

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

S.C. Supreme Court

John C. Few and D. Garrison Hill, Circuit Court Judges

Opinion No. 2010-5016 (S.C. Ct. App. Filed August 1, 2012,
Withdrawn, Substituted, and Refiled January 23, 2013

The South Carolina Public Interest Foundation, and Edward D. Sloan, Jr.,
individually and on behalf of all others similarly situated,.....Petitioners,

v.

Greenville County, Herman G. Kirven, Jr., Judy Gilstrap, Eric Bedingfield, Jim Burns, Scott
Case, Joseph Dill, Cort Flint, Lottie Gibson, Mark Kingsbury, Xanthene Norris, Robert Taylor
and Tony Trout Respondents.

APPENDIX VOLUME III

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John C. Few, Circuit Court Judge

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Jr., individually, and on behalf of all others similarly situated, ... Respondents,

v.

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Bedingfield, Jim Burns, Scott Case, Joseph Dill, Cort Flint, Lottie
Gibson, Mark Kingsbury, Xanthene Norris, Robert Taylor, and
Tony Trout, ... Appellants.

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STATEMENT OF ISSUES ON APPEAL

- I. When Sloan had previously sued Greenville County -- and lost -- in a case involving the same Council Reserves Policy that Sloan has challenged in the present case, arguing in both the prior case and the present case that County Council improperly delegated a portion of its authority to individual Council members, did the Trial Court err in refusing to dismiss the present case on the grounds of *res judicata*?
- II. In light of the broad discretion that Home Rule provides to county government, did the Trial Court err in finding that Greenville County's Council Reserves Fund, a component of Greenville County's budget which Greenville County Council voted upon as part of its annual budget ordinance, constituted an improper delegation of legislative authority?
- III. When the Trial Court in a prior case had ruled that the Council Reserves complied with local ordinances, state statutes and constitutional law -- including laws concerning non-delegation of legislative authority -- did the Trial Court in the present case err in awarding attorneys' fees to Sloan?

STATEMENT OF THE CASE

Introduction

Asserting taxpayer standing, Plaintiff Edward D. Sloan, Jr. and his non-profit corporation, the South Carolina Public Interest Foundation (collectively "Sloan"), sued Defendants Greenville County and Greenville County Council (collectively the "County") on July 20, 2006, challenging the County's establishment and use of the "Council District Expense Fund" (hereinafter referred to as "Council Reserves") (R. pp. 68-85) (Complaint). Both the County and Sloan moved for summary judgment (R. pp. 390-391, 430-431). The Trial Court, the Honorable John C. Few presiding, granted judgment to Sloan. See Order dated February 8, 2010, and entered February 10, 2010 (hereinafter the "Merits Order") (R. pp. 27-33). The County received written notice of the entry of this Order on February 12, 2010 and timely filed a Notice of Appeal on March 12, 2010. (R. pp. 640-647). Thereafter Sloan filed a motion for attorneys' fees, which the County contested. (R. pp. 554-623, 652-676). The Trial Court, the Honorable D. Garrison Hill presiding, granted Sloan's motion. See Order dated November 10, 2010, and entered November 11, 2010 (hereinafter the "Fees Order"). (R. pp. 34-43). The County received written notice of the entry of this Order on November 15, 2010 and timely filed a Notice of Appeal on November 19, 2010. (R. pp. 682-692). The Court consolidated both of these appeals by Order dated December 13, 2010.

Factual and Procedural Background

The Council Reserves

For fiscal year 1994-95, Greenville County Council, as a part of its annual budgeting process, established an account known as the County Council Reserves as an

item in the County's annual operating budget. See Order from Sloan v. Greenville County, C.A. No. 96-CP-23-2918 at 2 (R. p. 4). In 1996, County Council amended the Council Reserves to limit the use of Council Reserves to infrastructure purposes such as flooding and drainage, roads, lights, sewer, and public buildings and grounds. See id.

On August 2, 2005 Greenville County Council adopted Ordinance 3940, the County's Fiscal Year 2006-2007 budget ("2007 Budget"). Exhibit A to Complaint (R. pp. 71-74). The 2007 Budget appropriated \$109,422,318.00 for the General Fund to fund fiscal year 2007 County operations (R. p. 71). The General Fund Budget contains several departments, one of them being Department 1, Legislative and Administrative Services. See portions of Budget File, Exhibit 2 to Defendants' Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment and Cross-Motion and Memorandum in Support of Cross-Motion for Summary Judgment (hereinafter "Defendants' Summary Judgment Memo") (R. pp. 424-427). This department has three divisions: County Administrator (Division 40300), County Attorney (Division 40600), and County Council (Division 41500) (Id.). Each of these Divisions is divided into three categories: salaries, operating expense and contractual. Operating expense for each Division includes copy expense, postage, printing, awards, advertising, membership and dues, publications, operational support, transportation, training and conferences, office supplies and photo supplies. Id.

For the County Council Division, however, additional line items are included in the operational expense: the Council Reserves. See Exhibit 2 of Defendants' Summary

Judgment Memo, at 3 ("Council Dist. Exp. Dis." line item)¹ (R. p. 426). It is from these line items where the individual expenses of County Council members are funded. In addition, Council members may use funds from Council Reserves in connection with costs "associated with special, non-recurring community requests for infrastructure purposes" and for "contributions to local governments in Greenville County for community projects." The Council Reserves policy lists these expenses and costs as follows:

- Cost of general business supplies such as pens, paper, stationary, business cards, postage for district mailings, and ink cartridges;
- Cost of special documents, incentives and awards given either to the public or county employees for outstanding service or special recognition and the cost of framing by outside vendors of special documents;
- Cost of periodicals, professional journals, and reference books;
- Cost of per diem and mileage involved in the conduct of county business;
- Costs associated with community functions, conferences and training seminars such as food, gas, mileage, automobile rental, accommodations, tuition, and materials;
- Costs associated with special, non recurring community requests for infrastructure purposes such as:
 - Flooding
 - Roads
 - Lights
 - Sewer and drainage
 - Public buildings and grounds
 - Infrastructure related studies
- Contributions to local governments in Greenville County for community projects.

¹ Several years after creation of the Council Reserves, the County began using the name "Council District Expense" for the account, as shown on the line item in Exhibit 2 referenced above. The term Council Reserves, however, is used throughout this Brief for the sake of clarity.

See Exhibit 3 to Defendants' Summary Judgment Memo (R. p. 428).

The amount of the Council Reserves for the Council members for the 2007 Budget varied: \$26,946 for the Chairman; \$24,251 for the Vice-Chairman; and \$21,828 for all other Council members. Exhibit 2 to Defendants' Summary Judgment Memo (R. pp. 424-426). For those Council members who are standing for re-election or those who are not running for re-election in an election year, they may only spend one-half of their Council Reserves during the first half of the year. Exhibit 3 to Defendants' Summary Judgment Memo (R. p. 428). Finally, Council Members may not "carry over" Council Reserve funds. Id.

Sloan's Lawsuits Over the Council Reserves

The Prior Lawsuit

Following County Council's adoption of its budget for the 1997-98 fiscal year, Sloan sued the County, seeking an Order enjoining what Sloan alleged to be the "illegal practices" of the Council Reserves. See Third Amended Complaint in Sloan v. Greenville County, 96-CP-23-2918 (the "Prior Action" or "Prior Lawsuit"), at p. 13 (R. p. 61). In this Prior Action, Sloan plead eleven causes of action, six that he characterized as "procedural illegalities by Defendant," which he claimed violated various County and State Code sections. See Third Amended Complaint of Prior Lawsuit at pp. 8-12 (R. pp. 56-60). Regarding alleged violations of the Greenville County Code, Sloan alleged:

"that Defendant has continued to draw upon Council Reserves without voting on each expenditure or appropriation," id. at ¶ 74 (R. p. 56);

that the Council Reserves violated Greenville County Code § 7-81(a), which required that "appropriation of funds shall be made only by County Council to departments and agencies to provide public services to County citizens," id. at ¶ 80 (R. p. 57); and

that Council Reserves violated Greenville County Code § 7-81(b), which required that “Requests for County funds will be submitted to Council for review during the regular County budget process, and appropriation will be made only for specific line item purposes.” Id.

Regarding alleged violations of the State Code, Sloan claimed that Council Reserves violated S.C. Code Ann. § 4-9-130, “which required public hearings and reasonable notice whenever ‘Council action’ is taken to ‘make appropriations, including supplemental appropriations.’” Id. at ¶ 88 (R. p. 58). Expenditures through the Council Reserves, Sloan claimed, were supplemental appropriations made “after budget ordinances had already been enacted” and without “public hearings or [giving] reasonable notice,” which violated Code § 4-9-130. See id. at ¶ 89 (R. p. 58). For similar reasons Sloan claimed that Council Reserves violated S.C. Code Ann. § 4-9-140, which states that the “procedure for approval of supplemental appropriations shall be the same as proscribed for enactment of ordinances,” id. at ¶¶ 84 and 85 (R. p. 58), and S.C. Code Ann. § 4-9-120, which provides that “all ordinances shall be read at three public meetings of Council on three separate days with an interval of not less than seven days between the second and third meetings.” Id. at ¶ 92 (R. p. 59).

Both parties in the Prior Action moved for summary judgment. One set of arguments involved Sloan’s allegations that the County did not vote on each appropriation, or the “Procedural Irregularities” discussed above. See supra at 5-6. The County framed the issue as follows: “Sloan apparently contends that each disbursement from Council Reserves must be voted on and approved by Council as a whole following a public hearing regarding the proposed disbursement.” See Defendants’ Trial Brief from Prior Action at p. 16 (R. p. 154). Respecting this issue, and in particular Sloan’s claim that the Council Reserves violated S.C. Code Ann. §§ 4-9-130 and 4-9-140, the

County argued that § 4-9-130(2) “requires that after reasonable public notice a public hearing must be held before final Council action can be taken to ‘make appropriations, including supplemental appropriations.’” *Id.* at p. 16 (R. p. 154). On this point, the County argued further that:

[T]he appropriation at issue in this case is the appropriation made to the County Reserves budget item as part of the County’s annual budgeting process. As indicated above, this appropriation is made during the County’s annual budgeting process and there is no allegation, nor is there any evidence, that this appropriation is not made consistent with the requirements of [S.C. Code Ann. §] 4-9-130. Moreover, funds appropriated to Council Reserves are not ‘supplemental appropriations’ as defined in § 4-9-140 since Council Reserves are part of the County’s annual operating budget.

Id. Regarding the contention that County Council was violating its own County Code § 7-81, the County argued that “County Council is a department of county government that is a proper recipient of budget appropriations.” *Id.* at 17 (R. p. 155).

Sloan countered that the Council Reserves violated § 7-81 of the Greenville County Code. Motion for Summary Judgment and Memorandum of Law in Support of Motion at pp. 14-15 (R. pp. 176-177). He argued that

[A]ll ‘requests for County funds will be submitted to Council for review during the regular County budget process’ But [r]ather than the entire Council reviewing ‘requests for County funds’ that are ‘submitted for Council review during the regular County budget process,’ individual Council members receive requests throughout the year and respond to them by submitting individual requisitions to the Clerk of County Council ..., for amounts not exceeding their individual fund limits (more than \$18,000.00 per Council member this year).

Id. (emphasis added). Sloan asked the Court for an Order “enjoining Defendants’ appropriation, expenditures, disbursements, and donation of public funds **when they are not made by County Council as a whole, but rather they are made by individuals**, in violation of § 7-81(a).” (R. p. 179) (emphasis in the original).

The Trial Judge granted judgment to the County regarding the delegation of legislative authority issue. See, e.g., Order from Prior Action at 7-8 (R. pp. 9-10). Among other things, the Trial Judge expressly addressed Respondent Sloan's contention that the County had violated County Code § 7-81. The Trial Judge found that the County had not violated this provision, concluding "the County's actions have been consistent with the constitutional and statutory power granted county governments." See Order in Prior Action at 8 (R. p. 10). The Trial Judge held in part that based upon statutory and constitutional provisions and case law cited in the Order, "I find and conclude that Sloan has not sustained the burden of proving that the County has engaged in any illegal act. As noted, Council Reserves are approved during the County's annual budgeting process and Council Reserves has been an item in the County's annual budget ordinance since 1994-1995." Id. at 10 (R. p. 12) (emphasis added). Sloan did not appeal this Order.

The Present Case

Sloan challenged the Council Reserves policy again with the Present Case, after County Council had adopted the 2007 Budget pursuant to Ordinance 3940. The Complaint alleged that the County had "authorized and operated their fund variously known as the Council District Expense Fund, Council Reserves, Discretionary Funds, or the Slush Fund." See Complaint in the Present Case at ¶ 8 (R. p. 69). The Complaint noted that the 2007 budget as adopted in Greenville County Ordinance No. 3940 had provided for an appropriation for Council Reserves. Id. at ¶ 9 (R. p. 69). Sloan took issue with those "[c]osts associated with special, nonrecurring community requests for infrastructure purposes such as . . . flooding, roads, lights, sewer and drainage, public buildings and grounds, and infrastructure related studies." Complaint, ¶ 10 (R. p. 69);

see also Complaint at Exhibit B (R. pp. 69, 75). Sloan based this challenge entirely on a 2003 Opinion of the South Carolina Attorney General (AG), which dealt with a budget ordinance of Florence County. See Complaint, ¶ 11 (R. p. 70) (“County Council's delegation of legislative power to an individual member, as described herein, is unconstitutional and illegal, as explained in a South Carolina Attorney General Opinion dated November 13, 2003 (Exhibit C).”). See also Exhibit C to Complaint (AG Opinion) (R. p. 76-85). As noted above, Judge Few granted summary judgment to Sloan, see Merits Order (R. pp. 27-33), and after that Judge Hill granted Sloan’s Motion for attorneys’ fees. See Fees Order (R. pp. 34-43). This consolidated appeal followed.

STANDARD OF REVIEW

The Court should review this action under its own view of the preponderance of the evidence. Sloan brought this action as a declaratory judgment action seeking injunctive relief. See Complaint at ¶ 2 and Prayer of Relief (R. p. 68, 70). “A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue.” Sloan v. Greenville County, 356 S.C. 531, 544, 590 S.E.2d 338, 345 (Ct. App. 2003) (“Sloan v. Greenville County I”). As the Court stated in Sloan v. Greenville County I, “the fact that Sloan seeks equitable relief does not, however, require that the case be treated as an equitable action in toto. Rather, we must look to the ‘main purpose’ of the suit to determine its characterization.” Id. at 544, 590 S.E.2d at 345. In Sloan v. Greenville County I, a case involving multiple issues, the Court examined Sloan’s Complaint and held that “it seems clear that Sloan’s main concern is to enjoin the County from awarding contracts in a matter he claims is ultra vires under the County’s Procurement Code. ... Sloan did not pray for damages in his pleadings, and the Court

awarded none. ... The gravamen of the action, therefore, is merely to prevent the County from awarding future public works contracts in a matter employed in the present case.” 356 S.C. at 545, 590 S.E.2d at 345-46. Understood in this light, the Court stated that the action plead in the Complaint was “appropriately characterized as equitable and should be reviewed under the ‘preponderance of the evidence’ standard.” *Id.* at 546, 590 S.E.2d at 346. Like the relief sought in Sloan v. Greenville County I, the relief sought in the Present Case is to enjoin the County from making expenditures under the Council Reserves. Sloan has sought no damages in this action and the Trial Court has awarded none. The Present Case is clearly equitable in nature, and therefore the preponderance of evidence standard applies.

ARGUMENT

I. THE TRIAL COURT ERRED IN RULING THAT SLOAN'S CASE WAS NOT BARRED BY *RES JUDICATA* (CLAIM PRECLUSION).²

In the Present Case Sloan contends that the Council Reserves violates the non-delegation principle of both the South Carolina Constitution and general law. Sloan's claim, however, represents nothing more than a new label for an identical non-delegation

² It is well-recognized under South Carolina law that *res judicata* (i.e., claim preclusion) and collateral estoppel (i.e., issue preclusion) are separate concepts. See, e.g., Stone v. Roadway Express, 367 S.C. 575, 580, 627 S.E.2d 695, 697-98 (2006) (discussing each doctrine and setting out the elements of each); Nelson v. QHG of South Carolina, Inc., 354 S.C. 290, 305, 580 S.E.2d 171, 179 (Ct. App. 2003) aff'd in part and rev'd in part, 362 S.C. 421, 608 S.E.2d 855 (2005) (quoting other South Carolina authority for the proposition that "[t]he doctrines of *res judicata* and collateral estoppel are . . . two different concepts" (interior quotation marks omitted)). The County contends that Sloan's case is barred by the doctrine of *res judicata* (i.e. claim preclusion), (See Supplemental Memo. In Supp. of Mot. to Dismiss, 2) (R. p. 393) ("Defendants have raised claim preclusion as a defense to this lawsuit . . ."), not collateral estoppel (i.e. issue preclusion). The County's defense is one of claim preclusion, and thus analysis should focus on that concept to the exclusion of issue preclusion.

While South Carolina authorities repeatedly recognized and affirmed the distinction between claim preclusion and issue preclusion, some confusion could result from the fact that South Carolina case law has not always been consistent in its use of the term "*res judicata*" – sometimes using that term in a more general sense as an umbrella term for claim and issue preclusion, and sometimes using it in accord with the more modern trend of meaning only claim preclusion. See, e.g., Crestwood Golf Club, Inc. v. Potter, 328 S.C. 201, 216, 493 S.E.2d 826, 834 (1997) (recognizing the difference between claim preclusion and issue preclusion, but stating that "[t]he term *res judicata* encompasses two types of preclusion: claim preclusion and issue preclusion" before stating that "[f]or the sake of simplicity, this Court will use the terms issue preclusion and claim preclusion"); Price v. City of Georgetown, 297 S.C. 185, 188-89, 375 S.E.2d 335, 337-38 (Ct. App. 1988) (observing that "[t]he appealed order used the words *res judicata* and collateral estoppel interchangeably," observing that "[t]he modern trend is to refer to collateral estoppel as issue preclusion and to *res judicata* as claim preclusion," and concluding that "the trial judge . . . mistakenly used the terms *res judicata* and collateral estoppel as interchangeable terms"). For the sake of simplicity and clarity, the County also will use the terms issue preclusion and claim preclusion along with the terms *res judicata* and collateral estoppel.

argument pressed in the Prior Action. For this reason, the Trial Court erred in ruling that Sloan's case was not barred by *res judicata* (i.e. claim preclusion).

A. The Trial Court Erred by Relying on Commissioner of Internal Revenue v. Sunnen and Finding That A Separate Legal Claim is Created With The Enactment of Each Year's Budget.

The Trial Court's Merits Order makes clear that the **sole basis** of the Trial Court's refusal to apply *res judicata* was that because the Council Reserves appear "in each annual budget for Greenville County, the enactment of each budget creates separate legal claims." (Merits Order, 2.) (R. p. 29). The Trial Court made no mention of any other factor – particularly the impact of a change in the applicable law – on which it based its decision. In support of its decision, the Trial Court cited only one case: Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591, 598 (1948). In light of the true holding in Sunnen, as well as contemporary case law which has distinguished away the very proposition of Sunnen which the Trial Court relied upon, the Trial Court's holding cannot withstand review.

An Alabama Court of Appeals decision interpreting Sunnen in the context of a similar issue involving different tax years distinguishes away the very proposition relied upon by the Trial Court. State Dep't of Revenue v. Hoover, Inc., 993 So. 2d 889 (Ala. Civ. App. 2007) (Hoover II) was a successor case to Hoover I,³ which involved the same parties and the same fundamental issue "except that the **Hoover I litigation and the present case [Hoover II] [dealt] with different tax years and different amounts of**

³ Hoover I was the name that the Alabama Court gave to a series of cases involving the taxpayer Hoover, Inc. ("Hoover") and the Alabama Department of Revenue. The cites to the cases making up Hoover I are as follows: State Dep't of Revenue v. Hoover, Inc., 956 So. 2d 1157 (Ala. Civ. App. 2006); State Dep't of Revenue v. Hoover, Inc., 956 So. 2d 1142 (Ala. Civ. App. 2005); Ex parte Hoover, Inc., 956 So. 2d 1149 (Ala. 2006), and Hoover, Inc. v. State Dep't of Revenue, 833 So. 2d 32 (Ala. 2002).

sales taxes assessed by the Alabama Department of Revenue (“the Department”).” Hoover II, 993 So. 2d at 890 (emphasis added). Like Hoover II, the Present Case involves the same parties and the same fundamental issue from the Prior Action -- whether the Council Reserves impermissibly delegates authority to Council Members. Also like Hoover II, different fiscal years were involved. The only difference is that whereas Hoover II involved different tax years, the Present Case involves different budget years.

The issue in Hoover I centered on whether an Alabama sales-tax exemption statute violated the Commerce Clause of the United States Constitution. Hoover II, 993 So. 2d at 889. Hoover I addressed a tax assessment against Hoover for \$159,520.97 for years 1996 through 1999. Id. The Alabama Supreme Court ultimately found in favor of Hoover on the basis that the statute facially discriminated against interstate commerce and that the Department failed to provide evidentiary justification for the tax scheme. Id. at 891. In Hoover II, Hoover challenged another assessment (\$133,892.06) by the Department for the years 2000 through 2003. Id. at 890. Hoover appealed that assessment and moved for summary judgment on the basis that Hoover I was dispositive and barred relitigation of the issue of whether the Department established justification for a facially discriminatory tax scheme. Id. at 892.

