IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

Appeal No. 30947

THE CITY OF SIOUX FALLS,

Appellant–Plaintiff,

v.

JOHNSON PROPERTIES, LLC,

Appellee–Defendant,

Appeal from the Circuit Court
Second Judicial Circuit
Minnehaha County, South Dakota

THE HONORABLE Jeffrey C. Clapper
circuit court Judge

APPELLANT'S BRIEF

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PRELIMINARY STATEMENT

This brief refers to the Appellant, the City of Sioux Falls, as the "City." It refers to the Appellee, Johnson Properties, LLC, as "Johnson Properties." Citations to the transcript of the December 12, 2024, motions hearing on attorney fees will appear with the shorthand "Hrg. Tr. I" (for the argument portion of the hearing) or "Hrg. Tr. II" (for the decisional portion) and the corresponding page number of each transcript. Citations to the trial transcript appear with the shorthand "Trial Tr." Generally, citations to the 523-page electronic record will appear with the shorthand "Rec.," and citations to documents in the Appendix appear with the shorthand "App." Given the ubiquity of citations to the circuit court's findings of fact and conclusions of law, however, citations to those findings and conclusions will appear with the shorthand "FOF" or "COL," respectively, together with the referenced paragraph number in the document. For reference, these findings and conclusions are located at Rec. 470 through Rec. 477 and can also be found in the Appendix at App. 59 through App. 66.

JURISDICTIONAL STATEMENT

The City has appealed as of right from that part of the circuit court's judgment awarding attorney fees to Johnson Properties. The circuit court entered judgment on December 30, 2024, which followed the circuit court's issuance of an order awarding fees and costs on December 4, 2024. That order was supported by findings of fact and conclusions of law entered on December 30, 2024. The City filed a timely notice of appeal on January 2, 2025, from that part of the judgment awarding attorney fees. This Court has jurisdiction pursuant to SDCL § 15-26A-3(1).

STATEMENT OF THE ISSUE

1. Calculating the lodestar is the necessary first step in awarding attorney fees, and the lodestar provides a presumptively reasonable award from which a court may depart only when certain enumerated factors justify it. Here, the circuit court ignored the lodestar calculation ($61,740), treated the requested fee ($139,724.60) as presumptively reasonable based on a contingency-fee agreement, and otherwise justified the requested fee using considerations already accounted for by the lodestar. Is the fee award an abuse of discretion?

   The circuit court concluded that Johnson Properties was entitled to recover $139,724.60 in attorney fees, 100% of its requested fee award.

   SDCL § 21-35-23.
   City of Sioux Falls v. Kelley, 513 N.W.2d 97 (S.D. 1994).
   City of Sioux Falls v. Johnson, 2003 S.D. 115, 670 N.W.2d 360.
   Blum v. Stenson, 465 U.S. 886 (1984).

STATEMENT OF THE CASE

In October 2021, the City filed a verified petition and a declaration of taking pursuant to SDCL Chapters 9-27, 21-35, and 31-19. (*See* Rec 3-112.) In so doing, the City effected a partial taking of a property owned by Johnson Properties. At that time, Johnson Properties used the property to operate the Alibi Bar & Grill, a dive bar in the best sense of the term. Johnson Properties did not challenge the necessity of the partial taking under SDCL § 21-35-10.1 and, instead, disputed only the just compensation it was owed. (*See id.* at 117-18, 123.) In October 2024, the circuit court held a jury trial, the scope of which was limited to determining just compensation. At the end of the trial, the jury returned a verdict awarding Johnson Properties $382,600. (Trial Tr. 550.) This award exceeded by more than 20% the City's final offer for the property.

Thereafter, Johnson Properties filed motions seeking attorney fees, expert fees, and certain costs. (Rec. 380, 382, 403-04.) As pertinent here, SDCL § 21-35-23 permits

a landowner in a condemnation proceeding who receives a final judgment that is at least 20% greater than the condemning authority's final offer to recover, in addition to its taxable costs, "reasonable attorney fees and compensation for not more than two expert witnesses, all as determined by the court." The City did not object to Johnson Properties' requested expert fees or costs. (*See id.* at 425-34.) It did, however, object that the request for $139,724.60 in attorney fees was not "reasonable." (*Id.*) In particular, the City emphasized that the requested amount was more than double the $61,740 lodestar calculation, which serves as the only legitimate starting point in any fees-calculation analysis. The lodestar was based on the unchallenged hours spent by counsel for Johnson Properties multiplied by counsel's unchallenged hourly rate. (*Id.* at 427-28.) The City also pointed out that Johnson Properties had justified its $139,724.60 fee request figure only by reference to a private contingency-fee arrangement and by double-counting other factors already accounted for by the lodestar. (*Id.* at 430-32.)

After a hearing on Johnson Properties' motion, the circuit court—the Honorable Jeffrey C. Clapper—entered an order awarding Johnson Properties $139,724.60 in attorney fees. (App. 35-36.) On December 30, 2024, the circuit court entered findings of fact and conclusions of law on the issue of attorney fees. (*Id.* at 59-66.) In so doing, the circuit court reasoned that the substantial award was justified by a combination of circumstances rather routine to litigation, including, for example, (1) counsel employing "strategy and skill" in securing experts and other witnesses, selecting exhibits, and effectively presenting his theory of the case; (2) counsel's showing "the experience, the skill, and the ability" necessary to perform his task "properly"; (3) Johnson Properties'

having recovered a "substantial" amount at trial; and (4) counsel and Johnson Properties having privately agreed to a contingency-fee arrangement in lieu of an hourly fee.

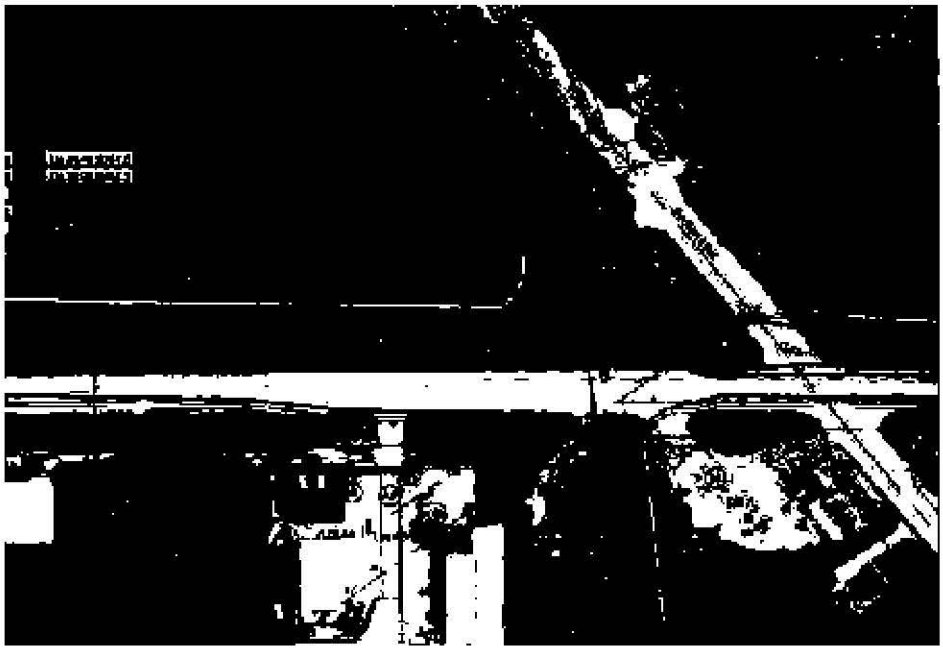
The same day, the circuit court entered a judgment against the City in a total amount that included (1) the jury award (less a previous deposit made with the clerk's office by the City), (2) pre- and postjudgment interest, (3) expert fees, (4) costs, and—of consequence here—(5) the requested $139,724.60 in attorney fees. (*Id.* at 67-71.) On January 2, 2025, the City filed this appeal. The appeal addresses a single issue: whether the analysis employed by the circuit court to produce this enormous upward variance adhered to this Court's framework for deciding whether a fee award is "reasonable."

STATEMENT OF FACTS

Arrowhead Parkway is a high-traffic, arterial road that runs through the heart of downtown Sioux Falls and traverses the entire length of the City from east to west.[1] (*See* Trial Tr. 360-61, 383-84.) Starting two decades ago, the City, in consultation with the South Dakota Department of Transportation, began work on a project to redesign and expand Arrowhead Parkway on the east side of the City to account for safety concerns and increased traffic counts. (*Id.* at 361-62, 366-68.) As relevant here, Phrase 2A of the project involved the realignment of the intersection of Arrowhead Parkway and Six Mile Road, a more lightly traveled north-south section-line road on the outskirts of the City. (*See id.* at 362, 365-67, 378, 384, 392-94.) The plan was to relocate the existing intersection to the west; to add turning lanes, medians, and stoplights; and to reorient its

[1] Strictly speaking, this road is designated as "Arrowhead Parkway" only in the eastern part of the City. (*See* Trial Tr. 360.) But no other portion of the road is relevant here.

harsh 52-degree angle, which presented a safety hazard, to a more conventional 90 degrees, (*see id.* at 369-71, 376-380), as illustrated in the following diagram:



(Rec. 326; *see also id.* at 325-30 (additional plan diagrams).) Construction on Phase 2A of the project started in 2022 and wrapped up the following year. (Trial Tr. 376.)

As of late 2021, Johnson Properties owned a piece of land at the corner of Arrowhead Parkway and Six Mile Road. (*Id.* at 311.) The property housed the Alibi Bar & Grill—a neighborhood dive bar and one of several bars owned or operated by Johnson Properties' proprietor, Justin Johnson. (*Id.* at 311, 332-34.) To relocate and reorient the intersection, the City concluded that it needed to acquire two portions of the Alibi Bar property—a 4,484-square-foot slice from its western edge and a 387-square-foot piece from its northeast corner. (*Id.* at 379-80; *see* Rec. 12 (diagram).) In addition, as a consequence of the project, the intersection of Arrowhead Parkway and Six Mile Road would be moved from the east side of the property to the west, resulting in the loss of

direct access from Arrowhead Parkway and a more circuitous route of access from the new intersection south to the old Six Mile Road and then north:

(*See* Rec. 328, 342 (where the top left corner of the diagram is the northernmost corner).)

On October 25, 2021, the City filed a verified petition and declaration of taking, effecting a partial taking of the property. (FOF ¶ 1; *see* Rec 3-112.) In addition to acquiring the two pieces of the property, the City obtained the temporary easements necessary to perform work on the project. (*See* Rec. 11.) In accordance with the statutory quick-take procedure for road projects, the City deposited its appraised value for the acquired property, $51,647, with the clerk of courts, as its estimate of the just compensation owed for the taking. (FOF ¶ 2; Rec. 113-14.) *See* SDCL § 31-19-28.

In response, Johnson Properties did not challenge the necessity of the taking. (*See* Rec. 117-18, 123.) Instead, it challenged the estimate of just compensation. (*Id.* at 117-19.) After obtaining competing appraisals and conducting limited discovery, the parties proceeded to trial. SDCL § 21-35-23 requires that a condemning authority file its final

offer of just compensation with the trial court as of "the time trial is commenced." To that end, in the weeks leading up to trial, the City filed its final offer of $250,000. (FOF ¶ 3; Rec. 148.)

In late October 2024, the circuit court held a jury trial to determine just compensation. Johnson Properties, which bore the burden of proof, presented six witnesses. (Trial Tr. 2, 205.) Among those witnesses were an appraiser, its proprietor Jeremy Johnson, and two local real-estate professionals. (*Id.*; *see id.* at 149, 172-73, 208.) At trial, Johnson Properties contended that the highest and best use of the property was reduced from convenience retail to a warehouse-type use. (*Id.* at 219-20, 294.) Its appraiser testified that the change in access changed the highest and best use of the property; in his opinion, the resulting difference between the value of the property before and after the taking was $405,000. (*Id.* at 254.) The City, for its part, presented two witnesses: its own appraiser, who testified to an updated valuation roughly in line with the City's original valuation, and the manager of the City's engineering program, who provided background concerning the project. (*Id.* at 205; *see id.* at 354, 402, 466.) Its appraiser testified that the change in access did not affect the highest and best use of the property, which was still suitable after the taking for a dive bar. (*Id.* at 459-60.)

The matter was tried in just three days (*see id.* at 204, 436), which included time spent on a site visit by the jury to the subject property. (*See id.* at 495-96.) During closing arguments, Johnson Properties requested that the jury award it $735,000, a figure calculated by Johnson himself, rather by than the appraiser counsel had retained. (*Id.* at 522; *see* Rec. 320.) At the end of the trial, the jury returned a verdict awarding Johnson Properties just compensation in the amount of $382,600. (FOF ¶ 5; Trial Tr. 550.)

Thereafter, Johnson Properties filed motions seeking the recovery of attorney fees, expert fees, and certain costs. (Rec. 380, 382, 403-04.) As pertinent here, SDCL § 21-35-23 permits a landowner in a condemnation proceeding who receives a final judgment that is at least 20% greater than the condemning authority's final offer to recover, in addition to its taxable costs, "reasonable attorney fees and compensation for not more than two expert witnesses, all as determined by the court." Johnson Properties requested that it be awarded $139,724.60 in attorney fees, as well as expert fees and costs. At the outset of this case, Johnson Properties and its counsel had entered into a private contingency-fee relationship: Under that arrangement, its counsel would be entitled to be paid one-third of any "lift"—*i.e.*, one-third of Johnson Properties' total recovery (including costs, expert fees, and attorney fees) above the City's final offer—plus tax. (FOF ¶ 17; *see* Rec. 408, 415-16.) On that basis, in its motion to the circuit court, Johnson Properties requested a fee award equal to one-third of the lift (this time excluding costs, expert fees, and attorney fees). (FOF ¶ 18; Rec. 388, 408-09.)

The City did not object to Johnson Properties' requested expert fees or costs. It did, however, object that the requested $139,724.60 in attorney fees was not "reasonable" within the meaning of SDCL § 21-35-23. (*See* Rec. 425-34.) The City emphasized that the requested amount was more than double the result of the "lodestar" reached by taking a reasonable hourly rate times the number of hours spent on the case. (*Id.* at 427-28.) Per his own records, Johnson Properties' counsel spent 137.2 total hours on the case. (*Id.* at 413-14.) And he represented in an affidavit that his "current hourly rate for eminent domain work is $450.00 per hour"—a figure that is "higher" than the rate he charges in non-condemnation cases but that is justified by his superior "knowledge and expertise in

this area of the law compared with other lawyers in the state." (*Id.* at 408.) Taking the 137.2 hours times $450 results in a lodestar of $61,740. Johnson Properties conceded at argument that this figure was the appropriate lodestar. (Hrg. Tr. I, at 4-5, 15.)

In addition, the City asserted that Johnson Properties, in its attempts to justify a fee award far in excess of the lodestar, was routinely double-counting factors already accounted for by the product of the lodestar calculation. (Rec. 430-32.) The City made clear that it did not challenge either the time spent by counsel or the higher-than-usual hourly rate charged in condemnation cases. (*Id.* at 428.) The City explained, however, that Johnson Properties could not support any upward deviation from the lodestar on the basis of factors that were, by their nature, built into either the time spent or the heightened rate—such as counsel's experience, reputation, and ability or the time and labor required to perform the legal services properly. (*Id.* at 430-32.)

After a hearing on Johnson Properties' motion, the circuit court entered an order awarding Johnson Properties 100% of its request: $139,724.60 in attorney fees. (*Id.* 435-36.) On December 30, 2024, the circuit court entered findings of fact and conclusions of law on the issue of attorney fees. In its written findings, the circuit court dispensed with the "illusion" that an adequate fee could "necessarily be ascertained by merely multiplying attorney's hours and typical hourly fees." (COL ¶ 6.) Then, without ever calculating a lodestar, the circuit court reasoned that an award equal to one-third of the lift was justified by (1) counsel employing "strategy and skill" in securing experts and other witnesses, selecting exhibits, and effectively presenting his theory of the case; (2) counsel's showing "the experience, the skill, and the ability" necessary to perform his task "properly"; (3) Johnson Properties' having recovered a "substantial" amount at trial;

and (4) counsel and Johnson Properties having privately agreed to a contingency-fee arrangement in lieu of an hourly fee. (*Id.* ¶ 7.) The same day, the circuit court entered a judgment against the City that included $139,724.60 in attorney fees. (App. 67-68.) The City has since paid the judgment except for the award of attorney fees.

STANDARD OF REVIEW

Awards of attorney fees are reviewed by this Court under an abuse-of-discretion standard. *Crisman v. Determan Chiropractic, Inc.*, 2004 S.D. 103, ¶ 24, 687 N.W.2d 507, 513. An abuse of discretion "is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable." *Arneson v. Arneson*, 2003 S.D. 125, ¶ 14, 670 N.W.2d 904, 910. An abuse of discretion may arise, however, "simply" by virtue of "an error of law or . . . discretion exercised to an unjustified purpose, against reason and evidence." *Nickles v. Nickles*, 2015 S.D. 40, ¶ 16, 865 N.W.2d 142, 149 (internal quotations omitted) (alteration in original). A court's legal error is, "[b]y definition," an abuse of discretion. *Credit Coll. Servs., Inc. v. Pesicka*, 2006 S.D. 81, ¶ 5, 721 N.W.2d 474, 476 (quoting *State v. Vento*, 1999 S.D. 158, ¶ 5, 604 N.W.2d 468, 469). In the context of fee-shifting statutes, the question of "whether a particular type of enhancement to a lodestar is legally viable involves mainly a question of law." *Lipsett v. Blanco*, 975 F.2d 934, 942 (1st Cir. 1992).

ARGUMENT

This appeal requires this Court to resolve a single issue: whether the circuit court's analysis adhered to this Court's framework for determining attorney-fee awards, such that it produced an attorney fees award that was "reasonable" within the meaning of

SDCL § 21-35-23. In a condemnation proceeding, a landowner who receives a final judgment that is at least 20% greater than the condemning authority's final offer may recover "reasonable attorney fees" "as determined by the court." SDCL § 21-35-23. The key word is "reasonable." The City has never disputed that at trial Johnson Properties obtained a judgment that entitles it to recover some amount of reasonable attorney fees. (COL ¶ 3; Rec. 462.) Instead, the City maintains that the fee awarded is unreasonable because it is the product of legal errors in deviating from the lodestar.

The circuit court calculated its $139,724.60 attorney-fee award by taking one-third of the "lift"—*i.e.*, one-third of Johnson Properties' recovery above the City's offer when counsel was retained—plus a 6.2-percent sales tax figure.[2] (FOF ¶ 17.) This formula was adopted verbatim from the one proposed by Johnson Properties. (*Id.*) And it has its nexus in a private arrangement between Johnson Properties and its counsel: Rather than charging an hourly rate, counsel agreed to represent Johnson Properties for a one-third contingency fee—again calculated by taking one-third of the lift plus 6.2 percent sales tax. (*Id.* ¶¶ 8, 18.) The Court's award and Johnson Properties' contingency-fee contract thus share the same basic structure. But there is one difference: In the attorney-fees calculation proposed by Johnson Properties and adopted by the Court, the lift consists of the sum of the jury verdict and prejudgment interest to the date of the verdict, less the amount of the City's offer. (*Id.* ¶ 17.) In the contingency agreement, by contrast, the lift includes all the same figures but then adds the costs, expert fees, and attorney fees the landowner is awarded pursuant to SDCL § 21-35-23.

[2] It was error for the circuit court to include sales tax in the fee award. The City, as a municipality, is exempt from sales tax. *See* SDCL § 10-45-10.

(*Id.* ¶ 18.) In other words, Johnson Properties' counsel increased its one-third share by incorporating any attorney fees (and costs) Johnson Properties received from the Court. (App. 061.)

The question for this Court is whether, under the circumstances, it was reasonable for the circuit court to adopt as a reasonable fee the contingency fee Johnson Properties proposed. The framework for calculating a reasonable fee award is well-established. The burden of proving the reasonableness of the award is on Johnson Properties, as the party seeking the award. *Arrowhead Ridge I, LLC v. Cold Stone Creamery, Inc.*, 2011 S.D. 38, ¶ 25, 800 N.W.2d 730, 737. And the first step in calculating a fee is to determine a lodestar amount: In "all civil actions," including condemnation proceedings, "the calculation of attorney fees *must* begin with the hourly fee multiplied by the attorney's hours." *In re Microsoft Antitrust Litig.*, 2005 S.D. 113, ¶¶ 30, 34, 707 N.W.2d 85, 100; *City of Sioux Falls v. Kelley*, 513 N.W.2d 97, 112 (S.D. 1994). This Court has held that this "simple mathematical exercise is the only legitimate starting point for analysis." *Kelley*, 513 N.W.2d at 112 (internal quotation omitted). Rightly so: While not always perfect, the lodestar is an objective metric that "cabins the discretion of trial judges, permits meaningful judicial review, and produces reasonably predictable results" for all parties. *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 551-52 (2010).

Only after a lodestar figure has been calculated may a court proceed to impose adjustments to account for "other, less objective factors." *Kelley*, 513 N.W.2d at 112. These factors may include (1) "the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly"; (2) the likelihood of representation precluding other employment for the attorney; (3) the fee

customarily charged for similar services; (4) "the amount involved and the results obtained"; (5) any time constraints imposed; (6) the nature and length of the attorney-client relationship; (7) the attorney's "experience, reputation, and ability"; and (8) the fee arrangement with the client. *Id.* (quoting Model R. of Prof. Conduct 1.5).

Here, the lodestar amount is undisputed: $61,740. (Hrg. Tr. I, at 4-5, 15.) This figure was derived from an affidavit submitted by Johnson Properties' counsel. In the affidavit, counsel represented that his "current hourly rate for eminent domain work" was $450 per hour, (Rec. 408), and that he had spent a total of 137.2 hours on the case. (*See id.* at 413-14.) The City did not challenge either the reasonableness of the 137.2 hours spent preparing the case (*id.* at 428), or the $450 hourly figure—which, by counsel's own admission, was "higher" than the rate he charged for his "other hourly work." (*Id.* at 408, 428.) Instead, both the City and Johnson Properties acknowledged that the product of these two figures constituted a reasonable lodestar. (*Id.* at 428; Hrg. Tr. I, at 4-5, 15.) The only question, then, was whether any deviation from the lodestar was justified.

1. The circuit court failed to calculate the lodestar figure and instead started from an implicit presumption that Johnson Properties' requested fee amount was reasonable.

From the outset, however, the circuit court departed from these principles. For decades, this Court has reiterated that the lodestar calculation is "the only legitimate starting point" in determining an award of attorney fees. *E.g.*, *Microsoft Antitrust Litig.*, 2005 S.D. 113, ¶ 30 (quoting *Kelley*, 513 N.W.2d at 112). In every case, the analysis "*must* begin" there. *Stern Oil Co. v. Brown*, 2018 S.D. 15, ¶ 51 n.7, 908 N.W.2d 144, 159 n.7 (internal quotation omitted) (emphasis added). In harmony with this approach, "[t]his Court has consistently required trial courts to enter findings of fact and

conclusions of law when ruling on a request for attorney fees," and to make "specific findings" related to the factors articulated in *Kelley*. *Crisman v. Determan Chiropractic, Inc.*, 2004 S.D. 103, ¶ 30, 687 N.W.2d 507, 514 (internal quotation omitted). After all, without written findings and conclusions, this Court could not possibly judge whether the deviation from the lodestar was justified. In effect, there would be "nothing to review." *Goff v. Goff*, 2024 S.D. 60, ¶ 28, 12 N.W.3d 139, 149 (internal quotation omitted).

At the motions hearing, both parties agreed on a lodestar figure of $61,740. (Hrg. Tr. I, at 4-5, 15.) But this figure is conspicuously absent from the circuit court's findings of fact and conclusions of law. (*See generally* FOF & COL; *see also* App. 43-44 (objecting to the proposed findings and conclusions on this basis).) Nor do these findings and conclusions purport to offer any alternative calculation of the lodestar. (*See generally* FOF & COL.) Instead, the circuit court began its analysis by reciting the contingency calculations outlined by Johnson Properties. (FOF ¶ 17.) Quoting *Kelley*, the court then dismissed as illusory the notion that an adequate fee "can necessarily be ascertained by merely multiplying attorney's hours and typical hourly fees." (COL ¶ 6.) But it omitted the immediately qualifying language dictating that this "simple mathematical exercise" is nevertheless "the only legitimate starting point for analysis." *Kelley*, 513 N.W.2d at 112. After setting the contingency amount as the baseline, the circuit court walked through the factors set forth in *Kelley*, seemingly deploying them as a means of defending the figure requested by Johnson Properties in the first instance, rather than as factors that might justify a deviation from the lodestar. (*See* COL ¶ 7.)

This was error. By discarding the lodestar and accepting Johnson Properties' contingency-fee-based calculation as the starting point, the circuit court effectively

inverted the burden of proof. Rather than putting the onus on Johnson Properties to show why the lodestar calculation did not produce a reasonable fee, *see Arrowhead Ridge*, 2011 S.D. 38, ¶ 25, 800 N.W.2d at 737, the circuit court gave presumptive weight to Johnson Properties' requested fee award and required the City to justify a lesser award. *But see Koehler v. Farmers All. Mut. Ins. Co.*, 566 N.W.2d 750, 755 (Neb. 1997) (finding that a court abused its discretion by treating a requested fee as presumptively reasonable).

