RECEIVED
Feb 18 2025
SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Charleston County
Court of Common Pleas
2022-CP-10-05123

Jennifer B. McCoy, Circuit Court Judge

Appellate Case No.: 2024-CP-00-000256

Board of Field Officers of the Fourth Brigade, Mark Calhoun, F. Preston Wilson, and Andrew Pickens Calhoun,

of which Board of Field Officers of the Fourth Brigade, Mark Calhoun, and F. Preston Wilson are Appellants,

Appellants,

v.

Members of City Council of the City of Charleston, South Carolina, Caroline Parker, Kevin Shealy, Jason Sakran, Robert M. Mitchell, Karl L. Brady, Jr., Stephen Bowden, Peter Sahid, Jr., Michael S. Seekings, Perry K. Waring, William Dudley Gregorie, Ross A. Appel, The City of Charleston, South Carolina, The Honorable Alan Wilson, Attorney General for the State of South Carolina and The Honorable John Tecklenburg, Mayor of the City of Charleston, South Carolina,

Respondents.

RESPONDENTS' INITIAL BRIEF

February 18, 2025

Armand Derfner
Jonathan S. Altman
Derfner & Altman, LLC
575 King Street, Suite B
Charleston, SC 29403
aderfner@derfneraltman.com
jaltman@derfneraltman.com
Telephone: (843) 723-9804

William J. Cook
Cultural Heritage Partners, PLLC
4370 Spring Island
Okatie, SC 29909
will@culturalheritagepartners.com
Telephone: (843) 801-3366

Monoc Law, LLC
Kathleen F. Monoc
77 Grove Street
Charleston, SC 29403
katie@monoclaw.com
Telephone: (843) 790-8910

Julia P. Copeland, Corp. Counsel
The City of Charleston
50 Broad Street
Charleston, SC 29401
copelandj@charleston-sc.gov
Telephone: (843) 724-3730

Attorneys for Respondents The City of Charleston, South Carolina and the individual City of Charleston officials named herein

TABLE OF CONTENTS

Table of Authorities i
Counter-Statement of Issues Presented 1
Statement of the Case 1
Standard of Review 2
Facts and Proceedings Below 2
Summary of Argument 4
Argument .....

1. APPELLANTS CANNOT SUE TO ENFORCE THE HERITAGE ACT BECAUSE THEY ARE PRIVATE PARTIES.....5

   A. THE HERITAGE ACT CONTAINS NO PROVISION FOR A PRIVATE CAUSE OF ACTION.....5

   B. WHEN THERE IS NO RIGHT OF ACTION, THERE CAN BE NO WRIT OF MANDAMUS.....6

   C. "PUBLIC IMPORTANCE STANDING" IS UNAVAILABLE FOR THE HERITAGE ACT.....8

   D. THIS CASE SHOWS HOW A PRIVATE RIGHT OF ACTION CAN BE ABUSED....10

2. APPELLANTS ARE NOT ENTILED TO SUE UNDER THE SOUTH CAROLINA TRUST CODE BECAUSE THEY ARE NOT WITHIN THE LISTED CATEGORIES.....11