The Department argued that “the decisions in the Hoover I litigation are not dispositive of the current case, which is based on different tax years” Id. More specifically, the Department argued that the first element of issue preclusion – “that an issue in a prior action was identical to the issue being litigated in the present action” – was not present because the litigation involved different tax years. Id. at 894-95 (citing

Smith v. Union Bank & Trust Co., 653 So. 2d 933, 934 (Ala. 1995)). In support of its position the Department relied on three cases. An Alabama Court of Appeals decision in State v. Delaney's, Inc., 668 So. 2d 768 (Ala. Civ. App. 1995), and the United States Supreme Court's decisions in Sunnen and Limbach v. Hoover & Allison Co., 466 U.S. 353 (1984). Hoover II, 993 So. 2d at 895. The Hoover II Court found that **these opinions did not "support the Department's position that collateral estoppel does not apply to the present case simply because different tax years are involved."** Id. (emphasis added). Instead, the Court found that "they support the proposition that collateral estoppel bars the relitigation of any issue in a **tax case when the controlling facts and applicable legal rules remain the same** as in a prior litigation." Id. (emphasis added).

With particular reference to Sunnen, the Hoover II Court interpreted the Supreme Court's decision as holding

that collateral estoppel did not apply because a line of cases, decided after the resolution of the previous action against the tax payer, had sufficiently changed the legal climate surrounding the issue at hand and that application of the principles currently in effect in light of that subsequent line of cases might have produced a different result from that reached in the previous action.

Id. (citing Sunnen, 333 U.S. at 606-07) (emphasis added). The Hoover II Court also interpreted Limbach in a similar fashion -- that collateral estoppel did not apply just because different tax years were involved, but because an intervening decision of the court changed the analysis of the issue at hand. Hoover II, 993 So. 2d at 896.

Summarizing the three cases cited by the Department, the Hoover II Court noted that

the courts held that the doctrine of collateral estoppel can apply to tax cases involving different tax years if the same issues were actually presented and determined in the first action, and 'the controlling facts and

applicable legal rules remain unchanged' However, when the controlling facts or applicable legal rules have significantly changed, collateral estoppel does not bar relitigation of the same issue previously decided **The Department is, therefore, incorrect in its assertion that Sunnen, Limbach, and Delaney's support the proposition that collateral estoppel does not apply simply because the litigation involves different tax years.**

Hoover II, 993 So. 2d at 897 (internal quotations omitted). Finding that there had been no change in the facts, legal analysis or doctrinal principle upon which Hoover I was based, the Hoover II Court held that collateral estoppel barred the Department from relitigating the same issue involved in Hoover I, despite the differing tax years. Id. at 897-98.

Considering the on-point issue (whether differing fiscal years create new legal claims) and analysis in Hoover II, the Trial Court's refusal to apply *res judicata*, which the Trial Court based solely on the rationale of differing budgets for each year, should be reversed. To hold otherwise would be to open the door to new litigation for each budget year between the same parties involving the same issues previously decided. The only difference would be the year in which the suit was filed. This result would subject the County and similar entities to an unending cycle of repetitive and continuous lawsuits – precisely the type of approach *res judicata* is meant to prevent, namely, bringing a lawsuit challenging some action under a number of legal theories and, when those prove unsuccessful, bringing another lawsuit with a new legal theory that was available the first time around. See, e.g., Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 34, 512 S.E.2d 106, 108 (1999) (“Res Judicata ends litigation, promotes judicial economy, and avoids the harassment of relitigation of the same issues.”); Norfolk S. Corp. v. Chevron

U.S.A., Inc., 371 F.3d 1285, 1290-91 (11th Cir. 2004) (“A major function of the doctrine of res judicata is to prevent piecemeal litigation . . .”).

As noted in Hoover II, the decisions in Sunnen and Limbach rested not on the creation of separate legal claims with each tax year, but on the fact that there was an intervening, significant change in the law. See Hoover II, 993 So. 2d at 895-96. Subsequent United States Supreme Court decisions have similarly interpreted Sunnen and limited its scope. For example, the Court in Montana, et al. v. United States, 440 U.S. 147 (1979) recognized that Sunnen limited the application of issue preclusion to contexts in which “the controlling facts and applicable legal rules remain unchanged.” Montana, 440 U.S. at 158 (quoting Sunnen, 333 U.S. at 600). Moreover, the Montana Court limited the reach of Sunnen even further by noting that only “**major** changes in the law” would bar the application of issue preclusion. Montana, 440 U.S. at 161 (emphasis added). The Eleventh Circuit has also acknowledged that the United States Supreme Court’s recent decisions have restricted the reach of Sunnen, noting that “[m]ore recent Supreme Court cases take a rather strict view of the holding in Sunnen, arguing that only ‘**major**’ changes permit the reopening of an issue.” North Ga. Elec. Membership Corp. v. City of Calhoun, 989 F.2d 429, 433-34 (11th Cir. 1993) (citing United States v. Stauffer Chemical Co., 464 U.S. 165 (1984) (other citations omitted) (emphasis added)). This opinion further notes that “[t]he recent cases in which the Supreme Court has discussed the application of collateral estoppel generally protect defendants from repetitive litigation, **unless prior law has been essentially overruled, thus making continued application of the principle of the earlier case unjust.**” North Ga. Elec., 989 F.2d at 434 (emphasis added).

Unlike the facts in Sunnen, there has been no change, much less a major change, in the non-delegation law applicable to the Present Case. Between the time that the Prior Lawsuit was resolved in favor of the County and the Present Case was filed, there was no material change in the legal analysis or doctrinal principle upon which the original decision in the Prior Lawsuit was based. Likewise, there was no material change in the statutory or constitutional law relevant to this issue. The intervening 2003 AG Opinion that apparently prompted the filing of the Present Case also does not represent a change in the law. First, it is not law and does not purport to be law. (See Ex. C to the Compl., AG Opinion at 2 (R. p. 77) (“while this Office may comment upon constitutional problems, only a court may declare an ordinance void as in conflict with the constitution”)). Moreover, the vast majority of the authority that the Opinion discusses pre-dates the Prior Lawsuit that was filed in 1996. (See Compl., Ex. C.) (R. pp. 76-85).⁴ Lastly, there is nothing in the Trial Court’s Order which would remotely suggest that the ruling denying the application of *res judicata* was based on a change in the law. (See Merits Order, 2.) (R. p. 29). Indeed, the opposite is true. In discussing the AG Opinion in the context of the County’s Motion to Dismiss on the basis of *res judicata*, the Trial Court noted: “I also don’t think the Attorney General issuing an advisory opinion is really all that significant of a change from a legal landscape.” See July 30, 2007 Transcript at p. 58, lines 20-23. (R. p. 706). See also October 27, 2007 Transcript at p. 30, lines 8-11 (R. p. 737) (Trial Court stating: “With all due respect to the Attorney

⁴ The AG Opinion notes in its conclusion that it is merely reaffirming a “previous opinion of this Office,” but does not specifically cite to its prior opinion. (Ex. C to Compl., 9) (R. p. 84). Regardless, the most recent Attorney General Opinion cited by the 2003 AG Opinion was dated June 24, 1997, (see Ex. C to Compl.) (R. p. 76), well before the Prior Lawsuit was resolved on February 23, 1998. Order from Prior Action at 11 (R. p. 13).

General of South Carolina, there is no intervening change in the legal context that is applicable here.”).

Moreover, significant amounts of authority from the United States Supreme Court, numerous Federal Circuits and South Carolina provide that a change in the law is ordinarily insufficient to bar the application of *res judicata* (i.e. claim preclusion, as distinguished from issue preclusion). Therefore, even if the 2003 AG Opinion rose to the level of being considered a change in the law, that change would not bar the application of claim preclusion. See Federated Dep't Stores v. Moitie, 452 U.S. 394, 398 (1981) (citing Angel v. Bullington, 330 U.S. 183, 187 (1947) (“the *res judicata* consequences of a final, unappealed judgment on the merits [are not] altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case.”); Precision Air Parts, Inc. v. Avco Corp., 736 F.2d 1499, 1503 (11th Cir. 1984) (“The general rule in this circuit, and throughout the nation, is that changes in the law after a final judgment do not prevent the application of *res judicata* and collateral estoppel, even though the grounds on which the decision was based are subsequently overruled.”); Barzin v. Selective Service Local Board No. 14, 446 F.2d 1382, 1383 (3d Cir. 1971) (recognizing that “a prior decision may serve as *res judicata* even if a contrary judicial decision on the legal issues involved intervenes between the first and second suits.”)); Pfizer Inc. v. Ranbaxy Labs., Ltd., 525 F. Supp. 2d 680, 689 (D. Del. 2007) (citing Federated, 452 U.S. at 398-99 (“the Supreme Court has declined to recognize an exception to *res judicata* [(i.e. claim preclusion)] based upon a change in the controlling law.”); Pfizer, 525 F. Supp. 2d at 690 (citing Wilson v. Lynaugh, 878 F.2d 846, 850-851 (5th Cir. 1989) (“the prevailing view by courts and commentators alike that a change in

the law is insufficient to bar the application of *res judicata*.”⁵); Hayes v. Hayes, 312 S.C. 141, 436 S.E.2d 305 (Ct. App. 1993) (after a change in the classification of military retirement benefits as marital property, the S.C. Court of Appeals found that the family court correctly determined that the change in the law did not overcome the bar of *res judicata*, but subsequently found that the family court had no subject matter jurisdiction over the issue.); see also 18 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 4415 (2d ed. 2002) (“Change in the controlling principles of law ordinarily does not warrant denial of claim preclusion.”)).

The Trial Court’s Order is clear – the sole basis for its ruling denying the application of *res judicata* was due to the differing budget years. (See Merits Order, 2.) (R. p. 29). However, the very case cited by the Trial Court does not support its ruling. As the Hoover II opinion, along with other subsequent Supreme Court cases limiting the application of Sunnen make clear, the Sunnen decision relied on an intervening change in the law, not the fact that differing tax years were involved. Subsequent Supreme Court cases have even further limited the application of Sunnen to “major” changes in applicable law when issue preclusion is at issue, and numerous other courts have recognized that there is no such exception when claim preclusion is at issue. Considering that this case involves claim preclusion, that there have been no changes in the applicable law since the Prior Lawsuit was resolved, and that the Trial Court’s Order did not even hint that a change in the law occurred or impacted the Court’s ruling, the Trial Court’s ruling denying the application of *res judicata* should be reversed and this case dismissed.

⁵ The Pfizer Court did note an exception to this general principle where there are “momentous legal changes invoking important and fundamental changes in constitutional rights.” Pfizer, 525 F. Supp. 2d at 690 n.2. As an example, the court cited the Supreme Court’s overrule of the separate but equal doctrine. Id.

B. Because the Prior Action Addresses Numerous Legal Challenges To The Council Reserves At Issue In The Present Case, Including Whether County Council Impermissibly Delegated Authority To Individual Council Members, *Res Judicata* Bars Sloan's Claim.

"Under the principles of claim preclusion, a final judgment on the merits in a prior action will **absolutely bar the parties** and their privies from **litigating in a subsequent action** issues actually litigated and **issues that could have been raised in the first action.**" Briggs v. Newberry County Sch. Dist., 838 F. Supp. 232, 235 (D.S.C. 1992) (applying South Carolina law) (citing Jaynes v. County of Fairfield, 303 S.C. 434, 401 S.E.2d 183 (Ct. App. 1991) (emphasis added). To establish claim preclusion as a defense, the defendant must show: (1) a final and valid judgment on the merits from a prior lawsuit; (2) an identity of parties between the prior action and the subsequent action; and (3) the subsequent action involves matters that were or could properly have been included in the prior action. See, e.g., Stone v. Roadway Express, 367 S.C. 575, 580, 627 S.E.2d 695, 697 (2006).

The elements of claim preclusion are undisputedly met in the Present Case. The Prior Action reached final judgment on the merits in favor of the County and against Sloan. See Order from Prior Lawsuit (R. pp. 3-13). Moreover, Sloan could have properly included his current constitutional non-delegation argument with his other non-delegation arguments in the Prior Action. And in fact, the same parties from the Present Case litigated to final judgment in the Prior Action the same issue that is present now: whether Council Reserves is an impermissible grant of authority to individual Council members. As a result, Sloan's case should be barred by *res judicata* (claim preclusion) and the Trial Court's ruling should be reversed.

In the Prior Lawsuit Sloan argued that establishment of the Council Reserves constituted an unlawful delegation of authority. Sloan based his non-delegation theory on the Greenville County Code and the State Code. Under the “Procedural Illegalities” section of the Third Amended Complaint in the Prior Lawsuit⁶, Sloan alleged that, by allowing individual Council Members to distribute funds on a discretionary basis, “Defendant has continued to draw upon Council Reserves without voting on each expenditure or appropriation.” Third Am. Compl., ¶ 74 (R. p. 56). The Prior Lawsuit’s Sixth Cause of Action (the first cause of action in the “Procedural Illegalities” section of the Third Amended Complaint) asserted that the County violated the law by “disburs[ing] funds at the requests of individual members rather than collectively as the ‘county council’ for ‘public services.’” *Id.*, ¶ 81 (R. p. 57) (emphasis added). Sloan alleged that this fact violated Greenville County Code § 7-81, which provides that “[a]ppropriation of funds shall be made only by county council . . .” and that “[r]equests for county funds will be submitted to council for review” *Id.*, ¶ 80 (R. p. 57). The Sixth Cause of Action expressly sought an injunction of “Defendant’s expenditures, disbursements, appropriations at the request of individual member of County Council” on the grounds that the “Greenville County taxpayers will suffer irreparable harm and levying of taxes for illegal expenditures.” *Id.*, ¶ 82 (R. p. 57). Thus, it is unmistakably clear that Sloan did in fact raise a non-delegation argument in the Prior Action.

Sloan not only made a non-delegation argument by alleging violations of the Greenville County Code, but he also made this argument by alleging violations of S.C.

⁶ The Third Amended Complaint in the Prior Lawsuit contained eleven causes of action, including several causes of action under the separate heading entitled “Procedural Illegalities by Defendant.” (See Third Am. Compl. from Prior Lawsuit, ¶¶ 73-103 (R. pp. 56-60).)

Code Ann. §§ 4-9-120 – 140 (id., ¶¶ 83-94) (R. pp. 58-59), which set forth the general requirement that a county must enact a budget annually and provide notice of a public hearing on such budget. The thrust of Sloan’s Seventh, Eighth and Ninth Causes of Action was that the County violated §§ 4-9-120 -- 140 by not holding public hearings or giving notice thereof of the appropriation to the County Reserves budget item as part of the County’s annual budgeting process, thus further making a non-delegation argument by the proposition that the appropriation to the County Reserves budget item must be an item of public hearing and notice thereof and cannot be a matter of “discretion.” See id.

Notably, while Sloan premised his “non-delegation” argument on the State and County Codes, the legal challenges to the Council Reserves in the Prior Lawsuit were not limited to violations of that law alone. Rather, Sloan expressly based some of his challenges on the S.C. Constitution. Specifically, the Tenth Cause of Action in the Third Amended Complaint asserted that establishment of the Council Reserves violated Article X, § 5 of the S.C. Constitution, which provides that “[a]ny tax which shall be levied shall distinctly state the public purpose to which the proceeds of the tax shall be applied.” (Third Am. Compl., ¶ 96) (R. p. 59). In support, Sloan further alleged that “Defendant disbursed proceeds of taxes that were budgeted only as ‘County Reserves’” and “Defendant has not ‘distinctly stated each public purpose’ for which Council Reserves funds would be spent.” Id., ¶¶ 97-98 (R. p. 60). Similarly to the Sixth Cause of Action, this cause of action also requested an injunction of such expenditures to save the taxpayers from unlawful action. Id., ¶ 99 (R. p. 60).

The prayer for relief further bears out that Sloan painted with a broad stroke in the Prior Lawsuit, challenging the Council Reserves on numerous legal theories that included

constitutional challenges. The prayer sought, among other things “[a] declaratory judgment that Defendant’s establishing ‘Council Reserves’ and appropriating, spending, disbursing, and donating public funds as described above violates the applicable statutes, Constitutions, ordinances and policies.” *Id.* p. 13. (R. p. 61). The prayer further sought “[t]emporary, preliminary, and permanent injunctions enjoining Defendant’s appropriation, expenditure, disbursement, and donation of public funds from the 1996-97 ‘Council Reserves’ in violation of the S.C. Constitution and Code and the Greenville County Codes regarding procedures for appropriation and expenditures.” *Id.*

While Sloan ultimately abandoned several of the theories raised in the Prior Lawsuit, he continued to push the non-delegation argument, contending that it was unlawful to delegate discretion for budget allocations to individual members of County Council. Sloan’s Summary Judgment Motion and Memorandum in support in the Prior Action bears this point out. After describing the parties in the first two paragraphs of the Motion, the third paragraph states that: “[i]n its fiscal year 1994-95 Annual Budget, Defendant established ‘County Council Reserves’ of \$60,000, from which Defendant would, at the request of each member of County Council, disburse up to \$5000 of county money, which is public money, to address special community needs.” (See Pl.’s Mot. and Supp. Mem. for Summ. J. in Prior Lawsuit, ¶ 3) (R. p. 165). The next thirty-one (31) numbered paragraphs list particular expenditures made from the Council Reserves from the ’94-95 budget, and to highlight the non-delegation legal theory, each of those paragraphs repeatedly label the expenditures as “discretionary funds.” *Id.*; ¶¶ 4-34 (R. pp. 165-166 compare with Prayer for Relief in the Complaint from the Current Action (contesting the “delegation of the **discretionary spending** authority” (R. p. 70)

(emphasis added)). The remainder of the Motion contains numerous other similar allegations, some related to other budget years, and continues to highlight the fact that funds were being spent in a discretionary manner as directed by individual Council members. Paragraph 52 of the Motion contains the charge that “Defendant has continued to draw upon Council Reserves without voting on each expenditure or appropriation.” (R. p. 171) (emphasis added).

By the time the “Facts” section of the Summary Judgment Motion from the Prior Lawsuit is complete, there are some seventy numbered paragraphs, the vast majority of which explicitly reference the discretionary spending being allocated to individual Council Members (R. pp. 165-73). Thus the non-delegation argument figured prominently in the Prior Action. Indeed, the first sentence of the Legal Discussion in Sloan’s Summary Judgment Motion and Memorandum from the Prior Action stated that “Defendant’s Council Reserve funds have in some measure taken on the characteristics of a private ‘slush fund’” (R. p. 174), which is nearly identical to the language Sloan used in the Current Lawsuit. See Compl. ¶ 8 (R. p. 69) (referring to the Council Reserves fund as a “Slush Fund.”).

Furthermore, Sloan actually dedicated a separate section of his Summary Judgment Motion and Memorandum in the Prior Lawsuit to arguing that the Council Reserves violated a non-delegation principle codified by the County Code. Quoting the County Code Section he relied on, Sloan argued that the County Code required “all ‘requests for county funds [to] be submitted to council for review during the regular county budget process’” (R. p. 176) (ellipsis in original). He then argued that,

Rather than the entire council reviewing ‘requests for county funds’ that are ‘submitted for council review during the regular county budget

process,' individual council members receive requests throughout the year and respond to them by submitting individual requisitions to the clerk of county council, Mrs. Elizabeth Hanzey, for amounts not exceeding their individual fund limits (more than \$18,000 per council member this year).

(R. pp. 176-177) (parenthetical in original). In the conclusion to the Motion, Sloan requested "[a]n order enjoining Defendant's appropriation, expenditure, disbursement, and donation of public funds when they are not made by County Council, as a whole, but rather they are made by individuals, in violation of [the County Code]." (Pl.'s Mot. and Supp. Mem. for Summ. J. in Prior Lawsuit, ¶ 4 (R. p. 179); cf. Compl. in the Current Lawsuit, ¶ 11 (R. p. 70) (complaining of "County Council's delegation of legislative power to an individual member")). The County responded, making many of the same arguments that it made in this case. Namely, the County argued that:

[T]he appropriation at issue in this case is the appropriation made to the County Reserves budget item as part of the County's annual budgeting process. As indicated above, this appropriation is made during the County's annual budgeting process and there is no allegation, nor is there any evidence, that this appropriation is not made consistent with the requirements of [S.C. Code Ann. §] 4-9-130. Moreover, funds appropriated to Council Reserves are not 'supplemental appropriations' as defined in § 4-9-140 since Council Reserves are part of the County's annual operating budget.

Defendants' Trial Brief from Prior Action at p. 16 (R. p. 154). These pleadings from the Prior Lawsuit make it unmistakably clear that Sloan pled and actively pursued a non-delegation argument in the Prior Action, just as he has done in the Present Case.

In its Order resolving the Prior Action in favor of the County, the Trial Court acknowledged the numerous challenges brought by Respondents against the Council Reserves. The Trial Court recounted that "Sloan contend[ed] that County's establishment of Council Reserves as part of its annual operating budget is in violation of various

statutory and constitutional provisions.” (Order from Prior Lawsuit at 2 (R. p. 4) (emphasis added.)) The Court further noted that “[a]lthough Sloan’s complaint cite[d] a number of statutory and constitutional provisions that Sloan alleges County is violating, at trial and in his trial brief he argued only two bases in support of his claim.” *Id.* at 3 (R. p. 5). One of the claims Sloan continued to press was the claim that “disbursements from Council Reserves violate Section 7-81 of the Greenville County Code.” *Id.* It is this Code Section, in part, that formed the basis of Sloan’s non-delegation argument in the Prior Action (see Third Am. Compl. in Prior Lawsuit, ¶¶ 53-56) (R. p. 53-54), and the Trial Court expressly held “that Council’s appropriation of funds to the Council Reserves budget item as an item in County’s annual budget . . . is in compliance with Section 7-81.” (Order from Prior Lawsuit, 8) (R. p. 10). The Trial Court further held that **“County’s actions have been consistent with the constitutional and statutory power granted county governments.”** *Id.* (emphasis added).

