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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM OCONEE COUNTY

Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2025-000790
Case No. 2024-CP-37-00202

South Carolina Public Interest Foundation, Jim Mann, David Dial, Rachel Moore, Terri Meyerring, Carl Meyerring, Doug Muzik, Bruce Burrell, India Lancaster, John Wagner, Gwen McPhail, Lillian Lusk, and Linda Love, on behalf of all others similarly situated, Appellants-Respondents,

v.

Oconee County, Respondent-Appellant,

RESPONSE OF APPELLANTS-RESPONDENTS TO AMICUS BRIEF OF THE SOUTH CAROLINA WATER QUALITY ASSOCIATION

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Table of Contents

Table of Authorities ii

Argument 1

I. THE 20-DAY STATUTE OF LIMITATIONS DOES NOT BAR THIS ACTION. 1

II. THE APPELLATE RECORD SHOULD NOT CONTAIN NEW FACTS OR NEW EXPERT OPINION. 1

III. AN AMICUS CURIAE SHOULD BE A FRIEND OF THE COURT, NOT A FRIEND OF THE COUNTY. 3

Conclusion 4

Table of Authorities

Cases

Elam v. South Carolina Dep't. of Transportation,
361 S.C. 9, 23-24, 602 S.E.2d 772, 779-780 (2004).. 1-2

Gaffney v. Peeler, 21 S.C. 55 (1884)...2

Long v. Dunlap, 87 S.C. 8, 68 S.E. 801 (1910)...2

Sykes v United States, 131 S.Ct. 2267, 2286, 180 L.Ed.2d 60 (2011)
(Scalia, *dissenting*)...2

Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)......................... 1-2

Statutes, Acts, and Ordinances,

SC Code Ann § 11-15-30 1

S.C. Code. § 15-77-300..5

Rules

Fed. Rule Crim. Proc. 16(a)(1)(F), (G) 2

Fed. Rules Evid. 702–703, 705...2

SCACR 210 ....1, 2

SCACR 213 3

Treatise

Larson, Allison Orr, *The Trouble with Amicus Facts*, 100 Va.Law.Rev. (2014)........... 3-4

Appellants, by their undersigned attorney, submit this brief in opposition to the Amicus Brief filed by the South Carolina Water Quality Association ("Association" or "amicus").

I. THE 20-DAY STATUTE OF LIMITATIONS DOES NOT BAR THIS ACTION.

First, the Association argues that the Circuit Court should have relied on the 20-day statute of limitations to dismiss the Appellants' case. (Amicus brief, p. 3). The Circuit Court properly ruled that the Act's 20-day statute of limitations related to the issuance of the bonds, not the use of the proceeds. (R. pp. 4-5).

The 20-day statute of limitations addresses matters of **the issuance** of the bonds, not the use of the proceeds, as is at issue in this case. Appellants know of no statute of limitations argument that would affect that legal contention. Appellants rely on their argument in their initial brief for this response.

Second, the Association argues that good policy reasons support the 20-day statute of limitations. (Amicus brief, pp. 4-6). The 20-day statute of limitations relates to the issuance of bonds, and their continuing validity; it has no application to the Appellants' arguments in this case.

II. THE APPELLATE RECORD SHOULD NOT CONTAIN NEW FACTS OR NEW EXPERT OPINION.

Testimony not presented to the lower court is not appropriate for consideration by the appellate court. "The Record shall not, however, include any matter which was not presented to the lower court or tribunal." SCACR 210(c). "[T]he appellate court will not consider any fact which does not appear in the Record on Appeal." SCACR 210(h).

> [A] great number of reported cases in South Carolina for at least four generations, and more recently the appellate court rules and rules of civil procedure, have emphasized the importance and absolute necessity of ensuring that **all issues and arguments are presented to the lower court** for its consideration. Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court. *E.g., Wilder Corp. v. Wilke,* 330 S.C. 71, 76, 497 S.E.2d

> 731, 733 (1998) ("It is axiomatic that **an issue cannot be raised for the first time on appeal**, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."); *Long v. Dunlap,* 87 S.C. 8, 68 S.E. 801 (1910) (**Supreme Court will not consider any point which was not presented and considered below** unless it involves jurisdiction of the court); *Gaffney v. Peeler,* 21 S.C. 55 (1884) (question of law which was not presented to or passed upon by the trial court cannot be raised on appeal); Rule 210(c), SCACR (**record on appeal shall not include matter which was not presented to lower court**).

Elam v. South Carolina Dep't. of Transportation, 361 S.C. 9, 23-24, 602 S.E.2d 772, 779-780 (2004) (emphasis added). The amicus brief would seek to supplement the factual record, contrary to the South Carolina Appellate Court Rules and contrary to "reported cases in South Carolina for at least four generations." *Id.*

Justice Scalia pointed out the inherent defects and the legal and logistical flaws in accepting factual data or other assertions in the nature of testimony, untested by the rules of evidence or the adversary process.