   A. APPELLANTS CANNOT SUE AS "AMONG OTHERS" UNDER THE SOUTH CAROLINA TRUST CODE.....11

   B. APPELLANTS CANNOT SUE AS "SETTLORS" UNDER THE SOUTH CAROLINA TRUST CODE.....12

      i. THIS ARGUMENT WAS NOT PRESERVED FOR APPEAL 12

      ii. APPELLANTS ARE NOT "SETTLORS." 14

Conclusion 16

TABLE OF AUTHORITIES

CASES

1. *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999) 9
2. *Ballard v. Newberry Cty.*, 432 S.C. 526, 531, 854 S.E.2d 848, 850-51 (Ct. App. 2021) .....5 & 10
3. *Charleston Chapter UDC v. Charleston County Sch. Dist.*, No. 2024-CP-10-03667.....11
4. *City of Rock Hill v. Thompson*, 349 S.C. 197, 563 S.E.2d 101 (2001) 8
5. *City of Rock Hill*, 349 S.C. at 199, 563 S.E.2d at 102 8
6. *Cricket Cover Ventures, LLC v. Gilland*, 390 S.C. 312, 321, 701 S.E.2d 39, 44 (Ct. App. 2010).....2
7. *Denson v. National Cas. Co.*, 439 S.C. 142, 152-54, 886 S.E.2d 228, 233-34 (2023).....5
8. *Doe v. Doe*, 370 S.C. 206, 212, 634 S.E.2d 51, 54-55 (Ct. App. 2006).....13
9. *Eidson v. SCDOE*, 444 S.C. 166, 906 S.E.2d 345 (2024).....9
10. *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994).....13
11. *Kubic v. MERSCORP Holdings, Inc.*, 416 S.C. 161, 168, 785 S.E.2d 595, 599 (2016)....5
12. *Godwin v. Carrigan*, 227 S.C. 216, 222, 87 S.E.2d 471 (1955).....7
13 *Green v. West*, 161 S.C. 161, 159, S.E. 23 (1931) 8
14. *S.C. DOT v. First Carolina Corp.*, 372 S.C. 295, 301-302, 641 S.E.2d 903, 907 (2007) 13
15. *S.C. Pub. Int. Fdn v. SCDOT*, 421 S.C. 110, 804 S.E.2d 854 (2017).....9
16. *Sanford v. S.C. State Ethics Comm'n*, 385 S.C. 483, 493-494, 685 S.E.2d 600, 605-606 (2009) 7
17. *Sloan v. Sanford*, 337 S.S. 431, 434, 593 S.E.2d 470, 472 (2004) 9
18. *State v. Russell*, 345 S.C. 128, 133 (2001) 13
19. *Stone v. Washington Medical Ctr.*, 515 S.W.3d 104 (Ark. 2017).....16
20. *Stone v. Washington Reg. Med. Ctr*, 2017 Ark. 90, 110 (2017).....16
21. *Unisys Corp. v. S.C. Budget & Control Bd. Div. of Gen. Servs. Info. Tech. Mgmt. Off.*, 346 S.C. 158, 165, 551 S.E.2d 263, 267 (2001) 2
22. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998).....14

STATUTES

1. South Carolina Heritage Act, S.C. Code § 10-1-165.....5
2. South Carolina Trust Code, 2.S.C. Code § 62-7-405(c) .....3 & 15
3. Section 47-1327 of the S.C. Code of 1962.....7
4. S.C. Code Ann. § 62-7-103 (14) .....14 & 15
5. Ark. Code. Ann 28-73-406 (c) 16
6. AM JUR 2d Charities 130, at 26 15

COUNTER-STATEMENT OF ISSUES PRESENTED

1. South Carolina Heritage Act: Did the circuit court err when it held that Appellants, as private citizens, cannot sue to enforce the Heritage Act because the Act creates no private cause of action?

2. South Carolina Trust Code:

   a. Should this Court summarily affirm the Circuit Court's ruling, not challenged on appeal, that Appellants are not "Among Others" entitled to sue as such under the Trust Code?

   b. May Appellants now raise a completely new argument, not raised below, that they are "Settlors" entitled to sue as such under the Trust Code?

   c. Even if they could raise this new argument, would Appellants' remote or non-existent ties to the actual Settlor entitle Appellants to claim to be "Settlors" and entitled to sue as such under the Trust Code?

STATEMENT OF THE CASE

This case involves a statue of John C. Calhoun which stood in Marion Square in the City of Charleston from at least 1898 until the Mayor and City Council of Charleston voted to take it down in June 2020. Appellants filed this suit to make the City restore the statue and claimed a right to sue under both the South Carolina Heritage Act and the South Carolina Trust Code. The Circuit Court dismissed their Petition and held that Appellants had no right to sue under either statute.

As to the specific procedural background, Appellants' Petition was filed on November 4, 2022. Respondents, the Mayor and City Council members of the City of Charleston, filed a Motion to Dismiss on February 1, 2023. Following oral argument on September 6, 2023, the circuit court dismissed the Petition on January 4, 2024. Appellants filed a Motion to Reconsider on January 12, 2024, which the circuit court denied on February 9, 2024. Appellants filed the Notice of Appeal on February 23, 2024.

Appellants filed separate Initial Briefs. Appellants Wilson and Board of Field Officers filed their Initial Brief and Designation of Matter on October 10, 2024. Appellant Mark Calhoun filed his Initial Brief and Designation of Matter on October 13, 2024. Appellant Andrew Pickens Calhoun did not file an Initial Brief and Designation of Matter, and this Court issued an Order on December 17, 2024, dismissing his appeal. Respondents believe he is deceased.

For convenience, Appellants Wilson and the Board of Field Officers will sometimes be referred to jointly as the Appellants Wilson/Board.