Given these proceedings from the Prior Lawsuit, it is clear that Sloan’s only claim in the Present Action, which is premised on the non-delegation of legislative authority principle, is barred by the doctrine of *res judicata*. That claim is, as previously noted, nothing more than a slightly different twist on a theory that was actually pled, pursued, litigated and ruled upon in the Prior Lawsuit. Sloan could have argued the constitutional non-delegation theory in the Prior Action when he brought a non-delegation theory under the County and State Codes (and also raised numerous constitutional challenges to the Council Reserves under both the federal and state constitutions). The primary right and duty and alleged wrong of the Present Case – whether the Council Reserves

impermissibly delegates authority to Council Members – is identical to the primary right and duty and alleged wrong in the Prior Action.

For these reasons, the Trial Court's ruling refusing to apply the doctrine of *res judicata* should be reversed and Sloan's case dismissed.

II. THE TRIAL COURT ERRED IN FINDING THAT THE COUNCIL RESERVES VIOLATED STATE LAW.

Sloan contends that Council Reserves are an unconstitutional delegation of legislative power. He bases this challenge entirely on an opinion issued by the South Carolina Attorney General's office issued on November 13, 2003, found at 2003 S.C. AG LEXIS 179 (hereinafter "AG Opinion"). See Complaint, ¶¶ 8 and 11 (R. p. 69-70). While the Trial Court did not base its ruling on constitutional grounds, Merits Order at 3, fn. 1 (R. p. 30), it did nevertheless find that Council Reserves violated the general law non-delegation of legislative authority principle. See Merits Order at 5-6 (R. p. 32-33). Both Sloan's arguments in the Present Case and the Trial Court's Merits Order give far too restrictive a view of the County's ability to govern itself under Home Rule. With regard to budgets and appropriations, State law requires that the County Council pass a budget, which it has done. Nothing in the Constitution or general statutes expressly prohibit the Council Reserves. Given these points, and given the liberal construction that Home Rule provides to County ordinances, Sloan's claims fail, and the Trial Court's Order should be reversed.

A. The Trial Court Did Not Give Due Regard to the Discretion That Home Rule Provides to the County.

Under Home Rule the powers of county government are broad and sweeping. Article VIII of the South Carolina Constitution provides that "all laws concerning local

government shall be liberally construed" in the local government's favor. S.C. Constitution, Art. VIII, § 17. Statutory law provides similarly that:

All counties of the State, in addition to the powers conferred to their specific form of government, have authority to enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State, including the exercise of these powers in relation to health and order in counties or respecting any subject as appears to them necessary and proper for the security, general welfare, and convenience of counties or for preserving health, peace, order, and good government in them. The powers of a county must be liberally construed in favor of the county and the specific mention of particular powers may not be construed as limiting in any manner the general powers of counties.

S.C. Code Ann. § 4-9-25 (emphasis added). Thus, as long as it is "not inconsistent with the Constitution and general law of this State," the County may adopt any ordinance that "appears to them necessary and proper for the security, general welfare, and convenience of counties or for preserving health, peace, order, and good government in them." This power "must be liberally construed in favor of the county." Moreover, the "specific mention of particular powers may not be construed as limiting in any manner the general powers" of a county.

Prior to the enactment of the Home Rule Amendments of the South Carolina Constitution and the Home Rule Act passed to effect those Amendments, local government in South Carolina was run out of Columbia, which, over time, became burdensome, impractical, and ineffective. Knight v. Salisbury, 262 S.C. 565, 571, 206 S.E.2d 875, 877 (1974) (stating that, by passing Home Rule, the General Assembly "clearly intended that home rule be given to the counties and that county government should function in the county seats rather than at the State Capitol"); Brown v. Horry County, 308 S.C. 180, 182, 417 S.E.2d 565, 566 (1992) ("The Home Rule Act was passed in 1975 ' . . . to comply with the mandate of the Constitution' in § 7 of Article

VIII, which requires the General Assembly to provide by general law for the ‘ . . . powers, duties, functions, and the responsibilities of counties.’”). In the pre-Home Rule era, since the General Assembly was the primary seat of local government, laws addressing the authority and powers of local governments were, by virtue of Dillon’s Rule, strictly construed against the local government; but the whole point of “Article VIII was to abrogate traditional restrictions on the exercise of local autonomy such as Dillon’s rule of strict construction.” D.W. Flowe & Sons, Inc. v. Christopher Constr. Co., 326 S.C. 17, 23 n.7, 482 S.E.2d 558, 562 n.7 (1997) (quoting South Carolina case law for the proposition that “object of Article VIII was to abrogate traditional restrictions on the exercise of local autonomy such as Dillon’s rule of strict construction”); Hospitality Ass’n of S.C., Inc. v. Charleston County, 320 S.C. 219, 225 n4, 464 S.E.2d 113, 117 n4 (1995) (“Prior to ratification of Article VIII, courts of this State strictly and narrowly construed any grant of local government power under what was commonly referred to as ‘Dillon’s Rule.’”). The primary point of Home Rule was to establish “complete local autonomy” with regard to matters “of a purely local nature.” Infinger v. Edwards, 268 S.C. 375, 382, 234 S.E.2d 214, 217 (1977) (“The uniformity contemplated by the Home Rule Act is the realization of complete local autonomy.” (emphasis added)); Duncan v. York County, 267 S.C. 327, 335, 228 S.E.2d 92, 95 (1976) (Home Rule was intended primarily to allow local governments to address matters “of purely local nature.”); see also Robinson v. Richland County Council, 293 S.C. 27, 31, 358 S.E.2d 392, 395 (1987) (“To require all counties to use the same means of financing for local improvements would defeat the objective of achieving complete local autonomy.” (emphasis added)); Southern Bell Teleph. & Telegr. Co. v. Aiken, 279 S.C. 269, 271, 306 S.E.2d 220, 221

(1983) (Home rule was intended to “grant[] renewed autonomy to local government.” (emphasis added)); Williams v. Town of Hilton Head Island, 311 S.C. 417, 421-22, 429 S.E.2d 802, 804 (1993) (“Article VIII of the South Carolina Constitution was completely revised for the purpose of accomplishing home rule; thus granting renewed autonomy to local government.” (emphasis added)); Williams v. Town of Hilton Head Island, 311 S.C. 417, 422, 429 S.E.2d 802, 805 (1993) (“[B]y enacting the Home Rule Act . . . the legislature intended to abolish the application of Dillon’s Rule in South Carolina and restore autonomy to local government.” (emphasis added)).

Pursuant to the constitutional directive to provide for the powers and duties of local government under the Home Rule regime, the legislature has expressly recognized that the local governments have the power, authority, and discretion to determine what laws are appropriate for advancement of “order and good government” at the local level and to enact ordinances accordingly. S.C. Code Ann. § 4-9-25 (granting counties the authority “to enact . . . ordinances . . . for preserving . . . order, and good government” in their respective localities). In addition, in an effort to directly address the fact that statutes were previously narrowly construed against local government, the constitution now mandates that all laws concerning the authority of local governments be liberally construed in their favor, a mandate the legislature itself has echoed by statute. Hospitality Ass’n of S.C., Inc. v. Charleston County, 320 S.C. 219, 225 n4, 464 S.E.2d 113, 117 n4 (1995) (“In addition, new Article VIII mandated a liberal rule of construction regarding any constitutional provisions or laws concerning local government,” which “effectively abolished Dillon’s Rule[.]”); Glasscock Co., Inc. v. Sumter County, 361 S.C. 483, 491, 604 S.E.2d 718, 722 (Ct. App. 2004) (“Article VIII

mandates that ‘all laws concerning local government shall be liberally construed in their favor.’”); S.C. Code Ann. § 4-9-25 (directing that statutes addressing local government powers and duties be “liberally construed in favor of the county . . .”).

S.C. Code Ann. § 4-9-140 requires that County Council “adopt annually and prior to the beginning of the fiscal year operating and capital budgets for the operation of county government and shall in such budgets identify the sources of anticipated revenue including taxes necessary to meet the financial requirements of the budgets adopted.” There is no further directive respecting a county’s budget: how much should be spent in one budget versus another, how the county should administer the budget, and so on. It simply requires operating and capital budgets be adopted prior to the fiscal year and that the revenues to fund these budgets be identified. A county is left to fill in the blanks. The broad wording of the directive in this section reflects the legislature’s awareness that local governments are to have a broad degree of discretion in administering their own budgets. Rather than imposing strict and detailed guidelines, the legislature simply elected to generally require that counties adopt budgets. This is exactly the type of flexibility and shift of autonomy to the local level that Home Rule was designed to effect. See, e.g., D.W. Flowe & Sons, Inc. v. Christopher Constr. Co., 326 S.C. 17, 23, 482 S.E.2d 558, 561 (1997) (quoting constitutional Home Rule provisions and concluding its analysis of the ordinance at issue by saying “[t]herefore, construing § 11-35-50 liberally in District’s favor, we hold District had legislative authority to enact Ordinance”).

Furthermore, to the extent there is any ambiguity or question about the County’s autonomy in this regard, the Constitution, statutes, and case law of this State unequivocally mandate that the ambiguity be resolved in favor of the County’s autonomy

to make its own policy decisions regarding “order and good government.” S.C. Code Ann. § 4-9-25 (granting counties the authority “to enact . . . ordinances . . . for preserving . . . order, and good government”); Glasscock Co., Inc. v. Sumter County, 361 S.C. 483, 491, 604 S.E.2d 718, 722 (Ct. App. 2004) (“Article VIII mandates that ‘all laws concerning local government shall be liberally construed in their favor.’”). To do otherwise would be a return to Dillon’s Rule. D.W. Flowe & Sons, Inc. v. Christopher Constr. Co., 326 S.C. 17, 23 n.7, 482 S.E.2d 558, 562 n.7 (1997) (quoting South Carolina case law for the proposition that the “object of Article VIII was to abrogate traditional restrictions on the exercise of local autonomy such as Dillon’s rule of strict construction”); South Carolina State Ports Authority v. Jasper County, 368 S.C. 388, 399 n7, 629 S.E.2d 624 n7, 629 (2006) (declining to invoke rules of statutory construction to limit the powers of a county, where to do so “would revive Dillon’s Rule, which has been overruled by Home Rule.”).

The Merits Order and the AG Opinion that Sloan relies on ignore Section 4-9-25 and run counter to the liberal construction that Home Rule affords County ordinances. Indeed, the problem with the AG’s Opinion is that it looks to find express authority to allow County Council to take action, instead of finding constitutional or statutory provisions that prohibit it. The AG Opinion states:

Just as the latter opinion suggests, there appears to be no statute which authorizes a county council to delegate spending authority to its individual members. While § 4-9-100 authorizes additional administrative duties to be delegated to the chairman and to receive additional compensation therefor, no state law appears to authorize subdelegation to individual Council members such broad discretion as is present here to determine how the funds in question are to be spent. **The fact that the General Assembly authorized subdelegation to a specific council member (chairman) in the limited circumstances defined by § 4-9-100 (administrative duties) strongly suggests that the subdelegation of**

authority to individual council members to expend funds from the so-called "discretionary fund" is not present. Absent such statutory authority being expressly provided by the General Assembly, it is our opinion that a court would conclude, just as the July 20, 1981 opinion so concluded, that this authority is lacking.

AG Opinion at **23-24 (R. p. 83). This is the wrong analysis. As long as an ordinance does not conflict with the Constitution or general law, the County Council can do whatever it feels necessary to preserve, among other things, order and good government. The AG Opinion, however, states there must be some state law that expressly authorizes a county action. Moreover, according to the AG in the bolded language above, by providing for subdelegation in one "limited instance" in one statute, the General Assembly must have intended that this power not be present elsewhere. This is the exact opposite of what Section 4-9-25 says: "specific mention of particular powers may not be construed as limiting in any manner the general powers."

The Merits Order and the AG Opinion also run counter to Home Rule and contradicts the Supreme Court's holding in McSherry v. Spartanburg County Council, 371 S.C. 586, 589-90, 641 S.E.2d 431, 433-34 (S.C. 2007). In McSherry, the issue was whether Spartanburg County Council had validly enacted a road maintenance fee ordinance. State law requires that "all ordinances shall be read at three public meetings of council on three separate days." McSherry, 371 S.C. at 588, 641 S.E.2d at 432-33. Spartanburg County Council's own operating procedures allowed an ordinance to be introduced for first reading by title only, and did not require a draft to be circulated until before the second reading. 371 S.C. at 589, 641 S.E.2d at 433. McSherry challenged the road maintenance ordinance on the grounds that "there was no ordinance in existence at the time of the first reading." 371 S.C. at 588, 641 S.E.2d at 432. The Supreme Court

responded that although it was “disconcerted by the methodology utilized by Council in this matter,” it was constrained to uphold the ordinance. 371 S.C. at 590-91, 641 S.E.2d at 433. In so doing, the Court made several points relevant to this case:

[I]n reviewing the discretionary decision of a legislative body, our courts have been loath to substitute their judgment for that of elected representatives. Such decisions should not be upset on appeal unless [they are] arbitrary, unreasonable, in obvious abuse of discretion, or in excess of lawfully delegated power. . . . **Importantly, nothing in the Code or in Article VIII of the South Carolina Constitution, which authorizes and establishes Home Rule, requires that an ordinance be in written form when it receives a first reading.** Thus, there is neither a constitutional provision nor a statutory requirement on which this Court could base an invalidation of Council’s rules and procedures. . . . Although the better practice may have been for the title to be in writing at the time of the first reading, we cannot say that this alone caused the ordinance’s enactment to be invalid.

371 S.C. at 590-91, 641 S.E.2d at 433-34 (emphasis added). By virtue of Home Rule, the County has a great deal of autonomy and discretion in enacting its budget. Furthermore, just as was the case in McSherry, nothing in the Code or in the Constitution requires that County Council vote as a body to approve every expenditure. In McSherry, all that was required of Spartanburg County Council was that it passed an ordinance by three readings. The details of preparing these ordinances were left to Spartanburg County Council as long as they were not in conflict with express Constitutional or Statutory requirements. McSherry also demonstrates that the proper statutory analysis in light of Home Rule is to resolve all doubt in favor of local autonomy. 371 S.C. at 590, 641 S.E.2d at 433 (“[i]n reviewing the discretionary decision of a legislative body, our courts have been loath to substitute their judgment for that of elected representatives. Such decisions “should not be upset on appeal unless [they are] arbitrary, unreasonable, in obvious abuse of discretion, or in excess of lawfully delegated power.”) (quoting Sloan v. Greenville

County, 356 S.C. 531, 555-56, 590 S.E.2d 338, 351 (Ct. App. 2003) and Smith v. Georgetown County Council, 292 S.C. 235, 238-39, 355 S.E.2d 864, 866 (Ct. App. 1987)).

S.C. Code Ann. § 4-9-140 requires that County Council “adopt annually and prior to the beginning of the fiscal year operating and capital budgets for the operation of county government and shall in such budgets identify the sources of anticipated revenue including taxes necessary to meet the financial requirements of the budgets adopted.” County Council did this by duly enacted ordinance. In light of the great deference given to an ordinance enacted by a county, and the fact that there is no express prohibition for creating budget allocations to individual council members to cover their office expenses, travel expenses, and if they so choose, small infrastructure projects, the Court should hold that the County has not abused its statutory or constitutional authority and that the Council Reserves comports with State law.

B. Legislative Powers Have Not Been Delegated.

County Council has full control over its budgeting process. See Op. S.C. Atty. Gen., January 11, 1985 (“the ultimate responsibility for adopting and maintaining the annual budgets and insuring that adequate revenue is generated to meet expenses lies with . . . County Council.”); Op. S.C. Atty. Gen., March 31, 1997, (recognizing that the “county council has ‘general authority over the county treasury.’”); and Op. S.C. Atty. Gen., October 22, 1996, (noting that “it goes without saying that the decision to spend money by a county council involves considerable discretion.”). There is no debate about this statement. As discussed above, Section 4-9-140 of the Code requires County Council to adopt a budget. Article X, § 7(b) of the Constitution of South Carolina likewise

mandates that a County must "prepare and maintain annual budgets which provide for a sufficient income to meet its estimated expenses for each year" Again, the County has prepared and adopted a budget.

The AG Opinion provides that "generally, it is recognized that unless a statute specifically provides otherwise, legislative powers vested in the governing body of a municipality cannot be delegated to administrative officials of the municipality." AG Opinion at *2 (R. p. 77). However, "purely administrative, ministerial, or executive powers may be delegated by a municipal governing body to the appropriate officer." Id. County Councils, unlike State Government, typically exercise the powers of all three branches of government. See AG Opinion at *10 (R. p. 85) (citing Op. S.C. Atty. Gen., September 10, 1973). Thus, "[t]he constitutional principle of separation of powers applicable to state government by Article I, § 8 of the Constitution has been held inapplicable to local political subdivisions of the State." Id. (R. p. 85). (citing Gaud v. Walker, 214 S.C. 451, 53 S.E.2d 316 (1949)).

The allocation of money to the Council Reserves is a legislative act performed by Council as a body in a duly enacted ordinance. The spending of those funds, however, is a ministerial/administrative function. The role an individual council member has in deciding how to spend the money allocated to him or her, within the guidelines of the Council Reserves as voted upon by County Council, is administrative in nature, and such spending decisions made within these guidelines implement the greater Council's policy to spend the Council Reserves on those items explicitly enumerated in the budget ordinance and Council Reserves Policy. This limited decision making authority, if any, of each member is no different than any other County administrative personnel's ability

to make decisions within the scope the Council has prescribed. County Council has not delegated its right and responsibility to adopt a budget.

This position is consistent with South Carolina law. In South Carolina State Highway Department v. Harbin, the court noted that “[a] statute which in effect reposes an absolute, unregulated, and undefined discretion in an administrative body bestows arbitrary powers and is an unlawful delegation of legislative powers.” 226 S.C. 585, 595, 86 S.E.2d 466, 471 (1955). Unlike Harbin, where the court found that no standards or limitations were placed on the administrative body, the Council has placed limitations on the ability of its members to spend the Council Reserves by specifically enumerating those items to which the Council Reserves may be spent. Harbin further noted that “while the legislature may not delegate its power to make laws, in enacting a law complete in itself, it may authorize an administrative agency or board ‘to fill up the details’ by prescribing rules and regulations for the complete operation and enforcement of the law within its expressed general purpose.” Id. (citing Davis v. Query, 209 S.C. 41, 39 S.E.2d 117 (1946) and State v. Taylor, 223 S.C. 526, 77 S.E.2d 195 (1953)). Each Council member is “filling in the details” when he or she chooses how to use the monies from the Council Reserves.

The Council Reserves Policy at issue “clearly establish[es] primary standards for carrying it out . . . [and] . . . lay[s] down an intelligible principle to which” each Council member must conform. Id. Recognizing the difficulty in the application of these principles, the South Carolina Supreme Court noted in Harbin:

that there is no fixed formula for determining the powers which must be exercised by the legislature itself and those which may be delegated to an administrative agency. The degree to which a legislative body must specify its policies and standards in order that the administrative

authority granted may not be an unconstitutional delegation of its own legislative power is not capable of precise definition. 'There are many instances where it is impossible or impracticable to lay down criteria or standards without destroying the flexibility necessary to enable the administrative officers to carry out the legislative will; especially may such a contingency arise when the discretion conferred relates to police regulations.'

Id. (citing Matz v. J. L. Curtis Cartage Co., 132 Ohio St. 271, 7 N.E.2d 220, 225 (1937)).

This point was made again by the South Carolina Supreme Court in Joytime Distribs. & Amusement Co. v. State, where the Court in reviewing a legislative delegation matter, stated

this Court has held that the power to legislate cannot be delegated to private persons or corporations. See State v. Watkins, 259 S.C. 185, 191 S.E.2d 135 (1972). Although the legislature may delegate its authority to create rules and regulations to carry out a law, the legislature may not delegate its power to make the law. DeLoach v. Scheper, 188 S.C. 21, 198 S.E. 409 (1938); State ex rel. Richards v. Moorner, 152 S.C. 455, 150 S.E. 269 (1929). In discussing the distinction between making and carrying out the law, the Court in Moorner quoted J. G. Sutherland, Sutherland on Statutory Construction, § 68 (1891) for the following:

[The distinction] is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done. To the latter, no valid objection can be made.

338 S.C. 634, 643-644, 528 S.E.2d 647, 652 (1999) (citing Moorner, 152 S.C. at 479, 150 S.E. at 297 (internal citations omitted)).

Under the present facts, the Greenville County Council delegated the authority to execute the law; it did not delegate the authority to make the law. Thus, the Council Reserves is a permissible delegation of the Council's authority. Of course, all reasonable doubt must be resolved in favor of the ordinance, S.C. Constitution, Article VIII, § 17, and if a constitutional construction is possible, it should be followed. Davis v. County of

Greenville, 322 S.C. 73, 470 S.E.2d 94 (1996). See also Westvaco Corp. v. South Carolina Department of Revenue, 321 S.C. 59, 476 S.E.2d 739 (1995) (“A legislative act will not be declared unconstitutional unless its repugnance to the Constitution is clear and beyond a reasonable doubt. ... A legislative act will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates a provision of the Constitution.”). In light of this presumption of constitutional validity and the fact the ordinance does not delegate legislative powers, the ordinance is legal and does not violate the South Carolina Constitution, statutory or common law.

