

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2012-CP-10-04969

South Carolina Public Interest Foundation and Waring S. Howe, Jr., individually, and on behalf of all others similarly situated, Appellants,

v.

Robert W. Harrell, Jr., in his official capacity as Speaker of the South Carolina House of Representatives, Glenn McConnell, in his official capacity as President of the South Carolina Senate, Representative Harry B. "Chip" Limehouse III, Senator George E. "Chip" Campsen, and the State of South Carolina, Respondents.

APPELLANTS' RESPONSE TO MOTION TO STRIKE

Appellants South Carolina Public Interest Foundation and Waring S. Howe, Jr., submit this Response to the Motion to Strike filed by Respondent Harrell. Harrell argues that this Court should not address the merits of the case, but only the issue of standing, because the Circuit Court refused to address the merits of the case on cross motions for Summary Judgment. Further, Harrell asks that the Court strike large sections of the Appellants' Initial Brief. Harrell's requested remedy goes well beyond a proper application of the rule.

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Plaintiffs alleged that Act 130 of 2007 was unconstitutional. Act 130 of 2007 added two members to the Charleston County Aviation Authority (“CCAA” or the “Authority”): the Chairman and Vice-Chairman of the Charleston County Legislative Delegation, or their designees (Howe Affidavit, Ex. D). Act 130 applies only to Charleston County and the CCAA. The Governor vetoed Act 130 because the South Carolina Constitution Article III, § 34 and Article VIII, § 7 prohibit special legislation or legislation that applies to only one county (Howe Affidavit, Ex. E). The General Assembly voted to override the Governor’s veto of Act 130, but the vote to override did not carry two-thirds of a quorum in the House, as the Constitution requires (Howe Affidavit, Ex. F, G).

Plaintiffs alleged five grounds on which Act 130 was unconstitutional:

- (1) The vote to override the veto lacked two-thirds of a quorum in the House as required by the South Carolina Constitution, Art. IV, § 21.
- (2) Act 130 was unconstitutional special legislation because it applies only to the CCAA.
- (3) Act 130 was unconstitutional single county legislation because it applies only to Charleston County.
- (4) Act 130 violates the Constitutional dual office holding prohibitions because it allows legislators to serve in a second “office.”
- (5) Act 130 violates the Constitutional separation of powers requirement because it allows legislators to serve in an executive agency.

Both Plaintiffs claimed public importance standing. Howe also claimed taxpayer standing and standing as a former member and chairman of the Charleston County Aviation Authority. The parties filed cross motions for Summary Judgment and legal memoranda. The motions and memoranda addressed not only Appellants’ standing, but also the merits of the case.

In oral argument at the Circuit Court, the Appellants argued the merits of the case, the five grounds under which the Appellants contend the Act at issue is unconstitutional (Hearing Transcript, February 14, 2013, pp. 19-24). Respondent Harrell also argued the merits (Hearing Transcript, p. 24, l. 22 – p. 27, l. 7). Respondent Limehouse joined in arguing the merits as well (Hearing Transcript, p. 27, l. – p. 31, l. 24). The Attorney General and the counsel for the Senators declined to argue the merits, because they agreed with the Appellants that the Act is unconstitutional.

The Court questioned the Attorney General, and he confirmed his position that the Act is unconstitutional (Hearing Transcript, p. 31, l. 25 – p. 33, l. 2). The Attorney General said,

On the home rule and special legislation, our brief in that earlier case did take the position that *this Act was unconstitutional* on those grounds. We don't deny or take back that position at all. . . . I don't believe any facts presented with the Court absence [sic] some fact showing that would show something that would lead to a different result we stand by our position in that brief. And, then, finally, on the issue of whether it's dual office holding, or a separation of powers violation, we don't believe the state needs to reach that issue or respectfully this court. If it gets past the standing issue, there'll be the separation of powers and home rule issue that appears to be more substantial.

