have taxpayer standing, citizens are not shareholders of the government by virtue of being taxpayers and, thus, cannot bring derivative actions. *See id.*; *see also Bodman*, 742 S.E.2d at 366, 403 S.C. at 66–67 ("We reaffirm this principle today and hold that Bodman's status as a mere taxpayer is insufficient to confer standing

upon him."); *ATC*, 380 S.C. at 198, 669 S.E.2d at 341, ("[A] taxpayer lacks standing when he 'suffers in some indefinite way in common with people generally.'") (quoting *Frothingham v. Mellon,* 262 U.S. 447, 488 (1923)).

Thus, even if Appellants might be able to challenge local government actions under *Hart*, they cannot challenge executive branch action absent some discrete injury not common to the general public. This type of injury they do not have. *Berry* is instructive in this regard because it rejected an effort to bring a legal malpractice claim on behalf of a municipality. That is, the town residents brought a claim against the town's former attorneys, alleging that they committed malpractice in how they handled the issuance of a revenue bond on behalf of the Town of New Ellenton. *Berry*, 328 S.C. at 440, 492 S.E.2d at 797. The Court of Appeals held that the town residents had no standing to sue either on behalf of New Ellenton or as a class of New Ellenton citizens. *Id*., 328 S.C. at 446-47, 492 S.E.2d at 800. However, the Court of Appeals noted that the "authority to decide when a claim should or should not be brought by a governmental entity is vested with the entity." *Berry*, 328 S.C. at 447, 492 S.E.2d at 800. Consequently, absent some plain cause of action, citizens do not have the right to bring a claim on behalf of a government. The plaintiffs in *Berry* could not avail themselves of that option because "the claim alleged by Residents on behalf of the town is not clearly set forth and is far from plain." *Id*., 328 S.C. at 448, 492 S.E.3d at 801. Thus, the Court of Appeals rejected plaintiff's efforts to bring the claim on behalf of the town because there was no plain remedy, and similarly rejected their efforts to allege a class action "because there [was] no claim of injury or damage not common to the public." *Id*., 328 S.C. at 449, 492 S.E.2d at 802. For the same reasons, Appellants cannot proceed with respect to the State even if that option were available to them.

At bottom, Appellants are seeking to exercise the powers entrusted to the Executive (and, specifically, constitutional officers) and are asking the Judiciary to assist in their quest. However, as noted above, governmental officials and entities are given the discretion to determine what action should be taken by the agency or entity for which they are responsible. *Berry*, 328 S.C. at 447, 492 S.E.2d at 800. Appellants, therefore, lack standing, and neither the "public importance" exception nor Appellants' claim of "derivative standing" remedy this deficiency or allow Appellants to proceed with their claims. Accordingly, this appeal should be denied and the dismissal of this case should be affirmed.

3. The circuit court should be affirmed on the additional sustaining grounds that Appellants' claims are moot, present non-justiciable political issues, and fail to state facts sufficient to constitute a cause of action.

A. *Appellants' claims are moot.*

Appellants' claims are moot because the payment of the attorneys' fees has already been made by the State pursuant to the approval of the Attorney General and the EBO and the authorization of the State Treasurer based on a warrant issued by the State Comptroller General. **(R. pp.)** (Am. Compl. ¶ 74 & Exs. 18, 19); *Sloan v. Greenville Cnty.*, 380 S.C. 528, 535, 670 S.E.2d 663, 667 (Ct. App. 2009) ("A case becomes moot when judgment, if rendered, will have no practical legal effect upon the existing controversy."). Appellants' claims therefore are merely a request for an advisory opinion because their claims have been rendered moot by payment of the fees to private counsel pursuant to the Attorney General's contract with those attorneys and the approval of four separate State officials and agencies. *See id*. ("The court does not concern itself with moot or speculative questions."); *Matter of Angela Suzanne C.*, 286 S.C. 186, 189, 332 S.E.2d 542, 543 (Ct. App. 1985) ("It is settled law that this Court will not issue advisory opinions on questions for which no meaningful relief can be granted."). Appellants' claims therefore are moot, and for this additional reason, this appeal should be denied and the dismissal of this case affirmed.

