

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

MAY 29 2013

S.C. SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

John C. Few and D. Garrison Hill, Circuit Court Judges

Opinion No. 2010-5016 (S.C. Ct. App. Filed August 1, 2012,
Withdrawn, Substituted, and Refiled January 23, 2013)

The South Carolina Public Interest Foundation, and Edward D. Sloan, Jr.,
individually and on behalf of all others similarly situated,.....Petitioners,

v.

Greenville County, Herman G. Kirven, Jr., Judy Gilstrap, Eric Bedingfield, Jim Burns, Scott
Case, Joseph Dill, Cort Flint, Lottie Gibson, Mark Kingsbury, Xanthene Norris, Robert Taylor
and Tony Trout Respondents.

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

THE CARPENTER LAW FIRM, PC

James G. Carpenter, S.C. Bar No. 1136
Jennifer J. Miller, S.C. Bar No. 13611
819 East North Street
Greenville, South Carolina 29601
(864) 235-1269 Tel.
(864) 331-3083 Fax.
Attorneys for Petitioner

Other Counsel of Record:

Boyd B. Nicholson, Jr.
Bonnie A. Lynch
Haynsworth Sinkler Boyd, PA
PO Box 2048
Greenville, SC 29601
(864) 240-3200
Attorneys for Respondents

Defendants continue to argue that *res judicata* bars the Petitioners' claims. First, they contend that recent cases from this Court support their argument. Second, they contend that the Petitioners are arguing to change the law of *res judicata*. Third, they contend that the Petitioners' assessment of the ruling from the Court of Appeals is simply wrong. Petitioners submit this Reply in Support of their Petition for Writ of Certiorari to demonstrate that this Court's most recent extensive discussions of *res judicata* support the Petitioners' argument, and *res judicata* does not bar Petitioners' claims.

ARGUMENT

Defendants rely heavily on *Judy v. Judy*, 393 S.C. 160, 712 S.E.2d 408 (2011), which, in turn, relied on this Court's previous decision *Plum Creek Development Company, Inc. v. The City of Conway*, 334 S.C. 30, 512 S.E.2d 106 (1999).

Plum Creek contains one of the most comprehensive discussions on *res judicata*. *Id.* The Plaintiff, Plum Creek Development Company, had previously sued the City of Conway for mandamus to provide water and sewer services without annexation into the city. Later, the City failed to comply with the mandamus, and the development company brought a separate action alleging breach of the contract and breach of an easement agreement, which were the basis of the earlier mandamus proceeding. The Circuit Court rejected the City's defense of *res judicata*, but the Court of Appeals reversed and ruled that because the wrong and the damages arose from the identical contract and easement agreement in both actions, *res judicata* barred the second action.

This Court agreed with the Court of Appeals. This Court issued an extended discussion of the nature of *res judicata* and ruled, "Res judicata bars subsequent actions by the same parties *when the claims arise out of the same transaction or occurrence*

that was the subject of a prior action between those parties.” *Id.*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999).

This Court reasoned further,

The *subject matter* in Plum Creek’s mandamus proceeding and damage action *is the same*. Both the mandamus proceeding and the damages action clearly arise from *the same factual basis*—City’s refusal to provide water and sewer service to the development unless it was annexed. Both proceedings concern *the same contract and easement agreement*. The only difference between the two proceedings is the remedy sought by Plum Creek. A different remedy, however, does not alter the fact that *the claims are identical* in both the mandamus action and current damage action.

Id. 334 S.C. 30, 35, 512 S.E.2d 106, 109 (1999) (emphasis added). Clearly, this Court viewed the identity of the claim to mean that the claim in the second action had the same factual basis as the one in the first action.

In a footnote, the *Plum Creek* court cited *South Carolina Civil Procedure* and its analysis:

South Carolina courts use various tests in determining whether a claim should have been raised in a prior suit: 1) when there is *identity of the subject matter* in both cases; 2) where the cases involve the *same primary right* held by the plaintiff and one primary wrong committed by the defendant; 3) when there is the *same evidence* in both cases; and recently 4) when the claims arise out of the *same transaction or occurrence*. *South Carolina Civil Procedure*, pp. 649–50.

Id. 334 S.C. 30, 35, n. 3, 512 S.E.2d 106, 109 (1999) (emphasis added). This Court again cited these four factors in *Judy v. Judy*, 393 S.C. 160, 171, 712 S.E.2d 408, 414 (2011), and clarified their importance:

Because this conceptual framework is fundamentally sound, we take this opportunity to definitively rule that the four tests previously used by our appellate courts should be considered merely as factors rather than rigid, independent tests. We believe this approach effectuates the fundamental purpose of *res judicata*, which is to ensure that “no one should be twice sued for the same cause of action.” *First Nat’l Bank of Greenville v. U.S. Fid. & Guar. Co.*, 207 S.C. 15, 24, 35 S.E.2d 47, 56 (1945).