During the hearing, the circuit court acknowledged the lodestar calculation before making its award. (*See* Hrg. Tr. II, at 4.) But the findings and conclusions, which ignore the lodestar, demonstrate that the court started its analysis elsewhere. The findings and conclusions are controlling: A "trial court's written findings of fact prevail when a discrepancy exists between those findings and the court's prior memorandum opinion or oral ruling." *Fenske v. Fenske*, 542 N.W.2d 98, 102 (N.D. 1996); *see also, e.g.*, *State ex rel. J.J.W.*, 520 P.3d 38, 43 n.3 (Utah Ct. App. 2022); *Thyssenkrupp Safway, Inc. v. Hyland Hills Parks & Rec. Dist.*, 271 P.3d 587, 589 (Colo. Ct. App. 2011); *Cole Vision Corp. v. Hobbs*, 714 S.E.2d 537, 540 (S.C. 2011). In its written findings and conclusions, the circuit court eschewed any lodestar calculation. Instead, it purported to use the *Kelley* factors as a means of justifying a fee award calculated based on a contingency fee. The circuit court had the opportunity to take a different approach but declined to do so. (*See* Rec. 464-65, 467 (declining to adopt any of the City's proposed conclusions, including one explaining that the parties had agreed on $61,740 as "the appropriate lodestar").)

Even if no other legal errors had infected the circuit court's fee analysis, its decision to start the analysis with the contingency award requested by Johnson Properties, rather than the lodestar, would warrant reversal. *See Vines v. Welspun Pipes*,

9 F.4th 849, 855-57 (8th Cir. 2021) (vacating a district court's fee award solely because it "did not calculate the lodestar"); *Jet Mw. Int'l Co. v. Jet Mw. Grp., LLC*, 93 F.4th 408, 421 (8th Cir. 2024) (same, because "the district court never set forth its lodestar calculation prior to considering additional factors"). The lodestar method, by design, operates as a restraint on the discretion afforded to circuit courts in calculating fee awards, and discarding that limitation constitutes an abuse of discretion.

2. The circuit court misapplied and double-counted several factors already inherent in the lodestar calculation.

Even had the circuit court properly started its analysis with the lodestar, its application of the *Kelley* factors still would have constituted an abuse of discretion. Once a lodestar is set, the only remaining question is whether that figure ought to be adjusted, up or down, to account for the other factors.[3] *See Kelley*, 513 N.W.2d at 112.; *see also Skender v. Eden Isle Corp.*, 33 F.4th 515, 522-23 (8th Cir. 2022) (recognizing that, in circumstances not applicable here, a downward variance may sometimes be appropriate). In this case, the circuit court abused its discretion by impermissibly double-counting factors already embedded within the lodestar and by giving undue weight to the contingency fee agreement between Johnson Properties and its counsel.

a. The circuit court correctly attributed no weight to three factors, which are not at issue on appeal.

Johnson Properties conceded before the circuit court that none of the following factors could justify an upward variance in the fee award: (2) the likelihood of acceptance of employment precluding other employment for the attorney, (5) the time

[3]The circuit court's failure to calculate the lodestar makes it something of a misnomer to speak of the court's reasoning in terms of "variances" or "departures." For simplicity's sake, however, this brief frames the issues in those terms.

constraints imposed on counsel, or (6) the nature and length of the attorney-client relationship. (*See* Rec. 388 (conceding that competing employment "was not a factor"); *id.* at 389 (acknowledging that no time limitations were placed on counsel that might have artificially suppressed fees); *id.* (noting only a "brief[]" attorney-client relationship "on one prior occasion" related to a land-use issue, without suggesting that relationship had any impact on the appropriateness of the fee charged).) The circuit court appropriately gave "no weight" to these factors. (COL ¶ 7(2), (5), (6).)

b. By relying on three other factors, the circuit court impermissibly double-counted considerations already built into the lodestar figure.

From that point onward, however, the circuit court's treatment of the *Kelley* factors was not consistent with established caselaw. The first factor is "the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly." *Kelley*, 513 N.W.2d at 111 (quoting Model R. of Prof. Conduct 1.5). This case was not especially novel or time-consuming. After all, by its very nature, the case immediately was reduced to a single issue: the amount of just compensation owed to Johnson Properties for the taking of its property. Thereafter, the case featured limited discovery and motions practice: Counsel for Johnson Properties took no depositions, while counsel for the City took four, and the only motions filed in the case were Johnson Properties' motion for a jury view of the property (to which the City promptly acquiesced) and three motions *in limine* filed before trial. (*See* Rec. 143-46, 150-54.) Meanwhile, the trial itself involved a short witness list and few objections; and it was tried to completion in only three days, which included time spent transporting the jury to and from the subject property for a jury view.

The circuit court disagreed with the City's assessment, suggesting that counsel for both sides only made handling a tricky case *look* "pretty easy." (Hrg. Tr. II, at 5.) It is telling, however, that, in rendering its assessment of this issue, the court relied largely on the basic strategic considerations inherent in every trial. For example, the court pointed to the need for Johnson Properties' counsel to (1) employ "strategy and skill" in securing experts and other witnesses, (2) carefully select exhibits to present to the jury and use them "in an effective manner," and (3) present testimony in a manner designed "to buttress [his] theory of the case, while not overburdening or boring the jury." (COL ¶ 7(1).) These are all important strategic considerations, to be sure. But they are also routine in any jury trial. If they justified an upward variance, a variance would be warranted in every case in which a talented lawyer represented a party entitled to fees.

The circuit court's view is not the law: The lodestar calculation accounts for counsel's skill and strategy. It is designed so that it "normally" establishes "full and reasonable compensation" for a prevailing party—even in cases in which the prevailing party's counsel "produces excellent results." *Microsoft Antitrust Litig.*, 2005 S.D. 113, ¶ 61, 707 N.W.2d at 106 (citing for this proposition *Blum v. Stenson*, 465 U.S. 886, 901 (1984)).[4] In part for that reason, there is a "strong presumption that the lodestar is

[4] Below, counsel for Johnson Properties openly "discourage[d]" the circuit court from relying on precedent from the U.S. Supreme Court as persuasive authority (or, indeed, from relying on any attorney-fee cases from outside the condemnation context). (Hrg. Tr. I, at 24.) This advice was misguided. First, the standards governing the "reasonableness" inquiry are not limited to fee awards based on SDCL § 21-35-23. *See, e.g.*, *Microsoft Antitrust Litig.*, 2005 S.D. 113, ¶¶ 29-30, 707 N.W.2d at 98-99 (reciting the same standards in an antitrust case); *Duffy v. Circuit Court*, 2004 S.D. 19, ¶ 16, 676 N.W.2d 126, 134 (same, in a case involving court appointments). Second, this Court has not hesitated to treat federal decisions as persuasive when interpreting state statutes with shared roots or similar language. *See, e.g.*, *Alone v. C. Brunsch, Inc.*, 2019 S.D. 41, ¶ 22

sufficient." *Perdue*, 559 U.S. at 546. And the product of its calculation should not be discarded absent "rare" and "exceptional" circumstances supported by "specific evidence." *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986) (quoting *Blum*, 465 U.S. at 898-901). If these principles mean anything, they must mean that the sort of strategic judgments that would have to be made by any litigator in any jury trial cannot serve as the basis for an upward departure from the lodestar figure—much less serve as a basis for more than doubling it.

On a more fundamental level, disagreements about the novelty of the issues at play or the skill needed to respond to those issues are neither here nor there. The City agrees that counsel for Johnson Properties is entitled to "a fully compensatory fee" for the services its counsel provided. *Blum*, 465 U.S. at 901 (internal quotation omitted). For that reason, the City has not argued that counsel spent too much time preparing for trial by engaging in "[a] full and complete review of all the possible issues," digesting the evidence, comparing appraisals, strategizing with his client, or "steamlin[ing]" his presentation of evidence for the jury. (*See* Rec. 386 (listing, in its brief below, the bases

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& n.2, 931 N.W.2d 707, 713 & n.2. Indeed, this Court has already taken that approach in the case of § 21-35-23, where it relied on federal authority to establish the proposition that the lodestar calculation, while not dispositive in every instance, "is the only legitimate starting point" in the fee-shifting analysis. *Kelley*, 513 N.W.2d at 112 (quoting *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 471 (2d Cir. 1974)). This should not be surprising: By making "reasonableness" the governing standard, § 21-35-15 builds on a longstanding tradition shared among state and federal fee-shifting statutes. And courts interpreting those statutes often deploy very similar frameworks. *Compare, e.g.*, *id.* at 111 (deriving the eight factors identified above from Model Rule of Professional Conduct 1.5), *with Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974) (adopting, in one of the most-cited federal cases on this topic, a similar list of factors, which the court noted were "consistent" with the predecessor to Rule 1.5). Of course, this Court is not *bound* to follow the U.S. Supreme Court's lead. But if that court's logic withstands careful scrutiny (and it does), this Court should also embrace it.

on which Johnson Properties justified the amount of time its counsel spent preparing for trial).) The Court may assume that all 137.2 hours spent by counsel on these matters—and on any other preparations—were reasonable. Instead, the modest proposition the City advances is that the most appropriate measure of "the time and labor required" to prepare for trial is the time Johnson Properties' counsel *actually spent* preparing for trial. A lawyer reasonably spends more time on a complex matter than a simple one.

Johnson Properties offers no basis for deviating from this elementary principle. Typically, "[t]he novelty and complexity of the issues" involved in a case are "fully reflected in the number of billable hours recorded by counsel." *Blum*, 465 U.S. at 898. Unsurprisingly, then, both Johnson Properties' briefing and oral argument below are devoid of any attempt to argue that the hours spent preparing for and presenting its case were not an adequate gauge of the novelty or difficulty of the legal or factual issues involved. (*See* Hrg. Tr. I, at 5-14 (walking through the *Kelley* factors while skipping any discussion of this factor); Rec. 386-87 (arguing only that a "full and complete review of all the possible issues" and obtaining "mastery" of the facts each "require[d] extensive preparation time," without suggesting this time was unrepresented in the hours recorded by counsel).) Instead of making such a case, Johnson Properties limited its argument below to asserting that "[t]he *time expended* by [its] counsel was necessary to adequately prepare the case." (Rec. 387 (emphasis added).) The City does not argue otherwise.

Meanwhile, the circuit court's purported justifications for a departure on this point are unpersuasive. The circuit court observed that condemnation is "a very particular and specialized area of the law," and that, as such, a "great deal of strategy and skill" was required of counsel to adequately prepare for the case. (COL ¶ 7(1).) While

condemnation may be a specialized area of practice, this fact would typically be "reflected in the number of billable hours recorded by counsel." *Blum*, 465 U.S. at 898. Again, the logic behind this principle is straightforward: It usually will take counsel more time to tackle a novel or complex issue than it will to tackle a run-of-the-mill problem. Nothing about this case was complicated for a lawyer who specializes in condemnation cases. What's more, even in cases "where the experience and special skill of the attorney will require the expenditure of fewer hours than counsel normally would be expected to spend on a particularly novel or complex issue," "the special skill and experience of counsel should be reflected in the reasonableness of the hourly rates." *Id.* That is the case here, where the rate used to calculate the lodestar, $450, is the self-described "higher hourly rate" charged in condemnation proceedings "because of [counsel's] knowledge and expertise in this area of the law compared with other lawyers in the state." (*See* Rec. 408.) On those facts, "[n]either complexity nor novelty of the issues . . . is an appropriate factor in determining whether to increase the basic fee award." *Blum*, 465 U.S. at 898-99. To do so would amount to double counting.

To illustrate the point, consider the effective hourly rate that was implemented by the circuit court. The court awarded $139,724.60 for 137.2 hours of work. (*See* COL ¶ 12; Hrg. Tr. I, at 8; Rec. 413-14.) As such, the effective hourly rate charged for Johnson Properties' counsel was $1,018.40—more than double its counsel's typical "hourly rate for eminent domain work," (*see* Rec. 408), and *far* in excess of the top-end hourly rates Johnson Properties' own affidavits say prevail for condemnation work in larger markets like Des Moines and Minneapolis-St. Paul. (*See id.* at 399 ($475 to $750 in the Twin Cities); *id.* at 401 ($350 to $550 in Des Moines).) Even the most

sophisticated legal work in South Dakota does not typically call for rates approaching that figure. By awarding the equivalent of a $1,018.40 hourly fee, the circuit court ventured well beyond awarding a "just and adequate" or "fully compensatory" attorney fee, *see Kelley*, 513 N.W.2d at 112 (internal quotation omitted); *Blum*, 465 U.S. at 901 (internal quotation omitted), and instead permitted a windfall at the City's expense.

A similar problem plagues Johnson Properties' attempt to justify the inflated fee award on the basis of its counsel's "experience, reputation, and ability," the seventh *Kelley* factor. 513 N.W.2d at 111 (quoting Model R. of Prof. Conduct 1.5). The City recognizes that counsel for Johnson Properties has extensive experience litigating condemnation cases on behalf of landowners in South Dakota, and that he has built up a corresponding reputation in that area of the law. (*See* Rec. 408-09.) Any fee calculation thus should account for that expertise and reputation. And the lodestar does. Johnson Properties' counsel has represented that his "current hourly rate for eminent domain work is $450.00 per hour"—the same $450 figure used to calculate the lodestar. (*Id.* at 408.) According to him, this figure is higher than the rate he charges in non-condemnation cases. (*Id.*) And he charges that "higher hourly rate" "because of [his] knowledge and expertise in this area of the law compared with other lawyers in the state." (*Id.*) There is no need to question whether the lodestar adequately captured the market for counsel's "experience, reputation, and ability" in this instance. He has told us that it does.

By any metric, then, to further increase the lodestar figure on the basis of experience or ability would constitute double counting. But that is exactly what the circuit court did: It started its analysis of this factor by observing that condemnation is "a very particular and specialized area of the law in which very few lawyers regularly

practice." (COL ¶ 7(1).) It then defended an increase in the award by explaining that counsel showed "the experience, the skill, and the ability to perform properly this particular form of litigation." (*Id.* ¶ 7(7).) In so doing, the circuit court offered no explanation for why the market value for counsel's experience and skill was not already adequately reflected in the lodestar figure. (*See id.*; *see also* Hrg. Tr. II, at 7 (observing only that counsel demonstrated the ability "to perform in this particular area of law").) Nor could it have plausibly done so, given counsel's own representations that $450 is the hourly rate he would charge for his services on the open market. (*See* Rec. 408.)

The issue on appeal is not whether Johnson Properties' counsel displayed the experience, skill, and ability necessary to "perform properly" at trial (*see* COL ¶ 7(7)), but whether counsel's skillset was already accounted for by the lodestar calculation. Even "brilliant insights and critical maneuvers" ordinarily "should be reflected in the reasonableness of the hourly rates," rather than made the subject of an upward variance from the lodestar figure. *Perdue*, 559 U.S. at 555 n.5 (internal quotations omitted). And that principle certainly holds true here, where counsel has represented that the fee amount used to calculate the lodestar is predicated upon his unique "knowledge and expertise in this area of the law" among South Dakota attorneys. (*See* Rec. 408.)

Similarly, an upward variance cannot be justified on the basis of the fourth factor—"the amount involved and the results obtained" in the litigation. *Kelley*, 513 N.W.2d at 111 (quoting Model R. of Prof. Conduct 1.5). The circuit court emphasized that "[h]undreds of thousands of dollars were at stake" in this case, and that Johnson Properties ultimately received a jury verdict ($382,600) that was higher than the City's

final offer ($250,000).[5] (COL ¶ 7(4); *see* FOF ¶¶ 3, 5.) It added that the jury verdict was substantially higher than the $51,711 valuation the City advanced at trial.[6] (*Cf.* FOF ¶ 4; COL ¶ 7(4).) This last point, in particular, is curious: The delta between the City's appraised valuation and the jury verdict ($330,889) is within spitting distance of the delta between the jury verdict and the $735,000 landowner valuation Johnson Properties requested during its closing arguments at trial ($352,400). (*See* Trial Tr. 522; *see also* FOF ¶ 4.) While it is fair to characterize the outcome of the trial as a positive result for Johnson Properties, if its own request at trial is to be credited, it did not achieve nearly the degree of success it had hoped for. *See, e.g.*, *Perdue*, 559 U.S. at 554 (reserving upward variances from the lodestar for "rare" and "exceptional" circumstances).

At any rate, an increase in the lodestar on the basis of the success achieved at trial once again constitutes double counting. As this Court has observed, the lodestar is calculated on the assumption that it "normally provides full and reasonable compensation for counsel who produces excellent results." *Microsoft Antitrust Litig.*, 2005 S.D. 113, ¶ 61, 707 N.W.2d at 106. "Because acknowledgment of the 'results obtained' generally

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[5] In making its own comparisons of these figures, the circuit court artificially inflated the amount of the jury award by adding $44,556.25 of prejudgment interest. (*See* FOF ¶¶ 6-7.) Under SDCL § 21-35-23, it is appropriate for a court to account for prejudgment interest when determining whether a landowner is entitled to claim attorney fees in the first instance. *State ex rel. Dep't of Transp. v. Clark*, 2011 S.D. 20, ¶ 12, 798 N.W.2d 160, 165. But, in this case, there is no dispute that § 21-35-23 applies. And the amount of prejudgment interest could not possibly justify a deviation from the lodestar. Prejudgment interest is calculated using a simple statutory formula; *any* prevailing landowner represented by *any* counsel would have been entitled to the same amount.

[6] The valuation the City advanced at trial ($51,711) was slightly higher than the amount it deposited with the clerk at the outset of the case ($51,647). (*Compare* Rec. 121 (deposit receipt), *with* Rec. 335 (appraisal used at trial).) In its written findings, however, the circuit court repeatedly misstated that the City was seeking $51,647 (*see* FOF ¶¶ 4, 7; COL ¶ 7(4)), despite an objection from the City pointing out the error. (App. 37.)

will be subsumed within other factors used to calculate a reasonable fee, it normally should not provide an independent basis for increasing the fee award." *Blum*, 465 U.S. at 900; *see Republican Party of Minn. v. White*, 456 F.3d 912, 921 (8th Cir. 2006). Instead, "superior results are relevant only to the extent it can be shown that they are the result of superior attorney performance" and, even then, only if there is "specific evidence that the lodestar fee would not have been adequate to attract competent counsel." *Perdue*, 559 U.S. at 554-55 (outlining a handful of cases where this rule would be implicated).

This point is an intuitive one: A prudent attorney invariably will consider the amount at stake in the litigation (and, thus, the potential for a positive result for the client) "when determining a reasonable number of hours to expend on any given issue or when allocating personnel resources based upon the expertise or experience required." *Bywaters v. United States*, 670 F.3d 1221, 1231 (Fed. Cir. 2012). For example, "[w]here only a small amount is at stake, it certainly would not be reasonable to expend countless hours on such a small claim or to commit the most experienced or valued attorney in the firm to work on the case." *Id.* Given the amount at issue in this litigation and the nature of the proceedings, the City did not challenge the time spent by Johnson Properties' counsel on any given task. It also took no issue with his decision to handle all those tasks by himself, rather than delegating the work to a more junior attorney. (*See* Rec. 413-14 (denoting all entries on the invoice with counsel's initials, "CS").) In this circumstance, the Court is free to presume that the allocation decisions by counsel were reasonable.

Yet, precisely because Johnson Properties' counsel would have accounted for the amount at stake and the potential recovery at the outset of representation, Johnson Properties cannot recover a windfall as a result of that recovery now. Johnson Properties

retained the attorney it believed offered it the best chance of prevailing at trial. Meanwhile, the City conceded that Johnson Properties was entitled to recover a fee based on an hourly of $450 that adequately reflected its counsel's skills and experience. Those skills and experience were parlayed into a successful result for Johnson Properties at trial. But nothing in the record "indicates that the services and results overshadowed, or somehow dwarfed, the lodestar." *Lipsett*, 975 F.2d at 942-43 (recognizing that any exception permitting enhancement on the basis of exceptional results "is a tiny one," which should not "eclipse the rule"). An enhancement on this basis was inappropriate.

In short, it constituted double counting for the circuit court to increase Johnson Properties' fee award based on any of (1) the time, labor, or skill required of counsel to respond to legal issues, (4) the amounts at stake in and the results of the litigation, or (7) counsel's experience, reputation, and ability. Each of these considerations was already baked into the lodestar figure calculated for this case, which both sides agreed was reasonable. Under such circumstances, no increase above the lodestar was warranted—much less an increase of over 200 percent. It was legal error and, thus, an abuse of discretion for the circuit court to rely on these factors to augment the fee award.

c. The fact that the landowner and its counsel have privately agreed to a contingency arrangement in lieu of an hourly-fee contract cannot, by itself, justify an upward variance—even if such a fee is customarily charged by attorneys in condemnation cases.

The remaining two *Kelley* factors, the third and eighth, cannot, by themselves, justify an upward departure. These factors are "the fee customarily charged in the locality for similar legal services" and the raw fact that the fee structure is contingent. *Kelley*, 513 N.W.2d at 111 (quoting Model R. of Prof. Conduct 1.5). In this instance,

where Johnson Properties argues that the typical fee arrangement *is* a contingency fee, those two factors effectively collapse into one. (*See* Hrg. Tr. I, at 8, 11-12, 16 (acknowledgements to that general effect by both parties during argument).)

A fee award is not made reasonable simply because it tracks the terms of a contingency arrangement—regardless of whether that contingency arrangement is of the sort that is commonly entered into by landowners in condemnation proceedings. This Court squarely rejected this argument in *Kelley*. There, a landowner sought to recover, as a reasonable fee award, a figure that coincided with the amount to which his attorney was entitled under a contingency-fee arrangement. *See* 513 N.W.2d at 111. The Court accepted the landowner's claim that "the majority of attorneys enter into similar [contingency] agreements in condemnation actions." *Id.* at 111. But that fact was not enough to render the requested fee reasonable. Even if such arrangements were "perfectly valid and proper as between an attorney and his client, it [did] not necessarily follow that such fee is a reasonable fee to be taxed against the party taking private property for a public use, as permitted under [§ 21–35–23]." *Id.* at 111. Instead, as in all other fee-shifting cases, "[i]t is the reasonableness of the fee, and not the arrangements the attorney and his client may have agreed upon, which is controlling." *Id.* at 112.

Put differently, the terms of a private contingency arrangement cannot dictate the reasonableness of an award entered pursuant to a fee-shifting statute. For good reason: At its core, a contingency-fee arrangement is a risk-management device. In the words of the circuit court, it allots "to the attorney the risk of much work with little reward and a lots [*sic*] to the client the risk of little work with substantial fees." (Hrg. Tr. II, at 2-3.) But that does not mean the attorney and his client may shift the risk they voluntarily

assumed onto the other party. As the U.S. Supreme Court has observed, "[t]he risk of loss in a particular case (and, therefore, the attorney's contingent risk) is the product of two factors: (1) the legal and factual merits of the claim, and (2) the difficulty of establishing those merits." *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992). Neither of those risks rightly can be passed by a landowner to a condemning authority.

Take the second of these two factors first. In considering this factor, one immediately confronts a recurring problem in this case: The difficulty of establishing the merits of a claim is already "reflected in the lodestar—either in the higher number of hours expended to overcome the difficulty, or in the higher hourly rate of the attorney skilled and experienced enough to do so." *Id.* at 562-63. If it is an uphill climb to prove a client's case, a responsible attorney will spend the additional time to research and craft the arguments necessary to reach the summit. Or, better yet, the client will have sought out an attorney learned enough to take the client's case without the extra work—who can then charge a higher hourly rate for his or her services. "Taking account of [this factor] again through lodestar enhancements amounts to double counting." *Id.*

On the other hand, while the relative merits of a claim are not necessarily reflected in the lodestar, "there are good reasons why [they] should play no part in the calculation of the award." *Id.* No claim has a 100-percent certainty of success, which means "that computation of the lodestar would never end the court's inquiry in contingent-fee cases," *id.*, in direct contradiction to this Court's observation that the lodestar "normally provides full and reasonable compensation." *Microsoft Antitrust Litig.*, 2005 S.D. 113, ¶ 61, 707 N.W.2d at 100. Accounting for the merits of the claim also would introduce a slew of negative externalities into the fee-award calculus. For

example, it would incentivize attorneys to bring "relatively meritless claims" by increasing the potential upside in cases where the prospects of success are low. *Dague*, 505 U.S. at 563. And it would permit attorneys who pool contingency-fee cases as a means of minimizing their total exposure to circumvent the risk altogether by, "in effect," forcing each party against whom an attorney prevails to also "pay for the attorney's time (or anticipated time) in cases where his client does not prevail." *Id.* at 564.

In accord with those concerns, this Court has rightly held that a circuit court may not determine the amount of the attorney fees to be awarded "solely on the basis of the contingent-fee contract." *See Kelley*, 513 N.W.2d at 111-12 (internal quotation omitted). Without other evidence that an enhancement is justified, therefore, Johnson Properties cannot rely on the mere fact that it agreed to a contingency arrangement to support the reasonableness of its proposed upward departure—much less to support a proposed departure that tracks the structure of its private arrangement. Here, no other indicia supporting an upward variance are present. Every other factor announced by this Court in *Kelley* either has no application on the facts of this case or already was incorporated in the hourly rate or hours expended that were used to produce the lodestar. Without a basis to depart from the lodestar, the circuit court's analysis should have ended there.

