THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable 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,
ANDREW PICKENS CALHOUN

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, AND 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.

FINAL REPLY BRIEF OF THE BOARD OF FIELD OFFICERS and F. PRESTON WILSON

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STANDARD OF REVIEW

"In deciding a motion to dismiss pursuant to 12(b)(6), SCRCP, . . . [t]he question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief." *Plyler v. Burns*, 647 S.E.2d 188, 192, 373 S.C. 637, 645 (2007) (citations omitted). "In deciding whether the trial court properly granted the motion to dismiss, the appellate court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief." *Brazell v. Windsor*, 682 S.E.2d 824, 826, 384 S.C. 512, 515 (2009).

ARGUMENTS

I. THE SOUTH CAROLINA ATTORNEY GENERAL HAS CONSISTENTLY OPINED THAT CERTAIN PRIVATE PERSONS HAVE STANDING TO ENFORCE THE HERITAGE ACT AND THAT SAID RIGHT OF STANDING INCLUDES PETITIONERS.

Appellants are not alone in asserting they have rights to enforce the Heritage Act. Indeed, the Heritage Act itself provides that: "[n]o 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 § 10-1-165. Our Attorney General opined not long after enactment of the Heritage Act that certain heritage groups were included within the term "the public body." S.C.A.G. Op. dated July 18, 2001 ("[W]hen the General Assembly speaks of the 'public body responsible for the monument or memorial,' it is not alluding to particular individuals, but is including bona fide nonprofit

groups such as the UDC, the SCV and other similar organizations.").

Appellant Board of Field Officers is an organization that the General Assembly speaks of when referring to the public body. It has long existed in South Carolina for the purpose of preserving our history and remembering those who have risked, or ultimately gave, their lives in service to our State. Like the groups mentioned by the Attorney General, the Board of Field Officers cooperated in the erection of the Calhoun Monument and in maintaining the grounds around the monument. In fact, it had maintained those grounds for over a century when the Heritage Act was enacted.

> "[I]t would be far too restrictive a reading of the statute to limit the meaning thereof only to governmental bodies per se. To exclude the various [] heritage groups which often provide the day-to-day care and upkeep of these monuments would disregard legislative intent. Instead, we believe the better reading of the Act would be to include within the meaning of the phrase 'body having oversight' those groups dedicated and devoted to [] heritage and history."

S.C.A.G. Op. dated July 18, 2001.

Less than a month ago, the Attorney General affirmed its position in an amicus brief directly addressing the issue of standing. *Charleston Chapter UDC v. Charleston County Sch. Dist.,* No. 2024-CP-10-03667 (Amicus Brief filed Jan. 28, 2025) (R. pp. 153- 175) It is the Attorney General's stance that not only are their private parties with legal standing to enforce the Heritage Act, but that Court involvement is necessary and proper to resolve the applicability of the act in particular circumstances. Amicus Brief at 8 (citing S.C.A.G. Op. dated Feb. 25, 2015 (2015 WL 1093151) and S.C.A.G Op. dated Sept. 7, 2012 (2012 WL 4283911))) (R. pp. 153-175).

> "[T]he legislative history of the Heritage Act indicates the General Assembly intended to provide broad protections for thousands of monuments across the State. In keeping with this intent, it seems plain that the General

> Assembly intended for the Heritage Act to create an implied right of action for private plaintiffs. *See Denson v. National Casualty Company*, 439 S.C. 142, 151 886 S.E.2d 228, 233 (2023) (describing 'legislative intent' as the 'main factor in determining whether a statute gives rise to a private cause of action.').
>
> Second, given the importance of the Heritage Act to South Carolina's history, Petitioner arguably has public importance standing. In such cases, a plaintiff need not always demonstrate that the relevant statute has an implied right of action. *See Sloan v. Dep't of Transp.,* 365 S.C. 299, 304, 618 S.E.2d 876, 879 (2005).
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> Third, Petitioner has filed a mandamus petition, which itself provides a means for remedy or relief in this case. *See Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 36, 512 S.E.2d 106, 109 (1999). Importantly mandamus relief may even be appropriate in cases in which a court is required to interpret a statute. *See Willimon v. City of Greenville*, 243 S.C. 82,87, 132 S.E.2d 169, 171 (1963) ("But where the only doubt that clouds the issue consists in the construction of the statute which confers the right or imposes the duty, the writ will issue if the Court, after considering the law, concludes that it confers the right claimed or imposes the duty asserted; otherwise, it will be denied.").