Id. at 393 S.C. 160, 173, 712 S.E.2d 408, 414 (2011).

The *Plum Creek* Court concluded on that basis that *res judicata* applied to bar the second action. This Court further explained its reasoning:

While a writ of mandamus is not a cause of action, there must be *underlying facts* which support issuance of the writ. *Where those underlying facts or subject matter of the mandamus proceeding and a subsequent proceeding are identical, and the other two elements exist, res judicata applies.* 50 C.J.S. *Judgment* § 749 (1997) (for purposes of *res judicata*, “cause of action” is not the form of action in which a claim is asserted but, rather the “*cause for action, meaning the underlying facts combined with the law* giving the party a right to a remedy of one form or another based thereon.”).

Id. 334 S.C. 30, 36, 512 S.E.2d 106, 109-110 (1999) (emphasis added).

Later in the *Plum Creek* opinion, this Court distinguished *Moseley v. Welch*, 218 S.C. 242, 62 S.E.2d 313 (1950). In analyzing *Moseley*, the *Plum Creek* court reasoned that in *Moseley*, this Court “concluded *res judicata did not* bar appellants’ action *because new facts*, the acquisition of property and *payment of taxes* in the new school district, *had altered the legal rights* of the parties.” *Id.* 334 S.C. 30, 38, 512 S.E.2d 106, 110 (1999) (emphasis added). In *Slush Fund III*, the case before this Court, new facts, payment of new taxes, and a new ordinance with new expenditures and allocations altered the legal rights of the Plaintiffs from those in *Slush Fund I*.

Similarly the *Plum Creek* Court distinguished *Griggs v. Griggs*, 214 S.C. 177, 51 S.E.2d 622 (1949).

In *Griggs*, the Court held *res judicata did not bar* the defendant from pleading adverse possession where in the first action as plaintiff she had alleged breach of deed agreement. The Court noted *different facts and evidence were necessary* to support the different causes of action, adverse possession and breach of deed agreement. Here, however, *Plum Creek’s* causes of action in each suit are the same; it simply seeks different remedies.

Id. 334 S.C. 30, 35, n. 4, 512 S.E.2d 106, 109 (1999) (emphasis added). Likewise, in

Slush Fund III, “different facts and evidence are present to fulfill different causes of action.” The taxes paid, allocation and expenditures made in 2005-2009 were nonexistent during the time of Slush Fund I.

In *Judy v. Judy*, this Court continued to reason that *res judicata* properly applies when the claim in the second lawsuit arises out of ***the same facts*** as the claim in the first lawsuit. This Court reasoned:

Instead, we reiterate and rely on the conceptual framework recognized in *Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 512 S.E.2d 106 (1999), wherein we stated:

Res judicata bars subsequent actions by the same parties when the claims arise out of ***the same transaction or occurrence*** that was the subject of a prior action between those parties. Under the doctrine of res judicata, “[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit.”

Id. at 34, 512 S.E.2d at 109 (citations omitted).

In *Plum Creek*, we also recognized that simply seeking a different remedy in the second lawsuit for the same cause of action does not negate the identical nature of the subjects of the two actions. *Plum Creek Dev. Co.*, 334 S.C. at 35 n. 4, 512 S.E.2d at 109 n. 4. We explained that “[a] claim for damages is a claim for relief rather than an assertion of a different cause of action for purposes of determining the applicability of res judicata.” *Id.* at 35, 512 S.E.2d at 109 (quoting 46 Am.Jur.2d *Judgments* § 536 (1994)). Furthermore, we noted that “***for purposes of res judicata, ‘cause of action’ is not the form of action in which a claim is asserted but, rather the ‘cause for action, meaning the underlying facts*** combined with the law giving the party a right to a remedy of one form or another based thereon.” *Id.* at 36, 512 S.E.2d at 110 (quoting 50 C.J.S. *Judgment* § 749 (1997)).

Judy v. Judy, 393 S.C. 160, 172, 712 S.E.2d 408, 414 (2011) (emphasis added). The claims of Slush Fund III did not “arise out of the same transaction or occurrence that was the subject of a prior action between those parties.” The transactions, occurrences were completely different, separated by nearly ten years.

The reasoning of *Plum Creek* and *Judy v. Judy* requires that the ruling of the Court of Appeals in the present case be reversed. The facts in Slush Fund I arose in the 1990s. The facts in Slush Fund III arose in 2005-2009. As in *Griggs*, the two claims, one against the section of the County Code, and the other against the South Carolina Constitution require “different facts and evidence.” Proof of the violations of the County code would require evidence of the provisions of the relevant section of the County Code.

Greenville County Code, Division 2, § 7-81 requires the following:

- (a) Appropriations of funds shall be made only by county council to departments and agencies to provide public services to county citizens. Appropriation of funds to private, nonprofit organizations and institutions is prohibited.
- (b) Requests for county funds will be submitted to council for review during the regular county budget process, and appropriations will be made only for specific line item purposes.

