STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
South Carolina Public Interest Foundation and John Crangle, individually and on behalf of all others similarly situated, Plaintiffs, v. Alan Wilson, Attorney General for the State of South Carolina, Willoughby & Hoefer, P.A., and Davidson, Wren & DeMasters, P.A., Defendants.	Docket No. 2020-CP-40-04603 **ORDER DENYING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

This matter came before the Court on October 7, 2020, on a Motion for Preliminary Injunction (Motion) filed by Plaintiffs South Carolina Public Interest Foundation and John Crangle, individually and on behalf of all others similarly situated (collectively Plaintiffs). James Griffin, Esq. and Badge Humphries, Esq. of Griffin Humphries appeared on behalf of Plaintiffs. J. Todd Rutherford, Esq., John Simmons, Esq., and Gerald Malloy, Esq. appeared on behalf of Defendant Willoughby & Hoefer, P.A. Will Davidson, Esq. and Ken Woodington, Esq. appeared on behalf of Defendant Davidson, Wren & DeMasters, P.A. J. Emory Smith, Esq. of the Office of the Attorney General appeared on behalf of Defendant Alan Wilson.

In the Amended Complaint, Plaintiffs instituted this action against the Attorney General of South Carolina and the law firms of Willoughby & Hoefer, P.A. (W&H) and Davidson, Wren & DeMasters, P.A. (DW&D, and together with W&H, the Law Firms), raising various arguments regarding the payment of attorneys' fees to the Law Firms in the amount of $75 million pursuant

to the Litigation Retention Agreement.[1] Plaintiffs seek a preliminary injunction to freeze the $75 million of settlement proceeds that Plaintiffs allege was unlawfully transferred to Defendant W&H at the direction of Defendant Alan Wilson for the payment of attorneys' fees pending this litigation.

FACTUAL BACKGROUND

It appears from the filings in this matter that, in February 2016, the State of South Carolina, represented by the Law Firms, initiated several lawsuits against the Department of Energy (DOE) related to the mixed oxide fuel fabrication facility (MOX Facility) at the Savannah River Site (SRS) and certain weapons grade (defense) plutonium stored at SRS. On August 28, 2020, a Settlement Agreement was executed with the Federal Government providing for a payment of $600 million from the Federal Government's "Judgment Fund." W&H Resp. to Pls.' Mot. for Prelim. Inj. (W&H Resp.), Ex. 1. The settlement provided DOE a grace period to comply with an obligation to remove additional defense plutonium from the State while maintaining the ability of the State to force removal of the plutonium and to receive additional payments should DOE not comply. *Id*. The Federal Government submitted the settlement payment to the State. The State jointly filed with the Federal Circuit Court an agreement for voluntary dismissal dismissing the pending litigation on September 29, 2020. W&H Resp., Ex. 2, Agreement to Voluntary Dismissal of Appeal.

The Litigation Retention Agreement, as amended, provides for the payment of attorney fees based upon a decreasing percentage scale contingent upon the amount of the recovery for two

[1] The Attorney General Alan Wilson and the Law Firms entered into an agreement for the Law Firms to represent the State of South Carolina in litigation relating to violations of 50 U.S.C.A.§ 2566 related to the MOX Facility. *See* Litigation Retention Agreement for Special Counsel Appointed by the South Carolina Attorney General as to Economic and Impact Assistance for the Violation of 50 USCA § 2566 Related to the Mixed Oxide (MOX) Facility.

cases and flat percentages of recovery for two other cases. The attorneys' fee under the agreement, including costs and expenses, is $75,000,000. This fee represents 12.5% of the cash recovery.

The State Attorney General submitted the request for approval of payment of the attorneys' fees owed pursuant to the Litigation Retention Agreement on September 17, 2020. Attorney General Mem. in Opp'n to First TRO Motion, Ex. 4, Buckley Affidavit. The payment was authorized by the Comptroller General and Treasurer and was approved by the Executive Budget Office (EBO) of the Department of Administration. *Id*. On September 29, 2020, the State made a wire transfer to W&H for $75 million, inclusive of attorneys' fees and costs, owed under the Litigation Retention Agreement and as contemplated by the dismissal filed in the Federal Circuit. *Id*.