To evade this result, Johnson Properties retreats to reliance on *City of Sioux Falls v. Johnson*, 2003 S.D. 115, 670 N.W.2d 360. *Johnson*, like *Kelley*, is a condemnation case in which the landowner and his counsel had a contingency arrangement in place. There, this Court upheld a $174,900 fee award after observing that this award fell "midway between the award proposed by [the] City and the actual fees paid to counsel" under the landowner's contingency-fee arrangement. *Id.* ¶ 10. In Johnson Properties'

view, this case stands for the proposition that an award must be considered *per se* reasonable if it falls in between the valuation proposed by the condemning authority and the amount the landowner would be obliged to pay under its contingency-fee contract. The circuit court adopted this logic, concluding that the $139,724.60 award proposed by Johnson Properties here was reasonable because, like in *Johnson*, it was "midway between the award proposed by the City and the actual fees that will be paid to counsel by [the l]andowner" under its private arrangement with its counsel. (COL ¶¶ 8-11.)

But Johnson Properties and the circuit court make far too much of *Johnson*. In practice, this overbroad reading of *Johnson* turns out to be little more than an exercise in bootstrapping. To see why, one need only return to the contract that serves as the basis of the award here. Johnson Properties' counsel structured its private fee agreement so that the starting point in its calculations was the total recovery awarded by the Court, *including the amount of requested attorney fees*. (FOF ¶ 18; *see* Rec. 415-16).) Translated to algebraic terms, Johnson Properties requested that the circuit court award to it attorney fees calculated as follows (before sales taxes), where "V" is the jury verdict, "I" is the amount of prejudgment interest accumulated as of the date of the verdict, and "O" is the City's offer as of the time Johnson Properties retained counsel:

$$\textbf{\textit{Fee Award}} = 1/3 \times ((V + I) - (O))$$

(*See* FOF ¶ 17.) Meanwhile, under the private, contingency-fee arrangement between Johnson Properties and its attorney, Johnson Properties agreed to pay the following:

$$\textbf{\textit{Contingency Fee}} = 1/3 \times ((V + I + \underline{\textit{Fee Award}} + \textit{Costs}) - (O))$$

(*See id.* ¶ 18; *see also* Rec. 415-16.) Basic math dictates that the second formula will always produce a result larger than the first. Meanwhile, there is never an incentive for a

condemning authority to challenge a landowner's requested fee award by proposing an amount that is *higher* than the amount proposed by the landowner. By definition, then, a proposed fee award calculated on this basis will *always* fall somewhere between the fee award proposed by the condemning authority and the fees due under the private agreement. And, on this logic, the condemning authority will always lose.

In this way, the standard Johnson Properties purports to borrow from *Johnson* is no standard at all. This Court has long cautioned circuit courts to scrutinize the fees requested in condemnation cases, recognizing that there is "no safeguard or incentive" for a landowner to arrange for reasonable attorney fees "when the fee is in addition to the award." *Kelley*, 513 N.W.2d at 111-12. If the Court embraced Johnson Properties' reasoning, it would provide the means for a landowner and its counsel to contract out of the "reasonableness" limitation altogether: They could demand that the condemning authority pay whatever fee they like, so long as they privately contract for a contingency fee that includes the amount of fees awarded as one input in their contractual formula. The law does not permit this result. To the contrary, in condemnation cases, as in other cases with fee-shifting statutes, "the reasonableness of the fee, and not the arrangements the attorney and his client may have agreed upon," is dispositive. *Id.* at 111.

A far more sensible reading of *Johnson* is available. While this Court upheld a $174,900 fee award that happened to fall in between the amount the landowner owed under his contingency-fee arrangement and the City's offer, the reasonableness of the fee was based on the time spent on the case. *See* 2003 S.D. 115, ¶¶ 10-11, 15, 670 N.W.2d at 363-64. The Court reached its conclusion based on 380 hours of work—nearly three times the hours expended here. *Id.* ¶¶ 8, 11. Although not mentioned on the face of the

Johnson decision, one would expect the trial court's lodestar calculation to have resulted in a figure far higher than the one at issue in this case. A higher volume of work naturally would result in a higher total fee. Against that factual backdrop, it is wholly unremarkable that this Court was "unable to say that the trial court abused its discretion" by awarding $174,900. *See id.* ¶ 10. This Court's determination in *Johnson* that the circuit court there did not abuse its discretion in awarding fees should not be stretched to stand for anything more. It certainly cannot be stretched to support the proposition Johnson Properties urges—that any fee award falling between the fee calculated pursuant to a contingency agreement and the lodestar is reasonable. Nor can it justify the proposition that the amount of the contingency fee is presumptively reasonable.

To sum up, no factors aside from the raw fact of a contingency arrangement support an increase in the lodestar amount. And the fact of the contingency arrangement, by itself, should not be permitted to dictate an increase. Any other result risks delegating the "reasonableness" of the fee award to private whims of the landowner and passing onto the City risks that were properly allocated to the landowner and its counsel.

CONCLUSION

Based on evidence submitted by Johnson Properties, the lodestar in this case is $61,740. Johnson Properties offered no legally cognizable justification for a departure from that amount. The circuit court thus erred in at least two respects: First, it failed to start with the lodestar. Second, it awarded a fee more than double the lodestar based on factors already accounted for by the lodestar or that otherwise cannot themselves support an increase. This Court should vacate the circuit court's award and hold that, without a legally cognizable basis for a departure, the lodestar of $61,740 represents a reasonable

fee award. At the very least, the Court should vacate the award and remand for further proceedings consistent with the principles outlined above.

The City respectfully requests that the fee award be reversed.

Dated this 9th day of April, 2025.

WOODS, FULLER, SHULTZ & SMITH P.C.

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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), the undersigned certifies that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word 365, features Times New Roman (12 point) font, and contains a total of 9,865 words, excluding the table of contents, table of authorities, and certificates of counsel. The undersigned has relied on the word and character count of the word-processing program to prepare this certificate.

Dated this 9th day of April, 2025.

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of April, 2025, a true and correct copy of the foregoing Appellant's Brief and Addendum was electronically filed and served via Odyssey File and Serve upon the following, with an original mailed to the clerk of the Supreme Court at 500 East Capitol Avenue, Pierre, South Dakota 57501.

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APPENDIX

STATE OF SOUTH DAKOTA) **COPY** IN CIRCUIT COURT
:SS
COUNTY OF MINNEHAHA) SECOND JUDICIAL CIRCUIT

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THE CITY OF SIOUX FALLS,

Plaintiff,

-vs-

JOHNSON PROPERTIES, LLC,

Defendant.

PARTIAL TRANSCRIPT

MOTIONS HEARING

RE: Decision was
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BEFORE: **The Honorable Jeff Clapper**
Circuit Court Judge
in and for the Second Judicial Circuit
State of South Dakota
Sioux Falls, South Dakota
November 26, 2024

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THE COURT: All right. This is the time and place for the hearing City of Sioux Falls versus Johnson Properties, 49CIV.21-2864. Counsel, please note your appearance.

MR. DRIESEN: Drew Driesen and James Moore for the plaintiff.

MR. SARGENT: Clint Sargent appearing for Johnson Properties, LLC.

THE COURT: Okay. So, I've reviewed both parties' briefs and I was really hoping I'd be prepared to make a ruling today, uh, but it's a little bit more involved than I thought, so I'm hoping today's hearing can give me a little more insight. So, before I have each of you argue your positions, I'd like to make sure that you cover the exact amounts that you think should be awarded in this case. With that, Mr. Sargent, you're the moving party, so I'll let you go first.

MR. SARGENT: Um, yeah, Judge, before we get into the attorney's fee argument, I, I know that Mr. Moore and I have had some discussions, and I don't think some of the other motions I have are in dispute, and so I just want to make sure that, that that's clear, and that there's no dispute later that we can enter whatever the judgment would be proposed to the court includes those. So, I made a motion for expert witness fees. Um, the total amount was $36,814.93. I don't believe there's an objection to that, ah

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THE COURT: -- is there any objection to that?

MR. MOORE: No, Your Honor.

THE COURT: Okay. 36,814.93.

MR. SARGENT: So, Judge, turning to attorney's fees, um --

MR. DRIESEN: Clint, do you want to address the costs?

MR. SARGENT: Yeah, oh, then the application for costs, disbursements, um, we had requested disbursements in the total amount of $573.13.

MR. DRIESEN: No objection.

THE COURT: Okay. So, the only remaining issue then is attorney's fees?

MR. SARGENT: Yes, Your Honor.

THE COURT: Okay. Before I forget, this was a USB drive that you guys offered, it's got your logo on it. I thought you might want it back.

MR. DRIESEN: We'll take it.

THE COURT: We purged all the other exhibits. All right.

MR. SARGENT: So, Judge, the, the issue of whether attorney, whether an attorney fee award is appropriate in this case isn't in dispute. The landowners have satisfied the requirement, um, and now it's just what is the appropriate amount, and from looking at the briefs where I

see it is we're asking the court to award $139,724.60. And the, the city is at $61,700. And so the question is okay, what is the court to do with this? Well, the *Seminal* case, of course, is the *Kelly* case that goes back to 1993, but what I think is actually the more analogous case. The one that's more similar to this case is the *Johnson* case, um, that was handed down in 2003. So, that'd be 2003 S.D. 115. Um, and how I would characterize the two parties' positions, we're obviously asking that the court award a one-third, ah, percentage fee, and, ah, the city is asking the court award an hourly fee.

THE COURT: Let me ask you this, Mr. Sargent, the city claims we should start with, is the baseline to evaluate the reasonableness of your fee, an hourly rate. An hourly rate times the hours you expended on the case, and that's where we should begin the analysis. Do you agree with that?

MR. SARGENT: I do. That, I mean that's the floor. Okay. That's where we start, and that's what, what, what the courts have said that that you do.

THE COURT: So, then that's their number, right?

MR. SARGENT: Right.

THE COURT: 61,700?

MR. SARGENT: Right.

THE COURT: So, then, then it's your burden then to show what, ah, factors have been met to show that the reasonable

fee would exceed that amount?

MR. SARGENT: Yes, Your Honor.

THE COURT: Okay.

MR. SARGENT: I agree with that.

THE COURT: So, let's hear what that.

MR. SARGENT: Well, where I would focus and, and where the I think the city's analysis fails it is because it, it doesn't take into consideration all of the other factors that the court laid out in *Kelly* and, and *Johnson*, and, um, the other factors include number one, whether the fee agreement that I had with my clients is contingent or hourly, um, that's the last of the list of factors, but that that's something that the court is required to consider. And so to say that that we should just get an hourly fee, um, doesn't take that factor into consideration, and, and why that's significant is by its very -- the fee is contingent, right. So, a, a $61,000 contingent fee is not a reasonable fee, right, under the circumstances. Um, when you only get paid if you're successful, um, you would expect that then when you are successful that the fee is significantly higher than a normal hourly rate. That's what the whole system is based upon is that, hey, I, I know I'm not going to get paid unless we are successful. And at that point then I, I would expect that I would get a much higher rate if it's, if you're looking at it on an hourly basis. And that's what the court,

you know in *Johnson* the court awarded that type of fee again, back at the time when the, the city in *Johnson* was saying that an appropriate fee would be an hourly fee at $81,500. Judge Srstka awarded $165,000, and the Supreme Court affirmed, and at that time that came out to about a 430 some dollar an hour fee, but that's 20 years ago, right.

THE COURT: What was their basis for upholding Judge Srstka's award?

MR. SARGENT: Here the, the significant factors if you, and they, they write down all of his findings.

THE COURT: I've got the case here.

MR. SARGENT: Yeah.

THE COURT: So, direct me to the page.

MR. SARGENT: So, if you printed it out, it, it's, it's right away in the opinions. It's the second page. It would be paragraph eight where the court goes through and lists all of the factors.

THE COURT: Okay. Those are the same factors from *Kelly*?

MR. SARGENT: Yep.

THE COURT: Yeah.

MR. SARGENT: And, Judge, ah, Srstka in that case found that the firm expended 300 and 80-80 hours. So, that's, you know, in our case we've submitted the hours that we've spent on the case. Um, the second factor is the same in both

cases, that this case would have only prevented the employment of my firm working for the City of Sioux Falls, so that's a nonfactor. The next one though is significant, that the fee customarily charged in the locality is a contingent fee. No evidence indicates that the usual private arrangement is hourly, but rather always contingent, and that's what we, that's why I've provided the affidavits that I've provided. Um, as far as --

THE COURT: -- from the other attorneys.

MR. SARGENT: From other attorneys. Okay. This is a very specialized area of law. There's really no other lawyers that I'm aware of that are practicing in this area with any significant regularity of other than Jeff Hurd in Rapid City, and he provided an affidavit saying that it is the customary that these are contingent fees, and his affidavit said 25% to 50%, ah, of the *lift* is, is customary. Provided affidavits from North Dakota, Minnesota, and Iowa all saying the same thing, that the customary fees are contingent fees based on a third to fifty percent of the *lift*. And so just as in the Johnson case, um, the fee requested by the landowner is at the low end of the reasonable fees charged. We're asking for a one-third percentage fee, which again is at the low end, just as it was in the *Johnson* case, um, when we know this is what is how fees are normally charged in these cases.

THE COURT: Remind me how many hours you put in your affidavit.

MR. SARGENT: Um, it's here, I'm looking at it, now, I don't think that my affidavit actually totaled up the hours. I can do it backwards, if you --

THE COURT: -- wasn't there an exhibit attached?

MR. SARGENT: It is, but it just it takes the --

MR. DRIESEN: We cal -- we calculated it.

THE COURT: The city --

MR. SARGENT: -- what did you guys come up?

THE COURT: Yeah, the city, the city did.

MR. DRIESEN: We have, we have 137.2.

MR. SARGENT: 137.2 hours.

THE COURT: The city obviously doesn't dispute that quantity of time?

MR. DRIESEN: No.

MR. MOORE: No, Your Honor.

THE COURT: Okay. All right. Sorry to interrupt you.

MR. SARGENT: So, the, the third factor favors the contingent fee. It's the customary fee or a percentage fee. It's the customary fee, and the 33% that we're asking for is at the low end of the customary range. As it relates to the fourth factor, um, whether the amounts are substantial and whether the results, ah, re -- obtained were significant, and I submit that that they were substantial. We're talking

about hundreds of thousands of dollars that were in dispute here that if you look at the initial offer that the city had made the landowner the results at trial or 13 times or 1300 percentage points more than what was obtained.

THE COURT: Okay. Clarify this for me. The city's initial offer to the Johnson Properties was 37?

MR. SARGENT: The -- it was $32,000 dollars.

THE COURT: 32,000, okay.

MR. SARGENT: Yep. $32,454, and that's what it was at the time that they retained me.

THE COURT: Okay.

MR. SARGENT: So, that became the floor or the basis for determining the *lift*.

THE COURT: And right before trial they made some offer of 51 or two?

MR. SARGENT: No. Then in order when they filed their declaration of taking in their petition for condemnation, the appraisal that they had obtained at that time was for $51,647. The same amount that they argued at trial is what should have been awarded.

THE COURT: Right. But was that offered to your client then?

MR. SARGENT: Well, yeah, it was deposited. My client was able to withdraw it.

THE COURT: But if he would have accepted that as

settlement for or not?

MR. SARGENT: No, under the, under the way it works when they're going to do a quick take like they did here.

THE COURT: Okay.

MR. SARGENT: They have to deposit with the clerk their estimated compensation, which is what the city did.

THE COURT: Okay.

MR. SARGENT: And then upon, ah, the landowner either agreeing or giving up the right of possession, then, then the city takes possession of the property, and the landowner gets the deposited amount, and then maintains the ability to have a trial to determine whether the deposited amount is the accurate amount. So, that's what happened here is --

THE COURT: -- okay.

MR. SARGENT: -- the city deposited $51,647 my client stipulated that the city could have possession of the property taken, and then that amount was released by order of the court to my client. Okay. And then we go, and we have -- we're going to have a trial, and the city at the trial says that that's the amount that's owed my client.

THE COURT: Sure.

MR. SARGENT: And we ended up getting eight times more than, you know, eight times more than that.

THE COURT: Okay.

MR. SARGENT: Now, the city does have the ability under

the statute to raise its offer, um, within 10 days of trial for determining attorney's fees purposes, and the city did, about two weeks before trial, offered $250,000.

THE COURT: Oh.

MR. SARGENT: To settle. But we still beat that by 71% under the verdict, and you know these numbers I would say are showing the success that we obtained are more significant than the *Johnson* case, right. We did better at as a percentage of the city's offer than they did in *Johnson* and where that was considered a significant factor warranting a higher fee than just an hourly rate.

THE COURT: Okay.

MR. SARGENT: Um, the next factor's five and six are very similar in this case as they were *Johnson*. There were no time limitations. There wasn't a lengthy relationship. And then the final is the defendant's counsel was shown the experience and skill, I think. It's about the least humble thing a person can do is fill out one of these affidavits. Um, and although I've never been known for my humility, so it's not that bad.

THE COURT: And then you already addressed it.

MR. SARGENT: And then number eight --

THE COURT: -- contingent fee arrangement.

MR. SARGENT: Yeah. The last one is the fee arrangement in this case was a contingent fee based on the percentage.

THE COURT: Okay.

MR. SARGENT: And it shows that, um, that was another factor that the, the Supreme Court said was when you look at all of these different factors, that the, the award of a percentage fee over double of what the city proposed as an hourly fee was reasonable under the analysis, and we submit that that same analysis is appropriate here, that if you look at all of these factors that a lodestar amount just hourly fee time or, ah, hours times an hourly rate doesn't contemplate what the court intended, uh, under the statute. Because we go back to the beginning right? In, in *Kelly* the, the Supreme Court the first thing that they said is that the formula and, and this motivation for awarding attorney's fees indicates that the Legislature meant to discourage the condemner from making inequitably low jurisdictional offers. And so you know that that's part of this, that that sometimes, yeah, the city is going to have to pay a, a fee, um, that while it might not be as high as what the landowner, uh, has to pay his lawyers, it still is going to be higher than that lodestar amount, um, when you consider all these factors because we wanted to discourage them from making low offers. And --

THE COURT: -- if you win?

MR. SARGENT: If, if the landowner wins.

THE COURT: Yes.

MR. SARGENT: And that's exactly right. And that goes back to it, you know, if you, if the court looks at in our fee agreement, um, that's attached to my affidavit, the actual fee agreement, how it works is that everything that we collect on behalf of our client, all of, all of this stuff. Interest. Everything goes in to a pot, and then, and then we deduct the $32,000 offer, and then everything over that. Right. The fee agreement provides that my law firm gets a third. So, even if the court awards $139,724, my client's gonna pay more in attorney's fees than that because of the way that the attorney fee agreement is written. We're just asking for the, the one-third of the increase of the amount of the offer over, ah, the verdict plus prejudgment interest.

THE COURT: Okay. I don't think that last part helps your client's case or your argument.

MR. SARGENT: Well, why I raise it is because that's what the, the court in *Johnson* says, and that's what the court in *Kelly* says. It says that the, the fact that, that, that the, the, the lawyer's agreement, um, might result in a higher fee, um, that's okay, and that's understandable, and that's, there's nothing wrong with that.

THE COURT: Okay.

MR. SARGENT: Um, and that, that's the only reason I bring it up is because it's something that's discussed in both *Kelly* and *Johnson* is I'm not asking the court for the

exact fee that we're going to receive because under *Kelly* and *Johnson*, that doesn't really matter the exact fee we're going to receive. It's, it's the application of all of these factors, and so that's why I'm asking the court to go through and, and apply these factors just as, as was done specifically in Johnson, because that really lays it out in an almost analogous situation how, um, okay, yes, you do start with the hours worked and whatever, but then you look at these other factors. Customary fee is contingent. The success was great. There's high percentage of increase. The actual fee is contingent. So, that means that the fees should be higher than a normal hourly rate because you might not get paid unless you win. So for all of those reasons, that's why we're asking the court to award the number that we've requested.

THE COURT: Okay. I'll give you a chance for rebuttal. Mr. Driesen, are you arguing this?

MR. DRIESEN: I am, Your Honor.

THE COURT: All right. What's the city's position?

MR. DRIESEN: I think as, as Mr. Sargent's laid out, this dispute is a relatively narrow one. We're not here arguing about the, about the experts, the costs, and we're not arguing that they're not that Johnson Properties not entitled to some reasonable attorney's fee as well. The question is simply what is reasonable under these

circumstances. Um, I was glad to hear Mr. Sargent recognized that the lodestar calculation is the starting point, as it is in condemnation actions, as it is in essentially all other civil context of what I'm aware, which is basically you take a reasonable hourly rate times a reasonable number of hours expended and that's your starting point. It's, it's, it's, it's inaccurate to say that's a floor because technically you could deviate down in some circumstances as well. We're obviously we're not arguing for that here. Um, fortunately, in our view, Mr. Sargent's affidavit, we think provides a reasonable lodestar fee, which is the 61,740 figure before taxes, ah, that's provided in his, in the attachment to his affidavit and that's calculated simply by taking the, the hourly rate he says he charges in South Dakota times the 137ish hours actually expended according to his records. Um, so the only question at that point then is whether a deviation one way or another from that figure is appropriate, and our position is simply that it's not. Um, contrary to the representation that we don't rely on the *Kelly* factors, I think our, our brief walks through them essentially one by one and how they apply in this instance. As I read Johnson's brief and as I hear today, there's essentially there's, there's arguments being presented with particular focus on three of those factors. Several are conceded, I think, not to be at issue in this case, um, and the particular focus

goes to the, the nature of the fee agreement between its privately arranged between the client and his attorney. The degree of success obtained and then there's some extensive discussion, although I heard less of it today concerning the, the time, the time demands, and the experience and reputation of the attorney and knowledge involved. So, I want to start with the, with the, with the two that received less attention, I think in the argument today, which is I think the, the, the focus on --

THE COURT: -- which number of factors are these? I've got this list of eight, might as well --

MR. DRIESEN: Yeah, let me pull up the, let me put *Kelly* in front of me so I can get… So, let's, so the ones that I think received particular attention are the fee customarily charged, which is three slash kind of blending into eight, whether the fee is fixed or contingent. Seven, which is the experience, ability, and reputation of the lawyer. Um, and then the degree of success obtained, which is four in that list of factors. Starting with the experience, reputation, the time spent, um, we have no issue with Mr. Sargent's very humble representations concerning his previous work in South Dakota. He, he clearly is qualified and well recognized for his expertise in this area. Our point is simply that the lodestar figure that we've provided, and that Mr. Sargent has provided already accounts for that fact. He says outright in

his affidavit that he can charge a $450 hourly fee, which we use as the basis of our calculation precisely because he has that particular experience and knowledge in the realm. Um, and both the South Dakota Supreme Court and the U.S. Supreme Court from which a lot of this jurisprudence has originally drawn have cautioned against double counting in that figure, and it would constitute double counting to basically take, to add on to the lodestar figure on the basis when that's already calculated for in the base figure. Um, a similar principle frankly governs the degree of success obtained. I don't think there's any dispute that there was a positive result in this case. You could spin it both ways. In one hand, yes, it was, it was the result actually obtained was, was higher than what the city had proposed, that's why we're here. On the other hand, it was actually far lower than what was ult -- the final request at trial was for that 750ish thousand dollar figure that Mr. Johnson himself proposed. And so we, what we ultimately arrived at was actually a figure in between those two.

Ultimately, though, I, I think it really doesn't matter in particular (unintelligible), um, as the U.S. Supreme Court in particular has observed and as the South Dakota Supreme Court stated in the Microsoft Antitrust litigation case, basic -- the lodestar figure already typically accounts for a degree of success except in the exceptional and rare

circumstances, and we would just posit that this isn't one of those exceptional and rare circumstances. By, by definition, if we're discussing attorney's fees, we're already in the realm of the positive result, and so the question is then only whether the, the -- whether there is a defined connection between some spectacular lawyerly efforts above and beyond what is normally accustomed that led to an exceptional and rare result. And I think that's particularly that's better explained frankly in the U.S. Supreme Court jurisprudence, but it's evident in South Dakota Supreme Court jurisprudence as well. Um, shifting to factor, to factor three slash eight, the fixed contingent matter. I would just submit that that's just it's one factor among several, and I think Johnson Properties recognizes that *Kelly*, the *Kelly* decision which we both agree is the seminal case in this area is a problem for them in this respect. Um, the *Kelly* court specifically observed, and it's been repeated since that yes, a contingency-contingent fee in South Dakota is a perfectly proper and valid variety of attorney-client relationship in South Dakota as between the client and the attorney, but it doesn't follow from that fact necessarily that the same figure can be passed on to the city as taxed against the city, and there are several reasons for that.

THE COURT: Well, Mr. Driesen, I don't think they would think that's the seminal case. They spent a lot of time

talking about City versus Johnson, which came after 2003, and they say their case is more analogous to that one than the '94 case, the City of Sioux Falls versus Kelly. So, how would you respond to that?

MR. DRIESEN: Well, just a brief, now, I think the seminal language actually comes from their brief I think is, is, is their opening description in *Kelly*.

THE COURT: Well, it's the factors, sure, that's where the factors came into the case law, as I understand it, but the case has since then they would say the 2003 case applying those factors would be more comparable to the facts and circumstances of their case. So, they, they go through the factors just like you're doing. Um, so, go ahead.