STANDARD OF REVIEW

An Order like the one in this case – dismissing a Complaint (here, the Petition) for failure to allege facts sufficient to state a cause of action and resting on legal conclusions about statutory interpretation and Petitioners' capacity to sue – raises only issues of law and is reviewed by this Court *de novo*. *Unisys Corp. v. S.C. Budget & Control Bd. Div. of Gen. Servs. Info. Tech. Mgmt. Off.*, 346 S.C. 158, 165, 551 S.E.2d 263, 267 (2001); *Cricket Cover Ventures, LLC v. Gilland*, 390 S.C. 312, 321, 701 S.E.2d 39, 44 (Ct. App. 2010).

FACTUAL AND LEGAL BACKGROUND

In the late nineteenth century, a private association known as the Ladies' Calhoun Monument Association erected a statue of John C. Calhoun on a portion of Marion Square in the City of Charleston. Order of Jan. 4, 2024, at 2; Pet. ¶¶ 13-15. In 1898, having achieved its goal and preparing to disband, the Association presented the monument to the City of Charleston. Order of Jan. 4, 2024, at 2.

The Calhoun statue remained at Marion Square from then until the City removed it in 2020. Order of Jan. 4, 2024, at 2. Several members of the public—three individuals and a fraternal organization—filed a lawsuit asking the Court to order the City to restore the statue. In the two

causes of action involved in this appeal, Appellants alleged that removal of the statue violated the Heritage Act as well as the Trust Code, and that Appellants are entitled to enforce those laws.

One of the Petitioners (Appellant F. Preston Wilson) is a descendant of an officer of the defunct Ladies' Calhoun Monument Association, and another (Mark Calhoun) is a descendant of John C. Calhoun.[1] The organizational Petitioner (Board of Field Officers of the Fourth Brigade) was the prior owner of a 36 ft x 36 ft plot of land which it conveyed to the Ladies' Calhoun Monument Association in 1885, and on which the Association thereafter erected the statue in 1896.[2]

Appellants sued City officials based on two statutes: the South Carolina Heritage Act, S.C. Code § 10-1-165 and the South Carolina Trust Code, S.C. Code § 62-7-405(c). As to the Heritage Act, they claimed to have standing based on the "public importance" standing doctrine. As to the Trust Code, which authorizes suit by "the settlor of a charitable trust, the trustee, and the Attorney General, among others," Appellants claimed they were entitled to sue under the "among others" prong.

After briefing and oral argument, the circuit court dismissed the Petition on the ground that Appellants had no right to sue under either statute. As to the Heritage Act, the circuit court held Appellants could not sue because the statute itself does not authorize a private right of action. As to the Trust Code, the circuit court held that the General Assembly's use of the words "among others" was not meant to abandon or expand the traditionally narrow rules of standing to enforce charitable trusts. The circuit court noted that giving private citizens, however well-intentioned,

---

[1] Petitioner Andrew Pickens Calhoun is also a descendant of John C. Calhoun. However, this Court dismissed his appeal because he never filed an initial brief.

[2] Once the statue was removed, the City quitclaimed the plot of land on which it had stood back to the Board of Field Officers.

free rein to sue under the Heritage Act or the Trust Code could threaten to deplete the resources of local governments and charities, which the General Assembly could not have intended.

SUMMARY OF ARGUMENT

On appeal, Appellants argue that they are entitled to sue under the Heritage Act and the Trust Code to restore the Calhoun statue on Marion Square.

As to the Heritage Act, the circuit court held correctly that Appellants could not sue because the Act contains no private cause of action. Appellants also argue that they are entitled to "public importance standing," but that is simply an argument that a court should create a private cause of action for a statute in which the General Assembly has chosen not to do so. Appellants Wilson/Board (but not Appellant Calhoun) also argue that, even without a private cause of action, they are still entitled to a writ of mandamus against the City barring its supposed violation of the Heritage Act. This argument is without merit because mandamus is simply a form of relief which could be available only if Appellants had a private cause of action under the Heritage Act.

As to the Trust Code, Appellants no longer argue that they can sue as "among others," a reading of the Trust Code that the circuit court correctly rejected completely without merit. Instead, Appellants Wilson/Board (but not Appellant Calhoun) now present a completely new argument under the Trust Code. They now argue that they are "settlors" of the Trust and entitled to sue as such to enforce the Trust Code. This argument fails because (a) they never argued this below (so it is not preserved for appeal), and (b) they do not qualify as "settlors" by any stretch of the imagination or legal doctrine.

ARGUMENT

1. APPELLANTS CANNOT SUE TO ENFORCE THE HERITAGE ACT BECAUSE THEY ARE PRIVATE PARTIES.

The Court should affirm the circuit court for correctly dismissing the Appellants' claims brought pursuant to the Heritage Act.