On September 29, 2020, virtual hearings on Plaintiffs' first Motion for Temporary Restraining Order against only the Attorney General were held before Judge Debra McCaslin. Thereafter, Judge McCaslin issued an Order Granting Temporary Injunction Pendente Lite (the First TRO) enjoining the Attorney General from "ordering, approving, or facilitating the distribution of any portion of the disputed funds until this Court issues a ruling on Plaintiff's motion."[2] The First TRO also enjoined the State Treasurer from "disbursing any portion of the disputed funds to any persons until such a ruling is made by this Court." When the First TRO was entered, the wire transfer to W&H paying the fees contractually owed of $75 million had already been completed.

Plaintiff filed an Amended Summons and Complaint the next day, September 30, 2020, adding the Law Firms as defendants. Plaintiffs also filed the instant Motion *ex parte*. On

[2] The First TRO was electronically signed on September 29, 2020, and electronically filed on September 30, 2020. It was subsequently dissolved by Judge McCaslin.

September 30, 2020, this Court issued an *Ex Parte* Temporary Restraining Order, electronically filed on October 1, 2020 (the Second TRO). The Second TRO enjoined the Law Firms, members of Law Firms, and "anyone acting in concert with these Defendants" from "transferring, spending, pledging or otherwise encumbering the proceeds of the $75 Million wire transfer received from the State of South Carolina on September 29, 2020." The Second TRO also set a hearing on the Motion for Preliminary Injunction for October 7, 2020. Thereafter, the parties were served with the Amended Summons and Complaint and the Second TRO.

Plaintiffs bring this action on behalf of the taxpayers of this State and assert standing under the public importance exception. At the close of the hearing, the Court issued a Form 4 extending the restraining order until Wednesday, October 14, 2020.

PLAINTIFFS LACK PUBLIC IMPORTANCE STANDING

A plaintiff must have standing to maintain a claim. "Under our current jurisprudence, there are three ways in which a party can acquire this fundamental threshold of standing: (1) by statute; (2) "constitutional standing"; and (3) the public importance exception." *Bodman v. State*, 403 S.C. 60, 66–67, 742 S.E.2d 363, 366 (2013) (citing *ATC South, Inc. v. Charleston Cnty*., 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008)). Plaintiffs do not assert they have statutory standing or constitutional standing, they assert standing through the "public importance" exception.

"Public importance" standing allows citizens in some limited instances to seek judicial resolution of an issue "of such public importance as to require its resolution for future guidance." *Davis v. Richland County Council*, 372 S.C. 497, 500, 642 S.E.2d 740, 741 (2007). However, the Supreme Court has recognized that courts "must be cautious with this exception, lest it swallow the rule." *Jowers v. S.C. Dep't Health & Envtl. Control*, 423 S.C. 343, 360, 815 S.E.2d 446, 455 (2018) (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 key for finding that public importance standing is warranted is a need for future guidance. As the Supreme Court has stated:

> For a court to relax general standing rules, the matter of 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(emphasis added).

Plaintiffs contend the meaning of § 1-7-150 of the South Carolina Code of Laws is a matter upon which future guidance is needed. S.C. Code Ann. § 1-7-150(B) states, "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…." Plaintiffs assert S.C. Code Ann. § 1-7-150 requires all attorney's fees to be approved by court order or be approved in the settlement, and because the Attorney General regularly employs outside counsel there is a need for future guidance on this matter. Plaintiffs also assert that without approval of the fees by court order or in the settlement, all proceeds from the settlement should have been deposited into the General Fund.

Plaintiffs challenge the one-time payment of the attorneys' fees here based upon this particular settlement and pursuant to this Litigation Retention Agreement. Any judicial ruling on this matter would be entirely limited to the Litigation Retention Agreement and payment for services performed pursuant to this single contract. *Cf. City of Charleston v. Masi*, 362 S.C. 505, 509, 609 S.E.2d 301, 304 (2005) (denying public importance standing with respect to right to vote in certain municipal elections because "the pertinent issue does not present a recurring dilemma

such that this issue should be addressed to clarify the law"). Plaintiffs acknowledge that it is because of the amount of the fee the statute requires interpretation.