III. THE TRIAL COURT ERRED IN AWARDING ATTORNEYS’ FEES.

The prevailing party to a civil action may recover attorneys’ fees against a state agency only if ‘the agency acted without substantial justification in pressing its claim against the party’ and there are no ‘special circumstances that would make the award of attorney’s fees unjust.’” Video Gaming Consultants, Inc. v. S.C. Dep’t of Revenue, 358 S.C. 647, 650, 595 S.E.2d 890, 891 (Ct. App. 2004) (citing S.C. Code Ann. § 15-77-300 (2010)). Consequently, to recover attorney’s fees from a governmental entity a plaintiff must (1) be the prevailing party in the action; (2) demonstrate that the governmental entity acted “without substantial justification” in pressing its claim; and (3) demonstrate that there are no special circumstances rendering an award of attorney’s fees unjust. Jasper County Bd. of Educ. v. Jasper County Grand Jury, 303 S.C. 49, 398 S.E.2d 498, 499 (1990); Heath v. County of Aiken, 295 S.C. 416, 368 S.E.2d 904 (1988).

At trial, Sloan was the prevailing party.⁷ The Trial Court erred, however, in finding that the County was not without substantial justification in defending this lawsuit. The Trial Court also erred in finding that an award of attorneys' fees in this action was not unjust. Thus, even if the Court sustains the Trial Court's Merits Order, the Court should reverse the award of attorneys' fees.

A. The County Was Substantially Justified in Relying on the Precedent of the Prior Action.

In the context of § 15-77-300, the term "substantial justification" "does not mean 'justified to a high degree,' but rather 'justified in substance or in the main' – that is, justified to a degree that could satisfy a reasonable person." Heath, 302 S.C. at 183 (quoting Pierce v. Underwood, 108 S. Ct. 2541, 2250 (1988)). "In deciding whether a state agency acted with substantial justification, the courts look to the agency's position in litigating the case to determine 'whether it is one which has a reasonable basis in law and fact.'" Video Gaming Consultants, Inc., 358 S.C. at 650. Importantly, "[a]n agency's loss on the merits does not create a presumption that its position was not substantially justified." Id. Rather, it is the governmental entity's litigation position which must satisfy the substantial justification standard, as opposed to the underlying action challenged in the litigation. McDowell v. South Carolina Department of Social Services, 304 S.C. 539, 405 S.E.2d 830 (1991). The record shows that the County's position in 'pressing its claim' was substantially justified.

⁷ Of course, should the County prevail with respect to either Sections I or II of the Argument portion of this Brief, then Sloan will no longer be the prevailing party, and the attorneys' fees to Sloan would be required to be stricken.

1. **By relying upon authority directly on point and from its home county Court of Common Pleas jurisdiction, the County was substantially justified in pressing their claims.**

When Sloan filed the Present Case the County relied upon existing authority dealing with the same issue presented in the Present Case, within the same county, and between the same parties. In its Order in the Prior Action, the Trial Court determined “that Council’s appropriation of funds to the Council Reserves budget item as an item in County’s annual budget” was in compliance with the County’s Code and State Law. Prior Action Order at p. 8 (R. p. 10). By relying upon a holding issued in the same county, dealing with the same issue, and between the same parties, the County was substantially justified in pressing its claim.

A review of the cases in which South Carolina courts have determined the governmental agency acted without substantial justification likewise reflects favorably upon the County’s position in pressing its claim in the Present Case. In Heath, for example, the South Carolina Supreme Court determined that Aiken County acted without substantial justification where the statute and “relevant precedent clearly established that the [defendant’s] claims were without merit.” 302 S.C. at 184. Likewise, in Brown v. City of N. Charleston, 314 S.C. 298, 301, 442 S.E.2d 633, 635 (Ct. App. 1994), the Court of Appeals issued an opinion similar to that in Heath, explaining that North Charleston had acted without substantial justification where the language of the relevant statute “plainly foreclose[d] the legal position taken by the city.” Lastly, in Cornelius v. Oconee County, 369 S.C. 531, 540, 633 S.E.2d 492, 497 (S.C. 2006), the South Carolina Supreme Court determined that the governmental entity acted without substantial

justification where the county could cite “no viable authority supporting its [legal] position.”

Because the County in the Present Case relied heavily on the Order in the Prior Action, a case directly on point, issued by the Greenville County Court of Common Pleas, and between the same parties, the Present Case simply does not compare to those in Heath, Brown, or Cornelius. In the Present Case, there are no statutes or precedents “clearly establish[ing]” that Defendants took an erroneous position in this litigation, nor are there statutes or other authority “plainly foreclose[ing]” the County’s position. Just the opposite is true. The Trial Court’s Order in the Prior Action supported the County’s position. The Supreme Court in Harbin noted that with respect to the issues of delegating legislative authority, “there is no fixed formula for determining the powers which must be exercised by the Legislature itself and those which may be delegated,” as the “degree to which a legislative body must specify its policies and standards in order that the administrative authority granted may not be an unconstitutional delegation of its own legislative power is not capable of precise definition.” South Carolina State Highway Department v. Harbin, 226 S.C. at 595, 86 S.E.2d at 471. There was nothing imprecise, however, about the Trial Court’s Order in the Prior Action. In that case, the Trial Court unequivocally held that the Council Reserves did not violate the non-delegation principle. See Prior Action Order at 7-11 (R. pp. 9-13). Rather, the authority most precisely on point stands directly in the County’s favor, specifically upholding the very Council Reserves that are the subject of this Present Case.

In an effort to demonstrate that Defendants were not substantially justified in their position, Sloan relied almost entirely on the fact that the Attorney General of South

Carolina rendered an opinion in 2003 concerning a distant county that was at odds with the County's position. "While an attorney general opinion may be persuasive, [however,] it is not binding precedent." Branch v. City of Myrtle Beach, 332 S.C. 575, 580, 505 S.E.2d 925, 927 (Ct. App. 1998); see also Anders v. S.C. Parole and Cmty. Corr. Bd., 279 S.C. 206, 209-210, 305 S.E. 229, 231 (S.C. 1983) ("The cited opinion of the Attorney General is not binding on this Court."); Kalber v. Redfearn, 215 S.C. 224, 54 S.E.2d 791 (S.C. 1949) ("While the opinions of the Attorney General are not binding upon the Court, they are persuasive..."). Consequently, the mere fact that the State's Attorney General rendered an Opinion at odds with County's position in pressing their claim neither "clearly establishes" that Defendants took an erroneous position in this litigation, nor "plainly forecloses" its position. A court may accept the Attorney General's Opinion or reject it outright – the authority is simply not binding upon any court. As an example, in the Present Case the Trial Court referred to the AG Opinion as "an advisory opinion" that was not "really all that significant of a change from a legal landscape." July 30, 2007 Tr. at p. 58, lines 20-23 (R. p. 706). The Trial Court also noted that while it believed the Attorney General to be "plenty smart", the Attorney General was "just one smart guy who thinks one way." October 27, 2007 Transcript at p. 44, lines 7-16 (R. p. 751). Thus, the Trial Court noted that the AG Opinion had "little influential weight in this court. ... I'm not [precluded] by it." Id. Consequently, the County was substantially justified in relying upon the Order from the Prior Action and in disputing the Opinion of the Attorney General.

2. **The Trial Court misinterpreted the focus of the ‘substantial justification’ prong by emphasizing the County’s governmental actions as opposed to its position in ‘pressing the claim.’**

The Trial Court found that by continuing to make the appropriations in controversy after receiving the Attorney General’s Opinion, the County was “not ‘substantially justified’ in pressing their claims in this lawsuit.” (Fees Order at 4) (R. p. 39). By focusing on the activity underlying the present litigation, the Trial Court misinterpreted the statutory language of §15-77-300.

As the Supreme Court in McDowell makes clear, the focus of the ‘substantial justification’ standard is on the governmental entity’s position in litigating its case. In McDowell, the South Carolina Department of Social Services (DSS) denied appellant food stamp benefits after determining that a car registered in her name was an asset that precluded her from eligibility to receive the aid. McDowell, 304 S.C. at 540. The Court of Appeals reversed the agency’s determination, finding in favor of the appellant. Id. In light of the favorable holding, appellant filed for attorney’s fees pursuant to S.C. Code Ann. § 15-77-300, arguing that DSS acted without substantial justification in pressing its claims. Id. at 541. The Supreme Court determined that DSS acted without substantial justification by “rel[ying] on an erroneous legal conclusion in defending its decision in proceedings before the circuit court and Court of Appeals.” Id. at 542-543. In so holding, the Court concluded that “DSS’s *litigation position* was not substantially justified because it had no reasonable basis in law and fact.” Id. at 543 (emphasis added). By contrast, the Supreme Court determined that appellant was **not** entitled to attorney’s fees for the initial hearing before DSS, reasoning that “at this point [DSS] was not ‘pressing its claim’ in litigation against appellant but was merely functioning as an

administrative decision-maker.” Id. McDowell makes clear that the governmental entity’s position in litigating the matter is the focus of the inquiry; governmental actions underlying the litigation do not factor into the analysis under § 15-77-300.

B. The Award of Attorneys’ Fees in the Present Case Would Be Unjust.

For the same reasons that the County’s position in this litigation was substantially justified, an award of attorney’s fees against the County would likewise be unjust. The precise issue presented in the present claim – the validity of the Council Reserves – was previously litigated from 1996 through 1998, and ultimately resulted in judgment for the County. In pressing its claim, the County in the Present Case relied heavily upon the Order in the Prior Action. Since the issuance of this 1998 Order, there has been no change in binding authority, and the County has continued to operate in consonance with the Order. The only contrary authority established between the issuance of the 1998 Order in the Prior Action and the Merits Order was the AG Opinion referenced above. While the AG Opinion certainly favored Sloan’s position, the Opinion itself did not constitute binding authority. Furthermore, the AG Opinion did not interpret any relevant case law filed subsequent to the issuance of the Order in the Prior Action. In pressing its claim in the Present Case, the County was faced with a fundamental choice: accede to the AG Opinion that was directed to a different county’s policy and of limited precedential value, or defend the County’s long-practiced and voted on Council Reserves Policy in light of the Trial Court’s Order from the Prior Action, which upheld the validity of that same Policy and which had not been affected by an intervening change in the governing case law, state statutes or constitution. The County respectfully submits that to require the County to pay for Sloan’s attorneys’ fees for adhering to an Order from the County’s

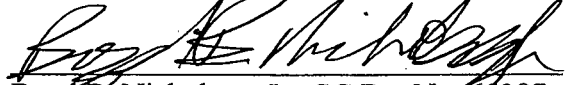
home jurisdiction, concerning the same issue, and adjudicated between these same parties, would be unjust.

CONCLUSION

For the forgoing reasons the County respectfully requests that the Court reverse the Trial Court's Merits Order and Trial Court's Fees Order.

Respectfully submitted,

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November 14, 2011
Greenville, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

John C. Few, Circuit Court Judge

Case No. 06-CP-23-4637

The South Carolina Public Interest Foundation, and Edward D. Sloan,
Jr., individually, and on behalf of all others similarly situated, ... Respondents,

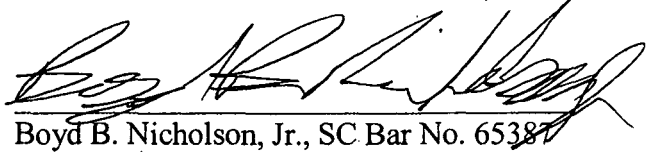
v.

Greenville County, Herman G. Kirven, Jr., Judy Gilstrap, Eric
Bedingfield, Jim Burns, Scott Case, Joseph Dill, Cort Flint, Lottie
Gibson, Mark Kingsbury, Xanthene Norris, Robert Taylor, and
Tony Trout, ... Appellants.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

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STATEMENT OF ISSUES ON APPEAL

- I. When the County Council allocated \$21,000 to each Councilor to spend without approval of the Council, did the Circuit Court properly rule that such expenditures were an unlawful delegation of legislative authority?
- II. When the County had ignored twelve South Carolina cases and unanimous scholarly opinion that the common law had always required legislative bodies to act as a whole, did the Circuit Court properly award fees against the County?
- III. When an earlier Circuit Court opinion addressed 41 expenditures from 1994 through 1997, and this action challenges different appropriations and expenditures from 2005 and 2006, did the Circuit Court properly rule that *res judicata* did not bar the claim?
- IV. When the County has *waived* its collateral estoppel argument, would the policies against applying collateral estoppel nevertheless outweigh the reasons for its strict application in this case?

STATEMENT OF THE CASE

Respondents South Carolina Public Interest Foundation and Edward D. Sloan, Jr. (collectively "SCPIF") filed suit challenging Greenville County's appropriation of public funds to a line item variously known as the "Council District Expense Fund," "Council Reserves," "Discretionary Fund," or the "Slush Fund" (herein "Slush Fund").¹ SCPIF alleged the Slush Fund unlawfully delegated legislative authority to individual councilors (Complaint; R. pp. 68-87). SCPIF sought declaratory and injunctive relief, costs and attorneys' fees. SCPIF attached to the Complaint a copy of a South Carolina Attorney General Opinion, dated November 13, 2003, which cited 12 South Carolina cases and several scholarly treatises on the subject, and opined that a similar fund in Florence County was an unlawful delegation of legislative authority. 2003 WL 22862787 (S.C.A.G.).

Because Mr. Sloan had challenged other expenditures from the Slush Fund several years earlier, the County moved to dismiss based on *res judicata* and collateral estoppel. In oral argument at the Circuit Court, the County explicitly waived its collateral estoppel argument. The Circuit Court, Judge John C. Few presiding, denied the County's motion to dismiss. The County filed an Answer and moved for Summary Judgment based on *res judicata* (Answer; County's Motion to Dismiss ; R. pp. 62-67; R. pp. 86-317). The Court denied the County's Motion (Order entered February 10, 2010; R. pp. 27-33).

SCPIF filed a Memorandum in Support of Motion for Summary Judgment on September 29, 2008 (R. pp. 402-429). The County conceded that Council could not law-

¹ Both the parties and the court below referred to the fund as the "Slush Fund." See the Order entered February 10, 2010, p. 3.

fully delegate legislative authority to individual Councilors,² and the issue was narrowed to whether the discretionary authority to select the amount, purpose, and beneficiaries of monetary expenditures was indeed *legislative* (SCPIF Motion for Summary Judgment filed September 30, 2008; R. pp. 408-411). The Court ruled that the authority was legislative, and therefore the delegation was unlawful (Order entered February 10, 2010; R. pp. 27-33).

The Court orally granted SCPIF's Motion for Summary Judgment (Transcript of Record, dated November 7, 2008, at pp. 5-7; 25-27; R. pp. 811-813; pp. 831-833). Many months later, the Court issued its written order declaring the Council District Expense Fund illegal (Order entered February 10, 2010; R. pp. 27-33). The Court found that the Slush Fund, "allows individual Council members, 'absolute, unregulated and undefined discretion' to make policy-based spending decisions that are legally required to be made by the Council as a whole," and ruled that the fund was "an impermissible delegation of legislative authority" (R. p. 28).

In the Circuit Court, SCPIF had urged as additional grounds for a finding of illegality that the individual councilors, as members of the body were not lawful *recipients* of such authority, because they were not agents of the Council or answerable to Council as a whole. (Transcript of Record, October 7, 2008, pp. 10-11, 20, 25 and November 7, 2008, pp. 8-9). Second, SCPIF also argued that such expenditures were *discretionary* decisions, as opposed to administrative or ministerial decisions, and could not lawfully be delegated (Transcript of Record, October 7, 2008, pp. 4-8; R. pp. 760-764 and November 7, 2008, pp. 8-9; R. pp. 814-815). The Circuit Court did not rely on the two latter

² See the Order entered February 10, 2010, p. 3, n. 1; p. 4.

grounds (Transcript of Record, October 7, 2008, pp. 9, 23, R. pp. 765, and November 7, 2008, p. 6, 8-9, 11-14, 25-26; R. pp. 812, 814-815, 817-820, 831-832). Nevertheless, SCPIF urges this Court to consider them as additional grounds for sustaining the judgment of the Circuit Court.

SCPIF filed a motion for attorneys' fees and costs under S.C. Code Ann. § 15-77-300 (Motion for Attorneys Fees filed February 23, 2010; R. pp. 554-623). Before the Court heard the Motion, Judge Few was elected Chief Judge of the Court of Appeals. The Court, Judge D. Garrison Hill, found that SCPIF prevailed, that the County lacked a reasonable basis in fact and law, and no other circumstances made an award of fees unjust (Order entered November 11, 2010; R. pp. 34-43).

On November 19, 2010, the County filed its Notice of Appeal of the order awarding fees and costs (R. pp. 682-692). The County moved to consolidate the two appeals, and this Court granted the Motion (Ct. App. Order entered December 13, 2010).

STATEMENT OF FACTS

Greenville has a Council-Administrator form of Government. S.C. Code Ann. § 4-9-10(b). *Greenville County Council v. Ashmore*, 274 S.C. 466, 265 S.E.2d 38 (1980).

For many years, Greenville County has authorized and operated a Slush Fund. In 1996, Sloan brought an action ("Slush Fund I") challenging many Slush Fund expenditures, including (1) funds for computers for a tenants' association; (2) donations to religious non-profit groups; and (3) the payment of Council members' Rotary dues (Third Amended Complaint filed December 15, 1997, Civil Action No. 96-CP-23-2918; R. pp.

49-61).³

The Circuit Court, Judge Tom Ervin presiding, ruled that claims related to the expenditures already made were moot (the public interest exception for mootness had not yet been widely recognized), and the payments to religious organizations did not violate the First Amendment Establishment Clause (Order entered March 2, 1998; R. pp. 3-13). The Rotary Club dues were not paid from Council Reserves, and the Court dismissed that claim. By separate order, the Court temporarily enjoined the expenditure for computers for a tenants' association (Order entered March 2, 1998; R. p. 13, par. 2). Through discovery, Sloan uncovered other improper expenditures. The Court ruled that Sloan must file new pleadings to challenge the newly discovered expenditures. *Id.* The Court then made the Temporary Injunction a Permanent Injunction (Order entered May 4, 1998; R. p. 14 and 17).

Mr. Sloan filed suit again (Slush Fund II) (R. pp. 68-85). The Court, Judge Jackson V. Gregory presiding, denied Mr. Sloan's Motion for a Temporary Restraining Order ("TRO") for expenditures to renovate a privately owned building that housed public agencies, because the money had been spent six days after the Complaint was filed, but before the Motion for TRO could be heard (Order entered June 15, 1998; R. p. 19). The Court also denied a TRO enjoining a \$5,000 expenditure for a private night watchman's patrol car, because the funds were never disbursed. The Assistant County Administrator had found that the request fell outside the Guidelines (R. pp. 18-19). The Court granted Sloan's Motion for Preliminary Injunction to enjoin the County from voting to circumvent the Guidelines (R. p. 19).

³ This case (Slush Fund I) was the first case in which the undersigned counsel represented Mr. Sloan, starting several months after the case was filed. Ronald K. Wray II represented the County.

The Court, Judge Larry Patterson presiding, made the Preliminary Injunction enjoining circumvention of the Guidelines a Permanent Injunction and awarded attorneys' fees (Order entered December 18, 2000; R. pp. 22-26). The Court also ordered a review of the County's compliance with its Guidelines two years later. In 2002, the Court reviewed the County's compliance, and found no further violation of the Guidelines.

On November 13, 2003, the South Carolina Attorney General issued an opinion that a similar fund in Florence County was an unlawful delegation of legislative authority. 2003 WL 22862787 (S.C.A.G.) (R. pp. 76 – 85). The facts and circumstances in Florence County were nearly identical to those of Greenville County. *Id.* The funds were known as "Discretionary Funds." *Id.* "Separate funds [had] been created for each individual district, . . . to be spent at the discretion of the council member." *Id.* The funds were used for "road improvements, public recreation, feasibility studies for water and sewer services, systems to municipalities for their building or water projects, and for rural fire districts." *Id.* "The money is dedicated to each individual Council District and is spent at 'the will of each individual Council person, for whatever project, for whomever, and whenever it is deemed appropriate by the council person.'" *Id.*

The Attorney General relied on twelve South Carolina cases, and scholarly treatises and legal encyclopedias. The Opinion concluded that the delegation of public funds to individual Councilors to spend without the approval of the whole Council was an unlawful delegation of legislative authority. *Id.*

On August 2, 2005, Greenville County enacted Ordinance No. 3940, which appropriated funds for the operation of county government for the fiscal year ending June 30, 2007, and included "Council District Expense" that appropriated more than \$22,000

to each council member to spend without the approval of the Council as a whole, to address “among other things, costs associated with special, nonrecurring community requests for infrastructure purposes such as: flooding; roads; lights; sewer and drainage; public buildings and grounds; infrastructure related studies” (R. pp. 71 – 75).

July 20, 2006, SCPIF and Mr. Sloan filed the case at bar, known as Slush Fund III (Complaint, Civil Action No. 06-CP-23-4637). The Complaint alleges, “County Council’s delegation of legislative power to an individual member, as described herein, is unconstitutional and illegal, as explained in a South Carolina Attorney General opinion dated November 13, 2003.” SCPIF attached a copy of the 2003 Attorney General Opinion to the Complaint.

