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S.C. SUPREME COURT

**S.C. Public Interest Foundation v. Wilson
Appellate Case No. 2021-000472**

**ATTACHMENT TO LETTER REQUEST OF May 6, 2022
Letter from Robert D. Cook, Solicitor General**



ALAN WILSON
ATTORNEY GENERAL

May 6, 2022

The Honorable Patricia Howard, Clerk
Supreme Court of South Carolina
1231 Gervais Street
Columbia, SC 29201

Re: SC Public Interest Foundation v. Alan Wilson (2)
Case No. 2021-000472

Dear Ms. Howard:

I am writing to bring to the Court's attention certain supplemental information regarding the unique history of § 1-7-150(B). As Solicitor General, I am one of the attorneys for the State in this case, and attended the oral argument on April 6, 2022. I was struck by the numerous questions and comments the Court had at oral argument regarding § 1-7-150(B) as it relates to public importance standing, as well as any limitation the statute may have placed upon the Attorney General's broad authority to enter into contingency fee agreements. The questions the Court raised related to whether there was the need for "future guidance" concerning these points, such that public importance standing would be conveyed.

Having had serious health issues during the time this case proceeded, I failed to recall the context in which this statute was enacted until after the oral argument. The entirely legitimate questions posed by the Court triggered my recollection regarding the context in which the statute was passed. Thus, I thought it important at least to offer this additional authority to the Court for its consideration, with the understanding, of course, that the Court is free to give no weight to my recollections.

I fully realize the Court may well choose to interpret the statute based solely upon its text in order to determine standing. But I note also that the "paramount consideration and controlling factor in the interpretation of a statute is the intent of the Legislature, and each enactment of the Legislature is to be construed in light of its own context." Ingram v. Bearden, 212 S.C. 399, 410, 47 S.E.2d 833, 837 (1948). This context may prove pivotal.

With that background, I note that Section 1-7-150(B) was enacted in 1998 as a permanent provision (Section 18) of the Appropriations Act (Act 419 of 1998). As I recall, the overarching purpose of the statute was not to impose a restriction upon the powers of the Attorney General, but to determine the disposition of the proceeds from the settlement of the Reedy River oil spill, a case

to which John McIntosh and myself were assigned at the time. Section 18 was introduced in the House shortly after the Reedy settlement was announced. Attorney General Charlie Condon, who announced the settlement of \$6.5 million, subsequently raised the issue that the House version of Section 18 did not specify that Reedy River settlement proceeds (minus the “costs of litigation”) would go to the Mitigation Trust Fund for cleanup of the oil spill, but would instead default to the General Fund. Much controversy ensued as friends of the Reedy were outraged. Thus, the primary, if not exclusive, focus of § 1-7-150(B), as amended in the Senate, was clearly to earmark these settlement monies to the Reedy River restoration, rather than to the General Fund. As I recall, Senator Leventis was instrumental in this change and the passage of the Proviso, as currently codified.

My recollection is that over time, notwithstanding § 1-7-150(B), which has not been amended since its passage in 1998, the corpus of various settlements or recoveries obtained by the Attorney General have been deposited in the Litigation Recovery Account (not the General Fund), pursuant to legislative directive through budget provisos mandating that such settlement and recoveries not be deposited in the General Fund. See e.g. 2019 S.C. Acts 91, Part 1.B, § 59.8. Moreover, contingency fees owed the attorneys hired by the Attorney General have been paid directly to the attorneys pursuant to their contingency fee contract. A reasonable explanation for this longstanding practice is that contingency fee attorneys possess a vested property interest in their fee once settlement or judgment occurs. See State v. Hagerty, 580 N.W.2d 139, 144-45 (N.D. 1998) (quoting Button’s Estate v. Anderson, 28 A.2d 404 (Vt. 1942)) [“ . . . the petitioners have equitable rights to that portion of the same which represents their fee. . . .”]. As the Court elaborated in Button’s Estate, the attorney fees earned pursuant to the contingency fee contract “never legally and equitably belonged to the State as part of its public funds. . . .” 28 A.2d at 410. This Court cited Button’s Estate with approval in Foster v. Taylor, 210 S.C. 324, 332, 42 S.E.2d 531, 535 (1947) [constitutional provision requiring appropriation by the Legislature “applies to funds of the public, not another’s. . . .”].