Plaintiffs do not challenge the Attorney General's authority to enter into retention agreements with outside counsel. The subject of this action is not the Attorney General's authority to enter into contracts for outside litigation counsel to represent the State. S.C. Code Ann. § 1-7-170 grants the Attorney General the authority to enter into an agreement or to hire private counsel on a contingency basis. Additionally, S.C. Code Ann. § 1-7-85 expressly states 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…." This Court finds that payment of attorneys' fees is expressly authorized under § 1-7-85 and, pursuant to a valid and binding contract for services rendered in civil proceedings brought on behalf of the State, the fees constitute a cost which the Attorney General is authorized to pay.

S.C. Code Ann. § 1-7-150 is unambiguous and allows the Attorney General to pay cost of litigation from the settlement proceeds. Plaintiffs concede the language is clear and unambiguous. The statute does not require court approval for the payment of the fee, and the appropriate State Officers followed applicable law in disbursing the funds to meet the State's contractual obligations. Thus, the Court finds that this is not a situation requiring future guidance. Public importance standing is inappropriate here because there is no ruling the Court might make that would assist other courts resolving future arguments regarding outside litigation.

Furthermore, future guidance is not needed on this matter because Proviso 59.8 of the State's current budget precludes the Attorney General from transferring ***any*** funds to the General Fund and instead directs him to deposit any funds that "otherwise" would go to the General Fund 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 continues in effect. 2020 S.C. Acts 135, § 1(A)(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 Cty. 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 Plaintiffs were correct that the entire settlement, including the money for attorneys' fees, should be deposited in the General Fund under § 1-7-150(B), the Proviso would prevent such action in this case. The argument articulated by Plaintiffs is therefore inapplicable.

The payment of the contractual attorneys' fees also constituted a "disposition required by law" and an "expend[iture] … prescribed by law" because the EBO approved the payment of the contract fees as expressly authorized 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."). Moreover, as Plaintiffs acknowledge, the Treasurer's Office processed the payment for the attorneys' fees pursuant to a warrant from the Comptroller General. *See* Mot., pp. 4-5 & Am. Compl., Ex. 19.

Plaintiffs claim that additional approval by the Joint Other Funds Oversight Committee was required and allege "the EBO Director apparently by-passed the approval process." Pls.' Suppl. Mem., p. 11. However, the Attorney General as the Chief Legal Officer of the State is specifically charged with administering § 1-7-150. The EBO is responsible for overseeing the expenditure of funds in this State. Both approved and authorized the payment of the attorneys' fees. The payment also was authorized by the Comptroller General and the Treasurer. Pursuant to the current continuing resolution passed by the General Assembly, 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; W&H Resp., Ex. 3, 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]."). The EBO Director therefore did not by-pass the requisite approval process. Thus, the agencies charged with administrating § 1-7-150 necessarily have determined that payment of the fees was authorized pursuant to the statute. *See Kiawah Development Partners, II v. S.C. Dep't of Health & Envtl. 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."). Plaintiffs' contention that further approvals were required is incorrect.

Therefore, without a showing that future guidance needed on this issue, Plaintiffs lack standing under the public importance exception.

PLAINTIFFS LACK DERIVATIVE STANDING

Plaintiffs also assert they have derivative standing to pursue claims for the recovery of State funds asserted under *Ex parte Hart*, 190 S.C. 473, 2 S.E.2d 52 (1939). *Ex parte Hart* allowed a citizen of a county to assert a plain claim on behalf of that county. Plaintiffs argue derivative standing should be extended to the State even though it is a sovereign entity and there is no "plain" claim. Pls.' Suppl. Mem., p. 16.

This Court finds that *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. However, *Hart* and the few decisions that follow its analysis involve claims with respect to counties, municipalities, and local government entities. *Berry v. McLeod*, 328 S.C. 435, 447, 492 S.E.2d 794, 800 (Ct. App. 1997) (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").

The Attorney General's authority to represent State interests is rooted in the Constitution, statutes, and the common law. Our courts have repeatedly emphasized that the Attorney General of South Carolina is the State's chief legal officer with broad authority to direct and control the State's legal affairs. The Supreme Court noted in *Cooley, et al. v. South Carolina Tax Commission*, 204 S.C. 10, 28 S.E.2d 445, 450 (1943), "[t]he office of Attorney General is created by the

Constitution." According to the Court, the various statutes relating to the Office demonstrate the "wide scope of authority and duties of the Attorney General as the legal representative of the state and of its several administrative departments." 28 S.E.2d at 451. The Court, in *Cooley*, recognizing the creation of the Office of Attorney General by the state Constitution, as well as the broad powers of the Office, concluded the Attorney General had the authority to settle that case.

