STATE OF SOUTH CAROLINA)	IN THE CIRCUIT COURT FOR THE
)	SECOND JUDICIAL CIRCUIT
COUNTY OF AIKEN)	
Mark Gregory Thompson and Jane Page Thompson, individually and on behalf of all those similarly situated,)	Civil Action Number 2021CP0202323
Plaintiffs,)	
vs.)	**ORDER ON MOTION TO ALTER OR AMEND REGARDING COUNTY DEFENDANTS**
Clay Killian, in his official capacity as Aiken County Administrator, Jason Goings, in his official capacity as Treasurer of Aiken County, Aiken County Council, Aiken County, City of Aiken, Aiken City Council, and Stuart Bedenbaugh in his official capacity as City Manager of Aiken,)	
Defendants.)	

Heard: January 13, 2023 via Webex Virtual Courtroom by consent
Attorney for Plaintiffs: William C. Lewis
Attorney for Aiken County Defendants[1] (Goings & Aiken County): Bradley T. Farrar
Attorney for City of Aiken Defendants (City Council, Bedenbaugh, & the City): Andrew Lindemann
Court Reporter: None – Webex recording procedure, by consent

Plaintiffs move to alter or amend an order of dismissal dated August 8, 2022. The basis of that ruling was that the plaintiffs cannot bring this case as a class action. A partial ruling on the motion for

[1] Clay Killian and Aiken County Council have been dismissed. The remaining County defendants, Jason Goings and Aiken County, have filed a return to the Motion to Reconsider. The rulings in this case have been segregated with an order related to the action against the City of Aiken defendants and the Aiken County defendants. An order filed October 14, 2022, indicated that written submissions were requested, but only requested asked for the City defendants' positions. However, in early January of 2023, two orders were issued establishing that a hearing would be conducted on the claims of both City and County. The court is considering the motion to alter or amend as having been fully argued as to the County defendants, and that no further briefing has been requested. Plaintiff's counsel may notify the court within 5 days of the filing of this order if they have a different interpretation and feel they were deprived of an opportunity to brief the issues.

reconsideration was issued January 3, 2023, declining to modify the ruling that a class action is barred in this circumstance. The prior order did not rule on other matters raised. The parties now request rulings on those issues. The motion to alter or amend is granted in part and denied in part, as set forth below. However, the net effect is that the case is dismissed, without prejudice.

BACKGROUND

This lawsuit relates to road maintenance fees imposed under separate ordinances by the City of Aiken and Aiken County. The initial order dismissed this case against both the City and County defendants, without prejudice, finding that class action lawsuits cannot be brought against political subdivisions.[2] A separate order dealing with the motion to alter or amend the rulings related to the City of Aiken has been filed. This order deals with the County ordinances and fees.

First, the plaintiffs' request the court to rule that the lawsuit may proceed by the plaintiffs in their individual capacities. The court had read the action as a class action because of certain averments in the Complaint, but upon reconsideration finds that there were sections of the Complaint that sought relief in individual capacities. Because of the strict standards applicable to dismissal at this stage, the court now agrees that the Complaint should have been construed so that the plaintiffs might sue in their individual capacities, if those claims are not subject to dismissal on other grounds. The other grounds for dismissal are discussed below, and those result in dismissal of the individual claims, as well.

The plaintiffs' causes of action are predicated on the assertion that the road maintenance fee is actually a tax. *Burns v. Greenville County Council*, 433 S.C. 583, 861 S.E.2d 31 (2021). *Burns* determined that the Greenville County road maintenance fee ordinance imposed an impermissible tax. The City of Aiken rescinded its road maintenance fee following *Burns*, but the

[2] *Aiken v. South Carolina Dept. of Revenue*, 429 S.C. 414, 839 S.E.2d 96 (2020)

County did not. This prompted the plaintiffs to differentiate between the claims against the City and those lodged against the County.

AIKEN COUNTY DEFENDANTS

The plaintiffs allege wrongful collection of the Aiken County road maintenance fee that was imposed by ordinance in 1992 and has continued uninterrupted for each year since. *Burns* ruled that a "road maintenance fee" as implemented by the Greenville County Council is actually a tax that violates S.C. Code Ann. § 6-1-630. It declared the Greenville fees to "invalid under South Carolina law." 861 S.E.2d at 31.