B. *Appellants' claims present non-justiciable political questions.*

"The fundamental characteristic of a nonjusticiable 'political question' is that its adjudication would place a court in conflict with a coequal branch of government." *S.C. Pub. Interest Found. v. Judicial Merit Selection Comm'n*, 369 S.C. 139, 142–43, 632 S.E.2d 277, 278 (2006) (citing *U.S. v. Munoz–Flores,* 495 U.S. 385, 393-94 (1990)). "Thus, the courts will not rule upon questions which are exclusively or predominantly political in nature rather than judicial." *Id*. (citing *Chicago & S. Air Lines v. Waterman S.S. Corp.,* 333 U.S. 103, 111 (1948)). Unlike the Federal Constitution, the South Carolina Constitution expressly requires that the branches of government remain separate so that one branch does not claim or exercise powers belonging to another branch. S.C. Const. art. I, § 8.

Here, Appellants' request that the judicial branch invalidate not only the Attorney General's ability to request payment through the procedures set forth in the law, but also the ability of the EBO, Comptroller General, and Treasurer (all non-parties to this lawsuit) to process the requested payments, seeks to have the Judiciary violate the separation of powers by asking it to rule on what amounts to a nonjusticiable political question. *E.g.*, *Segars-Andrews v. Judicial Merit Selection Comm'n*, 387 S.C. 109, 121–22, 691 S.E.2d 453, 460 (2010) ("The nonjusticiability of a political question is primarily a function of the separation of powers.") (quoting *Judicial Merit Selection Comm'n,* 369 S.C. at 142, 632 S.E.2d at 278). Therefore, it would be a violation of the separation of powers required by Article I, § 8 of the South Carolina Constitution for the judicial branch to intrude upon the process followed for government payments, thereby usurping the authority of the Attorney General, EBO, Comptroller General, and Treasurer, respectively, to make a contractually-required payment.

At bottom, Appellants' complaint states nothing more than a generalized grievance with a decision of the Attorney General, and Appellants are attempting to put this Court in the position

of wading into matters reserved for the Attorney General as the Chief Legal Officer of the State. However, Appellants do not challenge—nor could they challenge—the Attorney General's authority to enter into the Litigation Retention Agreement or to hire private counsel on a contingency basis. Indeed, as discussed below, South Carolina Code § 1-7-170 unequivocally grants the Attorney General that authority, which he exercised here. *See also Cooley v. S.C. Tax Comm'n*, 204 S.C. 10, 28 S.E.2d 445, 450 (1943) ("[The Attorney General] is authorized to contract for the collection of debts due the State, or any of its departments or institutions, ***on a contingent basis***.") (Emphasis added). The Attorney General determined that the Litigation Retention Agreement was in the best interests of the State, and Appellants' mere disagreement with it, especially after it has been fully performed, does not support a legally-cognizable claim, nor does it provide this Court jurisdiction or authority to require judicial approval of the Litigation Retention Agreement.

C. *Appellants claims fail to state facts sufficient to constitute a cause of action.*

To be clear, Appellants' arguments as to the merits of their claims are not preserved for this Court's review, notwithstanding the fact that Appellants focus most of their brief on those arguments. It is undisputed that the circuit court did not reach the merits of Appellants' allegations; nor did Appellants move for reconsideration based on an assertion that the circuit court erred in failing to reach Appellants' allegations.[17] By identifying these additional sustaining grounds,

[17] *See Lapp v. S.C. Dep't of Motor Vehicles*, 387 S.C. 500, 507, 692 S.E.2d 565, 569 (Ct. App. 2010) ("To be preserved for appellate review, an issue must have been: (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity."); *Chastain v. Hiltabidle*, 381 S.C. 508, 515, 673 S.E.2d 826, 829 (Ct. App. 2009) ("When an issue is raised to but not ruled upon by the trial court, the issue is preserved for appeal only if the party raises the same issue in a Rule 59(e) motion."). Given Appellants' failure to undertake any efforts to preserve these questions for appeal, their request that the Court entertain these unpreserved questions "in the interest of justice and judicial economy," itself an admission that those issues are unpreserved for appellate review, rings decidedly hollow.

W&H is not conceding at all that this Court should address Appellants' arguments as to the merits of their claims. That said, Appellants' claims fail to state facts sufficient to constitute a cause of action for four separate reasons and the circuit court may therefore be affirmed for this reason as an additional sustaining ground.

i. There is no private action for a third party to challenge the payment of attorneys' fees as violative of the Rules of Professional Conduct.