A. THE HERITAGE ACT CONTAINS NO PROVISION FOR A PRIVATE CAUSE OF ACTION.

The circuit court held correctly that the Heritage Act does not create a private right of action that would allow Appellants to sue to enforce it.

The Heritage Act provides:

> "No Revolutionary War, War of 1812, Mexican War, War Between the State, Spanish-American War, World War I, World War II, Korean War, Vietnam War, Persian Gulf War, Native American, or African-American History monuments or memorials erected on public property of the State or any of its political subdivisions may be relocated, removed, disturbed, or altered. No street, bridge, structure, park, preserve, reserve, or other public area of the State or any of its political subdivisions dedicated in memory of or named for any historic figure or historic event may be renamed or rededicated. No person may prevent the public body responsible for the monument or memorial from taking proper measures and exercising proper means for the protection, preservation, and care of these monuments, memorials, or nameplates."

S.C. Code Ann. § 10-1-165(A). The Act contains no "private right of action," *i.e.,* no language authorizing a private citizen to bring an enforcement lawsuit.

When the General Assembly enacts a statute, especially one governing the conduct of government, private citizens are not authorized to sue to enforce it unless the statute expressly allows private lawsuits or if the legislation was enacted for the special benefit of a private party. *Denson v. National Cas. Co.*, 439 S.C. 142, 152-54, 886 S.E.2d 228, 233-34 (2023); *Kubic v. MERSCORP Holdings, Inc.*, 416 S.C. 161, 168, 785 S.E.2d 595, 599 (2016); *Ballard v. Newberry Cty.*, 432 S.C. 526, 531, 854 S.E.2d 848, 850-51 (Ct. App. 2021).

The circuit court quoted from these cases and cited nine more appellate cases. Appellants do not address any of these South Carolina cases.

In this Court, none of the Appellants claim that the Act creates a private right of action. Instead, they make two other arguments that would do no more than effectively allow a private right of action – first, that, even without a private right of action, they are entitled to a writ of mandamus, and second, that they are entitled to "public importance" standing. Both arguments are wrong.[3]

B. WHEN THERE IS NO RIGHT OF ACTION, THERE CAN BE NO WRIT OF MANDAMUS.

Appellants Wilson/Board misunderstand the nature of mandamus when they argue that it somehow creates a private right of action that does not otherwise exist. They say, "Respondents assert that only the government can hold the government accountable!" Initial Brief at 22. They go on:

> "That is not accurate. There is a means for citizens to force a government to perform its duty. Where an inferior government office refuses to do its job, citizens may seek a court order in the form of a writ of mandamus to compel the government office to do its job."

Id. at 23.

This is a fundamental misunderstanding of the nature of mandamus. A writ of mandamus is not a freestanding magic wand; it is a *remedy* in a lawsuit, like other remedies, available if preconditions are met. If one person has a right to sue another, and establishes the liability of the person sued, the person bringing the suit is ordinarily entitled to relief, which may include among

[3] The Wilson/Board Appellants also say they can sue even without a private cause of action because they are seeking only mandamus, not damages, and/but offer no support for that argument, which has no basis anywhere in the law. In addition, Respondents note that Appellant Calhoun lists a circuit court reference to the Attorney General as an Issue Presented relating to the Heritage Act, but that reference was a mere observation that played no part in the circuit court's decision.

other remedies an injunction, and, in extreme cases, a writ of mandamus. But mandamus does not come without a right to sue.

Our courts have made this point many times:

> "[I]t is not the purpose of the writ to establish a legal right, but to enforce one which has already been established.'
>
> . . .
>
> "To obtain a writ of mandamus requiring the performance of an act, the petitioner must show: (1) a duty to perform the act; (2) the ministerial nature of the act; (3) the petitioner's specific legal right for which discharge of the duty is necessary; and (4) a lack of any other legal remedy."

Sanford v. S.C. State Ethics Comm'n, 385 S.C. 483, 493-494, 685 S.E.2d 600, 605-606 (2009) (internal citations omitted). The point has never been in doubt:

> "The writ of mandamus is employed to compel the performance, when refused, of a ministerial duty. To warrant its issuance, not only should there be a legal right in the petitioner, but it is also important that the asserted right is clear and certain. There must also be shown a legal and ministerial duty of performance resting upon the respondent, and the absence of any other specific remedy to enforce that which is sought. The requisite elements of the remedy of mandamus are so well established that it is not necessary to cite authorities or cases in support thereof."

Godwin v. Carrigan, 227 S.C. 216, 222, 87 S.E.2d 471 (1955).