MR. DRIESEN: Sure. I, I think the, the ultimate point with respect to *Johnson* is just that they sort -- they take *Johnson* to stand for it's not quite a per se rule, but a recognition that the, the, the amount of the *lift* was effectively what was ordered in that case. I don't necessarily read *Johnson* that way. It's listed as one factor among many to be sure, but the most important factor in my view in that case is the fact that there were 380 hours of work expended in that case, and just by simple mathematics, you're going to result in a higher total fee by virtue of working more hours, and as a practical consequence of that, depending on the valuations of the properties at issue, you

will end up closer perhaps to that *lift* figure as an estimate.

THE COURT: Part of the reason there were more hours is because that case got appealed two times; isn't that right?

MR. DRIESEN: Yes, I believe so.

THE COURT: Okay. All right. Go ahead. So, what I'm saying is that the quantity of hours didn't necessarily have anything to do with the complexity of the case. It had to do with trial appeal, trial appeal, and, of course, there's more hours expended for that.

MR. DRIESEN: Sure.

THE COURT: Is that fair?

MR. DRIESEN: I think generally so, and I'm not sure. I just frankly I'm not sure that it matters. I mean the fee is ultimate. The lodestar calculation is tied to the reasonable number of hours expended, and so that would account for the fact that yes, it went up and down a few times.

THE COURT: Okay.

MR. DRIESEN: And I think it is telling, granted it is, I mean it's a while ago, but it's telling that the ultimate, the hourly figure produced as a result of that calculation is right in line with what we proposed here. I think they came out to roughly, I think it was 460ish is what they came, um, and regardless, I think Mr. Sargent's affidavit has presented that 450 is a reasonable fee in this instance, that's what he

charges. Um, I don't think that the, the nature of the fee arrangement can be given any particular weight in this instance just because the other factors don't point toward an upward variance, which again has been described as exceptional or rare. Um, and *Kelly* sort of is recognized that the proposition that if that's just one factor among many, you can't necessarily follow that you get the fee award, and I think there are several reasons for that, that are best explained by the U.S. Supreme Court's decision in *Dague*. Um, you heard that there was some discussion at the close of Mr. Sargent's argument about kind of the, the shifting of risk and that is that's kind of the basis for requesting a contingency fee to some extent is the recognition that at the end of the day were you to lose you wouldn't ultimately prevail. Um, as the Supreme Court explained though that what that means in consequence is that if you were to on the basis of a contingency fee arrangement award the full contingency fee amount. What happens is you end up passing the risk and thereby the negative results in other cases on to the party against whom you happen to have a positive result in a given case, and that's not appropriate. The question ultimately is whether a reasonable fee based on the circumstances of this individual case as we know them, are appropriate -- is appropriate. And we do cite just for the court's reference, I guess, I should give you. *Dague* is

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THE COURT: I've got it.

MR. DRIESEN: Okay, perfect.

THE COURT: Page eight of your brief.

MR. DRIESEN: Perfect. The second concern, I think that's, that's explained by Justice Scalia in that case is essentially that a contingency fee model if, if embraced to its fullest extent basically results in a, a system whereby a plaintiff or in this case technically a defendant can always claim an increase in the fee award, but never a decrease. You would never have a circumstance where you would decrease the fee award based on the fact that it was a contingency. Because by definition, if we've reached to this point, there's been a positive result and a fee of some sort is appropriate. And again, that has the practical consequence of in this case, passing on to the city the risk of loss that is rightfully subsumed by the attorney-client relationship. Ultimately, it was Johnson -- we think it was Johnson's burden to justify its requested fee award in particular to justify what we I think agree now would be a significant increase from the lodestar amount that's calculated that I take us to agree on now, and that in lieu of imposing a pretty dramatic increase from the lodestar amount that the court should just take Johnson and Mr. Sargent at the, at their word in the attached affidavit and award a fee

representative of the effort actually expended in this case, which is the lodestar amount of 61,740.

THE COURT: Okay. Mr. Sargent.

MR. SARGENT: Yeah, Judge. So, I want to address a couple things. When we talk about the lodestar being the star, I want to follow what the South Dakota Supreme Court has said in its prior opinions, and so I'm going from the language of *Kelly*, and the quote is, "We are not under the illusion that a just and adequate fee can necessarily be ascertained by merely multiplying the attorney's hours and typical hourly fees. However, we are convinced that this simple mathematical exercise is the only legitimate starting point for the analysis. There's only after such a calculation that other less objective factors can be introduced into the account." So, I mean, the court said that's where you're supposed to start. I agree that's where you're supposed to start, but then you get into the factors. Okay. Now, we have all these factors. Well, what do the fact, how do the factors weigh? I would submit that there's not a single factor of the eight that supports just using an hourly fee. There's not a single one. Right. Um, there's three or four of them that are not really relevant. They don't really, they don't affect it one way or the other, but as far as, ah, you look at the fee customarily charged. The results obtained. The actual fee that was involved here,

they also support a percentage fee that is higher than the customary rate. I would discourage the court from relying on any U.S. Supreme Court precedent or South Dakota antitrust litigation for this reason. Okay. Our Supreme Court has said multiple times that the South Dakota Constitution provides greater protection to landowners than does the U.S. Constitution. Number two, there -- this is a -- this is specific to a statute, right. It's a South Dakota statute that says this is where somebody gets where a landowner gets attorney's fees. And third, we have absolute case directly on point here in South Dakota by our South Dakota Supreme Court giving this court guidance on how to analyze this situation. The Court doesn't need to look to antitrust cases or to the U.S. Supreme Court because they're not the same. Um, the, the guidance that this court needs and how to fashion a reasonable fee is contained in the *City of Sioux Falls v. Johnson*, 2003 S.D. 150. And so I don't think I have anything else to say that wouldn't be repetitive. I trust the court to come up with a reasonable fee.

THE COURT: Um, I think I am ready to rule on this, but I forgot to print something off of my office. So, be adjourned for five minutes and I'll come back.

(Recess at 11:00 a.m.)

(Decision was previously completed 12-12-24.)

STATE OF SOUTH DAKOTA)
:SS
COUNTY OF MINNEHAHA)

CERTIFICATE

This is to certify that I, Roxane Osborn, Court Recorder and Notary Public, do hereby certify and affirm that I transcribed the proceedings of the foregoing case, and the foregoing pages 1 - 24, inclusive, are a true and correct transcription from CourtSmart.

Dated at Sioux Falls, South Dakota, this 21st day of February, 2025.

/s/ Roxane R. Osborn

Roxane R. Osborn
Court Recorder
Notary Public - South Dakota
My commission expires: May 9, 2030

COPY

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
:SS
COUNTY OF MINNEHAHA) SECOND JUDICIAL CIRCUIT

****

THE CITY OF SIOUX FALLS,

Plaintiff,

-vs-

JOHNSON PROPERTIES, LLC,

Defendant.

MOTIONS HEARING

RE: DECISION ONLY
(*partial transcript.*)

49CIV.21-002864

****

BEFORE: **The Honorable Jeff Clapper**
Circuit Court Judge
Sioux Falls, South Dakota
November 26, 2024

APPEARANCES: Mr. James E. Moore
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For the Plaintiff;

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315 South Phillips Avenue
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For the Defendant.

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605-782-3032
Sioux Falls, South Dakota

PARTIAL TRANSCRIPT

DECISION ONLY

(Requested portion began at 10:58 a.m.)

THE COURT: All right. We're back on the record. I told the parties we'd probably have to come back, but as we were talking through the case, a lot of what I read before was coming back to me. I'd read about it when you filed your brief and then City filed theirs. Then I thought before the hearing well maybe I need to do some elaborate legal analysis, but I think I can get by without that based on all of the information you've provided in your briefs and your arguments today. Mr. Sargent, you prepared the or, you filed the motion for attorney's fees, so I expect you to prepare the order.

MR. SARGENT: Understood.

THE COURT: So, there was no objection to the expert witness fees of $36,814.93, so that is awarded to Johnson Properties. There was no objection to the cost of $573.13, so those are also awarded to Johnson Properties.

As to attorney's fees, the court orders the payment of $139,724.60 in attorney's fees and here's why. I didn't make this up. I read this in a case in some of my research and it said the only certainty about litigation is uncertainty. Depending on how the litigation unfolds, the contingency fee contract is a gamble for both the attorney and the client. A

contingency fee contract allows to the attorney the risk of much work with little reward and a lots to the client the risk of little work with substantial fees.

In this case, we're presented on what attorney's fees are reasonable. The city argues the fee requested by Johnson Properties based on the contingency fee arrangement is unreasonable. The city put in their brief on page two that the South Dakota Supreme Court in the *Kelly* case concluded that a proposed one-third contingency award was unreasonable. Well, that's not how I understood that ruling from that case. It said on page 112, that after reviewing the record, we are convinced that the one-third contingency fee agreement between *Kellys* and their attorney does not establish a reasonable fee for this case since it is only one factor to be considered in determining what a reasonable fee is.

So, it's not that a contingency fee is unreasonable, it's that you have to consider that as a factor and consider all the other factors in the case, and that's what I've done in reviewing this matter is reviewed all of the eight, eight factors that were stated in *Kelly* and gone through in subsequent cases, including the *City of Sioux Falls versus Johnson*, the 2003 case.

Here, we have a contingency fee case. The third factor, that's the customary charge is a contingency fees in a, in a domain case. There was evidence submitted in the filings by

Johnson Properties from other attorneys, that is the customary fee. The percentage of the contingency varies from 33 or a third, up to 50%. This is on the low end of that customary fee as I understand it. There was discussion about the first factor here about the quantity of time that was expended on the case. The time and labor there -- it stated in *Kelly* the fact of the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service property -- properly. Well, the number of hours, I believe was calculated by the city to be 137.2 hours times an hourly rate that Mr. Sargeant stated in his filings, ah, is it an enhanced amount because of this or was it 450 an hour for these type of cases, and so the city said the base lodestar amount is $61,700, if we take that number of hours expended times the enhanced rate of $450 an hour. Nobody disputes that calculation.

The city argues that on page five of their brief that this case was relatively simple, or as they stated, not especially novel or a time consuming matter. I don't find it that way. I find this to be a very particular special area of the law that not many lawyers practice in. There's a lot of specialty in determining evaluation of property, including finding adequate experts, which I believe even came up during the trial, where do you find an expert to do this type of analysis, because you got to find somebody that can rate the

property that doesn't already work for the city and go against their interests. There's a whole lot of strategy involved as I saw the trial play out. The trial might have only taken three days, but there was a lot of skill in determining which witnesses to call. How many witnesses to call. How to buttress the arguments, and the evidence made by Johnson Properties. Umm, I don't think that gets factored in to enough in determining the novelty or difficulty of the issues involved in this type of litigation.

Candidly, you two, they both sides, legal counsel in this made it look pretty easy, as I understand it, you've all been involved in these type of trials before, but nonetheless, that doesn't mean it was easy or simple. Umm, and I think that factors into the reasonableness of the fee.

Other matters that play in to that and support the attorney fee of 139,000 plus dollars is the burden of proof borne by the city, and then the Johnson Properties to have to counteract the city. Johnson Properties attorneys experience with eminent domain cases. There was a large spread in values in this case, and I think that's a big factor to consider when you have that wide range of case it's not -- that makes it more unpredictable how a jury is going to rule. And so a lot of decisions go into how to present the case for Johnson Properties.

There's no doubt time and effort was expended on the

case. It's not a case of one of those contingency fees where you sign up a client and you get a quick settlement, and the fee doesn't correspond it in any way to the effort expended on it. Here this case was started a couple of years ago. There was discovery. A lot of exhibits were obtained for trial, which by the way that all involves a lot of decision making and strategy on which exhibits to present to a jury in a coherent way in a matter of property, which in the realm of matters that go to trial, is somewhat relatively dull to jurors.

There were a number of -- although the case only took three days, this wasn't just Johnson Properties expert versus the city's expert. The Johnson Properties had a number of witnesses, including an adjoining property owner, umm, a real estate, ah, person plus their expert from the Twin Cities. All of that and their own client who the owner of Johnson Properties, which was involved in the business of land holdings. I also factored in the ability to present the case in the fashion that it was by Johnson Properties attorney and the skill that ultimately led to the jury's verdict in this case.

The second factor, the likelihood of precluding other employment isn't a factor in this case that I'm aware of.

The third factor, the fee customarily charged, we covered that already.

Fourth, the amount involved, and the results obtained. This was a case that involved substantial verdict from the jury that was significantly higher than the city's valuation of the property, which their expert testified was around the 51,000, and the jury's verdict came in at over 360,000 if I remember right.

The fifth factor I'm not aware of any time limitations.

The sixth factor, nature, and length of the professional relationship. I mean, it was one that Johnson Properties had with their attorney throughout the duration of the case, but I don't know that that factors into heavily.

The seventh factor, the experience, reputation, and ability of the lawyer performing the services. You know, this kind of overlaps with that first factor in my assessment of the skill and novelty of the legal issues and the strategic decisions that go on presenting this type of case to a jury to decide.

Johnson Properties Counsel definitely showed the experience, skill, and ability to perform in this particular area of law.

We covered the eighth factor. I'm also looking at the Supreme -- South Dakota Supreme Court case, the *City of Sioux Falls versus Johnson*, decided in 2003. They went through those factors in a similar way. I think the case is very analogous to this one. I think something, although we talk

about hours, and rates, and charging a premium for an expertise area of the law, one thing I've learned over time in the experience of law is time and efficiency gets developed the more you know about things and so the time accounted for it doesn't necessarily represent the effort and expertise brought to the case by the attorneys.

Anything else from either party? Anything I missed in deciding on the motions before the court?

MR. MOORE: No, Your Honor.

MR. SARGENT: No, Your Honor.

THE COURT: All right. With that, we're adjourned.

(Proceedings adjourned at 11:14 a.m.)

STATE OF SOUTH DAKOTA)
:SS CERTIFICATE
COUNTY OF MINNEHAHA)

This is to certify that I, Roxane Osborn, Court Recorder and Notary Public, do hereby certify and affirm that I transcribed the proceedings of the foregoing case, and the foregoing pages 1 - 8, inclusive, are a true and correct transcription from CourtSmart.

Dated at Sioux Falls, South Dakota, this 12th day of December, 2024.

/s/ Roxane R. Osborn

Roxane R. Osborn
Court Recorder
Notary Public - South Dakota
My commission expires: May 9, 2030

STATE OF SOUTH DAKOTA	) :SS	IN CIRCUIT COURT
COUNTY OF MINNEHAHA	)	SECOND JUDICIAL CIRCUIT

THE CITY OF SIOUX FALLS, Plaintiff, v. **JOHNSON PROPERTIES, LLC,** Defendant.	49CIV21-002864 **ORDER RE: POST-TRIAL MOTIONS**

A hearing was held on Defendant's Motion for Attorney's Fees and Motion for Expert Witness Fees on Tuesday, November 26, 2024, at 10:30 am at the Minnehaha County Courthouse, the Honorable Jeffrey Clapper presiding. Plaintiff appeared by and through its counsel, James E. Moore and Drew A. Driesen. Defendant appeared by and through its counsel, Clint Sargent. The Court having reviewed the submissions of the parties and having heard the arguments of counsel, and good cause appearing;

Now, therefore,

IT IS HEREBY ORDERED that Defendant's Motion for Attorney's Fees is granted. Attorney's fees in the amount of $139,724.60 are awarded to Defendant and shall be added to the final judgment in this matter.

IT IS FURTHER ORDERED that Defendant's Motion for Expert Witness Fees is granted. Expert witness fees in the amount of $36,814.93 are awarded to Defendant and shall be added to the final judgment in this matter.

IT IS FURTHER ORDERED that Defendant's Application for Taxation of Costs is granted. Total disbursements in the amount of $573.13 are awarded to Defendant and shall be added to the final judgment in this matter.

BY THE COURT:

HONORABLE JEFFREY C. CLAPPER
Circuit Court Judge

12/4/2024 9:53:16 AM

Attest:
Patzer, Sarah
Clerk/Deputy

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	:SS	
COUNTY OF MINNEHAHA	)	SECOND JUDICIAL CIRCUIT

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THE CITY OF SIOUX FALLS,	:	49CIV21-002864
Plaintiff,	:	
v.	:	**OBJECTIONS TO DEFENDANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**
JOHNSON PROPERTIES, LLC,	:	
Defendant.	:	

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Plaintiff, the City of Sioux Falls (the "*City*") offers the following objections to the proposed findings of fact and conclusions of law filed by Defendant, Johnson Properties, LLC ("*Johnson*"):

OBJECTIONS TO FINDINGS OF FACT

1. On October 25, 2021, a Verified Petition for Condemnation was filed by the City of Sioux Falls ("City") pursuant to SDCL Chs. 21-35, 9-27, and 31-19.

RESPONSE: No objection.

2. On October 26, 2021, City deposited $51,647.00 with the clerk of courts as City's estimate of just compensation owed to Landowner.

RESPONSE: No objection.

3. On October 15, 2024, City filed Plaintiff's Final Offer Under SDCL §21-35-23 offering the total sum of $250,000 as just compensation for the property rights acquired from Landowner.

RESPONSE: No objection.

4. At trial, there was a significant spread between the valuations of the parties. The amount of the loss in dispute ranged from Landowner's valuation of $735,000 versus the City's valuation of $51,647.00.

RESPONSE: The City's valuation was $51,711.00.

Filed: 12/19/2024 10:02 AM CST Minnehaha County, South Dakota 49CIV21-002864

5. On October 31, 2024, a jury returned a verdict in favor of Landowner awarding just compensation in the amount of $382,600.00.

RESPONSE: No objection.

6. The jury verdict ($382,600.00) plus prejudgment interest to the date of the verdict ($44,556.25) totals $427,156.25.

RESPONSE: No objection.

7. The final judgment is 71% higher than the City's final settlement offer. Moreover, the final judgment is over 7 times larger than the City's trial valuation ($51,647.00) and almost 12 times larger than the City's offer to Landowner at the time Landowner retained counsel ($32,454.00).

OBJECTION: This proposed conclusion is the subject of two distinct objections. First, under SDCL § 21-35-23, the relevant figure is the City's final offer, not its original one. The $32,454 figure has no relevance to determining whether the landowner is entitled to a reasonable attorneys' fee, much less to calculating the amount of that reasonable fee.

Second, under § 21-35-23, it is appropriate for a court to account for prejudgment interest when determining whether a landowner is entitled to claim a reasonable attorney fee in the first instance. *State ex rel. Dep't of Transp. v. Clark*, 798 N.W.2d 160, 165 (S.D. 2011). But, in this case, there is no dispute that § 21-35-23 applies. For present purposes, there is no reason to include prejudgment interest in any comparative figures. For example, the amount of prejudgment interest could not possibly justify a deviation from the lodestar calculation. On the rare occasion on which a deviation for the amount awarded is appropriate, that deviation must be tied to the "superior performance" of counsel. *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 552-54 (2010). The amount of prejudgment interest has no bearing on the quality of representation. The figure is the result of a simple mathematical calculation provided for by statute; *any* prevailing landowner represented by *any* counsel would have been entitled to the same amount.

8. Landowner entered into an attorney fee contract with Meierhenry Sargent LLP on December 14, 2020. The contract provides for a one-third contingent fee based on the total recovery received less the condemnor's offer of compensation at the time counsel was retained, i.e. 1/3 of the "Lift."

RESPONSE: No objection.

9. The only certainty in a contingent fee is uncertainty. Both the client and the lawyer take significant risks under a contingent fee agreement.

OBJECTION: The "risks" assumed by either a client or attorney under a contingency arrangement are irrelevant to calculating any appropriate deviation from the lodestar amount—and, therefore, to calculating an appropriate attorney fee in this case. As the U.S. Supreme Court has explained, "[t]he risk of loss in a particular case (and, therefore, the attorney's contingent risk) is the product of two factors: (1) the legal and factual merits of the claim, and (2) the difficulty of establishing those merits." *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992). The difficulty of establishing the merits is already "reflected in the lodestar—either in the higher number of hours expended to overcome the difficulty, or in the higher hourly rate of the attorney skilled and experienced enough to do so." *Id.* To base a deviation from the lodestar on the difficultly of the case would therefore constitute double counting. Meanwhile, the relative merits of the claim are not reflected in the lodestar—but for good reason. *Id.* at 563. Accounting for the merits in this way would mean "that computation of the lodestar would never end the court's inquiry in contingent-fee cases," and would incentivize attorneys "to bring relatively meritless claims as relatively meritorious ones." *Id.* It would be inappropriate to provide for deviations that introduce these externalities.

10. The normal and customary fee charged to landowners in South Dakota for representation in condemnation cases is a contingent fee.

RESPONSE: The City has no objection to this proposed finding, except to the extent it is meant to imply that the contingency arrangement is anything more than "one factor to be considered in determining what a reasonable fee is." *City of Sioux Falls v. Kelley*, 513 N.W.2d 97, 112 (S.D. 1994). Even if contingency arrangements are common in condemnation cases and are "perfectly valid and proper as between an attorney and his client," the mere fact of a defendant entering into such an arrangement does not justify passing the obligation for paying the fee onto a condemning authority. *Id.* at 111-12. At the end of the day, "[i]t is the reasonableness of the fee, and not the arrangements the attorney and his client may have agreed upon, which is controlling." *Id.* at 112.

11. Contingent fees charged in South Dakota range from 25% of the total recovery received, or 33.33% to 50% of the "Lift."

RESPONSE: The City has no objection to this proposed finding, except to the extent it is meant to imply that the contingency arrangement is anything more than "one factor to be considered in determining what a reasonable fee is." *City of Sioux Falls v. Kelley*, 513 N.W.2d 97, 112 (S.D. 1994). Even if contingency arrangements are common in condemnation cases and are "perfectly valid and proper as between an attorney and his client," the mere fact of a defendant entering into such an arrangement does not justify passing the obligation for paying the fee onto a condemning authority. *Id.* at 111-12. At the end of the day, "[i]t is the reasonableness of the fee, and not the arrangements the attorney and his client may have agreed upon, which is controlling." *Id.* at 112.

12. The normal and customary fee charged to landowners in North Dakota, Minnesota, and Iowa is also a contingent fee.

OBJECTION: The nature of the fee ordinarily charged to landowners in other states is irrelevant, as it has no bearing on "the fees customarily charged *in the locality* for similar legal services." *See Kelley*, 513 N.W.2d at 111 (emphasis added).

13. Contingent fees charged in North Dakota, Minnesota, and Iowa range from 33.33% to 50% of the "Lift."

OBJECTION: The amount of the fee ordinarily charged to landowners in other states is irrelevant, as it has no bearing on "the fees customarily charged *in the locality* for similar legal services." *See Kelley*, 513 N.W.2d at 111 (emphasis added).

14. The fee charged by Meierhenry Sargent LLP to Landowner in this case is at the low end of the contingent fees customarily charged in South Dakota and the neighboring states.

OBJECTION: The City objects to this proposed finding to the extent that it refers to neighboring states. The amount of the fee ordinarily charged to landowners in neighboring states is irrelevant, as it has no bearing on "the fees customarily charged *in the locality* for similar legal services." *See Kelley*, 513 N.W.2d at 111 (emphasis added).

15. Meierhenry Sargent LLP expended 137.2 hours on this case.

RESPONSE: No objection.

16. City has proposed a reasonable attorney fee of $61,740.

OBJECTION: This proposed factual finding is incomplete and potentially misleading. Any factual finding concerning the fee amount proposed by the City should explain that the proposed fee amount is drawn directly from the billing records prepared by Johnson's counsel and that the amount was calculated using the rate that Johnson's counsel describes as his "current hourly rate for eminent domain work." (*See* Sargent Aff. ¶¶ 16, 17; *id.* Ex. A.) The City's calculation did not arise from thin air.

17. Landowner has requested an award of reasonable attorney's fees in the amount of $139,724.60 calculated as follows:

Jury Verdict	$382,600.00
Prejudgment Interest to Date of Verdict	44,556.25
Final Judgment	$427,156.25
Less: City's Offer at Hiring	(32,454.00)
Lift	$394,702.25
1/3 of Lift	$131,567.42
Sales Tax – 6.2%	8,157.18
Total Reasonable Attorney Fee Request	$139,724.60

OBJECTION: There is no basis for accounting for sales tax as part of the fee award. The City, as a municipality, is exempt from the state sales tax. SDCL § 10-45-10.

Otherwise, this proposed finding accurately recounts the calculation of the fee award that was requested by Johnson, (*see* Johnson Br. 5; Sargent Aff. ¶ 20), and for that reason the City has no objection to its inclusion. The City emphasizes, however, that, as a consequence, the proposed finding also evidences Johnson's mistaken understanding of the law. In condemnation proceedings, as "[i]n all civil actions," "the calculation of attorney fees *must* begin with the hourly fee multiplied by the attorney's hours." *See In re S.D. Microsoft Antitrust Litig.*, 707 N.W.2d 85, 100 (S.D. 2005) (internal quotation omitted); *Kelley*, 513 N.W.2d at 112. In a sharp contrast to that instruction, Johnson's calculations disregard the lodestar figure and instead are premised on the mistaken assumption that the *actual* fee arrangement between Johnson and its counsel should be the starting point for the reasonable-fee analysis.