In the Circuit Court, the County waived its collateral estoppel argument and focused its entire attention on *res judicata* (Transcript of Record, October 27, 2007, pages 4-12; R. pp. 711 - 719). The County affirmatively disclaimed any interest in pursuing a collateral estoppel argument. The Court said, “Mr. . . . Nicholson is not claiming that you are barred by collateral estoppel. . . . It is either *res judicata* or we are ready to go forward. . . . Right?”

Mr. Nicholson responded, “I’ve made that statement. I don’t plan to go back on it” (Transcript of Record, October 27, 2007, pages 11-12; R. pp. 718-719).

The County maintained that legal position throughout that hearing. After hearing argument on *res judicata*, the Court offered to hear arguments on the merits of the case (Transcript of Record, October 27, 2007, pages 43, ll. 13-17; R. p. 750). Counsel declined the offer, because of a prior agreement, at the request of the County.

Mr. Carpenter: . . . [H]e wanted to focus the Court simply on the *res judicata*. I’m happy to accommodate him on that. I just don’t want him to

come back and once we've argued res judicata and he's refused to argue collateral estoppel, I don't want him to come back next time and argue I was wrong on collateral estoppel.

The Court: That would be res judicata.

(Transcript of Record, October 27, 2007, p. 43, l. 20 –p. 44, l. 2; R. pp. 750-751).

The Court found that the fund “allows individual Council members, ‘absolute, unregulated and undefined discretion’ to make policy-based spending decisions that are legally required to be made by the Council as a whole,” the fund is “an impermissible delegation of legislative authority” (Order issued February 10, 2010, p.1; R. p. 28).

STANDARD OF REVIEW

The Circuit Court granted Summary Judgment.⁴ “When reviewing the grant of a summary motion, this court applies the same standard of review as the trial court under Rule 56, SCRCF.” *Zurich American Ins. Co. v. Tolbert*, 378 S.C. 493, 662 S.E.2d 606 (Ct. App. 2008), *reh. den., cert. granted, aff'd* 387 S.C. 280, 692 S.E.2d 523.

⁴ “The parties agree that the case presents issues of law to be decided on undisputed facts.” Order entered February 10, 2010, p. 1.

ARGUMENT

(Summary)

The Circuit Court properly ruled that the Slush Fund constitutes an unlawful delegation of legislative authority to individual council members.

The Court properly awarded attorney's fees and costs under S.C. Code Ann. §15-77-300. The Court found: (1) SCPIF was the prevailing party; (2) the County acted without substantial justification because twelve South Carolina cases and unanimous scholarly opinion hold that legislative bodies must act as a whole; and (3) no special circumstances rendered the award of attorneys' fees unjust.

Res judicata does not bar the present action. Slush Fund I addressed 41 separate specific expenditures in 1994-1997; Slush Fund III addressed appropriations and expenditures in 2006 and 2007. County Council appropriates new moneys to the Slush Fund annually. Council members make individual expenditures each year. Each annual appropriation is a separate violation, and each expenditure that is not voted on by the whole Council is a separate violation.

Collateral estoppel does not bar this action. The County specifically waived its collateral estoppel argument. The Slush Fund I order failed to actually rule on the improper delegation of legislative authority. The Attorney General's 2003 opinion changed the legal context. The public importance of the issues outweigh the arguments for collateral estoppel. SCPIF "is not estopped to contend that the law is otherwise."

I. THE SLUSH FUND UNLAWFULLY DELEGATED LEGISLATIVE AUTHORITY TO INDIVIDUAL COUNCILORS.

A. Twelve South Carolina Cases Hold that Discretionary and Legislative Authority May Not Be Delegated.

The County erroneously argues that SCPIF relied “entirely” upon the Attorney General opinion in ruling that the Slush Fund was an unlawful delegation of legislative authority (Appellant’s Brief, p. 27). This contention is a gross over-simplification. The Circuit Court and SCPIF relied upon the twelve cases the Attorney General cited, which undergirded the analysis of his Opinion. The Circuit Court and the Attorney General also cited legal treatises, scholarly works and legal encyclopedias (Order entered February 10, 2010, p. 2); 2003 WL 22862787 (S.C.A.G.). The law on this point is well-settled.

The Attorney General’s Opinion cited and relied upon South Carolina cases dating back more than 100 years, starting with *Abbeville v. McMillan*, 52 S.C. 60, 72 (1897). The Attorney General wrote, “Our Supreme Court quoted with approval the language used by the United States Supreme Court in *Cooley v. O’Connor*:

[i]t is true that when an authority is given jointly to several persons, *they must generally act jointly or their acts are invalid* The commissioners were public agents, clothed with public authority. They were created to perform a governmental function, and it is a familiar principle that an authority given to several for public purposes may be executed by a majority of their number.

Id. 12 Wall. 391 at 398 (1871) (emphasis added). This observation was hardly novel. It is fundamental to our democratically elected representative system of government. The very make-up of the United States Constitution and our State Constitutions rely on legislative bodies acting as a whole.

The Attorney General cited *Gaskins v. Jones*: “In the absence of statute or other controlling provision, the *common law* rule that *a majority of a whole body* [to make de-

cisions] *is necessary* applies,” 198 S.C. 509, 18 S.E.2d 454 (1942) (emphasis added).

Likewise in *Pettiford v. S.C. State Bd. of Ed.*, our Supreme Court had ruled, that an administrative board or body, when acting in a quasi-judicial capacity, must *itself* consider all the evidence before rendering a decision. *Id.* at 218 S.C. 322, 62 S.E.2d 780, 791 (1950) (emphasis added). It could not delegate its fundamental decision-making function to any other entity.

The Attorney General also relied upon *South Carolina State Highway Dept. v. Harbin*, 226 S.C. 585, 86 S.E.2d 466 (1955), in which the court ruled that delegation of authority to the Highway Department “to suspend or revoke a driver’s license for any cause which it deems satisfactory” was invalid, because there was no standard except the personal judgment of the administrative officers of the Department. *Id.*, 226 S.C. at 596. The Court reasoned that the statute and ordinance contain “an *unconstitutional delegation of legislative power.*” *Id.* (emphasis added).

The Attorney General cited a similar decision, *Richards v. City of Columbia*, in which the Supreme Court declared that an ordinance unlawfully delegated legislative power because it did not “contain a sufficiently definite standard or yardstick.” *Id.*, 227 S.C. 538, 555-56, 88 S.E.2d 683 (1955). Likewise, the Attorney General reported that “our Supreme Court struck down as unconstitutional a statute which delegated to the county legislative delegation the authority to approve or disapprove any tax increase adopted by the board of trustees of the school district. . . . [T]he General Assembly possessed *no constitutional authority to delegate* the approval or disapproval of tax increases to the delegation,” citing *Gunter v. Blanton*, 259 S.C. 436, 441, 192 S.E.2d 473 (1972) (emphasis added). Legislative bodies may not delegate activities that constitute their

reason for being.

The Attorney General also relied upon *G. Curtis Martin Investment Trust v. Clay*: “A municipal corporation or other corporate political entity created by state law, to which police power has been delegated, may not divest itself of such power by contract or otherwise,” 274 S.C. 608, 612-13, 266 S.E.2d 82, 85 (1980). Another analogous case was *State ex rel. McLeod v. McInnis*, (“the delegation of the spending power to a committee made up of members of the General Assembly **unlawfully delegated legislative power** to a committee of the Legislature”). *Id.* 278 S.C. 307, 317-18, 295 S.E.2d 633 (1982) (emphasis added).

The Attorney General reasoned that the Florence County Infrastructure Fund ordinance would be declared unconstitutional because it “unlawfully delegates legislative power,” citing *Richards v. City of Columbia*, 227 S.C. 538, 88 S.E.2d 683 (1955).

The Attorney General noted,

[T]he only apparent standard here regarding the expenditure of the funds in question by individual members of Florence County Council is that such funds be for road paving or infrastructure improvements. Otherwise, such expenditures lie within the sole discretion or the “personal judgment” of the member of Florence County Council. In our opinion, based upon the foregoing authorities, a court would likely determine that such constitutes an unconstitutional delegation of the legislative power.

Id. at 7, citing *South Carolina State Highway Department v. Harbin*, 226 S.C. 585, 599 596, 86 S.E.2d 466 (1955).

Another case the Attorney General relied upon was *South Carolina Department of Social Services v. Bacot*, which held that a Family Court’s duty to decide the issue of paternity cannot be delegated to an expert or anyone else, 280 S.C. 485, 489, 313 S.E.2d 45, 48 (Ct. App. 1984). A similar case was *Dawson v. State Law Enforcement Division* (“We further conclude the Grievance Committee, as the final administrative authority, may not

delegate its role as final decision-maker to the Personnel Director”). *Id.* at 304 S.C. 59, 61, 403 S.E.2d 124 (1991).

The Attorney General explained that spending money is a legislative power. “Courts have held that one of the most fundamental legislative powers bestowed upon a municipal council is the spending power.” *Id.* (citing *Vermont Dept. of Public Service v. Massachusetts Municipal Wholesale Electric Co.*, 151 Vt. 73, 558 A.2 215, 220-21). The Attorney General noted that the South Carolina Supreme Court has ruled that the General Assembly may not transfer the power to spend “C” funds to the county legislative delegations. *Id.* (citing *Tucker v. South Carolina Dept. of Highways and Public Transportation*, 309 S.C. 395, 396, 424 S.E.2d 468, 469 (1992) and *State ex rel. McLeod v. McInnis*, in which the Court ruled that the General Assembly could not delegate its spending power, “legislative authority,” to the Joint Appropriation Review Committee, composed of 12 legislators), 278 S.C. 307, 317-18, 295 S.E.2d 633, 639 (1982). The Attorney General noted that these two decisions expressly addressed separation of powers, but also instructed, “legislative power resides in the hands of the General Assembly and may not be delegated to a committee of the Legislature.” *Id.* If the General Assembly, which has nearly plenary authority, cannot delegate legislative power to a portion of the whole, then certainly a County Council cannot delegate legislative or spending power to an individual councilor.

B. Legal Treatises Unanimously Hold that Discretionary and Legislative Authority May Not Be Delegated.

The Circuit Court’s ruling has a long established historical basis in the common law. This heritage is also demonstrated in scholarly treatises and legal encyclopedias.

The rule is well settled that legislative power cannot be delegated by a municipality, unless expressly authorized by the statute conferring the power. So, judicial, as distinguished from ministerial, functions cannot be delegated. So far as the powers of a municipal corporation are legislative they rest in the discretion and judgment of the municipal body entrusted with them, and the general rule is that that body cannot delegate or refer the exercise of such powers to the judgment of a committee of the council, or to an administrative board or officer of the city, or to arbitrators under an agreement for binding arbitration. If the legislature confers power on a municipal corporation, the exercise of discretion by the governing body of the municipality cannot be delegated to a municipal officer or other person or body.

2A McQuillin, Mun. Corp. § 10:43 (3rd ed.) (emphasis added). Under the County Council form of government, the Council as a whole must determine to which projects it will commit funds.

While *legislative or discretionary powers* or trusts *devolved* by charter or law *on a council or governing body*, or a specified board or officer *cannot be delegated to others*. [...] The council by ratification finally determines and thus fulfills the duty imposed by law.

2A McQuillin, Mun. Corp. § 10:45 (3rd ed.) (emphasis added). The Circuit Court properly ruled that the County Council members' ability to select a pet project in their districts and withdraw funds from the Slush Fund to pay for them was a delegation of legislative authority involving broad discretion.

A municipal governing body cannot delegate . . . to one of its own committees the power to decide legislative matters properly resting in the judgment and discretion of that body or to one member of the governing body. . . . The members of the governing body are chosen by the people to represent the municipality and they are charged with a public trust and the faithful performance of their duties and the public is entitled to the judgment and discretion of each member.

56 Am.Jur.2d, Municipal Corporations, § 134 (emphasis added).

"Powers involving exercise of judgment and discretion are in the nature of public trusts and cannot be delegated." 20 C.J.S., Counties, § 89. "The action of less than the quorum of a public body is void." 1 Am.Jur.2d Administrative Law § 196. "The authori-

ty of the commission may not be exercised by a single member of such a body, or less than a majority.” 73 C.J.S., Public Administrative Law and Procedure § 20.

The broad discretion of legislative authority is far different from ministerial acts, which may be delegated.

Administrative and executive functions are designed to carry out and effectuate the provisions of the laws. In their performance by municipal officers or employees no discretion is involved; they are ordinarily deemed to be mere ministerial acts, governed by rules discussed in a following section. This section discusses certain administrative and executive functions that involve a strictly limited discretion in their performance; *these acts may be contrasted, on the one hand, with ministerial acts involving no discretion, and, on the other hand, with legislative acts involving broad discretion* limited, generally speaking, only by constitutional, statutory or charter provisions, and which have been considered previously.

2A McQuillin, Mun. Corp. § 10:44 (3rd ed.) (emphasis added).

Ministerial functions of municipal corporations are absolute, fixed and certain acts required by law in a given state of facts, and in the performance of which the municipal board or officer exercises no discretion. They are distinguishable from judicial, and legislative or discretionary powers and functions. A ministerial function or duty is ordinarily an executive or administrative function in the performance of which *no discretion is involved*, as previously has been observed.

2A McQuillin, Mun. Corp. § 10:45 (3rd ed.) (emphasis added).

C. The Delegated Power Was Legislative.

The Circuit Court found that the Slush Fund, “allows individual Council members, ‘absolute, unregulated and undefined discretion’ to make policy-based spending decisions that are legally required to be made by the Council as a whole” (Order entered February 10, 2010, p. 1), and ruled that the fund was “an impermissible delegation of legislative authority.” *Id.* The Circuit Court first reasoned that the appropriation of public funds is ordinarily a legislative function.

The Supreme Court of South Carolina has held that “[i]t is fundamental that the appropriation of public funds is a legislative function.” *Gregory v. Rollins*, 230 S.C. 269, 95 S.E.2d 487, 490 (1956). . . . A “statute which in effect reposes an absolute, unregulated, and undefined discretion in an administrative body bestows arbitrary powers and is an unlawful delegation of legislative powers.”⁵ *Id.* (quoting *S.C. State Highway Dep’t v. Harbin*, 226 S.C. 585, 595, 86 S.E.2d 466, 471 (1955)).

Id. pp. 4-5. The Court then turned its examination to be specific, practical, day-to-day operations of expenditures from the Slush Fund.

Applying this standard to the Slush Fund, the ordinance allows individual Council members “absolute, unregulated, and undefined discretion” to make expenditures for a broad list of purposes. The only limitation on a Council member’s spending choice is that it be “associated with special, non-recurring community requests for infrastructure purposes.” The list following this phrase begins with “such as . . .,” and therefore provides examples, not further limitation. Members may individually determine whether to spend money on road construction or repair, public park construction, storm water drainage, sewer projects, lighting, or even for other purposes. It is difficult to imagine an expenditure a Council member may choose to make that is not arguably “associated” with infrastructure.

Id. The Court then considered what options were opened individual Council members as they made expenditures from the Slush Fund.

In making the determination as to how to spend the money allocated to him or her, each individual Council member must necessarily weigh the public policy considerations that favor one expenditure over another. One Council member may decide after considering these competing policies that the most appropriate expenditure of funds is for road construction, while another member believes it is for parks. One member may be unaware of policy considerations in favor of sidewalks in neighborhoods, and decide to spend money on speed bumps.

Id. The Court considered the impact of competing public policy considerations in the methods in which Council members requested specific expenditures.

The Slush Fund allows Council members to implement public policy that may have been rejected by the Council as a whole. For example, Council may consider passing a proposed ordinance to improve sewer service

⁵ Greenville County concedes that this is the test for the Court to apply. See October 7, 2008 hearing transcript at 35-36. (Footnote in original.)

throughout the County. After weighing the benefits of improved sewer service, the Council may decide that taxpayer money should be spent for other purposes, and vote not to enact that ordinance. By using the Slush Fund, however, an individual Council member may essentially veto the Council's policy determination by using that member's funds for sewer construction.

Id. Finally, the Court considered the impact of Slush Fund appropriations on the inherent workings of a legislative body such as a County Council form of government.

In all of these scenarios, different and often conflicting public policy is being implemented by different Council members in different parts of the County. These policy decisions are not being made after an open and public debate by the elected County Council, but based on the individual private preferences of Council members. Allowing members to make these policy decisions about how to spend taxpayer money is to allow individual members to make legislative decisions. This is an impermissible delegation of legislative authority.

Id.

Council members could and did determine individually what deserved funding, and how much funding it deserved, without the vote of Council. They would decide when to spend it. They would decide on what to spend it. They would decide how much to spend. Not only could councilors decide between competing "infrastructure" expenditures; they also had discretion to spend Slush Fund money for the following categories of approved expenditures:

- "contributions to local governments;"
- "general business supplies;"
- "costs of special documents, incentives and awards;"
- "periodicals, professional journals, and reference books;"
- "per diem and mileage;" and
- "community functions, conferences and training seminars."

See Exhibit 3 to Defendants' Summary Judgment Memo. Decisions with all these choices from one Slush Fund are legislative. Such decisions may not be properly delegated.

D. Individual Councilors Were Not Agents of the Council and Were Not Lawful Recipients of the Authority.

Under appropriate circumstances, a legislative body may delegate some powers to an *agent* of the body, but *elected members* of a legislative body are *not agents* of the body, nor are they answerable to the body as a whole. Therefore, the Council could not lawfully delegate powers to the individual councilors.

While legislative or discretionary powers or trusts devolved by charter or law on a council or governing body, or a specified board or officer cannot be delegated to others, it is equally well established that *ministerial or administrative functions may be delegated to subordinates*. The law has always recognized and emphasized the distinction between instances in which discretion must be exercised by the officer or department or governing body in which the power is vested, and the performance of merely ministerial duties by subordinates and agents. Hence, the *appointment of agents* to carry out the authority of the council is entirely proper, and does not violate the rule *delegatus non potest delegare*. So, the council may authorize the mayor to make a contract that the council alone is authorized to make, and itself afterwards ratify such contract and take action, as in issuing bonds, in pursuance of it. In such case, the mayor merely acts as the *instrument or amanuensis of the council*. It is through the mayor that the contract is made. The council by ratification finally determines and thus fulfills the duty imposed by law.

McQuillin, The Law of Municipal Corporations, § 10:45 (emphasis added).

The venerable legal rule "delegates non potest delegare" states:

[a] delegate cannot delegate; an agent cannot delegate his functions to a subagent without the knowledge or consent of the principal; *the person to whom an office or duty is delegated cannot lawfully devolve the duty on another, unless he be expressly authorized to do so.*

Black's Law Dictionary (revised 4th Ed.) p. 513. Councilors are elected by their constituency, and they are answerable to their constituency; they are not answerable to

the body as a whole. They have no duty to carry out the will of the Council, and delegation of legislative power to individual councilors is improper.

The Attorney General noted that “no statute . . . authorizes a county council to delegate spending authority to its individual members.” *Id.*, p. 7. The opinion notes,

While S.C. Code Ann. § 4-9-100 authorizes additional administrative duties to be delegated to the chairman and to receive additional compensation thereof, ***no state law appears to authorize subdelegation to individual Council members*** such broad discretion as is present here to determine how the funds in question are to be spent. The fact that the General Assembly authorized subdelegation to a specific council member (chairman) in the limited circumstances defined by § 4-9-100 (administrative duties) strongly suggests that the subdelegation of authority to individual council members to expend funds from the so-called “discretionary fund” is not present. Absent such statutory authority being expressly provided by the General Assembly, it is our opinion that a court would conclude, just as the July 20, 1981 opinion so concluded, that this authority is lacking.

Id. at 6 (emphasis added). The Chairman is distinguishable from the other councilors because he is elected by the councilors and is answerable to them. S.C. Code Ann. § 4-9-110. Individual members have no such obligation.

The Attorney General recognized that the law distinguishes between exercises of discretion by the body in which authority has been vested and an agent of that body.

The law has always recognized and emphasized the distinction between instances in which a discretion must be exercised by the officer or department or governing body in which the power is vested, and the performance of merely ministerial duties by the subordinates or agents.

Id. Under the Council-Administrator form of government, the County Administrator, rather than individual council members, is to “supervise the expenditure of appropriated funds.” S.C. Code Ann. § 4-9-630(5).

In the Circuit Court, SCPIF also urged that the *recipients* of the authority, the individual member of the County Council, were unlawful recipients (Transcripts of

Record, October 7, 2008, pp. 10-11, 20, 25 and November 7, 2008, pp. 8-9). Although the Circuit Court did not rule on this basis, SCPIF urges this ground as an additional sustaining ground for the ruling of the Circuit Court.

E. Slush Fund Expenditures Were Not Administrative or Ministerial Decisions and Could Not Be Delegated.

Under appropriate circumstances, a legislative body may delegate administrative or ministerial acts to an agent, but it may not delegate discretionary decisions. Slush Fund spending decisions were discretionary, and the law is well settled that discretionary decisions must be made by the elected body as a whole. The Attorney General agreed: “[I]t is well established that a municipal council may not delegate discretionary duties to individual members of council.” *Id.* at 2, citing 56 Am.Jur.2d, Municipal Corporations § 134. The South Carolina Supreme Court has supported this principle:

[a]n administrative board or body, when acting in a quasi-judicial capacity, must itself consider all the evidence before rendering a decision. In the Supreme Court’s opinion, while the Board of Education could delegate to Board members the authority to take testimony and hear witnesses, the Board could not subdelegate its decision-making authority.

Pettiford v. S.C. State Bd. of Ed., 218 S.C. 322, 62 S.E.2d 780, 791 (1950).