Thus, I cannot recall a situation in which attorney’s fees in a contingency contract were deposited in the General Fund, a predicament which would virtually destroy the Attorney General’s power to utilize contingency fee agreements to protect consumers, the public interest, and the rule of law. Deposit in the General Fund means the Legislature can appropriate these fees for any purpose. Attorneys would not agree to represent the State under such circumstances. This legislative history and longstanding practice strongly suggests that neither the Attorney General’s Office nor the Legislature, viewed § 1-7-150(B) as an infringement upon or a narrowing of the Attorney General’s power to contract with private attorneys on a contingency fee basis.

At the same time as the Reedy River settlement, there was much controversy surrounding the tobacco litigation (and other cases) regarding use of private attorneys by the Attorney General pursuant to contingency fee agreements. General Condon, seeking to calm the churning waters, supported a separate budget proviso, which was integrated into the same Section 18 creating § 1-7-150(B). This budget provision would have created § 1-7-85, requiring that the Attorney General

submit any contingency fee agreement to the Budget and Control Board for its approval. As adopted by the House Ways and Means Committee, the Attorney General could not “contract on a contingent or other basis for the legal representation of this State . . . without first receiving the written approval of the Budget and Control Board.” This portion of Section 18 of the Appropriations Act passed the House, but died in the Senate. See 1997-98 Bill 4700: 1998-1999 Budget Bill – Part 2 – As Passed By the Senate – South Carolina Legislature Online. The remainder of Section 18, creating current § 1-7-150(B), with the emphasis on the Mitigation Trust Fund, was enacted.

In short, this history demonstrates that § 1-7-150(B) did not seek to impose any limitation upon the Attorney General’s longstanding common law power to employ private attorneys to represent the State on a contingent fee basis. As the blue ribbon 1990 study, led by Dean John Montgomery of the USC Law School and I.S. Leevy Johnson, prominent Columbia attorney, found, “[s]ince at least the 1880’s, the State of South Carolina has used private attorneys for a portion of the State’s legal services...” and that “[i]n appropriate cases, the Attorney General should consider contingent fee arrangements instead of an hourly rate.” Report to the Attorney General of the Advisory Committee on Associate Counsel (1990), at 3, 11. According to the study, the need for outside counsel is essential to the function of the Attorney General in protecting the public interest and that “[t]he Attorney General has authority to make such decisions as well as the obligation to monitor the cost and effectiveness of services provided by associate counsel.” Id. at 13. The documentation supporting the reasons for passage vividly illustrates that Section 1-7-150(B) did not seek to destroy these foundational principles. Whereas the portion of the Section 18 Budget proviso relating to Budget and Control Board approval of all contingency fee agreements would have diminished the Attorney General’s power, it was not enacted; current § 1-7-150(B), which was in fact enacted, by contrast, does not alter that power.

My firm recall is, at the time, no one thought § 1-7-150(B) imposed a limitation upon the Attorney General’s authority to contract and that any outside approval of fees occurred at the Attorney General’s discretion, not as a matter of law. Indeed, even after passage of § 1-7-150(B), Attorney General Condon, in his discretion, insisted that the final Reedy River settlement agreement provide that the contingency fees of the lawyers involved be approved by the three trustees of the Mitigation Trust Fund before payment to them was made. Successor Attorneys General have, within their discretion, imposed different requirements. There can be no doubt that mandating court approval or other outside approval of contingency fees in every instance would emaciate the Attorney General’s ability to carry out the duties of his office. See State v. Long, 406 S.C. 511, 753 S.E.2d 425 (2015) [Art. V, § 24 of S.C. Constitution deems Attorney General as “chief prosecuting officer” of the State in both criminal and civil cases, with broad common law and statutory authority and the General Assembly cannot infringe upon that power.]. See also Conant v. Robins, et al., 603 N.W.2d 143, 149 (Minn. 1999) [“In conclusion, because the challenged moneys (contingency fees) are not state funds and because the law does not require an appropriation for payment of attorneys fees for special counsel, the appellants do not have standing

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to bring this action.”]. Historically, the General Assembly has not intruded upon, but has respected, this essential function of the executive branch’s chief legal officer.

Accordingly, should the Court desire, we are happy to provide supplemental briefing regarding the history and background of § 1-7-150(B) or any other issue relative to standing. State v. Quinn, supra. We offer this brief history to the Court because of the unique nature of the statute’s passage, as well as the fact that the Legislature, at the same time, considered and rejected a mandatory outside oversight of the Attorney General’s contingency fee agreements. Again, I regret that I did not bring this information to the Court’s attention in a more timely manner, but thought it important to the institution of the Attorney General to do so now.

Sincerely,



Robert D. Cook
Solicitor General

cc by email only:

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