Also, in *State ex rel. Condon v. Hodges*, 349 SC. 232, 562 S.E.2d 623 (2002), our Supreme Court addressed the question of the Attorney General's statutory and inherent common law authority as the State's chief legal officer. In *Condon*, the Court confronted the issue of the Attorney General's power to enforce the Constitution and laws of the State in the context of the improper or illegal expenditure of public funds. There, the Court stated:

> [T]he General Assembly has elaborated on the Attorney General's duties in several statutes. First, pursuant to S.C. Code Ann. § 1-7-40 (Supp. 2001), the Attorney General must
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> > appear for the State in the Supreme Court and the court of appeals in the trial and argument of all causes, criminal and civil, in which the State is a party or interested, and in these causes when required by the Governor or either branch of the General Assembly.
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> . . . The General Assembly has also provided that the Attorney General, upon written request of a state officer has a duty to appear and defend that officer when the officer is being prosecuted in a civil or criminal action or other special proceeding, due to an act done or omitted in good faith in the course of employment. S.C. Code Ann. § 1-7-50 (1986) [footnote omitted]. The Attorney General also must 'give his opinion upon questions of law submitted to him by either branch' of the General Assembly or by the Governor. S.C. Code Ann § 1-7-90 (1986).... Further,
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> > '[a]s the chief law officer of the State, [the Attorney General] may, in the absence of some express legislative restriction to the contrary, exercise all such *power* and *authority*, as public interests may from time to time require, and may institute, conduct, and maintain all such suits and *proceedings* as *he deems necessary for the enforcement of the laws of the State,* the *preservation of order,* and the *protection* of *public rights.*'

> *State ex rel. Daniel v. Broad River Power Co.*, 157 S.C. 1, 68, 153 S.E. 537, 560 (1929), *aff'd* 282 U.S. 187, 51 S.Ct. 94, 75 L.Ed. 287 (1930) (citation omitted and italics added by *Daniel* Court). *Cf. State v. Beach Co*., 271 S.C. 425, 248 S.E.2d 115 (1978) (while Attorney General has broad statutory authority, and arguably common law authority, to institute actions involving welfare of State, that authority is not unlimited).

State ex rel. Condon v. Hodges, 349 S.C. at 239, 240. In *State ex rel. McLeod v. v. McInnis*, 278 S.C. 307, 311, 295 S.E.2d 633, 635 (1982), the Court explained that the Attorney General, by bringing this action in the name of the State, speaks for all its citizens, and may, on their behalf, bring to the Court's attention for adjudication charges that there is an infringement in the separation-of-powers area.

Moreover, in *Condon v. State*, 354 S.C. 634, 641, 583 S.E.2d 430, 434 (2003), the Court reiterated that "[t]his Court has recognized that the Attorney General has broad statutory and common law authority in his capacity as the chief legal officer of the State to institute actions involving the welfare of the State and its citizens, including vindication of wrongs committed collectively against the citizens of the State." *State v. Southern* Ry. Co., 82 S.C. 12, 62 S.E. 1116 (1908) (the Court expresses it does not believe it was the Legislature's intent to deny the Attorney General "the power and responsibility of conducting the litigation according to his judgment.").

Accordingly, Plaintiffs have no authority to represent State interests in this proceeding. The Attorney General is the State's chief legal officer, and he properly exercised his authority to contract with the W&H law firm to represent the State in its action against the United States and to pay them pursuant to that contract from the settlement proceeds. As Judge Cooper stated in *Cephalon v. Wilson*, Civil Action No. 2012-CP-400737 (June 6, 2014), "[t]he Attorney General possesses the authority to associate outside attorneys to assist with enforcement actions … and to pay those outside attorneys on a contingency fee basis with money received in any settlement or

judgement obtained in the case." Order at 9 (Exhibit 3 to Attorney General's Memorandum).