Hearing Transcript, p. 32, l. 12 –p. 33, l. 2 (emphasis added). The Attorney General agreed that the act was unconstitutional special legislation and single County legislation, but did not take a position on the unconstitutional veto override, the separation of powers argument, or the dual office holding argument (Hearing Transcript, p. 32, ll. 8 – 12).

The Court questioned counsel for Defendants McConnell and Campsen, and confirmed their position that the Act is unconstitutional.

In regards to, *in regard to the separation of powers challenge and the dual office holding*, I think my client has made his position pretty clear and I believe in what he put in The Post and Courier and his position, basically, is he can't, which is also the position of the lieutenant governor, we really can't come up with an

argument to. I believe if you look at the *Ashmore* case on the *Tall Tower* case and the *Edwards* case, and you read all those cases together, ***there has to be some constitutional nexus*** between service as a member of the General Assembly and service on the board of commission ***and we can't, we just get there***. Now whether or not that's something that would have to be factually developed, or it could be decided on the record before you, we would defer to your judgment on that. It may be necessary to develop the facts as to what the powers of the Aviation Authority are, but ***we are not providing a defense to that, to that cause of action***.

Hearing Transcript, p. 32, l. 12 – p. 33, l. 2 (emphasis added). The senators found the Act to be unconstitutional in violation of the separation of powers provision, and the dual office holding prohibitions. On the veto override issue, the Senators asserted that their part of the vote to override the veto was constitutional (and it was, with more than 40 senators voting on the issue). The Senators stated that the Defendant members of the House of Representatives would have to argue their own case defending their override which carried only 12 votes (Hearing Transcript, p. 33, ll. 7- 14).

The Circuit Court did not address the merits of any of Appellants' five claims. Instead, the court ruled that Appellants lacked standing, thereby granting Harrell's Motion for Summary Judgment. However, all the issues were properly and fully presented to the Circuit Court. The parties briefed and argued the merits in the Circuit Court. The Circuit Court did ***not*** rule that an issue of fact precluded Summary Judgment. It simply refused to consider the merits, ruling instead on the standing issue from Harrell's Motion for Summary Judgment.

In the event that the Court decides that it must hear only the standing issue, the remedy sought by the Respondent is unduly harsh: the striking of pages 24 to 42 from the Appellants' Brief.

The Supreme Court recently granted public importance standing to Petitioners in *South Carolina Public Interest Foundation v. South Carolina Transportation*

Infrastructure Bank, 403 S.C. 640, 744 S.E.2d 521 (2013). The statute creating the South Carolina Transportation Infrastructure Bank Board allowed legislators to sit on the Infrastructure Bank Board, an executive body. Petitioners in that case alleged that the statute violated the Separation of Powers and Dual Office Holding provisions of the Constitution. In granting Mr. Sloan and the Foundation public importance standing the Court reasoned as follows:

Sloan presents a *colorable claim* that the Board is *unconstitutionally comprised*, casting a cloud of illegitimacy which could marginalize the important decisions of the Board. We find resolution of this question is certainly of importance and concern to the public and therefore hold *Sloan has standing to bring this challenge*.

Id. 744 S.E.2d at 524 (emphasis added). This holding is the most recent authoritative statement of the standard for public importance standing. Under this standard, the Circuit Court should have granted the Appellants public importance standing. The Supreme Court issued the *Transportation Infrastructure Bank* opinion after the ruling below.

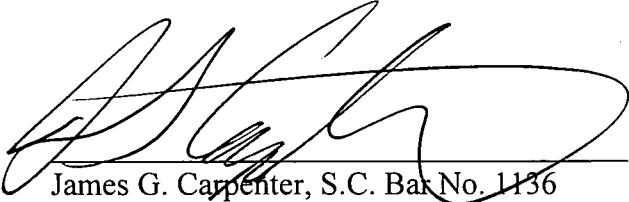
In support of their public importance standing in this case, Appellants presented not one, but five “colorable claim[s] that the Board is unconstitutionally comprised, casting a cloud of illegitimacy which could marginalize the important decisions of the Board.” *Id.* To avoid unnecessary repetition in the brief, Appellants simply referred to the parts of their brief addressing the substance (Section II, A-E) as the proof that they had presented five such “colorable claims.”