The cases cited at pages 22-24 of the Wilson/Board Brief are <u>not</u> to the contrary. A prime example is *Willimon v. City of Greenville, supra,* cited by Appellants on page 23. It is correct, as described, that the court in *Willimon* issued a writ of mandamus, but that was pursuant to a specific statute that gave the plaintiff a specific right to sue: Section 47-1327 of the S.C. Code of 1962:

> "The city council of any city containing more than five thousand inhabitants may lay out and open new streets in the city and close up, **widen** or otherwise alter streets in such city whenever, in its judgment, it may be necessary for the improvement or convenience of the city. But it shall first pay damages, should any be claimed, to any landowner through whose premises such streets may run, such damages to be fixed and determined as provided in §§ 25-161 to 25-170 of the Code."

To the same effect is *Green v. West*, 161 S.C. 161, 159, S.E. 23 (1931), also cited by Appellants. This case, too, began with a statutory cause of action – Section 5601 of the Code of 1932 (authorizing a suit by the heirs of a lynching victim against the culpable county). Another case, *City of Rock Hill v. Thompson*, 349 S.C. 197, 563 S.E.2d 101 (2001), also cited by Appellants, makes the same point: a writ of mandamus "is issued only when there is a specific right to be enforced, a positive duty to be performed, and no other specific remedy." *City of Rock Hill,* 349 S.C. at 199, 563 S.E.2d at 102.

The bottom line is clear: no cause of action means no writ of mandamus.

C. "PUBLIC IMPORTANCE STANDING" IS UNAVAILABLE FOR THE HERITAGE ACT.

The second main argument made by Appellants Wilson/Board is that the Court should create "public importance" standing here to allow private suits under the Heritage Act. The first answer to that suggestion lies in the very nature of the difference between "standing" and "private cause of action." In "standing" cases, the Court is guided by its interpretation of general principles of jurisprudence, but in "private cause of action" cases, a court's task is to carry out the General Assembly's statute, which leaves little or no leeway for a court's independent judgment.

Respondents are not aware of a case in which our appellate courts have used public importance standing explicitly to create a cause of action to enforce a statute, but even if Appellants were to find such a case, it is still undeniable that public importance standing, as a common law doctrine, is by its nature at odds with the Geneal Assembly's role of deciding how to write its statutes.

Another feature of "public importance" standing makes it incompatible with the Heritage Act. The Supreme Court has invoked public importance standing only where "an issue is of such

public importance as to require its resolution for future guidance." *Sloan v. Sanford*, 337 S.S. 431, 434, 593 S.E.2d 470, 472 (2004).

The key terms there are "an issue" and "resolution." The cases cited in the long quote in Appellant's Brief meet those two tests: they address "an issue" – meaning one issue – and they bring "resolution" – meaning that no or few questions are left.

A look at the cases in which public importance standing has been granted confirms its valuable function as well as the limitations of public importance standing. The cases involve such issues as the Governor's eligibility to serve in the military reserves (*Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004)); DOT's use of public funds for private projects (*S.C. Pub. Int. Fdn v. SCDOT*, 421 S.C. 110, 804 S.E.2d 854 (2017)); and the use of public medical funds by a private agency (*Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999)). Added to this list could be the recent case involving public funds for private or religious school tuition. *Eidson v. SCDOE*, 444 S.C. 166, 906 S.E.2d 345 (2024).

By contrast, if this Court recognized a private cause of action under the Heritage Act, that would open the gates of possibly endless litigation from every corner of the state, meritorious or not. There are thousands of monuments, named streets and parks, and even named rooms in public buildings – any of which could become targets of litigation.

This case illustrates the problem. The City of Charleston took down a statue which the Attorney General chose not to challenge and which the circuit court said in dictum did not appear to violate the Act. Yet Appellants have now kept the City mired in expensive litigation for more than three years on the bizarre theory that a statue of John C. Calhoun is a memorial of the War of 1812![4]

[4] See Wilson/Board Initial Brief at 25 n.2.

The circuit court observed that the Attorney General has full authority to block violations of the Act. The Attorney General has also provided useful guidance in Opinion letters. If public importance standing is supposed to "resolve" "an issue," extending it to the Heritage Act would guarantee the opposite—that countless issues involving the Heritage Act would be created, not resolved. This is especially so because the "issue" whose "resolution" is sought in this case is not only whether the Calhoun statue's removal violated the Act, but whether any person who believes any public agency has violated the Heritage Act in any way is free to bring a lawsuit at his or her volition.