Judge Roger Couch, in *State v. Eli Lilly*, 2007-CP-42-1855 (Sept. 22, 2009), also concluded § 1-7-150 "expressly authorizes payment of 'the costs of litigation' out of litigation proceeds and a 'cost of litigation' is certainly what legal fees are." Order at p. 19. He added, "Section 1-7-150 gives the Attorney General the right to withhold certain funds (investigative costs and costs of litigation) from the proceeds of litigation such as this." Order at 20. Similarly, in *Cephalon, supra,* Judge Cooper concluded that "the costs of litigation include attorneys' fees, [§1-7-150(B)] expressly provides the Attorney General the authority to pay attorneys' fees to outside counsel and other costs of litigation from the proceeds of any judgment or settlement without those funds being first deposited in the general fund." Order at p. 18.

Contrary to Plaintiffs' second assertion, these fees were also "awarded by settlement." The settlement provides that each party bears its own fees thereby allowing the payment to be made from the settlement proceeds. This understanding is ratified by the parties to the settlement in documents presented to the U.S. Court of Appeals for the Federal Circuit. The "Agreement To Voluntary Dismissal of Appeal" filed with the Federal Court and executed by all parties to the litigation incorporates the settlement into the dismissal. It specifically states that the settlement agreement 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 . . . ."

The Attorney General had the authority to pay the attorney's fees from settlement proceeds without depositing the money into a particular account. Therefore, Plaintiffs no authority to act for the State as to this matter.

PLAINTIFFS FAILED THEIR BURDEN FOR A PRELIMINARY INJUNCTION

Even if this Court has improperly determined that Plaintiffs do not have standing to pursue this claim, Plaintiffs have failed to meet their burden for a preliminary injunction.[3] "A preliminary injunction should issue only if necessary to preserve the status quo ante, and only upon a showing by the moving party that without such relief it will suffer irreparable harm, that it has a likelihood of success on the merits, and that there is no adequate remedy at law." *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc*., 387 S.C. 583, 586–87, 694 S.E.2d 15, 17 (2010). An applicant for a preliminary injunction must allege sufficient facts to state a cause of action for injunction and demonstrate that this relief is reasonably necessary to preserve the rights of the parties during the litigation. *County of Richland v. Simpkins*, 348 S.C. 664, 669, 560 S.E.2d 902, 904 (Ct. App. 2002). "Generally, to obtain an injunction, a party must demonstrate irreparable harm, a likelihood of success on the merits, and an inadequate remedy at law." *Id.*

Plaintiffs ultimately seek to prevent the Law Firms from spending the money paid to them pursuant to the agreement. Plaintiffs' claims can be remedied by money damages if they were to succeed, especially since no unique property was transferred to the Law Firms. "The applicable rule, reaffirmed in almost every case dealing with the matter, is that in the absence of some positive provision of the law to the contrary, an injunction will not be granted in cases where there is a choice between the ordinary processes of law and the extraordinary remedy by injunction, and where the remedy at law is sufficient to furnish the injured party the full relief to which he is entitled in the circumstances." (Emphasis added). *Van Robinson Ins. Agency, Inc. v. Harleysville Mut. Ins. Co*., 272 S.C. 127, 129, 249 S.E.2d 744, 745 (1978). Plaintiffs also have not shown a

[3] This Court does not address each and every claim raised by Plaintiffs, but briefly addresses only those elements that demonstrate Plaintiffs have not met their burden.

likelihood of success on their claim that the Attorney General lacked the authority to pay fees to W&H from the settlement proceeds. As noted above, S.C. Code Ann. §1-7-150 is unambiguous and allows the Attorney General to pay cost of litigation from the settlement proceeds. The statute does not require court approval for the payment of the fee, and the appropriate State Officers followed applicable law in disbursing the funds to meet the State's contractual obligations.

CONCLUSION

After hearing the issues and arguments of counsel and considering the materials submitted, this Court finds Plaintiffs lack standing and have failed to meet their burden for a Preliminary Injunction in this matter. Plaintiffs' Motion for Preliminary Injunction is **DENIED.** Accordingly, this Court dissolves the Temporary Restraining Order.

AND IT IS SO ORDERED.

[Electronic Signature to Follow]

Richland Common Pleas

Case Caption: South Carolina Public Interest Foundation , plaintiff, et al vs Alan Wilson , defendant, et al

Case Number: 2020CP4004603

Type: Order/Other

IT IS SO ORDERED!

s/ Alison Renee Lee