The foundation for Appellants' claim that the attorneys' fees to the Respondent Law Firms are unreasonable is their assertion that the Litigation Retention Agreement with the Attorney General violates Rule 1.5 of the South Carolina Rules of Professional Conduct. **(R. pp.)** (Am. Compl. ¶¶ 33-35). However, even putting aside that, as discussed below, there is no legal basis to require the Attorney General to seek judicial approval of his contracts with outside legal counsel, there is no private right of action for a third party to challenge the attorneys' fees as violative of the Rules of Professional Conduct, and, in any event, there is no avenue for the circuit court to consider any allegations of violations of the Rules of Professional Conduct, which are committed to the ***exclusive*** province of this Court. *See In re Dickey*, 395 S.C. 336, 353–54, 718 S.E.2d 739, 748 (2011) ("[The Supreme Court] has the sole authority to discipline attorneys and to decide the appropriate sanction after a thorough review of the record.") (citing *In re Welch,* 355 S.C. 93, 96, 584 S.E.2d 369, 370 (2003)); *In re Unauthorized Practice of Law Rules Proposed by South Carolina Bar*, 422 S.E.2d 123, 124, 309 S.C. 304, 305 (1992) ("The Constitution commits to [the Supreme Court] the duty to regulate the practice of law in South Carolina."); *see also Hambrick v. GMAC Mortg. Corp*., 370 S.C. 118, 124-25, 634 S.E.2d 5, 8-9 (2006) (affirming dismissal for lack of jurisdiction and finding no private action for the unauthorized practice of law).

ii. The Attorney General had authority to pay the attorneys' fees without the necessity of depositing those amounts into the General Fund.

Appellants contend that S.C. Code Ann. § 1-7-150 precluded the Attorney General's payment of $75 million pursuant to the Litigation Retention Agreement. Br. of Appellant at 18-23. This contention is wrong as a matter of law.[18] There are two primary reasons for this. First, Appellants' reading of § 1-7-150 is not consistent with the statute. Second, even assuming without conceding that Appellants' reading is correct, none of the MOX settlement funds would ever reach the General Fund in any event because § 1-7-150 was superseded by a proviso in the State budget, which directed any litigation recovery funds that "otherwise" would go to the General Fund to a separate account. Appellants' lack of basic comprehension of what laws even apply to the settlement funds is reason alone to affirm the circuit court. And the fact that Appellants brought a lawsuit accusing the State's Chief Legal Officer (and the third-party EBO) of impropriety without having even a basic understanding of the applicable law is disturbing and clearly demonstrates that this lawsuit is just a politically motivated gambit and baseless effort to enrich themselves.

Section 1-7-150 provides: "All monies, except investigative costs or costs of litigation awarded by court order or settlement, awarded the State of South Carolina by judgment or settlement in actions or claims brought by the Attorney General on behalf of the State or one of its agencies or departments must be deposited in the general fund of the State… except … where some other disposition is required by law." There are several reasons the Attorney General's actions comply with § 1-7-150 and the funds representing the attorneys' fees were not required to be deposited in the General Fund.

[18] Appellants do not challenge the Attorney General's authority to retain outside counsel. Nor could they make such a challenge in good faith, as the Attorney General's ability to engage outside counsel on a contingency fee basis has been codified. *See* S.C. Code Ann. §§ 1-7-85, 170.

As an initial matter, because the Attorney General retained outside counsel to prosecute these cases, as he was authorized by law to do, the contractual legal fees are a "cost[ ] of litigation" that the Attorney General is authorized to pay. **(R. pp.)** (October 14 Order (unappealed holding that "S.C. Code Ann. § 1-7-150 is unambiguous and allows the Attorney General to pay cost of litigation from the settlement proceeds.")). Consequently, § 1-7-150 authorized the Attorney General to pay the amounts to the Respondent Law Firms without first depositing those monies in the General Fund.

Furthermore, § 1-7-150(B) exempts from its coverage monies "where some other disposition is required by law." The fulfillment of valid and binding contracts entered into by the State's Chief Legal Officer and approved by the EBO is a disposition "required by law." Further, S.C. Code Ann. § 1-7-85 expressly provides that "the Attorney General may obtain reimbursement for its costs in representing the State in … civil and administrative proceedings. These costs may include, but are not limited to, attorney fees.…" Appellants' contentions, therefore, have no support in the plain language of the statute.

Moreover, even if Appellants' interpretation of § 1-7-150(B) was somehow correct—which it is not—it is irrelevant to this case because Proviso 59.8 precluded the Attorney General from transferring ***any*** funds to the General Fund and instead directed him to deposit those funds in a separate account:

> (AG: Litigation Recovery Account) During the current fiscal year, when there is a recovery or an award in any litigation managed by the Attorney General, any funds received that would have otherwise been credited to the General Fund shall be deposited to the credit of a special account created in the Office of State Treasurer entitled "Litigation Recovery Account." The funds deposited in this account must be expended only as prescribed by law.