18. Under Landowner's fee agreement with Meierhenry Sargent LLP, attorney's fees owed will exceed $202,973.99, calculated as follows:

Jury Verdict	$382,600.00
Prejudgment Interest to Date of Verdict	44,556.25
Attorney's Fees	139,724.60
Expert Fees	36,814.93
Disbursements	573.13
Total Recovery	$604,268.91
Less: City's Offer at Hiring	(32,454.00)
Lift	$571,814.91
1/3 of Lift	$190,585.91
Sales Tax – 6.2%	12,388.08
Total Attorney Fee per Agreement	$202,973.99

OBJECTION: The private agreement between Johnson and its counsel is irrelevant to the reasonableness of the fee award, as is explained at length in response to the objections to the proposed legal conclusions below.

19. The final attorney fee owed under Landowner's attorney fee contract cannot be definitively determined until the amounts owed to Landowner are paid by City because interest owed by City continues to accrue each day.

OBJECTION: The private agreement between Johnson and its counsel is irrelevant to the reasonableness of the fee award, as is explained at length in response to the objections to the proposed legal conclusions below.

20. Any findings of fact that should be designated as conclusions of law are so designated.

RESPONSE: No objection.

OBJECTIONS TO CONCLUSIONS OF LAW

1. SDCL § 21-35-23 provides:

> If the amount of compensation awarded to the defendant by final judgment in proceedings pursuant to this chapter is twenty percent greater than the plaintiff's final offer which shall be filed with the court having jurisdiction over the action at the time trial is commenced, and if that total award exceeds seven hundred dollars, the court shall, in addition to such taxable costs as are allowed by law, allow reasonable attorney fees and compensation for not more than two expert witnesses, all as determined by the court.

RESPONSE: No objection.

2. The term "final judgment" as used in SDCL § 21-35-23 means the amount of the jury's verdict plus prejudgment interest. *State ex rel. Dep't of Transp. v. Clark*, 2011 S.D. 20, ¶ 13, 798 N.W.2d 160, 165.

RESPONSE: No objection.

3. It is undisputed that Defendant is entitled to an award of reasonable attorney fees pursuant to SDCL § 21-35-23.

RESPONSE: No objection.

4. The factors for the Court to consider in determining a reasonable attorney fee are stated in the Supreme Court cases *City of Sioux Falls v. Kelley*, 513 N.W.2d 97 (SD 1994) and *City of Sioux Falls v. Johnson*, 2003 S.D. 115, 670 N.W.2d 360. They are:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent.

Kelley, at 111; *Johnson,* at ¶ 8.

OBJECTION: Without providing additional context, it is misleading to describe these factors as "[t]he factors for the Court to consider in determining a reasonable attorney fee." A court may not arrive at a reasonable attorney fee simply by abstracting out from these factors without a more concrete starting point. Instead, "the calculation of attorney fees *must* begin with the hourly fee multiplied by the attorney's hours." *Microsoft Antitrust Litig.*, 707 N.W.2d at 100 (internal quotation omitted) (emphasis in the original). This "simple mathematical exercise is the only legitimate starting point for analysis." *Kelley*, 513 N.W.2d at 112 (internal quotation omitted). Only after a lodestar has been calculated may a court proceed to impose adjustments to the lodestar on the basis of these "other, less objective factors." *Id.* (internal quotation omitted).

5. "The fee should not be based on any one single factor but all of these matters should be taken into consideration. The only requirement is that the fee which the court fixes in each case must be reasonable for the services rendered." *Kelley,* at 111.

RESPONSE: No objection.

6. Courts should not be "under the illusion that a 'just and adequate' fee can necessarily be ascertained by merely multiplying attorney's hours and typical hourly fees." *Id.* at 112. "[I]t is virtually impossible to set out every conceivable item that should be considered." *Id.*

OBJECTION: These quotations from *Kelley* have been divorced from their broader context in a manner that is misleading. There are two sentences that appear between the ones excerpted above, and those sentences are as follows:

> However, we are convinced that this simple mathematical exercise is the only legitimate starting point for analysis. It is only after such a calculation that other, less objective factors, can be introduced into the calculus.

Kelley, 513 N.W.2d 97, 112 (S.D. 1994) (internal quotation and citations omitted). As the intervening sentences make clear, (i) notwithstanding the fact that a lodestar calculation will not "necessarily" result in a reasonable fee, it is always the starting point of the analysis, and (ii) nonobjective considerations come into play only once a court has calculated the more objective lodestar figure. Moreover, even if is true that the lodestar will not "necessarily" result in a reasonable fee in every instance, it normally and presumptively will reflect an amount that is reasonable. The lodestar "normally provides full and reasonable compensation for counsel who produces excellent results." *Microsoft Antitrust Litig.*, 707 N.W.2d at 106; *see also Perdue*, 559 U.S. at 546 (2010) (recognizing a "strong presumption that the lodestar is sufficient").

7. In applying the *Kelley* factors, the Court concludes:

(1) While the case may have appeared simple, it was not. It involved a very particular and specialized area of the law in which very few lawyers regularly practice. Landowner bore the burden of proof in a case where the spread of values between the parties was approximately $700,000.00, making the possible outcome unpredictable and selecting an effective strategy crucial. It is evident that a great deal of strategy and skill was employed in securing experts and other witnesses prior to trial and then presenting their testimony at trial in the best way to buttress Landowner's theory of the case, while not overburdening or boring the jury. The exhibits selected for trial were used in an effective manner that indicates a great deal of thought, strategy and skill. Meierhenry Sargent LLP spent 137.2 hours working on this case. However, the time expended is not – standing alone – a fair gauge of the work put into the case. It is evident that counsel's skill and experience has led to significant efficiency in preparing for and presenting a case at trial.

OBJECTION: This was not an especially novel or time-consuming matter, "specialized area of law" notwithstanding. The case was immediately reduced to a single issue; featured limited discovery and motions practice preceding trial; involved relatively few objections at trial; and was tried to completion within three days (even after accounting for time spent transporting the jury to and from the subject property). Indeed, the only feature of this case Johnson identified as "difficult, or at least different," was "the huge spread in values between [its] appraiser and the City's appraiser." (Johnson Br. 4.) But, if anything, this gap

made it easier to identify and exploit differences in appraiser philosophy. Rather than having to focus the attention of the jury on subtle discrepancies in the value of comparables, Johnson's counsel could paint with broader brushstrokes.

In any event, however, the novel or time-consuming nature of the case does not matter to the calculus: The City did not quibble with any of the time Johnson's counsel spent engaging in "[a] full and complete review of all the possible issues," digesting the evidence, comparing the two appraisals, strategizing with his client, or "steamlin[ing]" his presentation. (*See* Johnson Br. at 3-5.) To the contrary, the City accepted that the time spent on each of these matters was reasonable. The City has merely asserted that, in this case, the most appropriate measure of "the time and labor required" is the time counsel actually spent. Johnson has not carried his burden of demonstrating otherwise.

To that point, nearly all the considerations Johnson has identified—its bearing the burden of proof, the employment of strategy and skill, the selection of exhibits—are all matters that would inhere *in any case* in which the prevailing party bore the burden of proof. By Johnson's logic, a lodestar figure almost never would be sufficient. This is not the law: "The lodestar amount normally provides full and reasonable compensation for counsel who produces excellent results." *Microsoft Antitrust Litig.*, 707 N.W.2d at 106 (citing for this proposition *Blum v. Stenson*, 465 U.S. 886 (1984), in which the U.S. Supreme Court held, among other things, that that the product of the lodestar calculation is presumptively reasonable).

In practice, moreover, Johnson's proposed legal conclusion results in double counting. *See Blum*, 465 U.S. at 898-99. To the extent its counsel's strategic choices evinced superior "skill and experience," the value of those characteristics already would be accounted for by counsel's hourly rate: Johnson's counsel has represented that he charges his $450 "higher hourly rate" in condemnation cases precisely "because of [his] knowledge and expertise in this area of the law compared with other lawyers in the state." (Sargent Aff. ¶ 17.) Likewise, to the extent the challenges posed by the case resulted in more-extensive-than-usual time spent strategizing or preparing for a presentation to the jury, that figure is already accounted for in the time actually spent in preparations, which the City did not challenge. *See Blum*, 465 U.S. at 898-99 (reasoning that "novelty and complexity" of the legal issues essentially will always be "fully reflected" in the number of hours billed or in the attorney's reasonable hourly rate).

(2) This case would have only prevented Landowner's counsel from representing the City of Sioux Falls. The Court places no weight on this factor.

RESPONSE: No objection.

(3) The fee customarily charged in the locality for similar legal services is a contingent fee. The normal rate of contingent fees is between a high of 50% to a low of 33% of the Lift. The fee requested by Landowner is at the low end of the range of reasonable fees charged between lawyers and landowners in this locality.

OBJECTION: Even if contingency arrangements are common in condemnation cases and are perfectly reasonable "as between an attorney and his client," the mere fact of a defendant entering into such an arrangement does not make it reasonable to pass the obligation for paying the fee onto a condemning authority. *Kelley*, 513 N.W.2d at 111-12. For that reason, in *Kelley*, the supreme court concluded that a landowner had failed to establish the reasonableness of its requested attorney fee when the only thing to which it could point was the raw fact of there being a one-third contingency agreement in place between it and its attorneys. *Id.* The same logic applies and precludes an upward adjustment here, where no other factors counsel in favor of an upward variation.

(4) The amount involved in this case was substantial. The amount of the loss in dispute ranged from Landowner's valuation of $735,000 versus the City's valuation of $51,647.00. Hundreds of thousands of dollars were at stake. In this case, not only was the amount at the higher levels of South Dakota litigation, but the stakes were extremely high on a personal level for Landowner. The case dealt with real property that the Johnson family had owned for years. Landowner did not want to sell this property. Landowner is a real estate investor, and the highway project disrupted an investment plan that had been in place for almost two decades. The results obtained were also substantial. Counsel for Landowner secured a recovery for their client of $177,156.25 above the highest offer. An increase of over 71%; 3.5 times the threshold for the award of attorney's fees in eminent domain case, which is certainly a benchmark for determining the success of the Landowner. Moreover, the final judgment is over 7 times larger than the City's trial valuation ($51,647.00) and almost 12 times larger than the City's offer to Landowner at the time Landowner retained counsel ($32,454.00).

OBJECTION: This proposed conclusion is the subject of three distinct objections. First, nothing in this case turns on the City's original offer. The $32,454 figure is not relevant to determining whether the landowner is entitled to a reasonable attorney fee, much less to calculating the amount of that fee.

Second, while it would be appropriate to account for prejudgment interest when determining whether SDCL § 21-35-23 has been triggered, *Clark*, 798 N.W.2d at 165, here, there is no dispute that § 21-35-23 applies. There is no analogous basis for accounting for prejudgment interest when measuring the performance of counsel in relation to the amount recovered. The amount a landowner received in

prejudgment interest has no bearing on the quality of the representation. The figure is the result of a simple mathematical calculation provided for by statute.

Third, "[t]he lodestar amount normally provides full and reasonable compensation for counsel who produces excellent results." *Microsoft Antitrust Litig.*, 707 N.W.2d at 106. "Because acknowledgment of the 'results obtained' generally will be subsumed within other factors used to calculate a reasonable fee, it normally should not provide an independent basis for increasing the fee award." *Blum*, 465 U.S. at 900. Instead, "superior results are relevant only to the extent it can be shown that they are the result of superior attorney performance" and, even then, only if there is "specific evidence that the lodestar fee would not have been adequate to attract competent counsel." *Perdue*, 559 U.S. at 552-54 (explaining that upward variances are reserved for "rare and exceptional circumstances") (internal quotations omitted). Here, there was no such showing. While Johnson obtained a positive result at trial, that result was not tied to any performance on the part of his attorney over and above what is already accounted for in his attorney's higher-than-usual hourly rate. Johnson has not shown that counsel's performance warranted more than double that rate. (*See* Johnson Br. 6; Sargent Aff. ¶ 17.)

(5) There were no time limitations involved. The Court places no weight on this factor.

RESPONSE: No objection.

(6) There was not a lengthy relationship between Landowner and counsel, but it has continued during the duration of this case, which now stretches four years.

RESPONSE: No objection.

(7) Defendants' counsel has shown the experience, the skill, and the ability to perform properly this particular form of litigation as stated under factor (1) above.

OBJECTION: The City has no objection to this statement in isolation. However, it objects to the extent that this conclusion permits the inference that counsel's "experience," "skill," and "ability" warrant any upward variance from the lodestar. The City recognizes that Johnson's counsel has extensive experience litigating condemnation cases on behalf of landowners in South Dakota, and that he has sharpened skills in that area of the law. (*See generally* Sargent Aff.) But the lodestar calculation already accounts for that skill and expertise. Johnson's counsel has represented that his "current hourly rate for eminent domain work is $450.00 per hour." (*Id.* ¶ 17.) This figure is higher than the rate he charges in non-condemnation cases. (*Id.*) And he charges that "higher hourly rate" "because

of [his] knowledge and expertise in this area of the law compared with other lawyers in the state." (*Id.*) Because the $450 figure used to calculate the lodestar already accounts for counsel's experience, reputation, and ability, it would constitute double counting to impose an additional upward adjustment on the basis of the same criteria. *See Blum v. Stenson*, 465 U.S. at 898-99.

(8) The fee arrangement in this case was a contingent fee based on a one-third percentage of the total recovery obtained over the City's offer to Landowner at the time Landowner retained counsel ($32,454.00). Under Landowner's attorney fee contract with Meierhenry Sargent LLP, Landowner will pay fees exceeding $202,973.99.

OBJECTION: Even if contingency arrangements are common in condemnation cases and are perfectly reasonable "as between an attorney and his client," the mere fact of a defendant entering into such an arrangement does not make it reasonable to pass the obligation for paying the fee onto a condemning authority. *Kelley*, 513 N.W.2d at 111-12. For that reason, in *Kelley*, the supreme court concluded that a landowner had failed to establish the reasonableness of its requested attorney fee when the only thing to which it could point was the raw fact of there being a one-third contingency agreement in place between it and its attorneys. *Id.* The same logic applies precludes an upward adjustment here, where no other factors counsel in favor of an upward variation.

In addition, for the reasons outlined in the objections that follow, it should have little bearing on the reasonableness of the fee that the requested award happens to fall below what the landowner has privately agreed to pay to its attorney.

8. This fee request is most analogous to *City of Sioux Falls v. Johnson*, 2003 S.D. 115, 670 N.W.2d 360, in which the Supreme Court affirmed the trial court's award of a contingent fee in the amount of $174,900.

OBJECTION: The fee award in *City of Sioux Falls v. Johnson*, 670 N.W.2d 360 (S.D. 2003), is not analogous to the requested award at issue here. The *Johnson* court upheld an award of $174,900, a figure that equaled roughly a quarter (not the requested third) of the lift and that approximates the total fee amount requested here. But it did so based on 380 hours of work—nearly three times the hours expended here. *Id.* at 362. If one translates those numbers into an hourly rate, one arrives at $460—a figure comparable to the $450-per-hour figure the City says is also reasonable in this case. The discrepancy in the *total* fee award is neither here nor there: One would expect that a substantially higher volume of work naturally would result in a substantially higher total fee.

9. In *Johnson*, the Supreme Court noted:

> Johnsons paid total compensation to their attorney of over $243,005 pursuant to a contingency fee agreement. They were awarded $174,900 by the remand court. Johnsons' reimbursement in this case was twenty-eight percent less than what they paid their counsel, an amount which even City's experts agreed was customary and reasonable in condemnation cases. Given these facts, we are unable to say that the trial court abused its discretion by awarding attorney fees in an amount that is midway between the award proposed by City [$81,500] and the actual fees paid to counsel by Johnsons.
>
> *Id.* at ¶ 10.

OBJECTION: For the reasons identified in the objection immediately above and in the objections that follow, this passage from *Johnson* is inapposite to the analysis in this case.

10. In this case, Landowner will pay at least $202,973.99 in actual fees to its attorneys. Landowner has requested a reasonable attorney fee award of $139,724.60. City proposes a reasonable attorney fee award of $61,740. A fee award of $139,724.60 in this case yields a reimbursement to Landowner that is 31% less than what Landowner will pay its counsel; an even smaller percentage reimbursement than what the Supreme Court approved in *Johnson*.

OBJECTION: For the reasons identified in the objections above and in the objection immediately below, this passage from *Johnson* is inapposite to the analysis in this case.

11. Just as in *Johnson*, a fee award of $139,724.60 is midway between the award proposed by City and the actual fees that will be paid to counsel by Landowner.

OBJECTION: This proposed legal conclusion is nothing more than an exercise in bootstrapping. As illustrated in the proposed factual findings above, Johnson's counsel structured its private fee agreement so that the starting point in its calculations is the total recovery awarded by the Court, *including the amount of requested attorney fees*. *See supra*. (*See also* Sargent Aff. Ex. B, § 2(B).) As a consequence, basic logic dictates that the contracted-for amount cannot be lower than the requested amount. Meanwhile, there is never an incentive for a condemnor to challenge a landowner's requested fee award by proposing an amount that is higher than that proposed by the landowner. By definition, then, a proposed fee award calculated on this basis will *always* fall somewhere between the fee award proposed by the condemnor and the fees due under the private agreement. And, on this logic, the condemnor will always lose. Were the court to embrace the reasoning Johnson proposes here, it would effectively mean that a landowner and its counsel can contract out of the reasonableness limitation: They can demand whatever attorney fee they like, so long as they privately contract for a contingency award that incorporates the amount of the awarded fee as a starting point in the calculations.

This result runs directly contrary to *Kelley*, in which the supreme court held that a private contingency agreement cannot, in and of itself, dictate the amount of costs that are passed

onto the condemning authority under § 21-35-23. *See* 513 N.W.2d at 111-12. And it illustrates why the *Kelley* court cautioned circuit courts to carefully scrutinize the requested amount of fees in condemnation cases, in which there is "no safeguard or incentive . . . for the landowner to arrange for reasonable attorney fees as would be the case if the fee were paid by the landowner out of the award or recovery." *Id.*

Nor does *Johnson* compel this absurd result. The *Johnson* court upheld, on abuse-of-discretion review, an award that happened to fall midway between the award proposed by the condemnor and the actual fees that were due under the private agreement between the landowner and its counsel. *See* 670 N.W.2d at 363-64. But the facts of *Johnson* help illustrate why the award was reasonable under the circumstances—and why the simplistic framing proposed above is inappropriate on the facts of this case. True enough, the *Johnson* court there upheld an award of $174,900, a figure that equaled roughly a quarter (not a third) of the lift. But it did so based on 380 hours of work—nearly three times the hours expended here. *Id.* at 362. Those two numbers produce an hourly rate of roughly $460—a figure comparable to the $450-per-hour figure the City says is also reasonable here. Stray language in *Johnson* should not be overread to permit a landowner to demand that the City pay more than double that effective hourly fee simply because the attorney chose to account for the fee award in his contingency agreement with the landowner.

12. For this case, an attorney fee of $139,724.60 is a reasonable fee under the *Kelley* factors.

OBJECTION: The proposed fee award is not reasonable under the lodestar framework that has been adopted by the South Dakota Supreme Court. As discussed at more length in the objections above, none of the nonobjective factors recognized in *Kelley* warrant a departure from the lodestar amount—either because they are not applicable to these circumstances or because they are already built into the lodestar calculation.

13. Any conclusions of law that should be designated as findings of fact are so designated.

RESPONSE: No objection.

Dated this 19th day of December, 2024.

WOODS, FULLER, SHULTZ & SMITH P.C.

By */s/ James E. Moore*

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Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of December, 2024, a true and correct copy of the foregoing Objections to Defendant's Proposed Findings of Fact and Conclusions of Law was filed and served through the Odyssey File and Serve system upon the following:

Clint Sargent
Meierhenry Sargent, LLP
315 South Phillips Avenue
Sioux Falls, South Dakota 57104
(605) 336-3075
clint@meierhenrylaw.com
Attorney for the Defendant

/s/ James E. Moore
One of the Attorneys for Plaintiff

STATE OF SOUTH DAKOTA	) :SS	IN CIRCUIT COURT
COUNTY OF MINNEHAHA	)	SECOND JUDICIAL CIRCUIT

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THE CITY OF SIOUX FALLS,	:	49CIV21-002864
Plaintiff,	:	
v.	:	**PLAINTIFF'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**
JOHNSON PROPERTIES, LLC,	:	
Defendant.	:	

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The Court held a hearing on the Motions for Attorneys' Fees and for Expert Witness Fees filed by the Defendant, Johnson Properties, LLC ("*Johnson*"). The hearing was held on November 26, 2024, at 10:30 a.m. at the Minnehaha County Courthouse in Sioux Falls. Plaintiff, the City of Sioux Falls (the "*City*"), appeared by and through its counsel, James E. Moore and Drew A. Driesen. Johnson appeared by and through its counsel, Clint Sargent. Having reviewed the written submissions of the parties and having heard the arguments of counsel, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. On October 25, 2021, the City filed a Verified Petition for Condemnation pursuant to SDCL Chs. 9-27, 21-35, and 31-19.

2. On October 26, 2021, City deposited $51,647 with the clerk of courts as an estimate of the just compensation owed to Johnson.

3. On October 15, 2024, the City filed its Final Offer pursuant to SDCL §21-35-23, in which it offered the total sum of $250,000 as just compensation for the property rights it had acquired from Johnson.

4. At trial, the City asserted that the appropriate valuation of the subject property was $51,711. Johnson's proprietor testified that, in his opinion, just compensation for the taking was $735,000. Johnson also offered testimony from a qualified appraiser whose opinion was that just compensation for the taking was $405,000.

5. On October 31, 2024, a jury returned a verdict in favor of Johnson awarding just compensation in the amount of $382,600.

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6. The jury verdict ($382,600.00) plus prejudgment interest to the date of the verdict ($44,556.25) totals $427,156.25.

7. Johnson entered into an attorney fee agreement with its counsel, Meierhenry Sargent LLP, on December 14, 2020. This agreement provides for a one-third contingency fee calculated on the basis of the total recovery received by Johnson, less the City's offer of compensation as of the time counsel was retained—*i.e.*, one-third of the "Lift."

8. The customary fee arrangement entered into by landowners in South Dakota for representation in condemnation cases is a contingent fee, and that contingency fee commonly is calculated by taking a percentage of the total recovery received anywhere from one-quarter to one-half of the Lift.

9. On some occasions, however, an attorney in South Dakota may choose instead to accept condemnation cases for landowners on an hourly basis.

10. The current hourly rate charged for condemnation work by Johnson's counsel is $450 per hour. Counsel charges a "higher hourly rate" for condemnation work than he does for his other work "because of [his] knowledge and experience in this area of the law compared with other lawyers in the state."

11. Johnson's counsel expended 137.2 hours on this case.

12. The parties agree that Johnson is entitled, under SDCL § 21-35-23, to be awarded a reasonable attorney fee. However, they disagree about what constitutes a "reasonable" fee.

13. The City has proposed a reasonable attorney fee in the amount of $61,740, which was calculated by multiplying counsel's $450 hourly rate times the 137.2 hours expended by counsel on the case.

14. Johnson has requested that the Court award a reasonable attorney fee in the amount of $139,724.60, calculated as follows:

Jury Verdict	$382,600.00
Prejudgment Interest to Date of Verdict	44,556.25
Final Judgment	$427,156.25
Less: City's Offer at Hiring	(32,454.00)
Lift	$394,702.25
1/3 of Lift	$131,567.42
Sales Tax – 6.2%	8,157.18
Total Reasonable Attorney Fee Request	$139,724.60

CONCLUSIONS OF LAW

1. In a condemnation proceeding, a defendant who receives a final judgment that is at least 20 percent greater than the condemning authority's final offer may recover, in addition to its taxable costs and expert-witness fees, "reasonable attorney fees." SDCL § 21-35-23.

2. The term "final judgment," as used in § 21-35-23, includes prejudgment interest. *State ex rel. Dep't of Transp. v. Clark*, 798 N.W.2d 160, 165 (S.D. 2011).

3. It is undisputed that Johnson is entitled to an award of reasonable attorney fees. The only question is what award qualifies as "reasonable" under the circumstances.

4. The burden of proving the reasonableness of an award is on Johnson, as the party seeking the fees award. *Arrowhead Ridge I, LLC v. Cold Stone Creamery, Inc.*, 800 N.W.2d 730, 737 (S.D. 2011); *In re S.D. Microsoft Antitrust Litig.*, 707 N.W.2d 85, 100 (S.D. 2005).

5. In "all civil actions," including condemnation proceedings, "the calculation of attorney fees *must* begin with the hourly fee multiplied by the attorney's hours." *Microsoft Antitrust Litig.*, 707 N.W.2d at 100 (internal quotation omitted) (emphasis in the original).

6. While the Court need not labor "under the illusion that a 'just and adequate' fee can necessarily be ascertained by merely multiplying attorney's hours and typical hourly rates," this "simple mathematical exercise is the only legitimate starting point for analysis." *City of Sioux Falls v. Kelley*, 513 N.W.2d 97, 112 (S.D. 1994) (internal quotation omitted).

7. Only after a lodestar figure has been calculated should a court proceed to impose adjustments based on "other, less objective factors." *Id.* (internal quotation omitted).