Likewise in *Dawson v. State Law Enforcement Division*, the Court said,

[T]he Grievance Committee, as the final administrative authority, may not delegate its role as final decision-maker to the Personnel Director. See *Bradley v. State Human Affairs Comm’n*, 293 S.C. 376, 360 S.E.2d 537 (Ct. App. 1987). Once an appeal is forwarded to the Grievance Committee, the Committee has exclusive jurisdiction to decide all issues.

Id. at 304 S.C. 59, 403 S.E.2d 124, 125 (1991).

Because the Slush Fund spending decisions were discretionary, not ministerial or administrative, they may not be properly delegated. Again, although the Circuit Court

did not rule on this basis, SCPIF tenders this argument as an additional legal ground to sustain the judgment of the Circuit Court.

F. County Council's Delegation of Legislative Authority is not "Consistent with the Constitution and General Laws of this State."

The County argues that Home Rule provides county governments with wide discretion. However, the government's actions must not be "inconsistent with the Constitution and general law of this state." S.C. Code Ann. § 4-9-25. For example, a county could not secede from the United States and declare itself an independent, sovereign nation. A county could not elect the sheriff as a military dictator. Such actions would be "inconsistent with the Constitution and general law of this state." Similarly, a County Council cannot delegate legislative authority because it is "inconsistent with the Constitution and general law of this state."

The "general law of this state" includes a council form of government. S.C. Code Ann. § 4-9-10. The "general law of this state" includes the common law rule, acknowledged in the twelve cases cited above, that a legislative body cannot delegate legislative or discretionary powers. The "general law of this state" includes, to some degree, the common law as stated in the many scholarly treatises and legal encyclopedias cited above and by the Attorney General.

The rule is well settled that legislative power cannot be delegated by a municipality [T]he general rule is that that body cannot delegate or refer the exercise of such powers to the judgment of a committee of the council, or to an administrative board or officer [T]he exercise of discretion by the governing body of the municipality cannot be delegated to a municipal officer or other person or body.

2A McQuillin, Mun. Corp. § 10:43 (3rd ed.). [L]egislative or discretionary powers . . . devolved . . . on a council . . . cannot be delegated to others. 2A McQuillin, Mun. Corp. § 10:45 (3rd ed.).

“A municipal governing body cannot delegate . . . the power to decide legislative matters . . . to one member of the governing body. . . . [T]he public is entitled to the judgment and discretion of each member.” 56 Am.Jur.2d, Municipal Corporations, § 134. “[P]owers involving exercise of judgment and discretion are in the nature of public trusts and cannot be delegated.” 20 C.J.S., Counties, § 89. “[T]he action of less than the quorum of a public body is void.” 1 Am.Jur.2d, Administrative Law § 196. “[T]he authority of the commission may not be exercised by a single member of such body, or less than a majority.” 73 C.J.S., Public Administrative Law and Procedure, § 20.

Although under Home Rule, the powers of county governments are ordinarily to be “liberally construed” in the County’s favor, the County is not entitled to a construction that would frustrate the basic council form of government. S.C. Code Ann. § 4-9-25. The delegation of the power to spend Council Reserve Funds to individual councilors is “*inconsistent* with the Constitution and general laws of this state.” S.C. Code Ann. § 4-9-25 (emphasis added). The “general laws of this state” provide for a council form of government: a legislative body that must act as a whole. *See Wilson v. Preston*, 378 S.C. 348, 662 S.E.2d 580 (2008) (under the Council-Administrator form of government, “Wilson, as a council member, cannot independently review attorney-client privileged documents. The privilege belongs to the client County; and *the Council, as a whole*, is authorized to release that information and has to waive the privilege before an individual council member can review privileged documents” (emphasis added)).

The purpose and emphasis of Home Rule was to transfer governing authority from the Statehouse to the County and was a state versus local government authority issue. The unlawful delegation of legislative authority to an individual council member is not a state versus local issue because it does not involve state action. The principle of Home Rule is simply irrelevant to this issue.

II. THE CIRCUIT COURT PROPERLY GRANTED ATTORNEYS' FEES.

The Circuit Court awarded attorneys' fees and costs to SCPIF under § 15-77-300 (Order entered November, 11, 2010). To recover under this section, a citizen must prove three elements: (1) the citizen must be the prevailing party; (2) the government entity must have acted without substantial justification; and (3) no special circumstances would have made the award of attorney's fees unjust. *Heath v. County of Aiken*, 302 S.C. 178, 182, 394 S.E.2d 709 (1990); *Richland County v. Kaiser*, 351 S.C. 89, 96-97, 567 S.E.2d 260 (Ct. App. 2002). The award of attorneys' fees is discretionary with the trial court. *Heath v. County of Aiken*, 302 S.C. 178, 182, 394 S.E.2d 709 (1990). SCPIF meets the three elements for an award of attorney's fees, and the Circuit Court properly awarded attorneys fees.

A. SCPIF Is a Prevailing Party.

The Circuit Court's order entered February 10, 2010 ruled, "The 'Council District Expense Fund' portion of the 2006-2007 budget for Greenville County is declared to be illegal." Thus, SCPIF is a prevailing party. The County does not dispute this point.

B. The County Acted Without Substantial Justification.

To act with “substantial justification,” the governmental entity must have a reasonable basis in law and fact. *Cornelius v. Oconee County* 369 S.C. 531, 539, 633 S.E.2d 492, 497 (2006), *Video Gaming Consultants, Inc. v. South Carolina Dept. of Revenue*, 358 S.C. 647, 595 S.E.2d 890 (Ct. App. 2004). The County did not have a reasonable basis in law and fact. As discussed above, South Carolina case law, the scholarly treatises, and the Attorney General opinion are unanimous. Councils may not delegate legislative or discretionary authority. Such powers must be exercised by the body as a whole. The County ignored this well-established authority. The Circuit Court ruled, “The Court finds that this Attorney General opinion accurately states the law regarding delegation of legislative authority as it has been understood for at least 100 years, and if Defendants did not know this legal principle, they were *willfully ignorant* of it” (Order entered November 11, 2010, p.3 (emphasis added) (R. p. 38).

The County also ignored the Circuit Court’s oral opinion and pending ruling. At oral argument, this Court announced its intention to rule that the “Council District Expense” was an unlawful delegation of legislative power, and asked SCPIF’s counsel to draft an order (Transcript of Record, November 7, 2008, p. 25-27; R. pp. 831-833). On June 16, 2009, the Greenville County Council enacted Ordinance 4296 appropriating public funds for the fiscal year ending June 30, 2010 and on August 4, 2009, enacted Ordinance 4301 appropriating public funds for the fiscal year ending June 30, 2011 (Ordinances 4296 and 4301; R. pp. 628-638). The County admitted “that Ordinances appropriating funds for fiscal years ending June 30, 2009, 2010, and 2011 appropriated Council District Expense funds in amounts exceeding \$20,000 per Councilor; . . . that the individual accounts of the Council District Expense for fiscal years ending June 30, 2009,

2010, and 2011 are substantively the same as the individual accounts for Council District Expense in Ordinance 3940; [and] . . . that the individual accounts of the Council District Expense for fiscal years ending June 30, 2009, 2010, and 2011 allow each Councilor to expend money as he sees fit, subject only to compliance with the ‘Guidelines’ applicable to that fiscal year” (Responses to Plaintiffs Second Set of Requests for Admission dated November 16, 2009; R. p. 613). Thus, ignoring the oral ruling of the Circuit Court, the County was not “substantially justified” in pressing its claims in this lawsuit.

South Carolina Courts have ruled that prevailing parties in this type of case are entitled to an award of attorney’s fees. In *Cornelius v. Oconee County*, the South Carolina Supreme Court affirmed the award of attorneys’ fees to Cornelius, who prevailed against Oconee County in her action for declaratory judgment. *Id.* at 369 S.C. 531, 633 S.E.2d 492 (2006). Oconee County had argued that § 15-77-300 does not provide for an award of attorneys fees in a declaratory judgment action, but the Court ruled, “A party whose position prevails in a declaratory judgment dispute with a state agency may be awarded fees under § 15-77-300.” *Id.* at 497. In the present case, SCPIF has prevailed in an action for declaratory judgment.

In *Cornelius*, the County also argued that it acted “with ‘substantial justification’ within the meaning of the statute” because novel issues were raised. *Id.* at 497. The Court disagreed and recognized that “declaratory judgment actions by their very nature often present novel questions. *Id.*

Because of this issue’s importance to County government, the County should have been aware of this long-standing common-law rule, this Attorney General opinion, and the cited authorities, but SCPIF does not rely solely on that *duty*. SCPIF *attached a*

copy of the Attorney General opinion to the Complaint. The County chose to ignore the Attorney General Opinion and its many authorities and vigorously opposed the claim. Furthermore, even after the filing of this civil action, Greenville County Council made similar appropriations for fiscal years ending June 30, 2008, June 30, 2009, June 30, 2010, and June 30, 2011.

C. No Special Circumstances Make an Award of Fees Unjust.

Finally, no special circumstances make an award of fees unjust. SCPIF and Mr. Sloan funded this litigation with their own resources. The County and the State benefit when civic minded citizens bring such actions. "It is very commendable that public-spirited citizens should endeavor to protect the taxpayers of a county from the efforts of an accommodating fiscal court to make unauthorized and unlawful appropriations of public funds." *Shillito v. City of Spartanburg*, 214 S.C. 11, 26, 51 S.E.2d 95 (1948), *quoting* *Fox v. Lantrip*, 169 Ky. 759, 185 S.W. 136, 139. The Court continued, "Citizens should be encouraged to bring suits like these." *Id.*

The Court ruled that the County's actions were illegal. With the Attorney General opinion on point that relied on South Carolina case law and many scholarly treatises, the County was on notice of the illegality of its actions. Thus, no circumstances make an award of attorneys' fees unjust. Accordingly, SCPIF meets the standard for an award of attorneys' fees under S.C. Code Ann. § 15-77-300.

D. SCPIF's Actual Attorneys Fees and Costs are Reasonable.

The County does not argue that the amount of the award of attorneys' fees and costs was excessive. SCPIF's counsel attached an affidavit and monthly statements documenting attorneys' fees and costs (Affidavit and Exhibits to Affidavit; R. pp. 561-606).

Counsel for SCPIF have discounted their normal rates due to the public interest nature of this litigation. This case presented a financial risk for SCPIF. Up until the time of filing the affidavit, SCPIF had incurred *and paid* \$59,612.50 in attorneys' fees and \$471.65 in costs. The County and the public benefited from this litigation.

The Court properly considered the six factors for attorneys' fees (Order dated November 11, 2010). *Burton v. York County Sheriff's Dept.*, 358 S.C. 339, 357, 594 S.E.2d 888, 898 (Ct. App. 2004). SCPIF's actual attorneys' fees and costs were reasonable, and SCPIF is entitled to an award of attorneys' fees and costs. The Circuit Court properly found that Respondents' actual attorneys' fees and costs were reasonable and that Respondents were entitled to a full award of attorney's fees and costs.

III. RES JUDICATA DOES NOT BAR THIS ACTION.

The County begins its discussion of *res judicata* by reaffirming its lack of interest in collateral estoppel. "The County contends that Sloan's case is barred by the doctrine of *res judicata* (i.e. claim preclusion, . . . not collateral estoppel (i.e. issue preclusion). The County's defense is one of claim preclusion, and thus analysis should focus on that concept to the exclusion of issue preclusion" (Appellants' Brief, p. 11, n. 2).

The Circuit Court properly rejected the application of *res judicata* to this case.

A. Slush Fund I Addressed Appropriations and Expenditures in 1994 Through 1997; This Case Addresses Appropriations and Expenditures in 2005 and 2006.

Greenville County appropriates money to its Slush Fund by annual ordinance. In the earlier Slush Fund cases, the Circuit Court found some expenditures legal, and others illegal. The "*res*" adjudicated in the earlier cases was the legality of specific expenditures. *Res judicata* bars SCPIF from challenging *those expenditures* a second time, but

does not bar challenges to other expenditures in later years. No court had previously adjudicated the legality of the expenditures in 2006 and 2007 that SCPIF challenged in the case at bar.

Furthermore, the expenditures in the case at bar are alleged to be illegal for different reasons. Unlike the earlier Slush Fund cases, the Circuit Court in the case at bar ruled that the Slush Fund expenditures in 2006 and 2007 were an unlawful delegation of legislative power to individual Councilors (Order entered February 10, 2010; R. pp. 27-33). The Circuit Court had not ruled on this issue before.

The United States Supreme Court declined to apply *res judicata* in a similar context.

Income taxes are levied on an annual basis. *Each year is the origin of a new liability and of a separate cause of action.* Thus if a claim of liability or non-liability relating to a particular tax year is litigated, a judgment on the merits is *res judicata* as to any subsequent proceeding involving *the same claim and the same tax year*. But if the later proceeding is concerned with a similar or unlike claim relating to a *different tax year*, the prior judgment acts as a *collateral estoppel* only as to those matters in the second proceeding which were *actually presented and determined* in the first suit.

Collateral estoppel . . . is not meant to create vested rights in decisions that have become obsolete or erroneous with time, thereby causing inequities among taxpayers.

Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591, 597-600, 68 S.Ct. 715, 719-720 (1948) (citations omitted; emphasis added). The *res judicata* and collateral estoppel issues in *Sunnen* are similar to those of the case at bar. In both cases, the courts addressed different fiscal years and different facts. Pursuant to *Sunnen*, the Circuit Court properly ruled that *res judicata* did not prevent a decision on the 2006 and 2007 expenditures, nor did *res judicata* prevent a ruling on the question of the unlawful delegation of legislative authority.

South Carolina law on this issue is similar to the federal law established by the United States Supreme Court in *Sunnen*.

The doctrine of *res judicata* originates from the principles that public interest requires an end to litigation and that no one should be sued twice for the same cause of action. *Hayes v. Hayes*, 312 S.C. 141, 439 S.E.2d 305 (Ct.App.1993). The *res judicata* defense requires a showing of three essential elements: (1) the prior judgment must be final, valid and on the merits; (2) the parties in the subsequent action must be identical to those in the first; and (3) the second action must involve matters properly included in the first action. *Owenby v. Owens Corning Fiberglas*, 313 S.C. 181, 437 S.E.2d 130 (Ct.App.1993). Under the doctrine of *res judicata*, a final judgment on the merits in a prior action will preclude the parties from relitigating any issues actually litigated or those that might have been litigated in the first action. *Foran v. USAA Casualty Ins. Co.*, 311 S.C. 189, 427 S.E.2d 918 (Ct.App.1993).

Wright, v. Marlboro County School District, 317 S.C. 160, 452 S.E.2d 12 (Ct. App. 1994). The 2006 and 2007 appropriations and expenditures were not—and could not have been—litigated in the 1996 case. Thus, *res judicata* did not bar Respondents' challenge to these appropriations and expenditures. The allegations arise from different fiscal years. *Res judicata* is not the proper analytical tool.

B. The County's Reliance on "Hoover II" is Misplaced.

The County acknowledges that the Circuit Court relied on *Sunnen* to deny its Motion for Summary Judgment on the grounds of *res judicata*. The County argues that the Circuit Court erred in relying on *Sunnen*. To support its position, the County relies on a decision from the Alabama Court of Appeals. *State Dep't. of Revenue v. Hoover, Inc.*, 993 So.2d 889 (Ala. Civ. App. 2007) ("*Hoover II*"). The County includes a lengthy, five-page discussion of *Hoover II* in its argument for *res judicata* (Appellants' brief, pp. 12-16). The County argues that *Hoover II* gives much needed insight for interpreting *Sunnen* and the United States Supreme Court cases on *res judicata*.

The County's fundamental problem is that it has built its whole argument about *res judicata* on *Hoover II*, a case that **focuses entirely on collateral estoppel**. *Hoover II* mentions *res judicata* only one time, and that reference is **directly contrary** to the County's whole *res judicata* argument: "The Court [in *Sunnen*] explained that . . . the doctrine of *res judicata* **does not apply** to tax litigation involving **different tax years**." *Hoover II*, 993 So.2d 889, 895 (emphasis added). *Hoover II* did not alter that rule.

The *Hoover II* court addressed collateral estoppel, its application, and its exceptions at some length. First, the court said, "[T]he doctrine of **collateral estoppel does apply** to tax litigation involving different tax years, but '**only as to those matters** in the second proceeding which were **actually presented and determined** in the first suit.'" *Id.* at 598, 68 S.Ct. 715. *Id.* (emphasis added). SCPIF will demonstrate below that the issue of unlawful delegation of legislative authority was not "actually . . . determined in the first suit."

Although the County purports to use *Hoover II* to argue for *res judicata*, the County (apparently unwittingly) lapses into a discussion of the policy considerations that are applicable to the exceptions to collateral estoppel (Appellants' brief, pp. 13-19). The County references "issue preclusion" (collateral estoppel) at the bottom of page 13. On page 14, the County's brief mentions "collateral estoppel" *five times*. On page 15, the County references "collateral estoppel" three times. On page 16, the County references "issue preclusion" twice, "reopening an issue," and "collateral estoppel." After all the discussion of collateral estoppel, the County concludes that *Hoover II* requires a reversal on the Circuit Court's decision, not based upon collateral estoppel, but on *res judicata*.

Even setting aside the County's analytical substitution, the County's reliance on *Hoover II* is misplaced, even under the theory of collateral estoppel. Like the courts of this State and the United States Supreme Court, *Hoover II* actually supports the position of SCPIF. *Hoover II* limited the application of collateral estoppel to cases in which "the same issues were **actually presented and determined** in the first action." *Id.*, 993 So.2d. at 897 (emphasis added). As demonstrated below, the issue of the unlawful delegation of legislative authority was **not** "actually presented and determined in the first action." Thus, *Hoover II* provides no help to the County on either *res judicata* or collateral estoppel, but rather supports the position of SCPIF.

Hoover II also acknowledged that *Sunnen* allowed for countervailing considerations to prevail against a strict application of collateral estoppel. The *Hoover II* court reasoned:

In *Commissioner v. Sunnen*, the United States Supreme Court held that the doctrine of **collateral estoppel did not apply** to bar the Commissioner of Internal Revenue from relitigating a tax issue that was identical to one previously decided in a case between the same parties, involving the same contract, but involving **different tax years**. The Court held that **collateral estoppel did not apply** because a line of cases, decided after the resolution of the previous action against the taxpayer, had **sufficiently changed the legal climate** surrounding the issue at hand and that application of the principles currently in effect in light of that **subsequent line of cases might have produced a different result** from that reached in the previous action. *Sunnen*, 333 U.S. at 606-07, 68 S.Ct. 715.

Hoover II, 993 So.2d. at 895 (emphasis added).

In addition, *Hoover II* quoted the following rule from *Sunnen*:

[Collateral estoppel] is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally. It is **not meant to create vested rights in decisions that have become obsolete or erroneous** with time, thereby causing inequities among taxpayers.

Hoover II, 993 So.2d. at 895, *quoting Sunnen*, 333 U.S. 591, 597-600, 68 S.Ct. 715, 719-720 (1948). Thus, contrary to the County's argument, *Hoover II* did not limit or modify or reinterpret *Sunnen*.

Hoover II distinguished its own facts from the facts of *Sunnen*: "Even though all three of the above-mentioned cases [including *Sunnen*] held that collateral estoppel did not apply to the respective case at hand, *all three cases are distinguishable from the present case.*" 993 So.2d. at 897. *Hoover II* simply applied the *Sunnen* rules to the distinguishable facts before it. *Hoover II* does not alter the legal analysis of *Sunnen*. *Hoover II* addressed collateral estoppel, not *Sunnen*'s rule that separate tax years constituted a separate "res" for purposes of *res judicata*.

IV. COLLATERAL ESTOPPEL DOES NOT BAR THIS ACTION.

Although the County has waived its collateral estoppel argument, both overtly in the trial court and in Appellants' Brief, a proper application of collateral estoppel would not provide the County any relief.

Several sets of circumstances justify exceptions to collateral estoppel: one is when the circumstances in the second case are separated in time from the circumstances in the first case. The second is when there has been a change in the "legal context" which calls for a fresh look at the legal interpretation. Third, in the case at bar the court properly relied upon the potential adverse impact on the public interest by applying the wrong legal standard. Thus, several exceptions to a strict application of collateral estoppel apply to SCPIF's claims in the case at bar.

The Restatement (2nd) of Judgments, § 28 recognizes several exceptions to the doctrine of collateral estoppel:

Although an issue is *actually litigated and determined* by a valid and final judgment, and the determination is essential to the judgment, *relitigation* of the issue in a subsequent action between the parties *is not precluded* in the following circumstances:

* * *

(2) The *issue is one of law* and (a) the two actions involve *claims* that *are substantially unrelated*, or (b) a new determination is warranted in order to take account of *an intervening change in the applicable legal context* or otherwise to *avoid inequitable administration of the laws*; or

* * *

(5) There is a clear and convincing *need for a new determination* of the issue (a) because of the *potential adverse impact* of the determination *on the public interest*

Id. (emphasis added).

South Carolina recognized these exceptions to the doctrine of collateral estoppel by quoting this section in *Pye v. Aycock*, 325 S.C. at 437-38, 480 S.E.2d at 460-61. *See also, Nelson v. QHG of South Carolina, Inc.*: “There are numerous exceptions to the application of res judicata and collateral estoppel. In *Pye*, the court adopted the Restatement (Second) of Judgments section 28.” *Id.* at 354 S.C. 290, 306, 580 S.E.2d 171, 179 (2003), *aff’d in part, rev. in part on other grounds* 362 S.C. 421, 608 S.E.2d 855 (2005).