2019 S.C. Acts 91, Part 1.B, § 59.8 (2019-2020 fiscal year). This proviso was in effect at the time of the Attorney General's receipt of the settlement funds and payment to the Respondent Law

Firms of the fees owed pursuant to the Litigation Retention Agreement. 2020 S.C. Acts 135, § 2 (extending the effective dates of 2019 Act 91, Part 1.B. "until the effective date for appropriations made in a general appropriations act for Fiscal Year 2020-2021"); *see also* 2019 S.C. Acts 91 ("All acts or parts of acts inconsistent with any of the provisions of … Part 1B of this act are suspended for Fiscal Year 2019-20."); *see Beaufort Cnty. v. S.C. State Election Comm'n*, 395 S.C. 366, 374, 718 S.E.2d 432, 436 (2011) (holding that a budget proviso that conflicts with a permanent statute suspends the statute for the period during which the proviso is effective).

Because Proviso 59.8 suspended the requirements of § 1-7-150(B) with respect to funds that "otherwise" would go to the General Fund, even if Appellants were correct that the portion of the settlement awarded for attorneys' fees generally would have to be deposited in the General Fund, they would not have to be in this case. The argument articulated by Appellants is therefore inapplicable. But even if it was applicable, the question becomes the Attorney General's compliance with the requirement that expenditures from the Litigation Recovery Account must be "prescribed by law." Again, fulfilling a contractual obligation is a duty "prescribed by law" for the Attorney General.

The payment of the contractual attorneys' fees also constituted a "disposition required by law" and an "expend[iture] … prescribed by law" because the Attorney General complied with all prerequisites to authorize a distribution of money. Specifically, the EBO approved the payment of the contract fees as it was expressly authorized to do by the General Assembly. 2020 S.C. Acts 135, § 7 ("The Executive Budget Office is authorized to approve agency requests for federal and other fund authorization adjustments.");[19] S.C. Code Ann. § 2-65-10, *et seq*. Moreover, the

[19] Appellants also claim that the EBO did not have authority to approve the payment of the contract fees and that an additional approval by the Joint Other Funds Oversight Committee of the General Assembly was required. Br. of Appellant at 23-25. Appellants even go so far as to allege "the EBO

Treasurer's Office processed the payment for the attorneys' fees pursuant to a warrant from the Comptroller General, as the law requires. **(R. pp.)** (Am. Compl. ¶ 74 & Exs. 18, 19).

Indeed, because both the Attorney General—who is the Chief Legal Officer of the State and is specifically charged with administering § 1-7-150—and the EBO—who is responsible for overseeing the expenditure of funds in this State—approved and authorized the payment of the attorneys' fees, even if there was some ambiguity regarding the applicable statutory provisions, the agencies charged with administering this statute necessarily have determined that the payment of the fees was authorized pursuant to the statute. *See Kiawah Development Partners, II v. S.C. Dep't of Health & Env't Control*, 766 S.E.2d 707, 718, 411 S.C. 16, 34 (2014) ("[O]ur deference doctrine provides that courts defer to an administrative agency's interpretations with respect to the statutes entrusted to its administration"). Because both the plain language and the reasonable interpretation of the applicable statutes support the Attorney General's payment of the fees, Appellants' claims fail as a matter of law.

Finally, and contrary to Appellants' contention, the fees paid to the Respondent Law Firms were also "awarded by settlement." Indeed, in making this contention, Appellants completely

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Director by-passed the approval process." *Id*. at 25. Appellants rely on an affidavit from one member of the General Assembly, Senator Nikki Setzler, in purported support of these contentions. However, the simple fact is that Appellants are completely wrong. The General Assembly expressly provided the EBO with complete authority to approve requests like the Attorney General's payment request ***without*** seeking any additional approvals. 2020 S.C. Acts 135, § 7 ("The Executive Budget Office is authorized to approve agency requests for federal and other fund authorization adjustments."); **(R. pp.)** (Stavrinakis Aff. ¶6 ("[T]he Executive Budget Office has full and complete authority to approve agency requests for other fund authorization adjustments without any action or review by the Joint Other Funds Oversight Committee….[A]ny authority of the Joint Other Funds Oversight Committee has been delegated to the [EBO]."). This is, of course, the reason that, as Mr. Setzler reports, there was no application for payment of the fees submitted to the Joint Other Funds Oversight Committee—by law, it was not required. The EBO Director therefore did not by-pass the requisite approval process, and Appellants' contentions are baseless.