Respondent Harrell’s proposed remedy would be unfair to the Appellants (to strike all the discussion of the merits, or the “colorable claims”). The discussion of the claims is essential to Appellants’ argument that the Appellants’ claims are of sufficient public importance to justify granting standing on that basis. *Id.* This Court should afford

the Appellants a full and fair opportunity to present the issue of their public importance standing.

Appellants will file a Motion to file Appellants' Revised Initial Brief addressing these "colorable claims" in the context of standing.

September 17, 2013

A handwritten signature in black ink, appearing to read "J.G. Carpenter", is written over a horizontal line.

James G. Carpenter, S.C. Bar No. 1136
Jennifer J. Miller, S.C. Bar No. 13611
THE CARPENTER LAW FIRM, PC
819 E. North Street
Greenville, South Carolina 29601
(864) 235-1269
Attorneys for Appellants

Certificate of Service

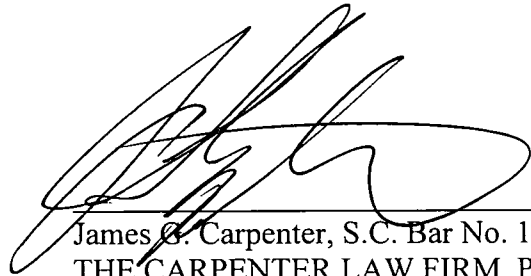
The undersigned attorney hereby certifies that he has served a copy of the foregoing Appellants' Response to Motion to Strike on counsel for Defendants by email and US Mail, postage prepaid on Tuesday, September 17, 2013 to the following persons:

Robert E. Tyson, Jr.
PO Box 11449
Columbia, SC 29211

J. Emory Smith, Jr.
PO Box 11549
Columbia, SC 29211

C. Mitchell Brown
Michael J. Anzelmo
P.O. Box 11070
Columbia, SC 29211

Michael R. Hitchcock
John P. Hazzard V
P.O. Box 142
Columbia, SC 29202



James G. Carpenter, S.C. Bar No. 1136
THE CARPENTER LAW FIRM, P.C.
819 E. North Street
Greenville, South Carolina 29601
Tel. (864) 235-1269
Fax (864) 331-3083
Attorneys for Plaintiffs

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ATTORNEYS AND COUNSELORS AT LAW

September 17, 2013

*JAMES G. CARPENTER
james.carpenter@carpenterlawfirm.net

JENNIFER J. MILLER
jennifer.miller@carpenterlawfirm.net

L. WARREN CLAYTON, III
warren.clayton@carpenterlawfirm.net

*LICENSED IN S.C. & N.C.

The Honorable Jenny Abbott Kitchings
Clerk of SC Court of Appeals
PO Box 11629
Columbia, SC 29211

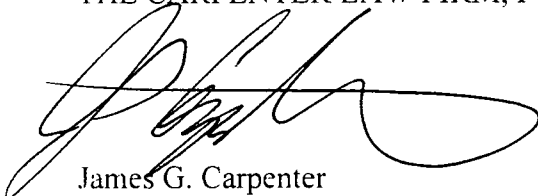
Re: *South Carolina Public Interest Foundation et al. vs. Harrell, et al*
Civil Action No. 2012-CP-10-04969

Dear Ms. Kitchings:

I enclose an original and seven copies of Appellants' Response to Motion to Strike, and Proof of Service in this matter. Please file-stamp the extra copy and return it to me in the enclosed, post-paid envelope.

If you need anything else, please telephone me. Thank you very much.

Sincerely yours,
THE CARPENTER LAW FIRM, PC



James G. Carpenter

Enclosures
CC w/enclosures: All opposing counsel

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