A. *Slush Fund I* Did Not Actually Decide the Issue of the Delegation of Legislative Authority.

Collateral estoppel prevents the relitigation of issues *actually litigated* in the previous civil action. *Limbach v. Hooven & Allison Co.* 466 U.S. 353, 104 S.Ct. 1837, 80 L.Ed.2d 356 (1984). In *Limbach*, “the parties were the same, . . . the issue . . . was also the issue in [the earlier case]; that the raw materials and the type of taxation were identical.” The Court’s analytical framework was not *res judicata*, but collateral estoppel. Under collateral estoppel, the analysis is more limited than under *res judicata*. *Id.*

The County argues that Slush Fund I rejected Mr. Sloan's arguments regarding the unlawful delegation of legislative authority. The County cites Mr. Sloan's *pleadings* and arguments in Slush Fund I. The County fails to cite the Circuit Court *Order* addressing the unlawful delegation issue of legislative power, because the Order does not address it.

In the Circuit Court, the County *admitted* that the Slush Fund I order failed to deal with unlawful delegation of legislative authority. "Now, admittedly looking at the order where Judge [E]rvin-- *I don't see that the order expressly deals with the issue* that Mr. Sloan has raised in this case" (Transcript of record dated October 27, 2007, pp. 5, ll. 14-17 (emphasis added)). The Circuit Court agreed: "[T]his Court has reviewed the prior order and finds that it did not specifically address the issue of delegation of legislative authority" (Order entered November 11, 2010, p. 3). The Circuit Court and counsel for the County are correct; Slush Fund I simply did not address this issue.

The Slush Fund I court limited its analysis to two basic issues:

Although Sloan's complaint cites a number of statutory and constitutional provisions that Sloan alleges County is violating, at trial and in his trial brief he argued only two bases in support of his claim. *First*, he contended that some Council Reserve disbursements are *constitutional violations* because they allegedly violate the United States and South Carolina constitutions in that they allegedly have resulted in the funding of religious activity. Sloan alleges and argued that these alleged disbursements violate U.S. Constitution, Article I, Amendment I, and South Carolina Constitution, Article I, Section 4. *Second*, Sloan alleged and argued and alleged that disbursements from Council Reserves violate *Section 7-81 of the Greenville County Code*. Based upon my careful review of the record and evidence submitted before me, I find and conclude that Sloan is not entitled to relief on either of these bases and I further conclude that County is entitled to judgment in its favor.

Order entered March 2, 1998, page 3 of 11 (emphasis added). The Court limited its analysis to the issues laid out in the section quoted above, and the legality or illegality of

specific expenditures. If the Order did not “expressly deal[] with the issue,” as opposing counsel admitted, then neither *res judicata* nor collateral estoppel applies.

Nevertheless, the County cites pages 7-8 of the same order and *now* argues, contrary to its earlier admission, that the Slush Fund I court rejected Sloan’s claim of unlawful delegation of legislative authority (Appellants’ Brief, p. 7). A careful review of the order reveals that the Slush Fund I court was addressing *only* Greenville County Code Section 7-81. The trial court was insightful: “it did not specifically address the issue of delegation of legislative authority” (Order entered November 11, 2010, p. 3).

Absent a definitive ruling on unlawful delegation of legislative authority in the prior case, neither *res judicata* nor collateral estoppel would prevent the court in the case at bar from ruling on that issue.

B. The Public Importance of These Actions Outweighs the Need for a Strict Application of Collateral Estoppel.

Several sets of circumstances justify exceptions to collateral estoppel. One is when the circumstances in the second case are separated in time from the circumstances in the first case. The second is when there has been a change in the “legal context” which calls for a fresh look at the legal interpretation. Third, the court properly could rely on the potential adverse impact on the public interest by applying the wrong legal standard. Thus, several exceptions to a strict application of collateral estoppel apply to SCPIF’s claims in the case at bar.

Montana v. United States demonstrates that when two cases are “closely aligned in time and subject matter,” collateral estoppel *should* ordinarily apply. However, the Supreme Court distinguished the application of collateral estoppel in normal, run-of-the-

mill actions from their application to constitutional claims and issues because of their public importance.

Thus, when issues of law arise in successive actions involving unrelated subject matter, preclusion may be inappropriate. *This exception is of particular importance in constitutional adjudication. Unreflective invocation of collateral estoppel against parties with an ongoing interest in constitutional issues could freeze doctrine in areas of the law where responsiveness to changing patterns of conduct or social mores is critical.* To be sure, the scope of the *Moser* exception may be difficult to delineate, particularly where there is partial congruence in the subject matter of successive disputes. But the instant case poses no such conceptual difficulties. Rather, as the preceding discussion indicates, the legal “demands” of this litigation are closely aligned in time and subject matter to those in *Kiewit I*.

Id. 440 U.S. 147, 162-163, 99 S.Ct. 970, 978, 59 L.Ed.2d 210 (1979) (citations omitted) (emphasis added). SCPIF respectfully suggests that the case at bar and its public interest considerations raise similar policy considerations. This court should not engage in “unreflective invocation of collateral estoppel” in such cases of public importance as the case at bar.

C. The Attorney General’s Opinion Changed the Applicable Legal Context.

Collateral estoppel is subject to other policy considerations, such as an intervening change in the applicable legal context, prevention of inequalities among taxpayers, discriminatory distinctions among taxpayers, and the need to reexamine the law as previously decided. *Limbach v. Hooven & Allison Co.* 466 U.S. 353, 104 S.Ct. 1837, 80 L.Ed.2d 356 (1984).

The Attorney General’s opinion amounted to a change in the legal context of this issue. Furthermore, the great public interest in requiring local governments to follow the law also outweighs any consideration of collateral estoppel. Third, even if the Court

were to decide that Slush Fund I dealt with unlawful delegation of legislative authority in some vague sense, or even if the ruling were clear but erroneous, collateral estoppel does not prevent a re-examination of the law.

“Where . . . a court in deciding a case has enunciated a rule of law, the parties in a subsequent action upon a different demand are *not estopped from insisting that the law is otherwise.*” *United States v. Moser* 266 U.S. 236, 242, 45 S.Ct. 66 (1924) (emphasis added). The *Moser* Court distinguished a ruling on the law from the mixed application of factual and legal determinations in a previously fully litigated case.

Similarly, in *Commissioner of Internal Revenue v. Sunnen*, the Supreme Court ruled, “*Collateral estoppel . . . is not meant to create vested rights in decisions that have become obsolete or erroneous* with time, thereby causing inequities among taxpayers.” 333 U.S. 591, 597-600, 68 S.Ct. 715, 719-720 (1948) (citations omitted; emphasis added). Thus, in the case at bar, SCPIF is not “estopped from insisting that the law is otherwise.” *Sonnen*, 333 U.S. 591, 597-600, 68 S.Ct. 715, 719-720 (1948), *quoting United States v. Moser*, (*supra*).

The Supreme Court ruled that an earlier decision involving import taxes would *not* be given collateral estoppel effect, when intervening case law indicated that the intellectual foundations of the previous case were no longer valid. *Limbach v. Hooven & Allison Company*, 466 U.S. 353, 104 S.Ct. 1837 (1984). The first case was decided in 1945. The intervening case was decided in 1976, and the case at issue was finally decided in 1984.

We move on to respondent’s collateral-estoppel argument. It is true, of course, that the parties in Hooven I were the same parties as those before us in the present case. It is true that the property sought to be taxed for 1976 and 1977 identifies with the property sought to be taxed for 1938,

1939, and 1940 in *Hooven I.* And it is true that the tax involved is the same Ohio nondiscriminatory ad valorem personal property tax. The parties, the tax, and the goods imported and their containers are the same. The Tax Commissioner does not dispute this. Tr. of Oral Arg. 12. Collateral-estoppel concepts, therefore, might have an initial appeal.

The years involved in this tax case, however, are not the same tax years at issue in Hooven I. Because of this, Commissioner v. Sunnen, supra, is pertinent and, indeed, is controlling. That case concerned licenses granted by a patent owner and his assignment of interests in the royalty agreements to his wife. An earlier decision of the Board of Tax Appeals, involving the same facts, questions, and parties but different tax years, was held *not to be conclusive* under the doctrine of collateral estoppel because certain *intervening decisions* of this Court *made manifest the error of the result that had been reached by the Board*. 333 U.S., at 602-607, 68 S.Ct. at 721-24. The reason for not applying the collateral-estoppel doctrine in the present case is even stronger than that in *Sunnen*, for here the constitutional analysis of the earlier case is repudiated by this Court's intervening pronouncement.

Id. 466 U.S. 353, 362, 104 S.Ct. 1837, 1843 (1984) (emphasis added). Likewise, in the case at bar, the expenditures are different, the budgetary years are different, and the Attorney General's opinion, together with the citation of cases and scholarly treatises he cites, "made manifest the error of the result that had been reached by the [prior decision]." *Id.*

In the case at bar, the Attorney General opinion created a new legal context justifying an exception to the doctrine of collateral estoppel. Slush Fund I addressed Establishment Clause violations, Section 7-81, and the County's failure to follow its own discretionary funds guidelines. The case was not appealed. Years later, the Attorney General published an opinion stating that granting individual council members discretionary public funds to use as they wish without a decision by the council as a whole was an unlawful delegation of legislative authority (2003 WL 22862787 (S.C.A.G.) November 19, 2003). This opinion, so clearly on point and well supported, constitutes a change in the legal context. The earlier decision, which did not address

unlawful delegation of legislative authority, does not collaterally estop a decision in this case that “the law is otherwise.”

The County contends that the Circuit Court did not rely on change in the legal context as an exception to the doctrine of collateral estoppel. If so, SCPIF proffers this argument as an additional sustaining ground for rejecting the County’s argument that collateral estoppel bars this court and the court below from addressing this issue.

CONCLUSION

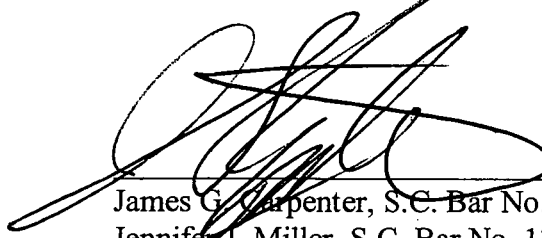
The Circuit Court properly ruled that the Slush Fund was an unlawful delegation of legislative authority. Furthermore, the *recipients* of the delegated authority were unlawful, and the decisions were discretionary and must not be delegated.

The Circuit Court properly granted SCPIF its attorney's fees and costs. Plaintiffs prevailed; the County ignored 100 years of South Carolina case law and unanimous opinion among scholarly treatises and legal encyclopedias. The Circuit Court properly ruled that if County Council were ignorant of the law, they were willfully ignorant.

Res judicata does not bar this lawsuit over new appropriations and new expenditures. The County waived its collateral estoppel argument. Even if the Court considers collateral estoppel, Slush Fund I did not actually adjudicate the issue of unlawful delegation. The Attorney General's 2003 Opinion changed the legal context surrounding the Slush Fund, and SCPIF is not estopped from contending that "the law is otherwise" than as articulated in Slush Fund I. SCPIF respectfully requests that this Court affirm the Orders of the Circuit Court in every respect.

Respectfully submitted, this 13 day of November, 2011,

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge
John C. Few, Circuit Court Judge

Case No. 06-CP-23-4637

The South Carolina Public Interest Foundation, and Edward D. Sloan, Jr.,
individually and on behalf of all others similarly situated,.....Respondents,

v.

Greenville County, Herman G. Kirven, Jr., Judy Gilstrap, Eric Bedingfield, Jim
Burns, Scott Case, Joseph Dill, Cort Flint, Lottie Gibson, Mark Kingsbury,
Xanthene Norris, Robert Taylor and Tony Trout Appellants.

PROOF OF SERVICE

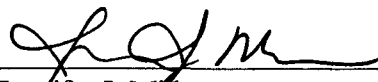
I certify that I have served Respondents Final Brief upon the Appellant by first class mail,
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The undersigned hereby certifies that Respondent's Final Brief is identical to the brief previously served under SCACR 208 except for references to the Record and correction of typographical errors and misspellings under SCACR 211(b).

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THE STATE OF SOUTH CAROLINA
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v.

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Bedingfield, Jim Burns, Scott Case, Joseph Dill, Cort Flint, Lottie
Gibson, Mark Kingsbury, Xanthene Norris, Robert Taylor, and
Tony Trout, ... Appellants.

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INTRODUCTION

In the following reply brief Appellants Greenville County and Greenville County Council (collectively the "County") will address, in the context of responding to the brief of Respondents Edward D. Sloan, Jr. and the South Carolina Public Interest Foundation (collectively "Sloan") the following: (1) whether res judicata bars Sloan's claims; (2) whether the Council Reserves were an appropriate exercise of the County's powers under Home Rule; and (3) whether the award of attorney's fees against the County was proper. With respect to those points in Sloan's brief that the County does not address herein, the County respectfully craves reference to its opening brief.

ARGUMENT

I. *RES JUDICATA* BARS SLOAN'S CLAIMS.

A. Recent Case Law Demonstrates that Sloan's Claims are Barred.

In Judy v. Judy, 393 S.C. 160, 712 S.E.2d 408 (S.C. 2011) the Supreme Court reiterated the well-established principles that *res judicata* "bars subsequent actions for the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties," and that a litigant "is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit." 712 S.E.2d at 414 (quoting Plum Creek Development Co. v. City of Conway, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999)). The Court noted that the "fundamental purpose of res judicata ... is to ensure that 'no one should be twice sued for the same cause of action.'" 712 S.E.2d at 414 (quoting First Nat'l Bank of Greenville v. U.S. Fid. & Guar. Co., 207 S.C. 15, 24, 35 S.E.2d 47, 56 (1945)).

In Judy the Court also re-affirmed its three part test to determining whether *res judicata* operates to bar a subsequent lawsuit: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit. Judy, 712 S.E.2d at 412 (citing Riedman Corp. v. Greenville Steel Structures, Inc., 308 S.C. 467, 419 S.E.2d 217 (1992)). Sloan does not challenge the first element. As to the remaining elements he argues that the “2006 and 2007 appropriations and expenditures [from the County’s budget] were not – and could not have been – litigated in the 1996 case.” Sloan Brief at 29. His analysis of the *res judicata* test ends there, and he spends the next ten pages of his brief addressing collateral estoppel, which both the County and he assert does not apply.

The thrust of the Plaintiffs’ claim in the Present Case, as it was in the Prior Action, is a challenge to the Council Reserves Policy itself. Sloan’s Complaint in the Present Case alleges that County Council has “for several years ... authorized and operated a fund variously known as the Council District Expenses, Council Reserves, Discretionary Funds, or the Slush Fund.” Complaint at 8 (R. p. 69). The Complaint states further that County Council’s alleged delegation of legislative power toward an individual member “as described herein” is “unconstitutional and illegal as explained in a South Carolina Attorney General Opinion.” See id. at ¶ 11 (R. p. 70). While the Complaint does make reference to an appropriation of funds for the Council Reserves referenced in ¶ 8, see id. at ¶ 9 (R. p. 69), the sole focus of the Complaint is the Council Reserves Policy. Indeed, the Complaint’s prayer for relief makes no reference to any specific budgetary expenditure in particular or to a budget ordinance in general. Rather, the prayer for relief asks that the Court declare that the delegation of discretionary

spending authority, which Sloan alleges is set forth in the Council Reserves Policy and had been in place for many years, to be invalid, illegal and unconstitutional. See Complaint at prayer for relief, items 1 and 2 (R. p. 70).

These allegations alone show identity of subject matter with the Prior Action and that Sloan could have brought an unlawful delegation of legislative authority claim in the Prior Action. “South Carolina courts have used at least four tests to determine when a claim should have been raised in the first suit: (1) when there is identity of the subject matter in both cases; (2) when the first and second cases involve the same primary right held by the plaintiff and one primary wrong committed by the defendant; (3) when there is the same evidence in both cases; and recently, (4) when the claims arise out of the same transaction or occurrence that is the subject of the prior action.” Judy, 712 S.E.2d at 414 (quoting James F. Flanagan, South Carolina Civil Procedure 649-50 (2d ed. 1996)). These four tests should be considered “merely as factors rather than rigid, independent tests,” and they cannot be reduced to a “formulated process.” Id. at 414. Rather, the aim in using these four factors is to effectuate the “fundamental purpose of *res judicata*, which is to ensure that ‘no one should be sued twice for the same cause of action.’” Id. (quoting First National Bank of Greenville v. U.S. Fidelity & Guaranty Co., 207 S.C. 15, 24, 35 S.E.2d 47, 56 (1945)).

Analyzing these four factors, it is clear that the issues raised by Sloan in this case could have been raised in the prior suit. First, there is a clear identity of subject matter in both cases. Both cases concern themselves with the Council Reserves, which Sloan has noted has been in effect “for several years.” See Complaint at ¶ 8 (R. p. 69). In both the Prior Action and in this Present Case, the Plaintiffs alleged that this fund improperly

delegated rights to individual Council members which should have been acted upon by the Council as a whole. See Third Amended Complaint in Prior Action at ¶ 74 (R. p. 56) and compare with Complaint in current action at ¶ 11 (R. p. 70) (“County Council’s delegation of legislative power to an individual member, as described herein, is unconstitutional and illegal, as explained in a South Carolina Attorney General Opinion dated November 13, 2003.”). See also, e.g., County Opening Brief at 5-6 and 21-23 (discussing different allegations from the prior and current cases and their similarities). Second, the evidence in both cases – the Council Reserves Policy itself – is the same. It is noteworthy that while the Plaintiffs in the Prior Action did include certain expenditures from the fund in the record, those expenditures were meant to prove that other allegations of the Complaint (such as violation of the establishment clause and the public purpose doctrine) had been violated. See, e.g., Third Amended Complaint in Prior Action at ¶¶ 57-72 (R. p. 54-56). With respect to the issue of improper delegation of legislative authority, the Plaintiffs offered evidence of no specific expenditures in the Prior Action, and likewise in the Current Action created no record of any specific expenditures. Third, both the Prior Action and the Current Action arise out of the same Council Reserves Policy which Sloan alleges has been in existence “for several years.” Present Action Complaint at ¶ 8. (R. p. 69). Fourth, and perhaps most important, Sloan’s counsel admitted that nothing prevented Sloan from challenging Council Reserves in the Prior Action in the same manner as he did in the Present Case. See October 27, 2007 Transcript at p. 7, ll. 6-14 (R. p. 714) (“**THE COURT:** Well, let’s -- I don’t think there’s any dispute that Mr. Sloan, taking it step by step, could have made the constitutional argument against the delegation of spending authority in the ’96 case that he now makes

in this case. No dispute about that, right, Mr. Carpenter? **MR. CARPENTER:** If I had been smarter, I could have done it, Judge.”).

Regarding identity of subject matter, Judy is also instructive. Judy involved an action by one brother, James, against another brother, Ronnie, alleging waste of property by Ronnie. Ronnie argued that *res judicata* barred this action because James could have raised the waste cause of action in a prior partition action that James had brought in the Probate Court. Specifically, during the partition hearing James requested that the Court take into consideration the fact that Ronnie had destroyed a pond located on the subject property. Judy, 712 S.E.2d at 410. Prior to the Court’s rendering a decision regarding the partition action, however, James withdrew his claim concerning the pond’s destruction and requested that the Court not “factor in” such destruction when the Court computed and ruled upon the amount of property each party would receive. Id. at 410. In the subsequent case, James sued Ronnie in tort for waste, based upon Ronnie’s destruction of the pond. Id. Ronnie moved to dismiss this Complaint based upon the doctrines of *res judicata* and collateral estoppel, but the trial court denied those motions. Id. at 411. The Court of Appeals affirmed with respect to collateral estoppel, but found that James’ suit for waste was barred pursuant to *res judicata*. Id. (citing Judy v. Judy, 383 S.C.1, 677 S.E.2d 213 (Ct. App. 2009)).

The Supreme Court began its analysis by noting that while *res judicata* does operate to bar subsequent suits if the three elements mentioned above are met, South Carolina courts “have found that the doctrine of *res judicata* is not an ‘ironclad’ bar to a later lawsuit.” Id. at 412 (citing Garris v. Governing Board of the South Carolina Reinsurance Facility, 333 S.C. 432, 449, 511 S.E.2d 48, 57 (1998)). The Court noted

and adopted the exceptions recognized to *res judicata* in Restatement (2nd) of Judgments, Section 26. Id. Those exceptions are as follows:

- 1) The parties have agreed (or the Defendant has acquiesced) that the Plaintiff may split his claim;
- 2) The Court expressly reserved the Plaintiff's right to maintain the second action; or
- 3) The Plaintiff was unable to rely on a certain theory of the case or could seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts or restrictions on their authority to entertain multiple theories or demands for multiple remedies or forms of relief in a single action, and the Plaintiff desires in the second action to rely on that theory or to seek that remedy or form of relief.

Id. at 412, n. 5 (citing Restatement (2nd) of Judgments, Section 26(1)(a-c)).

In Judy the Court addressed whether or not the Probate Court had the authority to rule upon James' claims of waste in the partition action. The Supreme Court held that the Probate Court did have such authority, and for this reason, the exception to the doctrine of *res judicata* did not apply. Id. at 413. In the present case, there can be no argument, nor has there been on the part of Sloan, that the Trial Court in the prior action lacked authority to rule upon a claim of improper delegation of legislative authority.¹ Moreover, Sloan has made no argument that any of the Restatement exceptions discussed in Judy apply to this case.