That type of question was before this Court recently in *Ballard v. Newberry County*, a decision relied on by the circuit court in this case. In *Ballard*, when a similar request was made to recognize a private cause of action under the Public Records Act, this Court applied the correct principles:

> "Finding standing here could well invite countless copycat suits filed against public bodies both large and small. That many of these suits might be well-intentioned is beside the point. The Public Records Act delineates specific means of enforcement. We believe is best to exercise restraint and refuse to do indirectly what the General Assembly could have done directly. We will not recognize a civil right to enforce the act when the General Assembly did not include such a right in the Code."

Ballard, 432 S.C. 526, 535, 854 S.WE.2d 848,852 (2021). This analysis applies here, as well.

D. THIS CASE SHOWS HOW A PRIVATE RIGHT OF ACTION CAN BE ABUSED.

This is not the only case these Appellants have filed against the Mayor and City Council members of Charleston.[5] Nor is the Calhoun statute the only monument these Appellants have

[5] A similar lawsuit by Petitioners Mark Calhoun, F. Preston Wilson, and Andrew Pickens Calhoun against these same Defendants was filed January 4, 2022, with amendments filed the same day, and on January 10, 2022, and on January 19, 2022, and on January 28, 2022. Case No. 2022-CP-10-01729. The City filed its Motion to Dismiss that case on March 1, 2022. A hearing was set before the Honorable Jennifer B. McCoy for September 19, 2022. Prior to that hearing, on September 2, 2022, the Petitioners filed a Stipulation of Dismissal Without Prejudice pursuant to Rule 41(a)(1)(A), S.C. R. Civ. P. On November 4, 2022, the same three individual Petitioners, along with Board of Field Officers of the Fourth Brigade, filed this lawsuit.

targeted. Nor are the Mayor and City Council members the only public servants to be targeted by these Appellants. Other targets have included the Charleston County School District and even an individual school – the Math and Science Charter School of Charleston.[6]

One or another of these cases has been going on for more than three years. The net effect is to keep the City of Charleston on a yo-yo string, expending time, attention, and money at the instance of those who, even if well-intentioned, may be pursuing only their own ends – at the public's expense.[7]

2. APPELLANTS ARE NOT ENTILED TO SUE UNDER THE SOUTH CAROLINA TRUST CODE BECAUSE THEY ARE NOT WITHIN THE LISTED CATEGORIES.

A. APPELLANTS CANNOT SUE AS "AMONG OTHERS" UNDER THE SOUTH CAROLINA TRUST CODE.

In the circuit court, Appellants argued that they were "among others" and thus entitled to sue in that capacity under the Trust Code. The circuit court analyzed the background and history of trust litigation in general and the South Carolina Trust Code in particular. The circuit court ruled correctly that "among others" in the Trust Code does not open the door to broad new categories of

[6] In the first case described in the previous footnote, the 4th Amended Petition added as Respondents the Charleston County School District and the Charleston County Charter School for Math and Science. Added target monuments were a former Robert E. Lee marker for a never-built highway and a building which in a former existence had borne the name of Confederate Treasury Secretary Christopher Memminger.

[7] The Attorney General of South Carolina has recently filed an amicus brief, in a separate private citizen lawsuit involving the Robert E. Lee marker mentioned in the previous footnote. There, the Attorney General argues—contrary to the circuit court in this case and unpersuasively—that there is or should be a private right of action to enforce the Heritage Act. His main arguments are similar to those made by Appellants here (mandamus and public importance standing) and are meritless for the same reasons discussed above. He also says that the Heritage Act does have a private right of action or should be so interpreted—points that no one else has ever seriously advanced. The case is *Charleston Chapter UDC v. Charleston County Sch. Dist.*, No. 2024-CP-10-03667 (Amicus Brief filed Jan. 28, 2025, at 8-9. One must wonder: If the Attorney General believes that moving the Lee marker violated the Heritage Act, why doesn't he bring his own lawsuit, as he is obviously authorized to do, instead of trying to revolutionize this State's "right to sue" doctrines?

people with standing. Appellants do not seriously challenge this holding[8] and this Court should affirm it.

B. APPELLANTS CANNOT SUE AS "SETTLORS" UNDER THE TRUST CODE.

Instead of renewing their "among others" position, Appellants Wilson/Board (but not Appellant Calhoun) now seek to reverse the circuit court's decision based on a new argument that they are somehow "settlors" under the Trust Code, despite having not raised this issue to the circuit court and despite their not being the settlor in any event.

i. THIS ARGUMENT WAS NOT PRESERVED FOR APPEAL.