Id. Evidence and arguments to prove a violation of this code section would include factual matters related to whether the recipients of county funds were “departments and agencies,” whether those recipients “provide public services,” whether they provide them “to county citizens,” whether the recipients were “private, nonprofit organizations and institutions,” whether the requests for county funds were “submitted to council for review during the regular budget process,” and whether appropriations were “made only for specific line item purposes.” None of these factual inquiries, relevant to Slush Fund I, would be relevant to Petitioners claim of Constitutional violations in Slush Fund III.

In contrast, the relevant factual and legal inquiries related to the Constitutional violation alleged in Slush Fund III relate to whether the delegation of decision-making authority for Slush Fund expenditures was an administrative decision or a legislative decision, the amount of discretion that each council member exercised, and whether the delegation of such authority was an unlawful delegation of legislative authority. Proving

a violation of the South Carolina Constitution would require discussion of the Constitutional provisions. None of these factual and legal issues would be relevant in Slush Fund I's claim of violation of the County Code.

In addition, as in *Moseley*, the "new facts" in Slush Fund III: were the new taxes paid, the new allocations and expenditures made from 2005-2009, the new governing ordinance, all of which were *not* a part of Slush Fund I, which addressed facts arising in 1995-1998.

In contrast to *Plum Creek*, the "underlying facts or subject matter" were *not identical* in Slush Fund I and Slush Fund III. Furthermore, the "*cause for action, meaning the underlying facts combined with the law* giving the party a right to a remedy of one form or another based thereon" was not the same in Slush Fund I and Slush Fund III. *Id.*

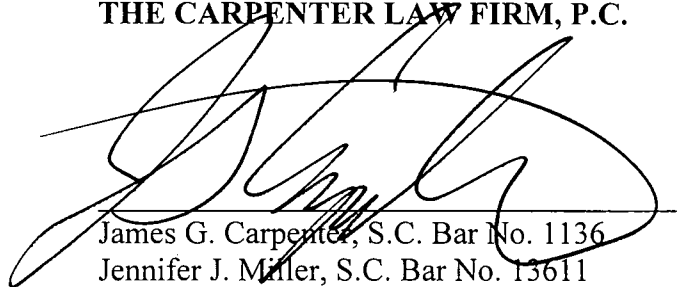
Finally, in cases involving a constitutional challenge to repeated government oversteps, *res judicata* should be considered very carefully. A citizen taxpayer dedicating personal funds to challenge unconstitutional acts and obtain an injunction should not bear the same scrutiny as a plaintiff seeking personal financial benefit. Clearly, this case is distinguishable on that basis alone.

CONCLUSION

Res judicata does not bar the Petitioners' claims. Accordingly, Petitioners respectfully pray the Court for a Writ of Certiorari to the Court of Appeals and a reversal of its judgment.

Respectfully submitted, this 23rd day of May, 2013,

THE CARPENTER LAW FIRM, P.C.



James G. Carpenter, S.C. Bar No. 1136
Jennifer J. Miller, S.C. Bar No. 13611
819 East North Street
Greenville, SC 29601
Telephone: (864) 235-1269
Facsimile: (864) 331-3083
Attorneys for Petitioners

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

John C. Few and D. Garrison Hill, Circuit Court Judges

Opinion No. 2010-5016 (S.C. Ct. App. Filed August 1, 2012,
Withdrawn, Substituted, and Refiled January 23, 2013

The South Carolina Public Interest Foundation, and Edward D. Sloan, Jr.,
individually and on behalf of all others similarly situated,.....Petitioners,

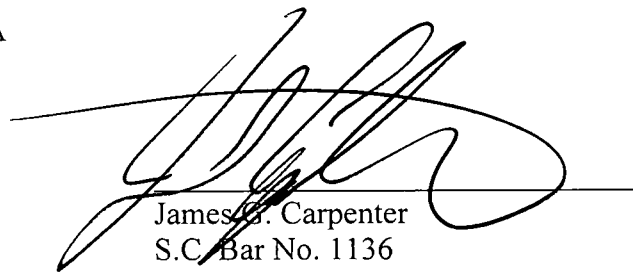
v.

Greenville County, Herman G. Kirven, Jr., Judy Gilstrap, Eric Bedingfield, Jim Burns,
Scott Case, Joseph Dill, Cort Flint, Lottie Gibson, Mark Kingsbury, Xanthe Norris,
Robert Taylor and Tony Trout Respondents.

PROOF OF SERVICE

I certify that I have served the foregoing Reply in Support of Petitioner for Writ of
Certiorari by first class mail, postage prepaid this May 23, 2013, addressed to:

Boyd B. Nicholson, Esq.
HAYNSWORTH SINKLER BOYD, PA
P.O. Box 2048
Greenville, SC 29602



James G. Carpenter
S.C. Bar No. 1136
819 E. North St.
Greenville, South Carolina 29601
Tel. (864) 235-1269
Fax (864) 331-3083
Attorneys for Petitioners