Amicus Brief at 8.[1] (R. p. 160). The Heritage Act establishes a right, it envisions persons caring for monuments enforcing that right, and it establishes a duty upon public entities not to remove or alter the monuments nor to prevent anyone protecting the monuments from doing so. A mandamus order to enforce the City to perform its legal duty is an appropriate remedy.

Appellant Board of Field Officers, as a heritage group directly involved with the Calhoun Monument, is included in the persons who may take "proper measures and exercise[e] proper means for the protection, preservation, and care of the [Calhoun Monument]." S.C. Code § 10-1-165. Appellant Wilson, as a direct descendant of an officer of the now defunct Ladies Calhoun

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[1] Respondent makes reference to the dicta of the circuit court that the Heritage Act may not protect the Calhoun Monument and refers to Appellant's theory as bizarre. While such analysis is not ripe, Appellant notes that the Attorney General opined on other monuments not specifically listed and determined "the Legislature clearly intended to protect other officially established public monuments and memorials dedicated to the men and women who served with distinction in defense of our country." S.C.A.G. Op. dated Sept. 7, 2012. The Heritage Act should be given the "broadest possible construction" and should not be interpreted to leave unprotected Charleston's largest and one of its oldest monuments to South Carolina's most distinguished statesman. *Id.*

Monument Association likewise is included in the persons who may take action. These were the groups envisioned when the General Assembly enacted the Heritage Act, and now these persons should be included in those who may enforce the heritage act as the body having oversight of the monuments.

II. THE SOUTH CAROLINA DECLARATORY JUDGMENT ACT INCLUDES A CAUSE OF ACTION TO INTERPRET THE LAW WHERE A PARTY HAS STANDING.

Respondents assert they "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." Resp. Init. Brief at 8. Respondents have completely overlooked that Appellants bring this action under the declaratory judgment Act which provides that "[a]ny Person . . . affected by a statute, municipal ordinance . . . may have determined any question of construction." S.C. Code Ann. § 15-53-30.

Said act has commonly been used to declare the meaning of a statute, ordinance, or the constitution and to enforce the same. *See* (discussing standing to bring suit challenging the governor's action in response to COVID); *Sloan v. Department of Transp.*, 379 S.C. 160, 666 S.E.2d 236, 241 (2008) (discussing standing to bring suit challenging the use of emergency procurement procedures.); *Sloan v. Hardee*, 371 S.C. 495, 640 S.E.2d 457, 498 (2007) (construing the law under the declaratory judgment act without questioning standing or cause of action.). Two of these cases were in the original jurisdiction of the Supreme Court. Further, the Court observed that "'taxpayer's standing to challenge unauthorized or illegal governmental acts has been repeatedly recognized in South Carolina,' *Sloan v. School Dist. of Greenville County,* 342 S.C. 515, 520, 537 S.E.2d 299, 301 (Ct. App. 2000), and indeed has been repeatedly

recognized as to Sloan himself. *See, e.g.,* id.; *Sloan v. Department of Transp.,* 365 S.C. 299, 304, 618 S.E.2d 876, 878-79; *Sloan v. Greenville County,* 356 S.C. 531, 548, 590 S.E.2d 338, 347." *Sloan v. Department of Transp.*, 379 S.C. at 169, 666 S.E.2d at 241.

Our Supreme Court would not have missed the lack of a cause of action. Instead, it realized that where standing is found, including under the public importance doctrine, the declaratory judgement act provides for a cause of action to interpret the meaning of the law and to declare an act or action valid or invalid. When invalid, appropriate remedy may be had by the plaintiff.

Appellants here have asserted claims under the declaratory judgment act, and if standing is had, the cause of action is clear. Respondent's focus on the Heritage Act as not creating a cause of action is a red herring. "Taxpayers must have some mechanism of enforcing the law." *Id.* (citing *Sloan v. School Dist. of Greenville County*, 342 S.C. 515, 523, 537 S.E.2d 299, 303 (Ct. App. 2000)). Where nothing else is allowed, the declaratory judgment act serves for that purpose.

III. APPELLANT WILSON AND THE BOARD OF FIELD OFFICERS STATEMENT OF ISSUE NUMBER 1 DOES CHALLENGE THE CIRCUIT COURT'S RULING THAT APPELLANTS DO NOT HAVE STANDING UNDER THE TRUST CODE, INCLUDING AS "AMONG OTHERS", TO SUE UNDER THE TRUST CODE.