This lawsuit includes a request for a declaratory judgment establishing that Aiken County's fee is an impermissible tax. The plaintiffs also seek monetary relief in the form of a refund of the road maintenance fees previously paid. The plaintiffs raise three causes of action seeking the monetary relief against the County defendants: (1) an equitable claim for unjust enrichment; (2) a claim for a violation of S.C. Code Ann. § 8-21-30 against the defendants Aiken County and Goings as its Treasurer; and (3) a claim for violation of Article I, § 3 of the South Carolina Constitution.

RECOVERY FOR INVALID IMPOSITION OF A TAX

The plaintiffs' contention is that the ordinances passed over the applicable years by Aiken County are essentially the same as the ones in Greenville County and were reached in the same impermissible way. That is a heavily disputed factual issue. *Burns* does not declare all road maintenance fees to be taxes. Instead, the Supreme Court recognized that there is a permissible way to have an enforceable road maintenance fee. *Burns* affirms a county's authority to impose uniform service charges under two separate statutes, stating:

> South Carolina law permits counties "to . . . levy ad valorem property taxes and uniform service charges." S.C. Code Ann. § 4-9-30(5)(a) (2021); see also S.C. Code Ann. § 6-1-330(A) (2004) ("A local governing body . . . is authorized to charge and collect a service

> or user fee."); S.C. Code Ann. § 6-1-300(6) (2004) ("'Service or user fee' also includes 'uniform service charges'.").

There are many assertions of fact concerning differences between Aiken County's ordinances and Greenville's. Those are outside the four corners of the Complaint and not permitted to be considered in a Rule 12(b)(6) motion. The question before the court is whether the plaintiffs can seek a declaration from this court that the fees are actually taxes or whether they are required to pursue their claims of invalidly collected taxes through administrative channels.

While basing their Complaint on the *Burns* court's ruling of an impermissibly imposed tax, the plaintiffs then style Aiken County's road maintenance uniform service charge as a fee. This wordplay is inconsistent. Recognizing that a plaintiff may plead in the alternative, that is not what is being done here. Based on the pleading, <u>any invalidity of the Aiken County ordinance requires its actually being a tax</u>.

The plaintiffs argue that the court has misapplied or ignored legislative intent in enacting the Revenue Procedures Act (RPA). S.C. Code Section 12-60-20 states:

> It is the intent of the General Assembly to provide the people of this State with a straightforward procedure to determine ***a dispute with the Department of Revenue and a dispute concerning property taxes.*** The South Carolina Revenue Procedures Act must be interpreted and construed in accordance with, and in furtherance of, that intent. (emphasis supplied).

The Complaint notes that a road maintenance fee is based on ownership of personal property – a registered motor vehicle. If the fee is a tax, it is assessed on ownership of property, but not its value.

The Plaintiffs rely upon *Aiken v. South Carolina Department of Revenue,* 429 S.C. 414, 839 S.E.2d 96 (2020), claiming that the dispute with the Department of Revenue makes *Aiken* distinguishable. The prior order discussed *Aiken* in the context of prohibiting class action

lawsuits. The Supreme Court in *Aiken* interpreted the language of statutory intent cited above to mean that a dispute concerning property taxes is covered, whether or not the Department of Revenue is a party.

Having reconsidered the matter, the court finds that the challenges raised in this Complaint are to addressed through the RPA.[3] The action for declaratory relief remains dismissed.

SUBJECT MATTER JURISDICTION

REVENUE PROCEDURES ACT

The prior order stated, "The court determines that *Aiken* prohibits this action, and it does not reach the other subject matter jurisdiction arguments." The parties now seek rulings.

The administrative procedure includes the ability to appeal issues raised before the Administrative Law Court. The Plaintiffs' claims seeking a refund or recovery of any alleged illegal or wrongfully collected taxes may be pursued through administrative channels. *See, B & A Development, Inc. v. Georgetown County*, 372 S.C. 261, 641 S.E.2d 888 (2007). The plaintiffs are not challenging the constitutionality of any statute.[4] Based upon S.C. Code Ann. § 12-60-80(A), the South Carolina Revenue Procedures Act provides for the exclusive remedy "in any case involving the illegal or wrongful collection of taxes, or attempt to collect taxes." S.C. Code Ann. § 12-60-3390 provides: "If a taxpayer brings an action covered by this chapter in circuit court, the circuit court shall dismiss the case without prejudice." The prior order dismissed the

[3] The court does have a practical concern in that the *Burns* case was initiated in circuit court.