Two Appellants, Wilson and the Board of Field Officers, for the first time now on appeal, claim to be "settlors" entitled to sue as such under the Trust Code. This new-found position is inconsistent with (1) their pleading, which made no such allegation, and (2) their previous position at oral argument that the Ladies' Calhoun Monument Association was the settlor.

As to the pleadings, the Petition itself claimed only "among others," status for themselves and specifically identified the Ladies' Calhoun Monument Association as the settlor. This was in the caption for the Third Cause of Action:

> "Declaratory Judgment That Petitioners [naming them] Are Persons "Among Others" Identified In [the Trust Code] That May Enforce The Terms Of The Charitable Trust Created By The Ladies' Calhoun Monument Association."[9]

At oral arguments on the City's Motion to Dismiss, the Appellants reaffirmed that the Ladies' Calhoun Monument Association was the settlor,[10] and argued that they (Appellants) were

---

[8] Appellant Calhoun refers to this in his second "Issue Presented," but makes no further reference to it. Appellants Wilson/Board have one sentence on page 22, saying they should have standing, because of 'special interest" even if not found to be settlors, but there is no argument supporting this statement.

[9] Pet. at 19. Paragraph 77 of the Petition added the Board of Field Officers to this Cause of Action.

[10] "The Charitable Trust Act provisions allow for not **just the settlor, which, in this case, would have been the Ladies' Calhoun Society** that dissolved when they gained [gave?] things in trust, but also the trustee. The trustee is the City who destroyed the monument and warehoused the statue somewhere and it's never—and tried to (indiscernible). So those two parties, it does leave "among others," not just the attorney general. And I can't think of

qualified to enforce the Trust Code under the "among others" provision of the Trust Code. Appellants did not argue that they qualified as settlors.[11]

South Carolina's Issue Preservation rules are strict:

> "There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity."

S.C. DOT v. First Carolina Corp., 372 S.C. 295, 301-302 (2007) (quoting JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 57 (2d ed. 2002)).

The circuit court never ruled on the "Settlor" question because it was not asked to do so. Therefore, the Appellants have not preserved this issue for appellate review. *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994); *Doe v. Doe*, 370 S.C. 206, 212, 634 S.E.2d 51, 54-55 (Ct. App. 2006).

Furthermore, the Appellants cannot claim their new "Settlor" argument was preserved for appeal merely because it falls under the same statute (Trust Code) as their former argument, that is insufficient because the two are completely different arguments. Raising one issue in the lower court ("among others") does not preserve a different issue for appeal ("Settlor"). *State v. Russell*, 345 S.C. 128, 133 (2001) ("A party cannot argue one ground for an objection at trial and an alternative ground on appeal."); *S.C. DOT v. First Carolina Corp.*, 372 S.C. 295, 301-302, 641 S.E.2d 903, 907 (2007) (issue must have been "raised to the trial court with sufficient specificity");

---

another party but the Board Of Field Officers who is more intricately involved and would have been intended to help those charitable trusts." (Tr. 30:7-18) (emphasis added).

[11] A stray sentence in a Memorandum seemed to suggest that the Board of Field Officers was a settlor, but later events and pleadings disavowed this position. The sentence was: "In fact, the City's return of the land to the Board recognizes that it is indeed the Settlor entitled to the return of the property given in Trust when the Charitable Trust was violated." Def. Mem. In Opp. At 10. Whatever this sentence means, Appellants later made clear their position that only the Ladies' Calhoun Monument Association was the settlor, *supra* note 10, and that the Board of Field Officers was claiming the right to sue only under the "among others" heading. Post-Hearing Supp. Mem. at 4.

Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("Issue cannot be raised for the first time on appeal").

Appellants Wilson and the Board of Field Officers tell this Court that:

> "The Circuit Court ignored Petitioners' assertions and arguments that Wilson and the Board of Field Officers are settlors of the trust who have statutory standing to maintain this action."

Wilson/Board Initial Br. at 12.

Respondents are unaware of any such "assertions and arguments" in the circuit court record. If they were not made below, it is too late now.

ii. APPELLANTS ARE NOT "SETTLORS."

Even assuming for the sake of argument that Appellants are not barred by error preservation rules, they do not qualify as "settlors."

The Trust Code provides:

> "'Settlor' means a person, including a testator, who creates, or contributes property to, a trust. If more than one person creates or contributes property to a trust, each person is a settlor of the portion of the trust property attributable to that person's contribution except to the extent another person has the power to revoke or withdraw that portion. Neither the possession of, nor the lapse, release, or waiver of a power of withdrawal shall cause a holder of the power to be deemed to be a settlor of the trust, and property subject to such power is not susceptible to the power holder's creditors."