> **Supreme Court briefs are an inappropriate place to develop the key facts in a case**. We normally give parties more robust protection, leaving important factual questions to district courts and juries aided by expert witnesses and the procedural protections of discovery. See Fed. Rule Crim. Proc. 16(a)(1)(F), (G); Fed. Rules Evid. 702–703, 705. **An adversarial process in the trial courts can identify flaws in the methodology** of the studies that the parties put forward; here, we accept the studies' findings on faith, without examining their methodology at all.

Sykes v United States, 131 S.Ct. 2267, 2286, 180 L.Ed.2d 60 (2011) (Scalia, *dissenting*) (emphasis added). The facts alleged in an amicus brief have none of the safeguards of the litigation process.

The amicus brief attempts to infuse additional fact and opinion testimony (not tested by cross-examination) (Amicus brief, pp. 2-7) The County had failed to present this evidence to the Circuit Court. The parties have already submitted their briefs and designated matters for the Record on Appeal. The amicus attempts to supplement the record improperly with new information.

"The [amicus] brief shall be **limited to argument** of the issues on appeal **as presented by the parties**." SCACR 213 (emphasis added). The amicus briefs in this action go beyond "argument of the issues on appeal as presented by the parties. The amicus briefs present new factual assertions and opinions, which are **not argument** and were **not presented** by the parties.

III. AN AMICUS CURIAE SHOULD BE A FRIEND OF THE COURT, NOT A FRIEND OF THE COUNTY.

A recent law review article addresses the problem of the new factual and expert testimony that was not presented to the lower court and is not a part of the lower court record. *The Trouble with Amicus Facts*, by Allison Orr Larson, Associate Professor of Law, the College of William and Mary School of Law,100 Va.Law.Rev. (2014). Professor Larson's article begins by tracing the history and development of the amicus brief.

> The amicus curiae – or "friend of the court"– is in no way a newfangled idea. Dating back to Roman law, the original amicus was a "bystander, who without having an interest in the case, of his own knowledge make a suggestion on a part of law or of fact for the information of the presiding judge." In pre-18th-century England, the amicus was a neutral lawyer physically present in the courtroom who would engage in impromptu "oral 'shepardizing' – the bringing up of cases not known to the judge." Early courts welcomed this form of amici curiae, on the theory that such neutral aids helped to avoid error and "served to maintain judicial honor and integrity."
>
> Interestingly, the original amicus was the lawyer not client –- the amicus curiae stood in "an essentially professional relation to the court." Organizations could not serve as amici curiae. The word amicus really describes a professional relationship between a judge and a lawyer. It was not until the early 1900s the courts began to attribute amicus briefs to the organization that sponsored it rather than the lawyer who submitted it.
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> Once the amicus arrived in America, the adversary system took hold of it, and it became common for an amicus to represent interests of another.
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> * * *
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> The turn of the twentieth century, then, brought dramatic change in the Amicus business – a total shift, as one scholar frames it, from "neutral assistance to partisan advocacy." . . . **Now amici are often compared to lobbyists**. Many interest

groups are established in least in part for the purpose of participation as amici in appellate cases . . . .

The evolution of the amicus from neutral bystander to "adversarial weapon" has generated a fair amount of criticism -- both past and present. In 1949, Justice Frankfurter complained that the amicus briefs were "embarrassing" the court: "I do not like to have the Court exploited as a soapbox or as advertising medium or as the target not of arguments but of mere assertions that this or that group has this or that interest in the question to be decided."

* * *

Political scientists and legal scholars now tell us that "more than any other type of brief filed that an appellate court, those drafted by amici contain a significant portion of new evidence." **These briefs are filed after the record was closed, and the new information they present is not subject to cross-examination below**.

Id., pp. 7-15 (footnotes omitted) (emphasis added). The amicus brief in this case is similar to those described by Professor Larson. The South Carolina Water Quality Association amicus brief seems like an argument of a lobbyist or advocate, like an "adversarial weapon." The amicus brief does not come from a neutral or disinterested "bystander, who without having an interest in the case, of his own knowledge makes a suggestion on a part of law or of fact for the information of the presiding judge."

Amicus briefs, such as this one, with their untested assertions, fundamentally alter the adversarial process under the South Carolina Appellate Court Rules. Instead of being a "friend of the court," the amicus in this case appears to be a "friend of the County."

CONCLUSION

The 20-day statute of limitations related to the issuance of the bonds does not bar Appellants' challenge to the use of the proceeds of the bonds. The use of the proceeds of the bonds violates the South Carolina Constitution. Finally, Appellants object to new testimony and new arguments from the Amicus brief.

WHEREFORE, Appellants pray the Court to:

1. Affirm the Circuit Court ruling that Taxpayers possess both public importance standing and taxpayer standing,
2. Affirm the Circuit Court ruling that Taxpayers have stated a valid claim for violation of the South Carolina Constitution Article X, section 12
3. Reverse the Circuit Court's dismissal with prejudice, reverse the reversal of its earlier opinion, and re-issue the preliminary injunction against the Constitutional violation,
4. Enjoin the expenditure of the proceeds of the bonds,
5. Grant the Taxpayers costs and attorneys' fees under S.C. Code Ann. § 15-77-300, et seq., and
6. Grant the Taxpayers such other and further relief as the Court deems just and proper.

Respectfully submitted,
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