Appellants are perplexed by Respondents' assertion that the Circuit Court's ruling that Appellants do not have standing, including as "among others", under the Trust Code is not challenged. Appellants clearly raise the issue whether the Circuit Court erred by holding they were not among the class of persons who have standing to enforce a Charitable Trust under the Trust Code. Brief of Appellant, 4 (Issue #1). That class of persons includes not just settlors,

which Appellants discuss and which Respondents took note of, but also other persons of special interest falling into the statutory language "among others."

Appellants put forward two primary arguments: 1) that Appellant Wilson and Appellant Board of Field Officers are each either settlors or stand in the shoes of settlors, and 2) that even if the first assertion is not correct, for all the reasons stated in such assertion, and for further reasons argued, Appellants are of such special interest to fall into the class of "among others" which the Trust Code also allows to enforce a Charitable Trust. Appellant craves reference to Brief of Appellant, Argument I.c where it explicitly challenges the circuit courts construing of the language "among others" to exclude Appellants.

At the circuit court, the Respondents set up a straw man argument that Appellants were mere beneficiaries not included in the class of persons "among others." Now, Respondents plainly ignore Appellants' arguments. Appellants assert that each, if not recognized as a settlor, has a special interest to bring enforcement of that trust. That special interest ranges from their involvement with the creation of the trust to their physical proximity to the trust property and the effect the breach of trust has on their property.

If it has not been clearly stated before, let it be clearly stated now: the Trust Code's language "among others," which is part of model language used in many states, includes those persons who have "'special interest' in the performance of a charitable trust." Edward C. Halbach Jr., Standing To Enforce Trusts: Renewing and Expanding Professor Gaubatz's 1984 Discussion of Settlor Enforcement Gaubatz's 1984 Discussion of Settlor Enforcement, 62 U. Miami L. Rev. 4 (April, 2008). The persons encompassed "among others" can include adjacent landowners. *Grabowski v. City of Bristol*, 780 A.2d 953, 955 (Conn. App. Ct. 2001) (standing

granted because, as owners of adjoining land, the individuals had interests greater than the public generally in the restricted use of the trust property). And it can include heirs of settlors. *See generally Obermeyer v. Bank of America*, N.A., 140 S.W.3d 18 (Mo. 2004) (allowing the settlor's heirs to bring suit to interpret the provisions of the charitable trust.).

Appellants do challenge the circuit court's ruling that they are not included in the "among others" class of persons who have standing. Appellant's assert they have standing. Standing as settlors, standing as persons with special interest, and, if all else fells, standing as members of the public where neither the trustee nor the Attorney General will protect the interest of the trust. *Kapiolani Park Pres. Soc'y v. City of Honolulu*, 751 P.2d 1022, 1025 (Haw. 1988) ("members of the public, as beneficiaries of the trust, have standing to bring the matter to the attention of the court.").

IV. PETITIONERS WILSON AND THE BOARD OF FIELD OFFICERS RAISED BELOW THEIR CLAIM UNDER THE TRUST CODE INCLUDING ALLEGEING THAT THE BOARD OF FIELD OFFICERS ESTABLISHED A TRUST BY GIFT OF LAND, "IN TRUST", TO THE LADIES CALHOUN MONUMENT.

Respondents allege that Appellants did not properly raise below their claim under the S.C. Trust Code. However, Appellants clearly alleged that the City of Charleston received the Calhoun Monument in trust as evidenced by the Blackman DeSaussure Letter to the City of Charleston and the unanimous resolution of Alderman Zimmerman Davis. (R. p. 29). Further, Appellants alleged that the Board of Field Officers had specifically granted the land title in trust for limited purposes reserving to itself a right of reversion. (R. pp. 24, 31).

"It is well settled that a decision to grant a Rule 12(b)(6) motion to dismiss cannot be sustained if facts alleged and inferences reasonably deducible therefrom would entitle the

plaintiff to any relief on *any theory* of the case, even though different from that on which the plaintiff may have supposed himself entitled to recover." *Mr. G v. Mrs. G,* 320 S.C. 305, 311, 465 S.E.2d 101, 105 (Ct. App. 1995) (Dissent, Hearn, J.) (emphasis in original). *Also see Morrow Crane Co. v. T.R. Tucker Const.*, 296 S.C. 427, 429, 373 S.E.2d 701, 702 (Ct. App. 1988).