8. These less objective factors include:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

Kelley, 513 N.W.2d at 111 (quoting Model R. of Prof. Conduct 1.5). No single factor is dispositive, and all must be taken into consideration. *Id.* "The only requirement is that the fee which the court fixes in each case must be reasonable for the services rendered." *Id.*

9. At the hearing, the parties agreed that $61,740—which was calculated by multiplying counsel's enhanced $450 hourly rate times the 137.2 hours expended by Johnson's counsel—constituted the appropriate lodestar rate in this matter.

10. Johnson has requested a total upward variance of $77,984.60 from the lodestar calculation, for a total attorney fees award of $139,724.60.

11. If calculated in accordance with the 137.2 hours expended on this case, this proposed revised figure would result in an effective hourly rate of $1,018.40.

12. After applying the factors outlined in *Kelley* and its progeny, the Court concludes that no deviation from the lodestar amount is appropriate under these facts.

13. The Court begins with factor (2), the likelihood that counsel's acceptance of the case will preclude him from accepting other employment. Because the decision to take this case would have prevented Johnson's counsel from accepting representation on behalf of no prospective client other than the City, the Court places no weight on this factor.

14. Likewise, the Court places no weight on factor (5), the time limitations imposed by the client or by the circumstances. There were no time limitations imposed in this case.

15. The Court also places no significant weight on factor (6), the nature and length of the professional relationship with the client, as there was no lengthy relationship between Johnson and counsel prior to this case.

16. Under these circumstances, no upward deviation can be justified on the basis of factor (1), which accounts for the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

17. When calculating deviations from the lodestar, a court must take care not to double-count considerations that already are reflected in the hours expended or in the reasonableness of an attorney's hourly rates. *See Blum v. Stenson*, 465 U.S. 886, 898-99 (1984).

18. "Neither complexity nor novelty of the issues, therefore, is an appropriate factor in determining whether to increase the basic fee award." *Id.* In the typical case, novelty and complexity are "fully reflected in the number of billable hours recorded by counsel and thus do

not warrant an upward adjustment." *Id.* And, in those cases in which "the experience and special skill of the attorney will require the expenditure of fewer hours than counsel normally would be expected to spend on a particularly novel or complex issue," "the special skill and experience of counsel should be reflected in the reasonableness of the hourly rates." *Id.*

19. In this instance, the City has not challenged the amount of time Johnson's counsel expended on any tasks in preparing for this case. And Johnson's counsel has reported that he charges an enhanced rate of $450 per hour to account for his "knowledge and expertise in this area of the law compared with other lawyers in the state."

20. As such, attributing additional weight to the issues involved, or the skill needed to address them, would constitute impermissible double counting.

21. For similar reasons, an upward deviation also cannot be justified on the basis of factor (7), which involves "the experience, reputation, and ability of the lawyer or lawyers performing the services." *Kelley*, 513 N.W.2d at 111 (internal quotation omitted).

22. Because the $450 figure used to calculate the lodestar already accounts for counsel's "experience, reputation, and ability," it would constitute double counting to impose an additional upward adjustment on the basis of the same criteria.

23. Nor is an upward deviation appropriate under factor (4), which accounts for the amount involved and the results obtained in the litigation.

24. Typically, "[t]he lodestar amount normally provides full and reasonable compensation for counsel who produces excellent results." *Microsoft Antitrust Litig.*, 707 N.W.2d at 106. "Because acknowledgment of the 'results obtained' generally will be subsumed within other factors used to calculate a reasonable fee, it normally should not provide an independent basis for increasing the fee award." *Blum*, 465 U.S. at 900.

25. Instead, "superior results are relevant only to the extent it can be shown that they are the result of superior attorney performance" and, even then, only if there is "specific evidence that the lodestar fee would not have been adequate to attract competent counsel." *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 552-54 (2010).

26. There has been no such showing in this instance. While Johnson obtained a positive result at trial, Johnson has not tied that result to any performance on the part of his attorney over and above what is already accounted for in his attorney's higher-than-usual hourly rate—much less shown that the performance warranted more than double that rate.

27. The only remaining factors to consider are (i) factor (3), which considers the fee customarily charged in the locality for similar legal services, and (ii) factor (8), which asks whether the fee is fixed or contingent.

28. Because the customary fee arrangement in condemnation cases in South Dakota is a contingency fee, these two factors substantially overlap with one another.

29. Even if contingency arrangements are common in condemnation cases and are "perfectly valid and proper as between an attorney and his client," the mere fact of a defendant entering into such an arrangement does not justify passing the obligation onto a condemning authority. *Kelley*, 513 N.W.2d at 112. Rather, "[i]t is the reasonableness of the fee, and not the arrangements the attorney and his client may have agreed upon, which is controlling." *Id.* at 112.

30. To the contrary, requested awards of attorney fees are particularly susceptible to scrutiny in condemnation cases, as "the fee is in addition to the award" and, thus, "no safeguard or incentive exists for the landowner to arrange for reasonable attorney fees as would be the case if the fee were paid by the landowner out of the award or recovery." *Id.* at 111-12.

31. In addition, the fact of contingency arrangement cannot be used to pass onto the City the risks assumed by Johnson and its counsel under their arrangement. This is because "[t]he risk of loss in a particular case (and, therefore, the attorney's contingent risk) is the product of two factors: (1) the legal and factual merits of the claim, and (2) the difficulty of establishing those merits." *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992).

32. The difficulty of establishing the merits is already "reflected in the lodestar—either in the higher number of hours expended to overcome the difficulty, or in the higher hourly rate of the attorney skilled and experienced enough to do so." *Id.* To base a deviation from the lodestar on the difficultly of the case would again constitute double counting.

33. Meanwhile, the relative merits of the claim are not reflected in the lodestar—but for good reason. Accounting for the merits in this way would mean "that computation of the lodestar would never end the court's inquiry in contingent-fee cases," and would incentivize attorneys "to bring relatively meritless claims as relatively meritorious ones." *Id.* at 563.

34. In light of the considerations above, the Court finds no basis to award an upward variance simply because Johnson and its attorney entered into a contingency arrangement.

35. On this point, the Court finds the South Dakota Supreme Court's decision in *City of Sioux Falls v. Kelley*, 513 N.W.2d 97 (S.D. 1994), particularly instructive.

36. In *Kelley*, the supreme court accepted a landowner's claim that "the majority of attorneys enter into similar [contingency] agreements in condemnation actions." *Id.* at 111. Nevertheless, the court concluded that fact, by itself, could not establish a reasonable fee in his case, "since it is only one factor to be considered in determining what a reasonable fee is." *Id.*

37. Where no other factor suggests that an upward deviation is appropriate, the Court declines to impose such a deviation solely on the basis of a private contingency arrangement.

38. *City of Sioux Falls v. Johnson*, 670 N.W.2d 360 (S.D. 2003), does not counsel otherwise. The supreme court there upheld an award of $174,900, which approximates the amount of the contingency fee award requested by Johnson here. But the court did so based on 380 hours of work—nearly three times the hours expended here. *Id.* at 362.

39. Here, the appropriate fee should be tied to the number of hours Johnson's counsel actually expended preparing the case—not the substantially higher hour figure in *Johnson*.

40. For this case, an attorneys' fee award of $61,740—the lodestar figure—constitutes a reasonable fee.

41. The City is exempt from state sales tax. SDCL § 10-45-10.

BY THE COURT:

Denied: 12/30/2024
/s/ Clapper, Jeff

HON. JEFFREY C. CLAPPER
Circuit Court Judge

STATE OF SOUTH DAKOTA	) :SS	IN CIRCUIT COURT
COUNTY OF MINNEHAHA	)	SECOND JUDICIAL CIRCUIT

THE CITY OF SIOUX FALLS, Plaintiff, v. **JOHNSON PROPERTIES, LLC,** Defendant.	49CIV21-002864 **DEFENDANT'S PROPOSED FINDINGS OF FACT & CONCLUSIONS OF LAW RE: MOTION FOR ATTORNEY'S FEES**

A hearing was held on Defendant's Motion for Attorney's Fees and Motion for Expert Witness Fees on Tuesday, November 26, 2024, at 10:30 am at the Minnehaha County Courthouse, the Honorable Jeffrey Clapper presiding. Plaintiff appeared by and through its counsel, James E. Moore and Drew A. Driesen. Defendant appeared by and through its counsel, Clint Sargent. The Court having reviewed the submissions of the parties and having heard the arguments of counsel, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. On October 25, 2021, a Verified Petition for Condemnation was filed by the City of Sioux Falls ("City") pursuant to SDCL Chs. 21-35, 9-27, and 31-19.
2. On October 26, 2021, City deposited $51,647.00 with the clerk of courts as City's estimate of just compensation owed to Landowner.
3. On October 15, 2024, City filed Plaintiff's Final Offer Under SDCL §21-35-23 offering the total sum of $250,000 as just compensation for the property rights acquired from Landowner.

4. At trial, there was a significant spread between the valuations of the parties. The amount of the loss in dispute ranged from Landowner's valuation of $735,000 versus the City's valuation of $51,647.00.
5. On October 31, 2024, a jury returned a verdict in favor of Landowner awarding just compensation in the amount of $382,600.00.
6. The jury verdict ($382,600.00) plus prejudgment interest to the date of the verdict ($44,556.25) totals $427,156.25.
7. The final judgment is 71% higher than the City's final settlement offer. Moreover, the final judgment is over 7 times larger than the City's trial valuation ($51,647.00) and almost 12 times larger than the City's offer to Landowner at the time Landowner retained counsel ($32,454.00).
8. Landowner entered into an attorney fee contract with Meierhenry Sargent LLP on December 14, 2020. The contract provides for a one-third contingent fee based on the total recovery received less the condemnor's offer of compensation at the time counsel was retained, i.e. 1/3 of the "Lift."
9. The only certainty in a contingent fee is uncertainty. Both the client and the lawyer take significant risks under a contingent fee agreement.
10. The normal and customary fee charged to landowners in South Dakota for representation in condemnation cases is a contingent fee.
11. Contingent fees charged in South Dakota range from 25% of the total recovery received, or 33.33% to 50% of the "Lift."
12. The normal and customary fee charged to landowners in North Dakota, Minnesota, and Iowa is also a contingent fee.

13. Contingent fees charged in North Dakota, Minnesota, and Iowa range from 33.33% to 50% of the "Lift."

14. The fee charged by Meierhenry Sargent LLP to Landowner in this case is at the low end of the contingent fees customarily charged in South Dakota and the neighboring states.

15. Meierhenry Sargent LLP expended 137.2 hours on this case.

16. City has proposed a reasonable attorney fee of $61,740.

17. Landowner has requested an award of reasonable attorney's fees in the amount of $139,724.60 calculated as follows:

Jury Verdict	$382,600.00
Prejudgment Interest to Date of Verdict	44,556.25
Final Judgment	$427,156.25
Less: City's Offer at Hiring	(32,454.00)
Lift	$394,702.25
1/3 of Lift	$131,567.42
Sales Tax – 6.2%	8,157.18
Total Reasonable Attorney Fee Request	$139,724.60

18. Under Landowner's fee agreement with Meierhenry Sargent LLP, attorney's fees owed will exceed $202,973.99, calculated as follows:

Jury Verdict	$382,600.00
Prejudgment Interest to Date of Verdict	44,556.25
Attorney's Fees	139,724.60
Expert Fees	36,814.93
Disbursements	573.13
Total Recovery	$604,268.91
Less: City's Offer at Hiring	(32,454.00)
Lift	$571,814.91
1/3 of Lift	$190,585.91
Sales Tax – 6.2%	12,388.08
Total Attorney Fee per Agreement	$202,973.99

19. The final attorney fee owed under Landowner's attorney fee contract cannot be definitively determined until the amounts owed to Landowner are paid by City because interest owed by City continues to accrue each day.

20. Any findings of fact that should be designated as conclusions of law are so designated.

CONCLUSIONS OF LAW

1. SDCL § 21-35-23 provides:

> If the amount of compensation awarded to the defendant by final judgment in proceedings pursuant to this chapter is twenty percent greater than the plaintiff's final offer which shall be filed with the court having jurisdiction over the action at the time trial is commenced, and if that total award exceeds seven hundred dollars, the court shall, in addition to such taxable costs as are allowed by law, allow reasonable attorney fees and compensation for not more than two expert witnesses, all as determined by the court.

2. The term "final judgment" as used in SDCL § 21-35-23 means the amount of the jury's verdict plus prejudgment interest. *State ex rel. Dep't of Transp. v. Clark*, 2011 S.D. 20, ¶ 13, 798 N.W.2d 160, 165.

3. It is undisputed that Defendant is entitled to an award of reasonable attorney fees pursuant to SDCL § 21-35-23.

4. The factors for the Court to consider in determining a reasonable attorney fee are stated in the Supreme Court cases *City of Sioux Falls v. Kelley*, 513 N.W.2d 97 (SD 1994) and *City of Sioux Falls v. Johnson*, 2003 S.D. 115, 670 N.W.2d 360. They are:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

Kelley, at 111; *Johnson,* at ¶ 8.

5. "The fee should not be based on any one single factor but all of these matters should be taken into consideration. The only requirement is that the fee which the court fixes in each case must be reasonable for the services rendered." *Kelley,* at 111.

6. Courts should not be "under the illusion that a 'just and adequate' fee can necessarily be ascertained by merely multiplying attorney's hours and typical hourly fees." *Id.* at 112. "[I]t is virtually impossible to set out every conceivable item that should be considered." *Id.*

7. In applying the *Kelley* factors, the Court concludes:

(1) While the case may have appeared simple, it was not. It involved a very particular and specialized area of the law in which very few lawyers regularly practice. Landowner bore the burden of proof in a case where the spread of values between the parties was approximately $700,000.00, making the possible outcome unpredictable and selecting an effective strategy crucial. It is evident that a great deal of strategy and skill was employed in securing experts and other witnesses prior to trial and then presenting their testimony at trial in the best way to buttress Landowner's theory of the case, while not overburdening or boring the jury. The exhibits selected for trial were used in

an effective manner that indicates a great deal of thought, strategy and skill. Meierhenry Sargent LLP spent 137.2 hours working on this case. However, the time expended is not – standing alone – a fair gauge of the work put into the case. It is evident that counsel's skill and experience has led to significant efficiency in preparing for and presenting a case at trial.

(2) This case would have only prevented Landowner's counsel from representing the City of Sioux Falls. The Court places no weight on this factor.

(3) The fee customarily charged in the locality for similar legal services is a contingent fee. The normal rate of contingent fees is between a high of 50% to a low of 33% of the Lift. The fee requested by Landowner is at the low end of the range of reasonable fees charged between lawyers and landowners in this locality.

(4) The amount involved in this case was substantial. The amount of the loss in dispute ranged from Landowner's valuation of $735,000 versus the City's valuation of $51,647.00. Hundreds of thousands of dollars were at stake. In this case, not only was the amount at the higher levels of South Dakota litigation, but the stakes were extremely high on a personal level for Landowner. The case dealt with real property that the Johnson family had owned for years. Landowner did not want to sell this property. Landowner is a real estate investor, and the highway project disrupted an investment plan that had been in place for almost two decades. The results obtained were also substantial. Counsel for Landowner secured a recovery for their client of $177,156.25 above the highest offer. An increase of over 71%; 3.5 times the

threshold for the award of attorney's fees in eminent domain case, which is certainly a benchmark for determining the success of the Landowner. Moreover, the final judgment is over 7 times larger than the City's trial valuation ($51,647.00) and almost 12 times larger than the City's offer to Landowner at the time Landowner retained counsel ($32,454.00).

(5) There were no time limitations involved. The Court places no weight on this factor.

(6) There was not a lengthy relationship between Landowner and counsel, but it has continued during the duration of this case, which now stretches four years.

(7) Defendants' counsel has shown the experience, the skill, and the ability to perform properly this particular form of litigation as stated under factor (1) above.

(8) The fee arrangement in this case was a contingent fee based on a one-third percentage of the total recovery obtained over the City's offer to Landowner at the time Landowner retained counsel ($32,454.00). Under Landowner's attorney fee contract with Meierhenry Sargent LLP, Landowner will pay fees exceeding $202,973.99.

8. This fee request is most analogous to *City of Sioux Falls v. Johnson*, 2003 S.D. 115, 670 N.W.2d 360, in which the Supreme Court affirmed the trial court's award of a contingent fee in the amount of $174,900.

9. In *Johnson*, the Supreme Court noted:

> Johnsons paid total compensation to their attorney of over $243,005 pursuant to a contingency fee agreement. They were awarded $174,900 by the remand court. Johnsons' reimbursement in this case was twenty-eight percent less than what they paid their counsel, an amount which even City's experts agreed was customary and

reasonable in condemnation cases. Given these facts, we are unable to say that the trial court abused its discretion by awarding attorney fees in an amount that is midway between the award proposed by City [$81,500] and the actual fees paid to counsel by Johnsons.

Id. at ¶ 10.

10. In this case, Landowner will pay at least $202,973.99 in actual fees to its attorneys. Landowner has requested a reasonable attorney fee award of $139,724.60. City proposes a reasonable attorney fee award of $61,740. A fee award of $139,724.60 in this case yields a reimbursement to Landowner that is 31% less than what Landowner will pay its counsel; an even smaller percentage reimbursement than what the Supreme Court approved in *Johnson*.

11. Just as in *Johnson*, a fee award of $139,724.60 is midway between the award proposed by City and the actual fees that will be paid to counsel by Landowner.

12. For this case, an attorney fee of $139,724.60 is a reasonable fee under the *Kelley* factors.

13. Any conclusions of law that should be designated as findings of fact are so designated.

Dated this ___ day of December, 2024.

12/30/2024 1:31:05 PM

Attest:
Patzer, Sarah
Clerk/Deputy

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	:SS	
COUNTY OF MINNEHAHA	)	SECOND JUDICIAL CIRCUIT

o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o

THE CITY OF SIOUX FALLS,	:	49 CIV 21-002864
Plaintiff,	:	
v.	:	**FINAL JUDGMENT**
JOHNSON PROPERTIES, LLC,	:	
Defendant.	:	

o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o

A jury trial was held in this case from October 29-31, 2024, at the Minnehaha County Courthouse before the Honorable Jeffrey C. Clapper. Plaintiff, the City of Sioux Falls, was represented by James E. Moore and Drew A. Driesen. Defendant, Johnson Properties, LLC, was represented by Clint Sargent. The Court previously entered an order dated November 4, 2021, granting Plaintiff access to the property described below. On October 31, 2024, the jury returned a verdict in favor of Defendant in the amount of $382,600. Based on the pleadings of record in this case, the jury's verdict, and good cause appearing therefore,

JUDGMENT IS HEREBY ENTERED as follows:

1. The City of Sioux Falls is granted a permanent easement for highway purposes on and over the following real property:

> Lots H3 and H4 in Lot A of Lots 1, 2 and 3 in Block 3 of Pleasant View Acres in Section 19, Township 101 North, Range 48 West of the 5th P.M., Minnehaha County, South Dakota, according to the recorded plat thereof. Lot H3 contains 4,484 sq ft (0.10 acre), more or less. Lot H4 contains 387 sq ft (0.01 acre), more or less.

A copy of the plat is attached as **Exhibit A**.

2. Defendant previously granted the City of Sioux Falls a temporary construction easement legally described as:

A parcel in Lot A of Lots 1, 2, & 3 in Block 3 of Pleasant View Acres in Section 19, Township 101, Range 48 West of the 5th P.M., Minnehaha County, South Dakota, as shown in **Exhibit B**. The parcel contains 3,257 sq ft (0.07 acre), more or less.

Construction of the project is complete and these temporary easement rights have expired.

3. Defendant is granted a money judgment against the City of Sioux Falls in the amount of $330,953, which is the amount of the jury verdict less the initial deposit paid by the City of Sioux Falls in the amount of $51,647.

4. Defendant is awarded prejudgment interest pursuant to SDCL § 31-19-33 to the date of the verdict in the amount of $44,556.25 with interest continuing to accrue after October 31, 2024, at the rate of 4.5% per annum until paid.

5. By separate order dated December 4, 2024, Defendant was awarded attorney fees pursuant to SDCL § 21-35-23 in the amount of $139,724.60 with interest accruing from the date of this judgment, at the rate of 4.5% per annum thereafter until paid.

6. By separate order dated December 4, 2024, Defendant was awarded expert fees pursuant to SDCL § 21-35-23 in the amount of $36,814.93 with interest accruing from the date of this judgment, at the rate of 4.5% per annum thereafter until paid.

7. By separate order dated December 4, 2024, Defendant was awarded costs pursuant to SDCL § 15-17-37 in the amount of $573.13 with interest accruing from the date of this judgment, at the rate of 4.5% per annum thereafter until paid.

9. This Judgment compensates Defendant for any and all taking and damage to Defendant's real property legally described as Lot A of Lots 1, 2 and 3 in Block 3 of Pleasant View Acres in Section 19, Township 101 North, Range 48 West, Minnehaha County, South

Dakota, according to the recorded plat thereof, arising out of the highway improvement project to reconstruct part of Arrowhead Parkway known as Project Number P 1358(02) PCN 05C2 .

12/30/2024 1:31:50 PM

BY THE COURT:

Honorable Jeffrey C. Clapper
Circuit Court Judge

Attest:
Patzer, Sarah
Clerk/Deputy

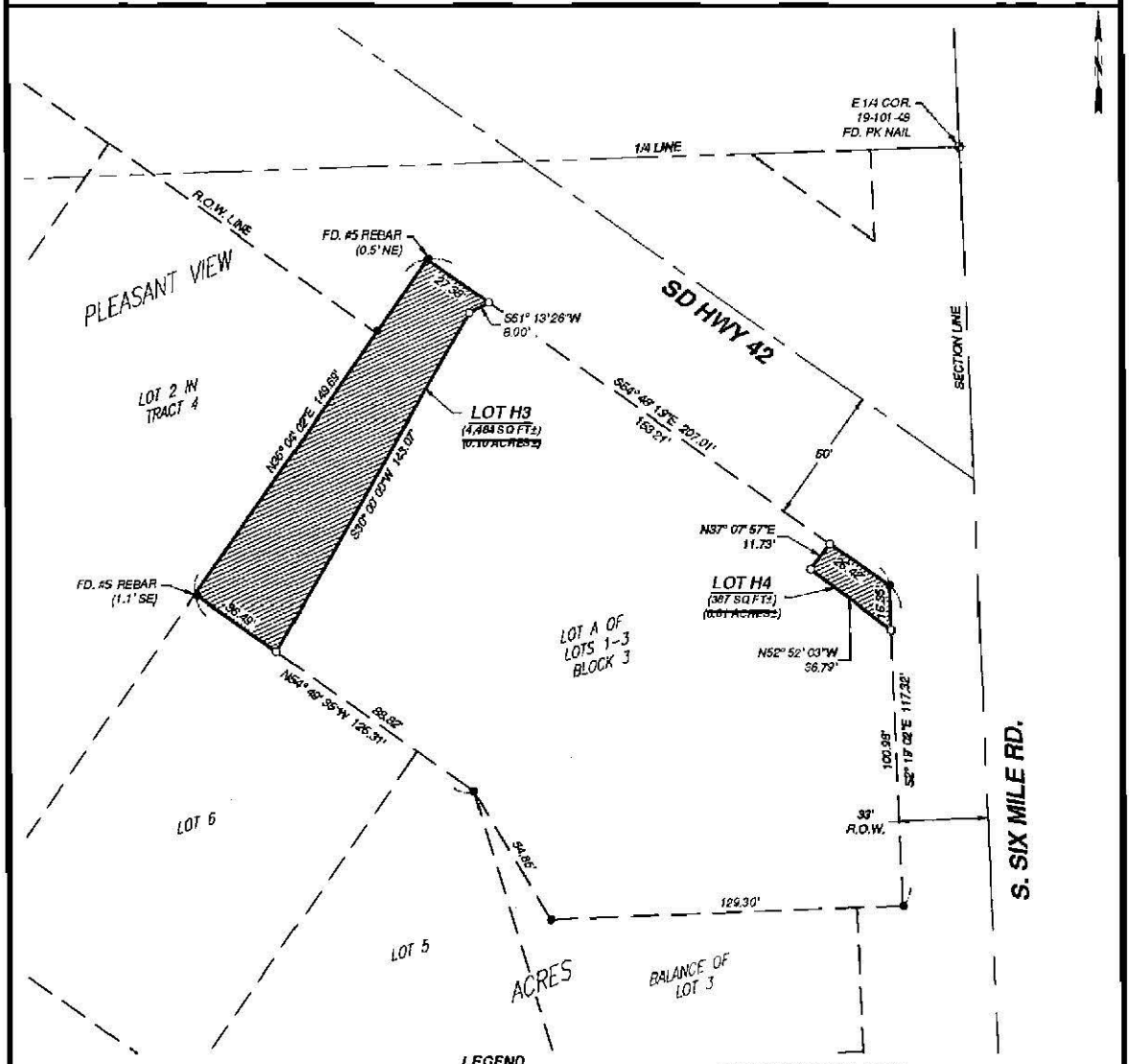
EXHIBIT A

PARCEL 14

PLAT OF LOTS H3 & H4

IN LOT A OF LOTS 1, 2 AND 3 IN BLOCK 3 OF PLEASANT VIEW ACRES IN SECTION 19, TOWNSHIP 101 NORTH, RANGE 48 WEST OF THE 5TH P.M., MINNEHAHA COUNTY, SOUTH DAKOTA

showing a parcel of land to be acquired for highway purposes
for construction of Project P1556(02)
SCALE: 1 INCH = 40 FEET



LEGEND

- ● FOUND MONUMENT
- ○ SET MONUMENT
- H-LOT RIGHT-OF-WAY AS SHOWN
- "ALL MONUMENTATION WILL BE SET UPON PROJECT COMPLETION"

NOTE: THE COORDINATES, DISTANCES AND AREAS SHOWN ON THIS PLAT ARE BASED ON THE SOUTH DAKOTA STATE PLANE COORDINATE SYSTEM GRID - SOUTH ZONE - NAD 83
GEOID 12A SF = 0.9998437048

PREPARED BY: BEAU M. KOOPAL
infrastructure design group, inc.
3241 E. BISON TRAIL
SIOUX FALLS, SD 57108
(605)271-5527

DRAWN BY	KAM	DATE	03/30/21
CHECKED BY	BMK	DATE	04/27/21

SURVEYOR'S CERTIFICATE

I, BEAU M. KOOPAL, A REGISTERED LAND SURVEYOR OF THE STATE OF SOUTH DAKOTA, DO HEREBY CERTIFY THAT AS ORDERED BY THE CITY OF SIOUX FALLS, THE PARCEL OF LAND AS SHOWN ON THIS PLAT HAS BEEN SURVEYED AT MY DIRECTION AND UNDER MY CONTROL, AND SUCH PARCEL OF LAND SHALL BE HEREAFTER KNOWN BY THE LOT NUMBER(S) DESIGNATED HEREIN. THE LOCATION AND DIMENSIONS OF THE PARCEL ARE SHOWN ON THIS PLAT.