[4] In a footnote, the prior order notes: "Plaintiffs' counsel stated on page 62 of the transcript: 'And, lastly, I will accept the stipulation that money damages aren't being claimed under the due process claim. I would ask, then, that that cause of action be dismissed.'"

claims without prejudice, leaving the plaintiffs the ability to pursue relief elsewhere. They have not exhausted administrative remedies under the RPA.

SOVEREIGN IMMUNITY

Another issue related to subject matter jurisdiction is the contention that the unjust enrichment claim is barred by sovereign immunity. The court agrees. The South Carolina General Assembly has not explicitly waived sovereign immunity to allow a claim for unjust enrichment to be prosecuted against a governmental entity.

The common law doctrine of sovereign immunity was abrogated in 1986. *McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985). However, in 1986, and in response to the Supreme Court's abrogation of sovereign immunity, the General Assembly enacted the Tort Claims Act. In so doing, the legislature first reinstated sovereign immunity in full, subject only to express waivers and limitations on actions against governments in South Carolina. *Murphy v. Richland Memorial Hospital*, 317 S.C. 560, 455 S.E.2d 688, 690 (1995) announced that, "…[i]n *McCall* we abolished the doctrine of sovereign immunity. In response to our decision in *McCall*, the legislature implemented a comprehensive act providing for the logical disposition of governmental liability. The Act first completely restores sovereign immunity. The Act then provides specific waivers and limitations on actions against governmental entities. Thus, the Tort Claims Act is a limited waiver of governmental immunity." (Internal citations omitted).

In S.C. Code Ann. § 15-78-20(a), the General Assembly determined that:

> [i]t is declared to be the public policy of the State of South Carolina that the State, and its political subdivisions, are only liable for torts within the limitations of this chapter and in accordance with the principles established herein."

The Tort Claims Act further provides that the General Assembly, "[i]ntends to grant the State, its political subdivisions, and employees, while acting within the scope of official duty,

immunity from liability and suit for any tort except as waived by this chapter," and, "[o]nly to the extent provided herein. All other immunities applicable to a governmental entity, its employees, and agents are expressly preserved." See § 15-78-20(b) [Emphasis added].

The question is whether this Act only intended to bar liability for tortious conduct as opposed to other theories of recovery such as non-tort/equitable remedies. The Tort Claims Act contains an explicit carveout for actions arising in contract. Section 15-78-20(d) reads, "Nothing in this chapter affects liability based on contract nor does it affect the power of the State or its political subdivisions to contract." Including reference to actions in contract within the Tort Claims Act indicates that the General Assembly considered the impact upon other remedies, including equitable remedies, in making its determination to reestablish sovereign immunity.

S.C. Code § 15-78-20(f) states, "[t]he provisions of this chapter establishing limitations on and exemptions to the liability of the State, its political subdivisions, and employees, while acting within the scope of official duty, must be liberally construed in favor of limiting the liability of the State."

The Tort Claims Act does not include a waiver of sovereign immunity for equitable causes of action for unjust enrichment or *quantum meruit* that do not lie in tort. While these are quasi contract actions, our Supreme Court held in *Dema v. Tenet Physician Services*, 383 S.C. 115, 678 S.E.2d 430 (2010), that "unjust enrichment is an equitable doctrine which permits the recovery of that amount the defendant has been unjustly enriched at the expense of the plaintiff." 678 S.E.2d 434. The State has never explicitly waived sovereign immunity for unjust enrichment, or any other equitable claim against the State or its political subdivisions.[5] It is well settled that "[w]aivers of

[5] "[w]aivers of the Government's sovereign immunity, to be effective, must be 'unequivocally expressed'" in legislation. *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33 (1992). *See also*, *United States v. Bormes*, 133 S.Ct. 12, 16 (2012).

the Government's sovereign immunity, to be effective, must be 'unequivocally expressed'" in legislation. *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33 (1992). *See also, United States v. Bormes*, 133 S.Ct. 12, 16 (2012).