ignore the fact that the "Agreement to Voluntary Dismissal of Appeal" filed with the Court of Appeals for the Federal Circuit and executed by all parties to the Federal litigation specifically states that the settlement payment is "inclusive of amounts for interest and the State's attorneys' fees and other costs, ***which are reimbursed and awarded from payment of the settlement amount*** and the State shall have no further claim against the United States for such fees and costs ...." **(R. pp.)** (Agreement to Voluntary Dismissal of Appeal (Emphasis added)). The primary contention of the Appellants is, therefore, based on a fiction contradicted by the undisputed record, demonstrating, again, the frivolity of Appellants' lawsuit.

Thus, the Attorney General's payment of the attorneys' fees was proper and in accordance with the applicable law, and Appellants' complaint failed to state facts sufficient to constitute a cause of action against Respondents. For this additional reason, the circuit court's dismissal of this case should be affirmed.

iii. The Attorney General is not required to obtain judicial approval of the Litigation Retention Agreement or the fees paid.

In their Amended Complaint, Appellants asked the circuit court to ***require*** the Attorney General to obtain judicial approval of the amount of fees paid to the Respondent Law Firms for services performed and costs incurred pursuant to their contract. But there is no contractual or statutory provision or any other mechanism that imposes a requirement or establishes a process for the Attorney General to obtain judicial approval of his own contract or the fees paid thereunder. And any procedure in that regard would violate the separation of powers by putting the Judiciary in the position of supervising the Executive Branch's discharge of its duties.

Appellants note in their Amended Complaint that the Litigation Retention Agreement contains a discretionary provision regarding judicial approval of the fees when possible, but that provision is optional and does not constitute a requirement that he obtain judicial approval. **(R. p.)**

(Litigation Retention Agreement at p.9 (stating only that "[w]hen possible, the attorneys' fees and costs awarded to Special Counsel shall be approved by a Court of competent jurisdiction.")). Thus, Appellants' argument that approval is mandatory is directly contradicted by the use of the prefatory condition "when possible" and renders such argument inapposite. Moreover, given that the parties to the Litigation Retention Agreement—the Attorney General and the Respondent Law Firms—agree on the payment of the fee, a declaratory judgment would not be available because there would be no live controversy affording jurisdiction to a trial court, and Appellants' attempts to stand in the shoes of the Attorney General to create a claim where none otherwise exists is unavailing. The settlement reached between the State and the Federal Government also did not require court approval, and there is no common law requirement that the Attorney General seek judicial approval of his contracts. In short, as a matter of law, there is nothing that would have required the Attorney General to seek judicial approval of the fees earned by the Respondent Law Firms under the Litigation Retention Agreement.

Appellants' (unfounded) allegation that the Litigation Retention Agreement—which provides for an effective contingency fee rate of 12.5%[20] for services performed over several years and in multiple lawsuits—violates the South Carolina Rules of Professional Conduct does not somehow confer upon the courts of South Carolina authority to review the Litigation Retention Agreement. A mere allegation of a violation of the South Carolina Rules of Professional Conduct does not change the simple and indisputable fact that there is no requirement—statutory or otherwise—that the Attorney General seek judicial approval of its contracts with outside counsel. This is especially so because the actual party to the contract in this case—the Attorney General—

[20] This percentage is based solely on the immediate $600 Million payment and not future payments the State might receive as a result of the settlement—which payments do not entitle the Law Firms to any further compensation. *See* n. 8, *supra*.

has already approved the fee amount, and three other State officials or agencies—the State Treasurer, the State Comptroller General, and EBO—have approved and authorized the payment of the fee. Accordingly, as a matter of law Appellants' claims seeking to require the Attorney General to seek judicial approval of the Litigation Retention Agreement or the fees paid pursuant to such contract fail to state facts sufficient to constitute a cause of action.

iv. Appellants' constructive trust and restitution claims fail as a matter of law.

As discussed throughout, the Respondent Law Firms received payment of their fee for services performed pursuant to a legally-binding contract entered into with the Attorney General. As established by the Amended Complaint, the payment of the fee was authorized and approved by the Attorney General, the Treasurer's Office, the Comptroller General's Office, and the EBO. No statute requires court approval of the payment of the fee. And payment was intentionally and voluntarily made by the State to meet the State's binding contractual obligations. Critically, none of those State officials contend that payment was somehow induced by "fraud, bad faith, abuse of confidence, or violation of a fiduciary duty" or that the Respondent Law Firms are not entitled to their contractual fees. *Lollis v. Lollis*, 354 S.E.2d 559, 561, 291 S.C. 525, 529 (1987) (discussing requirements to impose constructive trust); *JASDIP Properties SC, LLC v. Estate of Richardson*, 395 S.C. 633, 640, 720 S.E.2d 485, 489 (Ct. App. 2011) ("[I]f there is no basis for unjust enrichment, there is no basis for restitution.").