S.C. Code Ann. § 62-7-103 (14).

Allowing "settlors" to sue is a slight loosening of common law restrictions on who may bring trust litigation, but it does not authorize freestyle litigation. As the circuit court noted correctly, the common law severely restricts the class of parties who may sue to enforce the terms of a charitable trust. Order of Jan. 4, 2024, at 6. The rule has been stated many times: "A person whose only interest is that interest held in common with other members of the public cannot

compel the performance of a duty the charitable organization owes to the public." AM. JUR. 2D *Charities* 130, at 126.

This limitation protects trusts from needless litigation that could dissipate the assets of the charity at the unrestrained option of private citizens who might have only personal motivations for suing the charity. For this reason, South Carolina law strictly limits those parties who can sue to enforce a charitable trust. S.C. Code Ann. § 62-7-405(c).

Appellants' claims to be "settlors" are far-fetched. Respondents have assumed that the Ladies' Calhoun Monument Association's gift to the City may have created a charitable trust even without documentation. From that starting point, however, Appellants Wilson and the Board of Field Officers assert that a trust can reach far back and forward in time and extend to the most tenuous of relationships. Contrary to Appellants' claims, that is not how courts interpret the narrow terms of the Trust Code, even when it allows settlors to bring suits.

As to the Board of Field Officers, it conveyed a 36' x 36' plot of land to the Ladies' Calhoun Monument Association in 1885, with a reverter if the land ceased being used for the Calhoun statue. If the Ladies' Association's gift of the Calhoun statue to the City a dozen years later somehow created a trust, that hardly turned the Board of Field Officers suddenly and magically from the grantor of a parcel of land under the statue into a "settlor" of a trust.

Likewise, Appellant Wilson claims as a distant descendant of an officer of a long-defunct unincorporated association (perhaps only a *former* officer, since her election took place in 1855, at least forty years before the statute was given to the City). This is too attenuated to allow Appellant Wilson to stand in the Association's shoes as a settlor 125 years later. Pet. at ¶ 16. *See* S.C. Code Ann. § 62-7-103 (14).

Appellants cite cases on various side topics, but cite no cases or other authority supporting their far-fetched claim to be settlors. By contrast, there is a case squarely on point holding that heirs of a settlor do not stand in the settlor's shoes. In *Stone v. Washington Medical Ctr.*, 515 S.W.3d 104 (Ark. 2017), an Arkansas couple created a charitable trust of land to be used by a hospital. When the hospital later sold that land to a private company, the settlors' heirs sued, claiming the right to enforce the trust. The Arkansas statute, like South Carolina's, allowed such suits by settlors: "The settlor of a charitable trust, among others, may maintain a proceeding to enforce the trust." Ark. Code Ann. 28-73-406(c).

But the Supreme Court of Arkansas held the heirs had no standing under the statute:

> "In this instance, the Stone heirs' argument is misplaced because they are not the settlors who established the charitable trust in the 1909 deed."

Stone v. Washington Reg. Med. Ctr, 2017 Ark. 90, 110 (2017).

The Arkansas court also held the heirs could not sue as "among others" either:

> "Nor are they 'among others' contemplated in section 28-73-406 (c) because they, as the settlors' heirs, no longer possess an interest in the property."

Id.

Many states do not allow settlors to sue, but the Arkansas law is relevant here because that statute, like South Carolina's, specifically allows settlor lawsuits – and it draws the line there. Accordingly, Appellants are not settlors, even if they could now make the argument.

CONCLUSION

For the reasons stated above, the Court should affirm the judgment of the circuit court.

Respectfully submitted,

February 18, 2025

s/Armand Derfner
Derfner & Altman, LLC
Armand Derfner
Jonathan S. Altman
575 King Street, Suite B
Charleston, SC 29403
jaltman@derfneraltman.com
Telephone: (843) 723-9804

William J. Cook
Cultural Heritage Partners, PLLC
4370 Spring Island
Okatie, SC 29909
will@culturalheritagepartners.com
Telephone: (843) 801-3366

Kathleen F. Monoc
Monoc Law, LLC
77 Grove Street
Charleston, SC 29403
katie@monoclaw.com
Telephone: (843) 790-8910

Julia P. Copeland, Corp. Counsel
The City of Charleston
50 Broad Street
Charleston, SC 29401
copelandj@charleston-sc.gov
Telephone: (843) 724-3730

Attorneys for Respondents The City of Charleston, South Carolina and the individual City of Charleston officials named herein