The plaintiffs' cause of action for unjust enrichment is a non-tort/equitable claim, barred by sovereign immunity. It is dismissed because the General Assembly has never explicitly waived sovereign immunity for such an equitable claim, like it has for tort claims.[6]

RETURN OF FEES PLUS TENFOLD PENALTY

Plaintiffs assert that they are entitled to return of fees, plus a penalty, presumably if the road maintenance fees are not declared to have been taxes. S.C. Code § 8-21-10 prohibits officers listed in that section from improperly imposing fees and states that the provisions are not applicable to other officers.

S.C. Code Section 8-21-10 provides:

> The several officers named in this chapter, Article 3 of Chapter 11 of Title 14, Chapter 19 of Title 14, Article 7 of Chapter 23 of Title 14, Chapter 19 of Title 19, Chapter 7 of Title 22, Article 3 of Chapter 9 of Title 22, and Article 1 of Chapter 19 of Title 23, shall be entitled to receive and recover the fees and costs prescribed by this chapter, Article 3 of Chapter 11 of Title 14, Chapter 19 of Title 14, Article 7 of Chapter 23 of Title 14, Chapter 19 of Title 19, Chapter 7 of Title 22, Article 3 of Chapter 9 of Title 22, and Article 1 of Chapter 19 of Title 23, and none other, <u>for the services herein enumerated</u>. (Emphasis supplied herein).

S.C. Code § 8-21-15 reads, in part:

> No fee for performing duty, responsibility, or function of agency unless authorized by statute and regulation; exceptions.
> (A) No state agency, department, board, committee, commission, or authority initially may set a fee for performing any duty, responsibility, or function unless the fee for performing the particular duty, responsibility, or function is authorized by statutory law and set by regulation except as provided in this section.

[6] Two earlier Circuit Court decisions were called to the attention of the court, not as precedent, but argued as being persuasive. This reasoning was applied by then Circuit Court Judge John Few in the case of *Shirley Iron Works v. City of Union*, Civil Action Number 2003-CP-44-171, and more recently by Circuit Court Judge Jocelyn Newman in *Fields v. Richland County*, Civil Action Number 2020-CP-40-2621.

Section 8-21-30 establishes a penalty of ten times the illegally charged fee.

The Supreme Court in *Burns* makes no mention of the invalidity of Greenville County's ordinances under §§ 8-21-10, et seq. It discusses deficiencies under § 4-9-30(5)(a) and § 6-1-330(A), specifically finding that Greenville County's failure to comply with § 6-1-330(A) makes its fees taxes.

Pursuant to § 8-21-10, only the fees and costs prescribed in Chapter 21 are recoverable. Road maintenance is not one of the "services enumerated" in that limited fee statute. Rather, Chapter 21 deals with fees charged and collected for such things as mileage reimbursement for jurors and witnesses (§ 8-21-20), fees for recording a mark or brand imposed by the Secretary of State (§ 8-21-110), fees of appraisers of homestead and commissioners in dower or partition (§ 8-21-120), fees of twenty-five cents that county auditors shall receive for every entry and endorsement on any deed of conveyance of real property recorded in their offices (§ 8-21-130), notary public fees (§ 8-21-140), fees of deputy surveyors (§ 8-21-150), and other similar charges for mainly ministerial duties of select officials in limited circumstances. Road maintenance is nowhere mentioned or contemplated in §§ 8-21-10 et seq., the same being prescribed under the Home Rule statutes of Title 4, and the tax and uniform service charge provisions of Title 6 for counties as adopted by their governing bodies and not by any of the individual officials named in § 8-21-10.

In this regard, Defendants contend that the Title 8 chapter dealing with "Fees and Costs Generally" contains a fraction of the fees and uniform service charges the General Assembly has

prescribed.[7] The Court agrees, taking note of the hundreds of such fees cited by Defendants that are not contained in Title 8, Chapter 21.

Further, § 8-21-15(A) provides:

> No state agency, department, board, committee, commission, or authority initially may set a fee for performing any duty, responsibility, or function unless the fee for performing the particular duty, responsibility, or function is authorized by statutory law and set by regulation except as provided in this section. (Emphasis added).

Road maintenance fees are permitted by §§ 4-9-30(5) and 6-1-300 et seq., unless the governing body does not follow the requirements discussed in *Burns*. S.C. Code §§ 8-21-10, et seq. have no application to such fees.