Despite all this, which they know, Appellants nevertheless seek to stand in the shoes of the State and non-party State Executive Branch officials to contend a "constructive trust" should be created "***in favor of* [*Appellants*]**," **(R. p.)** (Am. Compl. ¶ 85), to deprive the Law Firms of their rights to the fee owed and already paid to them for services performed and costs incurred pursuant to their contract with the State. This contention completely lacks merit. "A constructive trust results from fraud, bad faith, abuse of confidence, or violation of a fiduciary duty which gives rise

to an obligation in equity to make restitution." *Lollis*, 354 S.E.2d at 561, 291 S.C. at 529. "Fraud is an essential element, although it need not be actual fraud." *Id*. "In order to establish a constructive trust, the evidence must be clear, definite, and unequivocal." *Id*.

Appellants make the remarkable (and entirely frivolous) claim that the Respondent Law Firms' receipt of the funds—which were owed and paid to them pursuant to a legally-binding and valid contract for services performed and for which payment was authorized by four separate State officials—was somehow wrongful and necessitates the creation of a constructive trust, thereby depriving the Respondent Law Firms of their rights to and the benefit of these funds. However, Appellants do not allege, nor could they allege, a single act on the part of either of the Respondent Law Firms that in any way amounts to "fraud, bad faith, abuse of confidence, or violation of a fiduciary duty." *Lollis*, 354 S.E.2d at 561, 291 S.C. at 529. The closest Appellants come to such an allegation is their contention that the Respondent Law Firms' contingency fee pursuant to its contract is not "reasonable" under the Rules of Professional Conduct.[21] But, as discussed, the circuit court did not have jurisdiction over such claims; the Rules of Professional Conduct do not give rise to a private cause of action; Appellants are not parties to the underlying contract; and Appellants have no standing to assert such a claim. And the actual party to the contract—the Attorney General—approved the fee, and multiple other State officials authorized payment of the fee.

[21] Other than this mere contention, there also is nothing in Appellants' Amended Complaint that supports their claim that the 12.5% fee paid is unreasonable. Notably, as part of the proceedings before Judge Lee, W&H introduced the affidavits of Professor Nathan Crystal, Professor John Freeman, Professor Michael Verzi, and Peter Protopapas, Esquire, all recognized experts in the field of legal ethics and all of whom testified that the 12.5% fee paid is reasonable. **(R. pp.)**. In contrast, Appellants did not submit any expert testimony or any other evidence in support of their contention that the fee is unreasonable. Accordingly, Appellants' contention is contrary to the evidence of record in this case and wholly without merit. Moreover, as previously discussed, this contention is not preserved by Appellants for review in this appeal.

Like with their reasonableness claim, at bottom, Appellants not only ask the Judiciary to usurp the statutory powers of the Attorney General, but also seek to force the State to breach its contract with the Respondent Law Firms after the contract has been fully performed by all parties. Appellants cite to no authority—because there is none—that would allow the Judiciary to take such drastic action and create additional litigation against the State. Therefore, Appellants' request for imposition of a constructive trust and for restitution are devoid of merit and warrant affirmance of the circuit court for this reason as well.

CONCLUSION

For the myriad reasons explained above, this Court should deny the appeal of Appellants and affirm the order of the circuit court dismissing this case.

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,

John S. Simmons, S.C. Bar No. 10260
SIMMONS LAW FIRM, LLC
1711 Pickens Street
Columbia, South Carolina 29201
(803) 779-4600
jsimmons@simmonslawfirm.com

s/ J. Todd Rutherford
J. Todd Rutherford, S.C. Bar No. 12097
RUTHERFORD LAW FIRM, LLC
2113 Park Street
Columbia, South Carolina 29201
(803) 256-3003
todd@therutherfordlawfirm.com

Gerald Malloy, S.C. Bar No. 12033
MALLOY LAW FIRM
Post Office Box 1200
Hartsville, South Carolina 29551
(843) 339-3000
gmalloy@bellsouth.net

Attorneys for Respondent
Willoughby & Hoefer, P.A.

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