Appellant's statements in the Complaint make clear that the Board of Field Officers gave land, in trust, for the erection of the Calhoun Monument. (R. p. 24) If such statement is not explicit, then it is a reasonable inference that the donor of land to which title is held in trust is a settlor of said trust. (R. p.73) ("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."). And where the property so donated is to be used for a public purpose, that said trust is charitable in nature. *Id.*

Building upon this, Appellants brought a claim under the S.C. Trust Code to enforce the charitable trust for the display of the Calhoun Monument. That Appellants are a beneficiary of a charitable trust is one theory, but only one theory of the case. It is also a theory that Appellants are the settlors, or stand in the shoes of the settlors, of the Trust. (R. pp. 35-36). This second theory is encompassed in Appellant's Complaint, was raised to the circuit court, and, under this Court's de novo review standard is ripe for consideration.[2] "A motion to dismiss under 12(b)(6) cannot be sustained if the facts alleged in the complaint and inferences reasonably deducible therefrom would entitle plaintiff to *any relief on any theory of the case*." *Morrow Crane*, 296 S.C. at 429, 373 S.E.2d at 702 (emphasis added). Because all well pled facts must be considered

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[2] It is a third theory of the case that Appellants are persons of 'special interest' who fall into the class "among others" granted statutory grounds to sue. Such theory is discussed *supra*.

true for a motion to dismiss under 12(b)(6), appellants have pled that each is a settlor, or stands in the shoes of settlor, and settlors have standing under the Trust Code, therefor this Court should recognize Appellant's standing and remand this case to the Circuit Court for further consideration.

V. REVIEW OF DISMISSAL UNDER RULE 12(B)(6) SHOULD BE BOTH DE NOVO AND GENEROUS IN THAT THE CASE IS VIEWED IN THE LIGHT MOST FAVORABLE TO THE PETITIONER AND WITH EVERY DOUBT RESOLVED IN HIS BEHALF.

In considering a motion to dismiss pursuant to SCRCP Rule 12(b)(6), the facts and inferences should be considered in the light most favorable to the plaintiff. *Baird v. Charleston County,* 333 S.C. 519, 511 S.E.2d 69 (1999). When a Court finds that dismissal is proper for failure to state facts sufficient to constitute a cause of action, the "plaintiff in most cases should be given an opportunity to file and serve an amended complaint." *Spence v. Spence*, 368 S.C. 106, 628 S.E.2d 869, 881 (2006) (citing *Foman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.E.2d 222 (1962)). Here Appellants were given no opportunity to amend their pleadings.

De novo review, especially in light of the standard that a motion to dismiss pursuant to SCRCP Rule 12(b)(6) is improper if plaintiff can recover on *any* theory of the case, should encompass any and all theories of Appellant's case which are included, in part or in whole, in the complaint. When any theory exists, the appellate court can extend the statute of limitations to allow amendment of the complaint. *Spence*, 628 S.E.2d at 881. "An appellate court should follow this procedure when the plaintiff presents additional factual allegations or a different theory of recovery which, taken as true in a well-pleaded complaint, may state a claim upon which relief may be granted." *Id.* (citing *Potter, Prescott, Jamieson & Nelson, P.A. v. Campbell,*

708 A.2d 283, 286-87 (Me. 1998). "[A]n appellate court must find the dismissal was without prejudice and remand for the filing of an amended complaint unless the court concludes any amendment would be clearly futile." *Skydive Myrtle Beach v. Horry County*, 426 S.C. 175, 190 826 S.E.2d 585, 593 (2018).

Appellants' claim clearly stated that the Board of Field Officers gave land for the Calhoun Monument and title to said land was in trust. The deed by which the land was given was cited in the complaint, and as a matter of public record, was included in the Complaint. Further, filings with the Court noted that the Board of Field officers was the settlor of the trust and entitled to have the land returned to it. The case for Appellant Wilson is similar in that his relation to the settlor the Ladies Calhoun Monument Association is well established.

Appellants are not springing these theories of the case upon Respondents. These theories were there and apparent, this Court should consider these theories, and even if technically deficient, the appropriate action is remanding the case to the circuit court and imposing a reasonable amount of time to address deficiencies through an amended complaint.

CONCLUSION

Appellants challenge the SCRCP Rule 12(b)(6) dismissal by showing multiple theories of the case upon which the Appellants could prevail. These include causes of action under the declaratory judgment act including both public importance standing and standing as interested parties, standing as interested parties to enforce the heritage act under the language of said act, standing as settlors under the charitable trust code to enforce the charitable trust, and standing as "among others" due to their special interest in the trust to enforce the charitable trust.

Under any of these theories Appellants have standing and could recover for harms caused. Recovery may include return of property, re-erection of the Calhoun Monument, a declaration of illegality of one or more acts by Respondents, payment of damages, and/ or declaration of rights under the law. Any one of these is enough for Respondents to survive a Rule 12(b)(6) motion to dismiss and the order of the circuit court should be reversed and this case remanded for further proceedings.

Respectfully submitted,

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