Section 8-21-30 provides for the tenfold penalty. It reads:

> If any officer herein named shall charge any other fee or fees for any services herein mentioned, such officer shall be liable to forfeit ten times the amount so improperly charged, to be recovered by suit in the court of common pleas, by attachment or by sale when the penalty does not exceed twenty dollars. (Emphasis supplied herein).

The Defendants argue that County Treasurer Goings does not charge a road maintenance fee. Rather, his ministerial duty is to collect taxes, fees, and charges that are listed on tax bills. That is a logical argument with which the Court has wrestled. This Treasurer did not impose or decide to impose a road maintenance fee. These fees clearly were collected after they were created by the County's governing body. Plaintiffs did not allege this Cause of Action against the Aiken

[7] Defendants note that, "[t]he South Carolina Code of Laws is set forth in sixty-three (63) titles. "Fees" are prescribed in fifty-nine (59) of them: Titles 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16, 17, 19, 20, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 54, 55, 56, 57, 58, 59, 60, 61, 62 and 63. Only Titles 10, 18, 21, and 53 contain no references to fees." Memorandum in Support of Motion to Dismiss, filed on December 1, 2021. Defendants then proceed to list five hundred (500) separate fees codified in the South Carolina Code of Laws. *Id.* at pp. 18-45.

County Council.[8] Imposing a tenfold penalty makes sense when there is an unauthorized charge created and levied by a ministerial official. Here, the Treasurer was merely collecting pursuant to County ordinances.

S.C. Code Ann. §§ 8-21-10 and 8-21-30 have no application to these road maintenance fees, and the Defendant Goings cannot be held liable under S.C. Code Ann. § 8-21-30 for charging a fee for a service that is not enumerated in S.C. Code Ann. § 8-21-310.

The Plaintiffs' Third Cause of Action against the County Treasurer for the recovery of what are alleged to be improperly assessed and collected fees pursuant to S.C. Code Ann. §§ 8-21-10 and 8-21-30 is dismissed.[9]

ARTICLE I, § 3 OF THE SOUTH CAROLINA CONSTITUTION

Plaintiffs allege in their Fourth Cause of Action a loss of a property interest without due process of law. Plaintiffs do not have a private right of action for money damages for a violation of provisions of the South Carolina Constitution, including Article I, § 3. See *Palmer v. South Carolina*, 427 S.C. 36, 829 S.E.2d 255 (Ct. App. 2019), where the South Carolina Court of Appeals held that "the South Carolina Constitution does not provide for monetary damages for civil rights violations and the legislature has not enacted an enabling statute." 829 S.E.2d at 261.

[8] Of all the chapters referenced in S.C. Code Ann. § 8-21-10, a county treasurer is mentioned only in a single Code section, S.C. Code Ann. § 8-21-310. In that section, the county treasurer is named, in addition to the clerk of court and register of deeds, as being authorized to charge filing or recording fees in expressly stated amounts for a variety of legal documents.

[9] There is not a sufficient record at this stage to adopt the Defendants' argument that S.C. Code Ann. § 8-21-30 has been impliedly repealed by the South Carolina Tort Claims Act. It is argued that § 8-21-30 pre-dates the South Carolina Tort Claims Act and the waiver of sovereign immunity.[9] For the reasons set forth in the discussion on Plaintiffs' Second Cause of Action, the Defendants contend that § 8-21-30 was impliedly repealed by the adoption of the Tort Claims Act, which reinstated sovereign immunity then waived it with exceptions. This Court declines to rule on this issue in light of the other bases for dismissal.

Therefore, the Court concludes that the Plaintiffs are precluded from recovering money damages for the alleged violation of the South Carolina Constitution, and as a result, the Fourth Cause of Action is dismissed.

THEREFORE, IT IS ORDERED, after reconsideration, that the Defendants' Motion to Alter or Amend is granted in part and denied in part, as set forth above. The Complaint remains dismissed, without prejudice.

AND IT IS SO ORDERED.

[Judge's electronic signature follows on separate page]

Aiken Common Pleas

Case Caption: Mark Gregory Thompson , plaintiff, et al VS Clay Killian , defendant, et al

Case Number: 2021CP0202323

Type: Order/Amend

Circuit Judge (Code #2050)

s/ William P. Keesley