IN WITNESS WHEREOF, I HAVE SET MY HAND AND SEAL THIS ___ DAY OF _____, A.D., 2021.

BEAU M. KOOPAL
REGISTERED LAND SURVEYOR NO. 12467

REGISTERED LAND SURVEYOR
REG. NO. 12467
BEAU M. KOOPAL
SOUTH DAKOTA

OFFICE OF REGISTER OF DEEDS

STATE OF SOUTH DAKOTA

COUNTY OF _____ SS

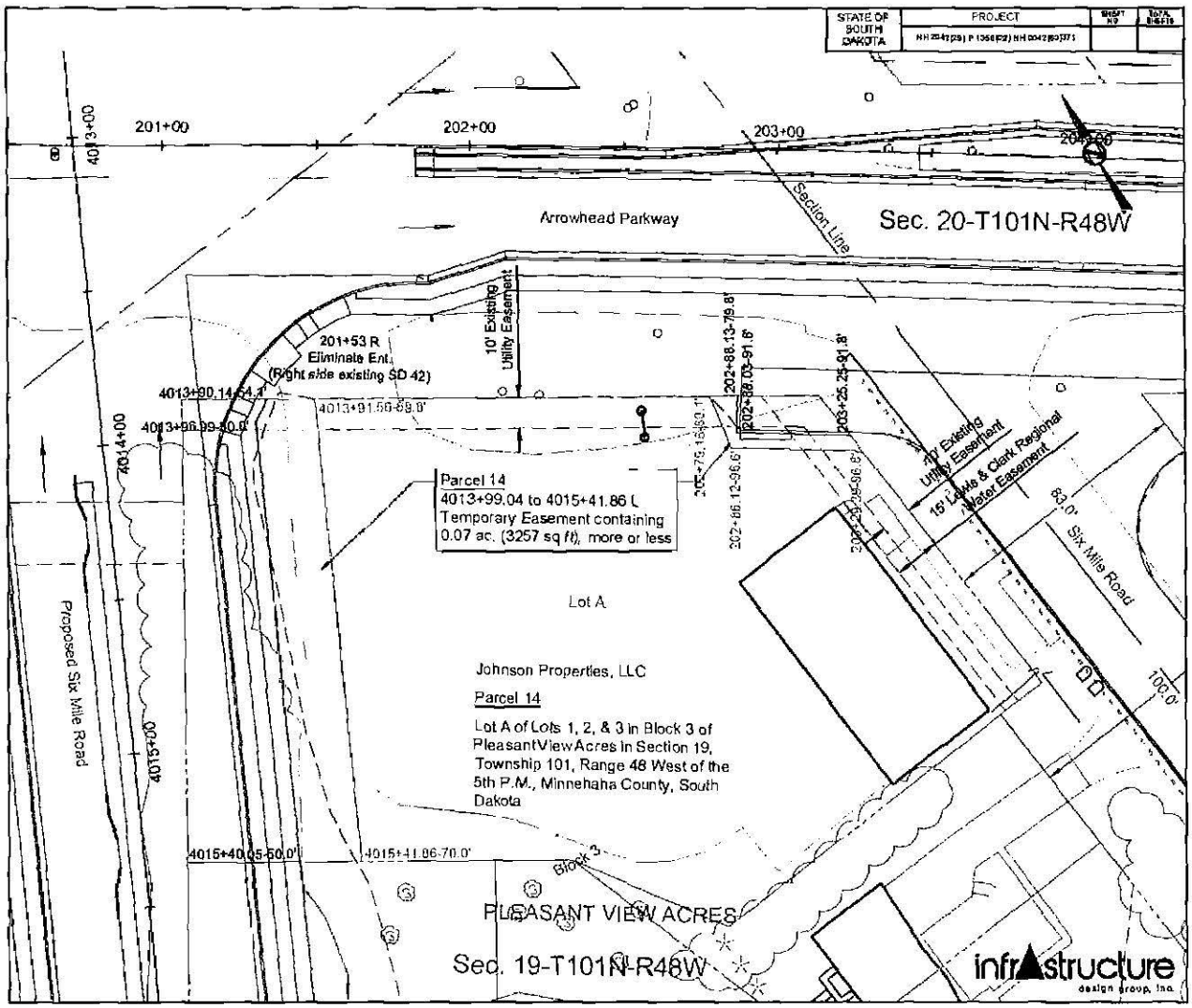
FILED FOR RECORD THIS ___ DAY OF _____, A.D., 2021, AT _____

O'CLOCK __.M., AND RECORDED IN BOOK _____ OF PLATS ON PAGE ____ THEREIN.

REGISTER OF DEEDS BY DEPUTY

05C2

EXHIBIT B


STATE OF SOUTH DAKOTA
PROJECT
201+00
202+00
203+00
204+00
Arrowhead Parkway
Section Line
Sec. 20-T101N-R48W
10' Existing Utility Easement
201+53 R
Eliminate Ent.
(Right side existing SD 42)
4013+90.14-64.1'
4013+91.50-69.9'
4013+96.99-80.0'
4014+00
Parcel 14
4013+99.04 to 4015+41.86 L
Temporary Easement containing
0.07 ac. (3257 sq ft), more or less
202+88.13-79.8'
202+88.03-91.8'
203+25.25-91.8'
202+66.12-96.6'
203+25.29-96.8'
10' Existing Utility Easement
15' Lewis & Clark Regional Water Easement
83.0'
Six Mile Road
100.0'
Lot A
Johnson Properties, LLC
Parcel 14
Lot A of Lots 1, 2, & 3 in Block 3 of Pleasant View Acres in Section 19, Township 101, Range 48 West of the 5th P.M., Minnehaha County, South Dakota
Proposed Six Mile Road
4015+00
4015+40.05-50.0'
4015+41.86-70.0'
Block 3
PLEASANT VIEW ACRES
Sec. 19-T101N-R48W
infrastructure
design group, inc.

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 30947

THE CITY OF SIOUX FALLS,
Plaintiff and Appellee,
v.
JOHNSON PROPERTIES, LLC,
Defendant and Appellant.

Appeal from the Circuit Court, Second Judicial Circuit
Minnehaha County, South Dakota

The Honorable Jeffrey C. Clapper
Circuit Court Judge

APPELLEE'S BRIEF

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Notice of Appeal filed on the 2nd day of January, 2025

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

JURISDICTIONAL STATEMENT

This is an appeal of a judgment filed on December 30, 2024, which followed the circuit court's order awarding attorney's fees and costs on December 4, 2024. On January 2, 2025, Plaintiff/Appellant City of Sioux Falls, filed a Notice of Appeal. This Court has jurisdiction pursuant to SDCL § 15-26A-3(1) (appeal from final judgment as a matter of right).[1]

STATEMENT OF THE ISSUES

I. The Circuit Court's Award of Attorney's Fees Does Not Constitute an Abuse of Discretion.

City of Sioux Falls v. Kelley, 513 N.W.2d 97 (S.D. 1994)

City of Sioux Falls v. Johnson, 2003 SD 115, 670 N.W.2d 360

STATEMENT OF THE CASE

On October 25, 2021, a Verified Petition for Condemnation was filed by the City of Sioux Falls ("City") pursuant to SDCL Chs. 21-35, 9-27, and 31-19. App 59; CR 470. On October 26, 2021, City deposited $51,647.00 with the clerk of courts as City's estimate of just compensation owed to Landowner. *Id.* On October 15, 2024, City filed Plaintiff's Final Offer under SDCL §21-35-23 offering the total sum of $250,000 as just compensation for the property rights acquired from Landowner. *Id.*

A three-day trial was held to determine the just compensation for the property rights acquired by City from Landowner. At trial, there was a significant spread between

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[1] For purposes of this brief, references are as follows: (1) "CR" designates the certified record; (2) "App" designates the Appellant's Appendix; (3) "HT" designates the transcript for the November 26, 2025, motions hearing.

the parties' valuations. App 60; CR 471. The amount of the loss in dispute ranged from Landowner's valuation of $735,000 versus the City's valuation of $51,647.00. *Id.* On October 31, 2024, a jury returned a verdict in Landowner's favor awarding $382,600.00 in just compensation. *Id.*

The jury verdict ($382,600.00) plus prejudgment interest to the date of the verdict ($44,556.25) totaled $427,156.25. *Id.* The final judgment was 71% higher than the City's final settlement offer. *Id.* Moreover, the final judgment was over 7 times larger than the City's trial valuation ($51,647.00) and almost 12 times larger than the City's offer to Landowner at the time Landowner retained counsel ($32,454.00). *Id.*

Pursuant to the jury's verdict, the Honorable Jeffrey C. Clapper granted a permanent easement across Landowner's property and a monetary judgment against the City in the amount of $330,953, prejudgment interest in the amount of $44,556.25, attorney's fees in the amount of $139,742.60, and expert witness fees of $36,814.93, all with corresponding interest. App 67-68; CR 483-484.

The City objected to the circuit court's award of attorney's fees.

The Judgment was filed on December 30, 2024. CR 478. Notice of Entry was filed on January 2, 2025. CR 483. City of Sioux Falls filed its Notice of Appeal to the South Dakota Supreme Court on January 2, 2025. CR 490.

STATEMENT OF THE FACTS

The only issue in this appeal is the award of attorney's fees. On December 14, 2020, Landowner entered into an attorney fee contract with Meierhenry Sargent LLP. App 60; CR 471. The contract provided for a one-third contingent fee based on the total recovery received less the condemnor's offer of compensation at the time counsel was retained, i.e. 1/3 of the "Lift." *Id.* The normal and customary fee charged to landowners in South Dakota for representation in condemnation cases is a contingent fee. *Id.* Contingent fees charged in South Dakota range from 25% of the total recovery received, or 33.33% to 50% of the "Lift." *Id.* The normal and customary fee charged to landowners in North Dakota, Minnesota, and Iowa is also a contingent fee. *Id.* Contingent fees charged in North Dakota, Minnesota, and Iowa range from 33.33% to 50% of the "Lift." App 61; CR 472. The fee charged by Meierhenry Sargent LLP to Landowner in this case is at the low end of the contingent fees customarily charged in South Dakota and the neighboring states. *Id.* Meierhenry Sargent LLP expended 137.2 hours on this case. *Id.* The City of Sioux Falls proposed a reasonable attorney fee of $61,740, based solely on the loadstar calculation. *Id.* Landowner requested an award of reasonable attorney's fees in the amount of $139,724.60 calculated as follows:

Jury Verdict	$382,600.00
Prejudgment Interest to Date of Verdict	44,556.25
Final Judgment	$427,156.25
Less: City's Offer at Hiring	(32,454.00)
Lift	$394,702.25
1/3 of Lift	$131,567.42
Sales Tax – 6.2%	8,157.18
Total Reasonable Attorney Fee Request	$139,724.60

Under Landowner's actual fee agreement with Meierhenry Sargent LLP, attorney's fees owed will exceed $202,973.99, calculated as follows:

Jury Verdict	$382,600.00
Prejudgment Interest to Date of Verdict	44,556.25
Attorney's Fees	139,724.60
Expert Fees	36,814.93
Disbursements	573.13
Total Recovery	$604,268.91
Less: City's Offer at Hiring	(32,454.00)
Lift	$571,814.91
1/3 of Lift	$190,585.91
Sales Tax – 6.2%	12,388.08
Total Attorney Fee per Agreement	$202,973.99

The circuit court weighed both proposals, the motion for attorney's fees filed by Landowner, the objection filed by the City, arguments by both parties, the proposed findings of fact and conclusions of law drafted by both parties, the factors outlined by the Supreme Court in *City of Sioux Falls v. Kelley,* and the Supreme Court's analysis in *City of Sioux Falls v. Johnson* to reach its determination of a reasonable attorney's fee award. CR 473-477. The circuit court awarded Landowner attorney's fees in the amount of $139,742.60. CR 477.

STANDARD OF REVIEW

"Attorney fee awards are reviewed under an abuse of discretion standard." *City of Sioux Falls v. Johnson*, 2003 S.D. 115, ¶ 6, 670 N.W.2d 360, 362. "We determine that an abuse of discretion occurred only if no judicial mind, in view of the law and the circumstances of the particular case, could reasonably have reached such a conclusion." *Id.* (quoting *Action Mechanical, Inc. v. Deadwood Historic Preservation Com'n,* 2002 S.D. 121, ¶ 14, 652 N.W.2d 742, 748). "An abuse of discretion 'is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary and unreasonable.' " *Stern Oil Co., Inc. v. Brown*, 2018 S.D. 15, ¶ 46, 908 N.W.2d 144, 157 (quoting *Erickson v. Earley*, 2016 S.D. 37, ¶ 8, 878 N.W.2d 631, 634).

ARGUMENT

I. Circuit Court's Award of Attorney's Fees Was Not an Abuse of Discretion.

SDCL § 21-35-23 provides:

> If the amount of compensation awarded to the defendant by final judgment in proceedings pursuant to this chapter is twenty percent greater than the plaintiff's final offer which shall be filed with the court having jurisdiction over the action at the time trial is commenced, and if that total award exceeds seven hundred dollars, the court shall, in addition to such taxable costs as are allowed by law, allow reasonable attorney fees and compensation for not more than two expert witnesses, all as determined by the court.

"The formula indicates that the legislature meant to discourage the condemnor from making inequitably low jurisdictional offers." *City of Sioux Falls v. Kelley*, 513 N.W.2d 97, 111 (S.D. 1994)(quoting *Standard Theatres v. Wisconsin, Dept. of Transp.*, 349 N.W.2d 661, 668 (WI 1984)). In addition to dissuading the government from making

unreasonably low acquisition offers, providing an avenue for attorney's fees recognizes the implicit need and effort to make a landowner truly whole.

Kelley Factors

In *Kelley*, this Court laid out eight parameters, patterned after the Model Rules of Professional Conduct, Rule 1.5, that a trial court should consider when deciding what a reasonable attorney fee is. Those factors are:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> (3) the fee customarily charged in the locality for similar legal services;
> (4) the amount involved and the results obtained;
> (5) the time limitations imposed by the client or by the circumstances;
> (6) the nature and length of the professional relationship with the client;
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
> (8) whether the fee is fixed or contingent.

Kelley, 513 N.W.2d at 111; *City of Sioux Falls v. Johnson*, 2003 S.D. 115, 670 N.W.2d 360.

As directed by this Court, the circuit court specifically addressed and weighed each of the eight factors when it enumerated its decision and award of attorney's fees. See App 63-65; CR 474-476. In the circuit court's Conclusion of Law 7, it stated:

> (1) While the case may have appeared simple, it was not. It involved a very particular and specialized area of the law in which very few lawyers regularly practice. Landowner bore the burden of proof in a case where the spread of values between the parties was approximately $700,000.00, making the possible outcome unpredictable and selecting an effective strategy crucial. It is evident that a great deal of strategy and skill was employed in securing experts and other witnesses prior to trial and then presenting their testimony at trial in the best way to buttress Landowner's theory of the case, while not overburdening or boring the jury. The exhibits selected for trial were used in an effective

manner that indicates a great deal of thought, strategy and skill. Meierhenry Sargent LLP spent 137.2 hours working on this case. However, the time expended is not - standing alone - a fair gauge of the work put into the case. It is evident that counsel's skill and experience has led to significant efficiency in preparing for and presenting a case at trial.

(2) This case would have only prevented Landowner's counsel from representing the City of Sioux Falls. The Court places no weight on this factor.

(3) The fee customarily charged in the locality for similar legal services is a contingent fee. The normal rate of contingent fees is between a high of 50% to a low of 33% of the Lift. The fee requested by Landowner is at the low end of the range of reasonable fees charged between lawyers and landowners in this locality.

(4) The amount involved in this case was substantial. The amount of the loss in dispute ranged from Landowner's valuation of $735,000 versus the City's valuation of $51,647.00. Hundreds of thousands of dollars were at stake. In this case, not only was the amount at the higher levels of South Dakota litigation, but the stakes were extremely high on a personal level for Landowner. The case dealt with real property that the Johnson family had owned for years. Landowner did not want to sell this property. Landowner is a real estate investor, and the highway project disrupted an investment plan that had been in place for almost two decades. The results obtained were also substantial. Counsel for Landowner secured a recovery for their client of $177,156.25 above the highest offer. An increase of over 71 %; 3.5 times the threshold for the award of attorney's fees in eminent domain case, which is certainly a benchmark for determining the success of the Landowner. Moreover, the final judgment is over 7 times larger than the City's trial valuation ($51,647.00) and almost 12 times larger than the City's offer to Landowner at the time Landowner retained counsel ($32,454.00).

(5) There were no time limitations involved. The Court places no weight on this factor.

(6) There was not a lengthy relationship between Landowner and counsel, but it has continued during the duration of this case, which now stretches four years.

(7) Defendants' counsel has shown the experience, the skill, and the ability to perform properly this particular form of litigation as stated under factor (1) above.

(8) The fee arrangement in this case was a contingent fee based on a one-third percentage of the total recovery obtained over the City's offer to Landowner at the time Landowner retained counsel ($32,454.00). Under Landowner's attorney fee contract with Meierhenry Sargent LLP, Landowner will pay fees exceeding $202,973.99.

App 63-65; CR 474-476.

Circuit Court Started Analysis with Lodestar

City argues the award for attorney's fees should be overturned because the circuit court failed to calculate the lodestar figure at the start of its analysis. City's argument is not supported by the settled record. A hearing on Landowner's motion for attorney's fees was held on November 26, 2024, at which the lodestar was addressed by both parties. App 1-34. At that hearing, Landowner's attorney agreed determining the lodestar was the starting point.

> **The Court:** Let me ask you this, Mr. Sargent, the city claims we should start with, is the baseline to evaluate the reasonableness of your fee, an hourly rate. An hourly rate times the hours you expend on the case and that's here we should begin the analysis. Do you agree with that?
>
> **Mr. Sargent:** I do. That, I mean that's the floor. Okay. That's where we start, and that's what, what, what the courts have said that you do.
>
> **The Court:** So, then that's their number, right?
>
> **Mr. Sargent:** Right.
>
> **The Court:** 61,700.
>
> **Mr. Sargent:** Right.

HT 2024-11-26 4:12-23.

Despite City's arguments, the lodestar is just that, a starting point, and City acknowledged this at the motions hearing. "I was glad to hear Mr. Sargent recognized

that the lodestar calculation is the *starting point*, as it is in condemnation actions, as it is in essentially all other civil context of what I'm aware, which is basically you take a reasonable hourly rate times a reasonable number of hours expended and that's your *starting point.*" HT 2024-11-26 15:1-6 (emphasis added). In *Kelley*, this Court was clear that the analysis does not stop after determining the lodestar, but rather the circuit court shall consider all eight factors laid out. "The fee should not be based on any one single factor, but all of these matters should be taken into consideration." *Kelley* at 111 (quoting *City of Bismarck v Thom,* 261 N.W.2d 640, 646 (N.D. 1977)).

Fee Calculated Solely on an Hourly Basis Inconsistent with Precedent

This Court has been clear, "[t]here is absolutely no restriction in the statute implying that reasonable refers only to fees calculated on an hourly basis." *Kelley*, 513 N.W.2d at 111. Further, as this Court enumerated in *Kelley*, courts should not be "under the illusion that a 'just and adequate' fee can necessarily be ascertained by merely multiplying attorney's hours and typical hourly fees." *Id* at 112. City argues a contingency fee is not reasonable. However, in *Kelley,* this Court specifically denied the notion that an attorney fee based on a contingency-fee could not be a reasonable fee: "We conclude that a reasonable fee in certain instances may be in excess of what a one-third contingency fee would produce or it may be less. It is the reasonableness of the fee, and not the arrangements the attorney and his client may have agreed upon, which is controlling." *Id* at 111–12.

While an hourly fee may partially account for the skill and the experience of the lawyer, an hourly rate does not account for the efficiencies that skill and experience provide in reducing the amount of hours spent on the case by a less skillful or

experienced lawyer. Judge Clapper noted this when rendering his decision and held that "time expended is not – standing alone- a fair gauge of the work put into the case. It is evident that counsel's skill and experience has led to significant efficiency in preparing for and presenting a case at trial." App 64; CR 475. While City argues that the case was not novel or complex based on the amount of time Landowner's counsel spent preparing and trying the case, Judge Clapper found to the contrary and concluded that the skill and experience of counsel for both parties made a novel and complex case look much easier than it was. App. 30 ("Candidly, you two, they both sides, legal counsel in this made it look pretty easy, as I understand it, you've all been in these types of trials before, but nonetheless, that doesn't mean it was easy or simple.").

City asks this court to adopt the position that a reasonable fee should only be calculated utilizing an hourly rate calculation. To award a fee based solely on an hourly rate calculation clearly ignores the well-established precedent of *Kelley* and its progeny. Such an approach would completely ignore factor (3) – "the fee customarily charged in the locality for similar legal services," factor (4) – "the amount involved and the results obtained," and factor (8) – "whether the fee is fixed or contingent." *Kelley*, 513 N.W.2d at 111.

Moreover, City's approach does not in any way discourage the condemner from making low introductory offers. If condemning authorities know, as they certainly do by now, that most condemnation cases are taken on a contingency fee with a percentage of the lift used to calculate the fee, they should know that by making low offers they may be increasing the likelihood of a significant attorney fee award if they lose. Prohibiting a contingency fee as a reasonable fee would be antithetical to the stated goal of the fee

award statute. *Id.* It would remove consequences to the condemner for making low initial offers. If the condemner makes reasonable initial offers, they can control the amount of the potential lift, and whether a lawyer will even agree to take the case on a contingency because the potential lift is so minimal.

Circuit Court's Reliance on City of Sioux Falls v. Johnson

The circuit court concluded that the circumstances of this case were analogous to this Court's decision in *City of Sioux Falls v. Johnson,* in which this Court affirmed the trial court's award of a contingent fee in the amount of $174,900 in lieu of the City's proposed lodestar amount of $81,500. 2003 S.D. 115, ¶¶ 6-10, 670 N.W.2d 360. The fee awarded by the trial court in that case, and affirmed by this Court, was 215% of the lodestar amount proposed by the City. This Court rejected the same argument made by City in this case that "only an hourly rate of compensation is reasonable," noting "[t]he remand court carefully considered all of the *Kelley* factors, finding that some were more applicable than others. In reaching its determination, the remand court used an hourly rate as one reference point and the actual fees paid by landowner as another." *Id.* at ¶ 10. Judge Clapper employed the same reference points in this case. See App. 66; Conclusion of Law ¶¶ 10 & 11. The fee of $139,724.60 awarded by Judge Clapper is 226% of the lodestar amount proposed by the City, and squarely within the same range of reference points approved by this Court in Johnson.

Conclusion

A complete review of the record shows that despite City's arguments to the contrary, the circuit court was fully aware of the lodestar amount and used it as a starting point in its analysis. After recognizing the lodestar and hearing arguments from both

parties, the circuit court used its discretion to apply each of the eight *Kelley* factors. Based on the application of those factors, the circuit court awarded Landowner $174,900 in attorney's fees. Applying the *Kelley* factors to reach an award above the lodestar was not only within the circuit court's discretion but required by this Court's prior decisions. *Johnson,* 2003 S.D. 115. As such the circuit court's attorney's fee award is within the range of permissible choices, cannot be deemed arbitrary or unreasonable, and does not amount to a "fundamental error of judgment." *Stern Oil Co., Inc.*, 2018 S.D. 15, ¶ 46, 908 N.W.2d 144, 157 (quoting *Erickson*, 2016 S.D. 37, ¶ 8, 878 N.W.2d 631, 634.

Appellee respectfully requests that this Court affirm the circuit court's Judgment and deny all relief sought by Appellant.

Respectfully submitted this 20th day of May, 2025.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of the foregoing Appellee's Brief and all appendices were filed online and served upon:

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CERTIFICATE OF COMPLIANCE

In accordance with SDCL §15-26A-66(b)(4) I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word, and contains 3,147 words from the Statement of the Case through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

On this 20th day of May, 2025.

/s/ Clint Sargent
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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

Appeal No. 30947

THE CITY OF SIOUX FALLS,

Appellant–Plaintiff,

v.

JOHNSON PROPERTIES, LLC,

Appellee–Defendant,

Appeal from the Circuit Court
Second Judicial Circuit
Minnehaha County, South Dakota

THE HONORABLE Jeffrey C. Clapper
circuit court Judge

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ARGUMENT

The circuit court committed a pair of errors when calculating the "reasonable" attorney fee to be paid by the City of Sioux Falls (the "*City*") to Johnson Properties, LLC ("*Johnson Properties*"). First, the circuit court departed from the framework established by this Court. It failed to calculate a lodestar figure and, in effect, inverted the burden of proof for establishing the reasonableness of the landowner's proposed award. Second, in justifying the inflated fee award, the circuit court repeatedly double-counted factors already accounted for by the lodestar figure and gave dispositive weight to the private contingency-fee agreement between Johnson Properties and its counsel. Each of these errors was legal in nature. *See Jet Mw. Int'l Co. v. Jet Mw. Grp., LLC*, 93 F.4th 408, 421 (8th Cir. 2024); *Lipsett v. Blanco*, 975 F.2d 934, 942 (1st Cir. 1992). A circuit court's legal error is, "[b]y definition," an abuse of discretion. *Credit Coll. Servs., Inc. v. Pesicka*, 2006 S.D. 81, ¶ 5, 721 N.W.2d 474, 476 (internal quotation omitted). In its response, Johnson Properties more-or-less ignores these errors. The arguments it advances provide no basis on which the circuit court's fee award could be affirmed.

1. As demonstrated by its written findings and conclusions, the circuit court failed to calculate the lodestar and instead started from an implicit presumption that Johnson Properties' requested fee was reasonable.

Johnson Properties disputes that the circuit court failed to calculate the lodestar and argues that the "settled record" shows the opposite. (Appellee's Br. 10.) In support of this argument, Johnson Properties cites a brief colloquy at the fees hearing, during which its counsel acknowledged that the lodestar was the appropriate starting point for the analysis. (*Id.*) But Johnson Properties misses the point. The City does not dispute that *the parties* agreed on a $61,740 lodestar as the starting point. Counsel for Johnson Properties conceded this at the hearing. (Hrg. Tr. I, at 4-5; *see* Appellant's Br. 14.) But

this concession is not the circuit court's finding of fact or conclusion of law. Even if it was, if there is a discrepancy between a court's oral pronouncements at a hearing and its written findings and conclusions, the written findings prevail. *Fenske v. Fenske*, 542 N.W.2d 98, 102 (N.D. 1996); *see also, e.g.*, *State ex rel. J.J.W.*, 520 P.3d 38, 43 n.3 (Utah Ct. App. 2022); *Thyssenkrupp Safway, Inc. v. Hyland Hills Parks & Rec. Dist.*, 271 P.3d 587, 589 (Colo. Ct. App. 2011); *Cole Vision Corp. v. Hobbs*, 714 S.E.2d 537, 540 (S.C. 2011). Johnson Properties has not provided this Court with any authority that suggests otherwise. Johnson Properties' counsel conceded what had to be conceded. But the circuit court's findings and conclusions are not consistent with that concession.

In the circuit court's written findings and conclusions—which are what this Court reviews—there is no mention of the agreed-upon lodestar. (*See generally* FOF & COL; *see also* App. 43-44 (objecting to the proposed findings and conclusions on this basis).) Instead, the circuit court began its analysis by reciting the contingency calculations outlined by Johnson Properties. (FOF ¶ 17.) Quoting *City of Sioux Falls v. Kelley*, 513 N.W.2d 97 (S.D. 1994), the court then dismissed as illusory the notion that an adequate fee "can necessarily be ascertained by merely multiplying attorney's hours and typical hourly fees." (COL ¶ 6.) It omitted the immediately qualifying language dictating that this "simple mathematical exercise" is nevertheless "the only legitimate starting point for analysis." *Kelley*, 513 N.W.2d at 112. After setting the contingency amount as the baseline, the circuit court walked through the factors set forth in *Kelley*, deploying them as a means of defending the figure requested by Johnson Properties in the first instance, rather than as factors that might justify a deviation from the lodestar. (*See* COL ¶ 7.)

In calculating a reasonable award under a fee-shifting statute, there is no presumption that a party's requested award is reasonable. *Koehler v. Farmers All. Mut. Ins. Co.*, 566 N.W.2d 750, 755 (Neb. 1997). Rather, the court's analysis "must begin" with the lodestar. *Stern Oil Co. v. Brown*, 2018 S.D. 15, ¶ 51 n.7, 908 N.W.2d 144, 159 n.7 (internal quotation omitted). The burden is then on the landowner to show the basis for a departure. *See Arrowhead Ridge I, LLC v. Cold Stone Creamery, Inc.*, 2011 S.D. 38, ¶ 25, 800 N.W.2d 730, 737 ("The party requesting an award of attorneys' fees has the burden to show its basis by a preponderance of the evidence."). By failing to start its analysis with the lodestar, and instead using Johnson Properties' requested figure as the starting point, the circuit court committed reversible error. *See Vines v. Welspun Pipes*, 9 F.4th 849, 855-57 (8th Cir. 2021) (vacating a district court's fee award solely because it "did not calculate the lodestar"); *Jet Mw.*, 93 F.4th at 421 (same, because "the district court never set forth its lodestar calculation prior to considering additional factors"). The lodestar method, by design, operates as a restraint on the discretion afforded to circuit courts. Discarding that limitation constituted legal error and an abuse of discretion.

2. The circuit court misapplied and double-counted several factors already inherent in the lodestar calculation—without which there is no legally cognizable basis for deviating from the lodestar.

Even had the circuit court properly started its analysis with the lodestar, its application of the *Kelley* factors would have constituted an abuse of discretion. Once a lodestar is set, the only remaining question is whether that figure ought to be adjusted, up or down, to account for the other factors. *See Kelley*, 513 N.W.2d at 112. Here, the circuit court recited the eight factors established in *Kelley* in weighing an adjustment. But simply reciting the factors is not enough. By using some of these factors to justify a

dramatic increase, the court double-counted considerations already accounted for by one or both of the two inputs to the lodestar formula—(i) the "higher hourly rate" of $450 Johnson Properties' counsel charges "for eminent domain work," (*see* Rec. 408), and (ii) the 137.2 hours he spent working on this case. (*See id.* at 413-14.) By so doing, the court committed legal error: The question of "whether a particular type of enhancement to a lodestar is legally viable involves mainly a question of law." *Lipsett*, 975 F.2d at 942.

Rather than mounting a defense to the City's assertions of error, Johnson Properties simply quotes the circuit court's reasoning.[1] (*See* Appellee's Br. 8-10.) Beyond reciting these written conclusions, it makes no real attempt to justify the circuit court's double-counting. That should be unsurprising, as there is no plausible defense. Take, for example, the circuit court's attempt to justify the dramatic variance on the basis of the novelty or difficulty of the issues at play in condemnation cases. Typically, "[t]he novelty and complexity of the issues" involved in a case are "fully reflected in the number of billable hours recorded by counsel." *Blum v. Stenson*, 465 U.S. 886, 898 (1984). That principle accords with simple intuition: One would expect a case involving complex issues to place bigger demands on an attorney's time, while straightforward cases can be resolved with a smaller investment. Both below and before this Court, Johnson Properties has never argued that the time its counsel expended on this case did not accurately reflect the novelty or complexity of the issues presented. In fact, it has

[1] By adopting this reasoning without caveat, Johnson Properties embraces even the most obvious of legal and factual errors. For example, it defends the inclusion of sales tax in the fee award, (*see* Appellee's Br. 5), even though the City is statutorily exempt from the sales tax. SDCL § 10-45-10. And it repeatedly asserts that the City advanced a $51,647 valuation at trial, (*see* Appellee's Br. 9 (quoting COL ¶ 7(4))), when a cursory review of the record shows that this is not the figure the City used. (*See* Rec. 335.)

argued just the opposite: that "[t]he *time expended* by [its] counsel" was what was "necessary to adequately prepare the case." (Rec. 386-87 (emphasis added).)

A similar principle defeats Johnson Properties' attempt to justify the inflated fee award on the basis of its counsel's "experience, reputation, and ability." *Kelley*, 513 N.W.2d at 111 (quoting Model R. of Prof. Conduct 1.5). Even "brilliant insights and critical maneuvers" ordinarily "should be reflected in the reasonableness of the hourly rates," rather than made the subject of an upward variance from the lodestar figure. *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 555 n.5 (2010) (internal quotation omitted). On that score, Johnson Properties' counsel represented in affidavit form that his "current hourly rate for eminent domain work is $450.00 per hour"—the same $450 figure used to calculate the lodestar. (Rec. 408.) According to him, this figure is higher than the rate he charges in non-condemnation cases "because of [his] knowledge and expertise in this area of the law compared with other lawyers in the state." (*Id.*) By purporting to justify an increased award on the basis of the same "experience," "skill," and "ability," (COL ¶ 7(7)), the circuit court again engaged in double counting.

Johnson Properties' countervailing argument that a higher hourly rate "does not account for the efficiencies that skill and experience provide in reducing the amount of hours spent on the case by a less skillful or experienced lawyer" is inconsistent with authority and common sense. (Appellee's Br. 11-12.) One reason why a seasoned partner can justify charging a higher rate than a novice associate is because clients intuit that the partner's skill and learned experience will enable him or her to complete tasks in a manner more efficient than the associate. The same basic rationale supports a client's decision to retain a lawyer well-versed in a particular industry over a similarly skilled

lawyer without subject-matter expertise, even if the former charges a higher rate than the latter. The U.S. Supreme Court has recognized this basic point: There may be cases "where the experience and special skill of the attorney will require the expenditure of fewer hours than counsel normally would be expected to spend on a particularly novel or complex issue." *Blum*, 465 U.S. at 898. But, "[i]n those cases, the special skill and experience of counsel should be reflected in the reasonableness of the hourly rates." *Id.*

Likewise, on this record, without double counting, an upward variance cannot be justified on "the amount involved and the results obtained." *See Kelley*, 513 N.W.2d at 111 (quoting Model R. of Prof. Conduct 1.5). "Because acknowledgment of the 'results obtained' generally will be subsumed within other factors used to calculate a reasonable fee, it normally should not provide an independent basis for increasing the fee award." *Blum*, 465 U.S. at 900. A prudent attorney invariably will consider the potential for a positive result "when determining a reasonable number of hours to expend on any given issue or when allocating personnel resources based upon the expertise or experience required." *Bywaters v. United States*, 670 F.3d 1221, 1231 (Fed. Cir. 2012). The City has not questioned counsel's resource allocations. And there has been no showing that the results "overshadowed, or somehow dwarfed, the lodestar," such that an adjustment was needed. *Lipsett*, 975 F.2d at 942-43 (recognizing that any exception for increases based on exceptional results "is a tiny one," which should not "eclipse the rule").

In short, it constituted double counting for the circuit court to increase Johnson Properties' fee award based on any of (i) the time, labor, or skill required of counsel to respond to legal issues, (ii) the amounts at stake in and the results of the litigation, and (iii) counsel's experience, reputation, and ability. Each of these considerations was

already baked into the lodestar, which both sides agreed was the product of a reasonable number of attorney hours expended and a reasonable hourly rate. Under such circumstances, no increase above the lodestar was warranted—much less an increase of over 200 percent. It was legal error for the circuit court to rely on these factors to augment the fee award, and Johnson Properties makes no real case to the contrary.

Aside from these instances of improper double counting, there is only one possible justification for more-than-doubling the lodestar: the raw fact that Johnson Properties and its counsel entered into a private contingency arrangement, which, as it happens, tracks the general framework of the circuit court's award. But that alternative basis for the award runs counter to this Court's precedent. In *Kelley*, this Court rejected the proposition that a fee can be awarded "solely on the basis of [a] contingent-fee contract." 513 N.W.2d at 111-12 (internal quotation omitted). Even if such arrangements were "perfectly valid and proper as between an attorney and his client, it [did] not necessarily follow that such fee is a reasonable fee to be taxed against the party taking private property for a public use, as permitted under [§ 21–35–23]." *Id.* at 111. Instead, it was "the reasonableness of the fee, and not the arrangements the attorney and his client may have agreed upon, which [was] controlling." *Id.* at 112.

In simple terms, while a court may consider the private fee structure as one consideration among many in evaluating a proposed award, *see id.* at 111, the terms of a private contingency arrangement cannot unilaterally dictate the reasonableness of an award entered pursuant to a fee-shifting statute. The Court had good reason to draw this line. Contingent risk "is the product of two factors: [(i)] the legal and factual merits of the claim, and [(ii)] the difficulty of establishing those merits." *City of Burlington v.*

Dague, 505 U.S. 557, 562 (1992). The difficulty of establishing the merits of a claim is already "reflected in the lodestar—either in the higher number of hours expended to overcome the difficulty, or in the higher hourly rate of the attorney skilled and experienced enough to do so." *Id.* at 562-63. And, while the relative merits of a claim themselves are not necessarily reflected in the lodestar, "there are good reasons why [they] should play no part in the calculation of the award." *Id.* For example, because no claim is certain to succeed, the "computation of the lodestar would never end the court's inquiry in contingent-fee cases," *id.*, in direct contradiction to this Court's observation that the lodestar "normally provides full and reasonable compensation." *In re Microsoft Antitrust Litig.*, 2005 S.D. 113, ¶ 61, 707 N.W.2d 85, 106. For these reasons (and others), a party's simply adverting to the terms of a contingency-fee arrangement does not automatically make reasonable an award that is rooted in those terms.

This case illustrates the point. Ultimately, the court awarded $139,724.60 for 137.2 hours of work. (COL ¶ 12; Hrg. Tr. I, at 8; Rec. 413-14.) The effective hourly rate charged for Johnson Properties' counsel was thus $1,018.40—more than double his typical "hourly rate for eminent domain work," (*see* Rec. 408), and far in excess of the top-end hourly rates Johnson Properties' own affidavits say prevail for similar work in larger markets like Des Moines and Minneapolis-St. Paul. (*See id.* at 399 ($475 to $750 in the Twin Cities); *id.* at 401 ($350 to $550 in Des Moines).) Even the most sophisticated legal work in South Dakota does not typically call for rates approaching that figure. Yet, Johnson Properties insists that awarding $1,018.40 per hour is justified for no reason other than because it is based on a private contingency arrangement. This

is not the law: "[T]he reasonableness of the fee, and not the arrangements the attorney and his client may have agreed upon," is what matters. *Kelley*, 513 N.W.2d at 112.

Instead of confronting these issues, Johnson Properties erects a strawman: It suggests that the City is arguing that, in all instances, "a reasonable fee should only be calculated utilizing an hourly rate calculation." (Appellee's Br. 12.) But the City has argued no such thing. The City recognizes that a departure from the lodestar calculation may sometimes be warranted—such as when, for example, a party can show that "the hourly rate employed in the lodestar calculation does not adequately measure the attorney's true market value." *Perdue*, 559 U.S. at 554-55. But those cases represent the exception, not the rule. As this Court has observed, the lodestar is calculated on the assumption that it "normally" represents "full and reasonable compensation," even "for counsel who produces excellent results." *Microsoft Antitrust Litig.*, 2005 S.D. 113, ¶ 61, 707 N.W.2d at 106; *see also Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986) (explaining that the lodestar should be discarded only in "rare" and "exceptional" circumstances where "specific evidence" supports it). It is not a token to be discarded every time a landowner achieves a positive result at trial.

At any rate, to rule in favor of the City, this Court need not pen a treatise outlining all the circumstances in which upward deviations are appropriate. Rather, it need only accept two simple propositions: First, it must reaffirm what it has already decided—that the reasonableness of a proposed fee award is not to be determined "solely" by a private contingency arrangement. *See Kelley*, 513 N.W.2d at 111-12. To hold otherwise would place the "reasonableness" of the fee award in private hands and enable condemnation defendants and their attorneys to circumvent the reasonableness limitation altogether by

contracting for large contingency awards. Second, the Court must hold that, in any given case, factors like the novelty and complexity of the issues involved, counsel's experience and expertise, and the amount at stake in the litigation can be either baked in the lodestar calculation *or* used to justify an upward departure from the lodestar. They cannot be counted twice. While SDCL § 21-35-23 permits "a just and adequate fee," *id.* it does not contemplate a double recovery at the City's expense. *See Blum*, 465 U.S. at 899.

In response to this straightforward roadmap, Johnson Properties offers a flawed argument based on policy. It worries that any approach that does not give dispositive weight to a private contingency arrangement would not sufficiently "discourage the condemner from making low introductory offers." (Appellee's Br. 12.) By contrast, it says that its preferred approach would incentivize condemning authorities to minimize "the amount of the potential lift" by making higher initial offers to the landowner. (*Id.*) This is so, it suggests, because condemning authorities can be assumed to know not only that the most popular attorney-fee arrangement in a given locality is a contingency arrangement, but a contingency arrangement that uses a condemning authority's introductory offer as the starting point for calculating the lift. (*Id.*) As the theory goes, a condemning authority will respond to this fact by basing its initial offer not on a professional appraisal of market value (as it must in a case like this one, *see* SDCL § 21-35-24(5), (6)), but on the prospect that the landowner has entered into a contingency-fee agreement. The premise of this argument is flawed. Condemning authorities in quick-take cases have a legal duty to base offers on estimates of just compensation determined by market value, not fees. *See State Highway Comm'n v. Am. Mem. Parks, Inc.*, 144

N.W.2d 25, 27 (S.D. 1966) ("The 'just compensation' . . . to which an owner of property taken for public use is entitled is the full market value at the time of taking.").

Moreover, Johnson Properties' rationale has no basis in the facts of this case. There is no evidence that the City acted in bad faith or intentionally lowballed Johnson Properties. When it made its deposit with the clerk of courts, the City estimated just compensation as $51,647. (FOF ¶ 2; Rec. 17.) It arrived at that figure on the basis of an appraisal prepared by a licensed appraiser with expertise in right-of-way and eminent-domain appraisals. (*See* Rec. 28-30, 108-11; Trial Tr. 402-03.) Later, in an effort to settle the case before trial, the City made a final offer of $250,000. (FOF ¶ 3; Rec. 148.) When that offer was refused, the City advanced at trial a fair market valuation roughly in line with its initial figure—$51,711—on the basis of an updated appraisal. (Trial Tr. 466-67; *see* Rec. 335.) The gap between this figure and Johnson Properties' much higher $735,000 valuation, (*see* Rec. 320), owed both to Johnson Properties' proprietor holding an opinion of value that exceeded its own appraisal and to a disagreement about how to value the impact of the change in access on the value of the property. Johnson Properties argued that the highest and best use of the property changed from convenience retail to a lesser, destination-oriented use, like a warehouse. (Trial Tr. 219-20, 294.) The City's appraiser, by contrast, testified that the change in access did not change the highest and best use of the property, which made the before-and-after difference in value much smaller. This factual dispute explains the differences in opinion about just compensation.

The jury ultimately awarded $382,600, an amount between the figures advanced by each side. (FOF ¶ 5; Trial Tr. 550.) Although the jury did not accept the City's evidence of valuation (or Johnson Properties' valuation), there is no evidence that the

City somehow acted unreasonably by presenting its appraisal. For example, the City presented undisputed evidence that the revenues of the Alibi Bar were not affected by the change in access after construction—a point it used to argue that the highest and best use of the property (as a bar) was not impacted by the change in access. (Trial Tr. 125-27; *see* Rec. 362-79.) That the jury may have been unpersuaded by this or other evidence does not establish, or even imply, that the City lowballed the landowner. More to the point, that the jury awarded a higher amount does not suggest that the City would have modified its approach, and abandoned its best estimate of just compensation, simply because it suspected that the landowner had a contingency arrangement in place with its attorney. If anything, that the case proceeded as it did suggests just the opposite.

Even supposing that Johnson Properties' understanding of the incentives was correct, however, its argument is unmoored from the statutory text. *See* Antonin Scalia & Bryan Garner, *Reading Law* 34 (2012) ("[P]urpose—as a constituent of meaning—is to be derived exclusively from a text."). By its terms, § 21-35-23 is triggered whenever a judgment exceeds by 20-plus percent "the . . . final offer . . . filed with the court . . . at the time trial is commenced." If the legislature was concerned with incentivizing higher *introductory* offers, it would have drafted the statute with that concern in mind. Instead, it focused on the "final offer" that precedes trial. *See State ex rel. Dep't of Transp. v. Clark*, 2011 S.D. 20, ¶ 12, 798 N.W.2d 160, 165 (S.D. 2011) (explaining the evident purpose of the fee-shifting statute). Here, by contrast, neither Johnson Properties' contractual formula nor the formula adopted by the circuit court account for the final offer. They rest on the City's offer as of the time the landowner hires counsel, whenever that may be (in this case, before the City even deposited its initial estimate of just

compensation with the clerk). (FOF ¶¶ 17-18.) In other words, Johnson Properties' approach does not bear on the only incentive that appears on the face of the statute.

That leaves only Johnson Properties' simplistic reading of *City of Sioux Falls v. Johnson*, 2003 S.D. 115, 670 N.W.2d 360. Johnson Properties maintains that, under *Johnson*, an attorney-fee award can be justified simply because it is "midway between the award proposed by the City and the actual fees that will be paid to counsel by [the l]andowner" under its private arrangement with its counsel. (COL ¶¶ 8-11; *see* Appellee's Br. 13 (asserting that an award is justified if it falls "within the . . . range" between the lodestar figure and "the actual fees paid by the landowner").) But *Johnson* does not stand for nearly so broad a proposition. While the Court upheld a $174,900 fee award that fell in between the amount the landowner owed under his contingency-fee arrangement and the City's offer, the reasonableness of the fee was evaluated based on the time spent on the case. *See* 2003 S.D. 115, ¶¶ 10-11, 15, 670 N.W.2d at 363-64.

As the City has explained at length elsewhere, Johnson Properties' alternative reading amounts to little more than an exercise in bootstrapping. (*See* Appellant's Br. 30-31.) If its argument was accepted by the Court, it would provide the means for a landowner and its counsel to contract out of the "reasonableness" limitation altogether: They could demand that the condemning authority pay whatever fee they like, so long as (like here) they privately contract for a contingency fee that includes the amount of fees awarded as one input in their contractual formula. Tellingly, Johnson Properties does not respond to this point. However, consistent with *Kelley*, and with persuasive authority from the U.S. Supreme Court, the reasonableness of any departures from the lodestar are judged based on unique features of the case that lead to undercounting in the formula.

They cannot be dictated by the private contingency-fee arrangement that the landowner happens to have entered with its counsel. Any other result risks delegating the "reasonableness" of the fee award to the private whims of the landowner and passing to the City risks that were properly allocated to the landowner and its counsel.

Johnson Properties cannot justify the circuit court's inflated award solely on the basis of its private contingency arrangement. Meanwhile, in this case, there is no other basis for departing from the lodestar. Every other factor announced by this Court in *Kelley* either has no application on the facts of this case or already was incorporated in the hourly rate or hours expended that were used to produce the lodestar. (*See* Appellant's Br. 16-26.) With no legally cognizable basis for a departure, the circuit court's analysis of a "reasonable" fee award should have ended at the lodestar calculation. The only reasonable fee that could be awarded was $61,740.

CONCLUSION

When calculating a reasonable attorney fee under SDCL § 21-35-23, the lodestar figure—a reasonable hourly fee multiplied by the number of hours expended—"is the only legitimate starting point for analysis." *Kelley*, 513 N.W.2d at 112 (internal quotation omitted). This calculation "normally" establishes the "full and reasonable compensation" owed to a prevailing party. *Microsoft Antitrust Litig.*, 2005 S.D. 113, ¶ 61, 707 N.W.2d at 106. Here, the parties agreed that the lodestar is $61,740. There are no special circumstances that warrant a departure from that figure. To the contrary, the purported bases for a departure embraced by the circuit court (and restated verbatim by Johnson Properties here) are not legally cognizable under basic logic and established law: By awarding $139,724.60, the circuit court repeatedly double-counted factors already

embraced by the lodestar and, in effect, gave dispositive weight to a private contingency-fee arrangement, rather than assessing the reasonableness of any upward deviation. The circuit court's doing so was legal error and an abuse of discretion.

Against that backdrop, the City respectfully requests that the fee award entered by the circuit court be reversed. This Court should vacate the circuit court's award and hold that, without a legally cognizable basis for a departure, the lodestar of $61,740 represents a reasonable fee award in this case.

Dated this 12th day of June, 2025.

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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), the undersigned certifies that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word 365, features Times New Roman (12 point) font, and contains a total of 4,572 words, excluding the table of contents, table of authorities, and certificates of counsel. The undersigned has relied on the word and character count of the word-processing program to prepare this certificate.

Dated this 12th day of June, 2025.

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of June, 2025, a true and correct copy of the foregoing Appellant's Reply Brief was electronically filed and served via Odyssey File and Serve upon the following, with an original mailed to the clerk of the South Dakota Supreme Court at 500 East Capitol Avenue, Pierre, South Dakota, 57501.

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