¹ The dissent in Judy agreed with the majority that ordinarily the doctrine of *res judicata* or claim preclusion would preclude James' tort action for waste. However, the dissent maintained that another exception, acquiescence on the part of the Defendant to split a claim, applied to this case. Judy, 712 S.E.2d at 415-16. Such an exception has no application to the Present Case. The record reveals no agreement between the parties or any acquiescence of the County to allow Sloan to bring a second and subsequent cause of action concerning the Council Reserves.

Having concluded that an exception to *res judicata* did not apply, the Supreme Court turned its attention to whether the three elements of claim preclusion were met. First, by way of footnote, the Supreme Court noted that two of the elements, the identity of the parties and adjudication of the issue in the former suit, were met, as there was “no dispute regarding” these elements. Id. at 414, n. 6. This statement is important, especially with respect to the element of adjudication of the issue in the former suit. As noted above, in the Probate Court James had raised the issue of waste, but then specifically asked the Probate Court not to consider waste in its Order. See id. at 410. Therefore, the issue of waste was not actually decided in the Probate Court. The test for *res judicata*, however, is not whether or not an issue was actually decided, but whether or not the issue could have been decided. Clearly in Judy, the issue of waste could have been decided in the partition action inasmuch as James raised that issue himself. Likewise for this case, in the Prior Action Sloan clearly could have raised the issue of whether or not Council Reserves is an improper delegation of legislative authority. Indeed, the County has argued in its Opening Brief that Sloan did make this argument. See County Opening Brief at 20-26. As noted by the Supreme Court in Judy, whether or not the Trial Judge in the Prior Action ruled upon this issue is of no moment given that Sloan had the opportunity to adjudicate this issue. Again, the County contends that Sloan pressed this issue, that the County defended it, and that the Trial Judge did rule upon it. See County Brief at 20-26. In the alternative, however, even if the Trial Judge did not make this ruling in the Prior Action, such a fact would not preclude the application of *res judicata* given the undisputed and admitted fact that Sloan could have raised the very issue in the Prior Action that he raises in the Present Case.

The Court in Judy also looked at the third element of *res judicata*, identity of the subject matter, or as the Court more particularly stated the issue, “whether the ‘identity of the subject matter’ between the partition action and the waste action was the same for purposes of *res judicata*.” Id. at 414. The Court noted that “simply seeking a different remedy in the second lawsuit for the same cause of action does not negate the identical nature of the subject of the two actions.” Id. at 414 (citing Plum Creek Development Co., 334 S.C. at 35 n. 4, 512 S.E.2d at 109, n. 4). The Court also noted that for purposes of *res judicata*, cause of action “is not a form of action on which a claim is asserted but, rather the ‘cause of action, meaning the underlying facts combined with the law giving the party a right to a remedy of one form or another based thereon.’” Id. (citing and quoting Plum Creek, 334 S.C. at 36, 512 S.E.2d at 110). Using this “conceptual framework,” the Court concluded that James “clearly raised a waste cause of action in his Probate pleadings. Even though James did not delineate waste as a separate cause of action, the allegations in his pleadings set forth the elements of his tort.” Id. at 415. The Court held further that even though James specifically requested that the Probate Court not rule on this waste claim, and even though the Probate Court withheld ruling on this issue because of James’ request, because the tort duties that were breached and the evidence was the same in both the Probate and waste proceedings, there was “identity of subject matter” for the purposes of *res judicata*. Id.

As was the case in Judy, all three elements of *res judicata* are met in the Present Case. For this reason, Sloan’s claims should be barred.

B. Sloan's Continued Reliance Upon Sunnen and Federal Income Tax Cases is Misplaced.

In an attempt to create a red herring where there is simply none, Sloan principally attacks Appellants' citation to State Dep't of Revenue v. Hoover, Inc., 993 So. 2d 889 (Ala. Civ. App. 2007) ("Hoover II") on the basis that it is a collateral estoppel (issue preclusion) case and therefore carries no weight, despite its clear interpretation of the sole case cited and relied upon by the Trial Court – Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591, 598 (1948). Sloan fails to recognize the fundamental principle for which Sunnen was cited by the Trial Court and how Hoover II completely discredits that very same principle.

The plainly stated and sole rationale of the Trial Court in refusing to grant Appellants' Motion to Dismiss was that differing budget years creates separate legal claims. (Merits Order, 2.) (R. p. 29). In support, the Trial Court cited Sunnen for the sole proposition that, with respect to federal income taxes, "[e]ach year is the origin of a new liability and of a separate cause of action." Id. (quoting Sunnen, 333 U.S. at 598). For the purpose of explaining to this Court why that proposition of law was faulty and any decision relying thereon could not survive review, Appellants cited and discussed Hoover II, which discredited the exact same principle relied upon by the Trial Court. (See Appellants' Br., 12-20.) A plain reading of Sunnen confirms that differing tax years was not the sole basis of the Court's decision in refusing to apply collateral estoppel, but, instead, a change in the controlling legal climate surrounding the matter at issue. As outlined at length in the County's Brief, there has been no intervening change in the law applicable to the Present Case. (Appellants' Br., 17-18.) The Trial Court's sole reliance on the principle of differing budget years is simply untenable under a plain reading of

Sunnen, and as confirmed by Hoover II. Plainly stated, the very proposition for which the Trial Court based its decision is faulty and cannot withstand review.

Sloan also points to the court's dicta in Hoover II, which notes that Sunnen explained that *res judicata* does not apply to tax litigation involving different years. Hoover II, 993 So. 2d. at 895. Although the Hoover II Court did not directly quote from Sunnen, it is likely that the court was referring to the following passage:

Income taxes are levied on an annual basis. Each year is the origin of a new liability and of a separate cause of action. Thus if a claim of liability or non-liability relating to a particular tax year is litigated, a judgment on the merits is *res judicata* as to any subsequent proceeding involving the *same claim and the same tax year*.

Sunnen, 333 U.S. at 598 (emphasis added). Sloan attempts to convolute this passage of Sunnen, involving federal income tax, into a hard and fast rule that *res judicata* cannot be applied to County ordinances that are tied to differing budget years. This language, however, does not address the facts at bar. Sloan, through counsel, admits that he could have made the same claims in the Prior Action as he makes here. The above quoted language in Sunnen does not address the applicability of *res judicata* where the issue is whether a claim is barred when it *could* have been litigated in a prior action involving a *different* tax year. Not only does Sloan fail to explain why the fact that Hoover II involved the application of collateral estoppel matters, he also conveniently fails to acknowledge that Sunnen itself also involved the application of collateral estoppel when the issue at bar is *res judicata*.

Even if the distinction is relevant, Sunnen addresses collateral estoppel in the context of federal income tax liability, a factual scenario highly distinguishable from the facts at bar and a distinction left unaddressed by the Trial Court. Unlike Sunnen, Sloan

challenges a longstanding budget Policy – Council Reserves. The very nature of this budget Policy is highly distinguishable from tax liability. Unlike taxes, this Policy stays the same from year-to-year excepting the amounts allocated. In contrast, federal income taxes involve a unique set of facts and circumstances each and every year which, in turn, create a unique tax liability each year. As outlined in Appellants’ Brief, the Council Reserves line item has been in existence since 1994. (Appellants’ Br., 2-3.)

Ruling that Sloan’s Current Action is not barred by the doctrine of *res judicata* solely on the ground that differing budget years creates new claims would open the door to an unending cycle of continuous lawsuits involving the same issues and same parties, with the only difference being the year in which the suit was filed. The doctrine of *res judicata* serves an important policy – limiting the amount of cases before the courts and protecting litigants from repetitive litigation. Stated another way, *res judicata* seeks to protect the limited resources of the courts and litigants by reducing unnecessary litigation. If a taxpayer were allowed to bring suit against the same county policy, year after year, arguing virtually the same thing but styled as a different cause of action each year (breach of an ordinance one year, breach of statute the next, and unconstitutional the next), the doctrine of *res judicata* would virtually cease to exist as to local government. Virtually everything involving local government involves a budget. Indeed, everything local government does must be tied to monies appropriated in a budget. Thus, under Sloan’s rationale that every budget creates a new claim, conceivably any County policy would be subject to serial litigation. Even if a local government continued to successfully defeat these challenges, it would lead to an untenable choice – change the policy simply to avoid the costs of such litigation, or continue with the policy and face

the specter of costly litigation. Such a choice is never a good one, but this fact is especially true in these days of extremely limited resources. Allowing concerns of litigation costs, rather than notions of good government, to determine policy would be an affront to our democratic system.

II. SLOAN IMPROPERLY DISREGARDS THE EFFECT OF HOME RULE, WHICH REQUIRES THAT THE COURT UPHOLD COUNTY COUNCIL'S DECISION WITH RESPECT TO COUNCIL RESERVES.

The County contends, as the Trial Court held below, that the appropriate test in determining whether an unlawful delegation of legislative power has occurred is when a statute "in effect proposes an absolute, unregulated, and undefined discretion" on a body such that it "bestows arbitrary powers" on that body. South Carolina State Highway Department v. Harbin, 226 S.C. 585, 595, 86 S.E.2d 466, 471 (1955). This test itself presents "no fixed formula for determining the powers which must be exercised by the legislature itself and those which may be delegated," and the "degree to which a legislative body must specify its policies and standards in order that the administrative authority granted may not be an illegal delegation of its own legislative power is not capable of precise definition." Id. The mutable nature of the Harbin test is heightened in the context of local government. In Harbin, the issue of whether an improper delegation of legislative authority took place was presented in a context of state government, which has a clear delineation between legislative, executive, and judicial authority. See S.C. Constitution, Art. I, § 8 (enumerating the three branches of state government). For county governments, however, county council exercises not only a legislative function, but it also exercises an administrative or executive function. See, e.g., Gaud v. Walker, 214 S.C. 451, 53 S.E.2d 316 (1949). Thus, in determining whether a county has

improperly delegated legislative authority, or is simply carrying out an administrative function, the “formula” set forth in Harbin to determine whether such legislative powers have been improperly delegated becomes even less fixed.

Overlaying the Harbin test in the context of county government is Home Rule. Under Home Rule a local government ordinance conflicts with a State law when its conditions, express or implied, are inconsistent and irreconcilable with the State law. Hospitality Assn. of South Carolina v. County of Charleston, 320 S.C. 219, 228, 464 S.E.2d 113, 119 (1995); City of North Charleston v. Harper, 306 S.C. 153, 410 S.E.2d 569 (1991).² However, “[m]ere differences in detail” between an ordinance and state law “do not render them conflicting.” If either provision is silent where the other speaks, “there can be no conflict between them.” Town of Hilton Head v. Fine Liquors, LTD., 302 S.C. 550, 397 S.E.2d 662 (1990) (citing McAbee v. Southern Rwy. Co., 166 S.C. 166, 169 S.E. 444, 445 (1932); Amvets Post 100 v. Richland County Council, 280 S.C. 317, 313 S.E.2d 293 (1984); Simmons v. City of Columbia, 280 S.C. 163, 311 S.E.2d 732 (1984)).

Moreover, in determining whether a state law conflicts with local law, “all laws concerning local government shall be liberally construed” in the local government's favor. S.C. Constitution, Art. VIII, § 17 (emphasis added) . See also S.C. Code Ann. § 4-

² Determining whether a local ordinance conflicts with state law requires a two step process. The Court must first ascertain whether the county had the power to enact the ordinance. If no such power exists, the ordinance is invalid and the inquiry ends. However, if the local government had the power to enact the ordinance, the next step is to ascertain whether the ordinance is inconsistent with the Constitution or general law of this State. Hospitality Assn. of South Carolina v. County of Charleston , 320 S.C. 219, 464 S.E.2d 113 (1995). Sloan has not challenged the County’s authority to adopt policies like the Council Reserves.

9-25 (“The powers of a county must be liberally construed in favor of the county.”) . The reason for this deference to local government is the legislature’s “realization that different local governments have different problems that require different solutions. . . . By enacting statutes like § 4-9-25 . . . the General Assembly gave local governments the power to deal with these problems at the local level rather than at the State Capitol.” Hospitality Assn. of South Carolina, 320 S.C. at 230, 464 S.E.2d at 120.

The Trial Court, and to a lesser degree Sloan, agreed below that there was some level at which the County could delegate spending authority. See generally October 7, 2008 Transcript at pp. 31-35 (R. pp. 787-791). See also id. at p. 31, l. 23 – p. 32, l. 7 (R. p. 787-788) (“**THE COURT:** Well, some of these things are clearly okay, right? I mean, it’s fine for Council to give some money to a Council member to buy pens and pencils. **MR. CARPENTER:** We are not challenging that. Maybe we should have. Maybe County Council should have some administrative person go out and buy 100 pencils and pass out pens to each Council member. But we are not challenging that.”) and p. 34, l. 7 – p. 35, l. 3 (R. pp. 790-791 (“**THE COURT:** One Council member might . . . want to fulfill their responsibility to the County by driving around and looking to see what the issues are in the County whereas another Council member might want to use the internet and use the telephone to call constituents to see what their concerns are. So is it okay for the Council member to be reimbursed for mileage if the member chooses to go out and see some project in the community, see some area of the community? **MR. CARPENTER:** Yeah, that . . . **THE COURT:** Of course it is. So there is some level of . . . **MR. CARPENTER:** There is a de minimis . . . **THE COURT:** Okay. Maybe it is de minimis but there is some stuff in there in here that’s okay. Clearly what you are

saying though is, you are saying mixing in this big stuff is improper. It's improper delegation. It's okay to delegate some things. But what they are really doing is they are giving away this legislative authority away. **MR. CARPENTER:** Yes.”). The Court then stated “Mr. Sloan agrees that there is some level of what’s in here that’s valid. And you [the County] agree that there is some level of delegation that could take place that’s invalid. The question is where is the line.” *Id.* at ll. 7-11 (R. p. 791). While the County submits that the Trial Court properly framed the issue in this regard, the County respectfully submits that the Trial Court did not give the County proper deference under Home Rule in determining where this line may lie.

This is especially true given that nothing in the General Provisions of the County Government sections of the State Code (S.C. Code Ann. §§ 4-9-10 -- 4-9-195) directly prohibit or even address anything approaching the Council Reserves. Indeed, as explained in the County’s opening brief, these code sections are exceptionally broad. See Opening Brief at 31-35. For example, one section requires that the County adopt annual operating and capital budgets for the operation of county government and to identify the sources of anticipated revenue to meet the requirements of those budgets. See S.C. Code Ann. § 4-9-140. But relative to budgeting, these are the only requirements. Under Home Rule, the County Council is left to decide how to implement its budgets.

In similar fashion, the sections dealing with the Council-Administrator form of government applicable to the County (see S.C. Code Ann. §§ 4-9-610 -- 670) set forth in broad fashion the interplay between a County Administrator and a County Council. Nothing in these sections or elsewhere prohibits County Council or one of its members

from playing a role in the administrative operation of the County. In fact, just the opposite is true. S.C. Code Ann. § 4-9-100 contemplates County Council members performing administrative duties individually. This section states that a Chairman of County Council “who is assigned additional administrative duties” may receive additional compensation. Id. By noting that a Chairman may perform “additional administrative duties,” as opposed simply to “administrative duties,” this section contemplates that all council members may perform administrative duties. Even putting this argument aside, at the very least there is no statutory language prohibiting other council members from performing administrative duties.

The AG’s Opinion cited Section 4-9-100 for the proposition that only the Chairman may perform administrative duties. The Opinion states:

[T]here appears to be no statute which authorizes a county council to delegate spending authority to its individual members. While § 4-9-100 authorizes additional administrative duties to be delegated to the chairman and to receive additional compensation therefor, no state law appears to authorize subdelegation to individual Council members such broad discretion as is present here to determine how the funds in question are to be spent. The fact that the General Assembly authorized subdelegation to a specific council member (chairman) in the limited circumstances defined by § 4-9-100 (administrative duties) strongly suggests that the subdelegation of authority to individual council members to expend funds from the so-called “discretionary fund” is not present. Absent such statutory authority being expressly provided by the General Assembly, it is our opinion that a court would conclude ...that this authority is lacking.

AG Opinion at 8 (R. p. 83) (internal cite omitted). Relying on this portion of the AG’s Opinion, Sloan states that the Council Chairman is different from other members of County Council, and thus a delegation of any administrative duty to anyone but the Chairman runs afoul of state law. See Sloan Brief at 19.

Both the AG's Opinion and Sloan turn Home Rule on its head. In essence, they argue that because a statute does not specifically grant County Council or one of its members a specific power, that power does not exist. Home Rule states the opposite. It provides that the "specific mention of particular powers may not be construed as limiting in any manner the general powers" of County Council. See S.C. Code Ann. § 4-9-25. As long as an ordinance does not conflict with the Constitution or general law, the County Council can take what action it feels necessary to preserve order and good government. See, e.g., McSherry v. Spartanburg County Council, 371 S.C. 586, 589-90, 641 S.E.2d 431, 433-34 (2007) ("Importantly, nothing in the Code or in Article VIII of the South Carolina Constitution, which authorizes and establishes Home Rule, requires that an ordinance be in written form when it receives a first reading. Thus, there is neither a constitutional provision nor a statutory requirement on which this Court could base an invalidation of Council's rules and procedures.").

In this case, the County decided, with their longstanding Council Reserves Policy, to leave it up to individual Council members to determine what types of expenses an individual Council member would incur in the operation of his or her office. These include travel expenses, the purchase of paper and pens, and the costs of conferences. These expenditures also include funds to pay for small, non-recurring projects of a specified nature (infrastructure). County Council appropriated these funds pursuant to a properly enacted budget ordinance, and in such ordinance, County Council identified the sources of anticipated revenue to fund these appropriations.

Concerning an individual Council member's decision to purchase office supplies, versus attending a conference, Sloan argues that even these decisions are legislative ones

that County Council may not make individually. See Sloan's Brief at 17-20. Sloan admits that the Court did not rule on these issues, but offers them for sustaining grounds. Id. This argument runs contrary to admissions made by Sloan's counsel before the Trial Court. As noted above, Sloan's counsel admitted that there was some level at which a County Council member could make his or her own decisions relative to certain expense items such as pens or pencils. See Transcript at p. 31, line 9 – p. 32, line 15 (R. pp. 787-788) and p. 33, line 4 – p. 35, line 12 (R. pp. 789-791). More important, as discussed above state law gives County Council discretion in deciding whether he or she would rather spend his or her allotment of expense money on office supplies versus conferences versus community functions, and Home Rule allows counties the flexibility to enact laws such as this. In the absence of any direct law specifically prohibiting Council Reserves, Home Rule requires that they stand.

III. THE COURT IMPROPERLY AWARDED ATTORNEYS' FEES.

A. Sloan Improperly Relies Upon Judge Few's Oral Pronouncements from the Bench.

In arguing that the County acted without substantial justification in pressing its lawsuit, Sloan argues that the County "also ignored the Circuit Court's oral Opinion and pending ruling" by continuing with the policy for its fiscal year 2009-2010 after Judge Few announced his "intention to rule" that the Council Reserves was an unlawful delegation of legislative power. See Sloan's Brief at 24. For purposes of determining an award of attorneys' fees, however, these facts are irrelevant.

"No Order is final until it is written and entered." Corbin v. Kohler Company, 351 S.C. 613, 620, 571 S.E.2d 92, 96 (Ct. App. 2002). It is the "final written order" that "contains the binding instructions which are to be followed by the parties." Corbin, 351

S.C. at 621, 571 S.E.2d at 97 (quoting Ford v. State Ethics Commission, 344 S.C. 642, 646, 545 S.E.2d 821, 823 (2001)). At no time during the oral announcement that Sloan points to did the Trial Court ever prohibit or enjoin the County from taking any action.

B. Sloan Fails to Give the Trial Court's 1998 Order on the Prior Action Proper Weight.

In taxpayer cases such as the present one, the South Carolina Supreme Court has on several occasions conferred standing upon a party when an issue is of such public importance as to require its resolution for future guidance. Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999). See also Sloan v. Sanford, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004) (“we have recognized, under certain circumstances, standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance.”); ATC South, Inc. v. Charleston County, 380 S.C. 191, 669 S.E.2d 337 (2008) (“For a court to relax general standing rules, the matter of importance must, in the context of the case, be inextricably connected to the public need for court resolution for future guidance.”). This Court has found public interest standing in cases dealing with the spending of public money. See Sloan v. Greenville County, 356 S.C. 531, 550, 590 S.E.2d 338, 348 (Ct. App. 2003) (“The expenditure of public funds pursuant to a competitive bidding statute is of immense public importance.”). The South Carolina Supreme Court has also “recognized a ‘public importance’ exception to mootness holding that ‘an appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest.’” Sloan v. Greenville County, 361 S.C. 568, 570, 606 S.E.2d 464, 465-66 (2004) (emphasis added). See also id. at 576, 606 S.E.2d at 468 (Moore, J., Dissenting, stating that “the issue in the present case is of sufficient public importance to confer standing.

Resolution of the issues in this case will likely have an impact on government practices beyond the confines of the case itself.”).

In these cases our courts have recognized the tension between the competing policies between the doctrines of standing and mootness on the one hand, and the public importance exception on the other, stating:

An appropriate balance between the competing policy concerns underlying the issue of standing must be realized. Citizens must be afforded access to the judicial process to address alleged injustices. On the other hand, standing cannot be granted to every individual who has a grievance against a public official. Otherwise, public officials would be subject to numerous lawsuits at the expense of both judicial economy and the freedom from frivolous lawsuits.

Sloan v. Sanford, 357 S.C. at 434, 593 S.E.2d at 472.

The primary focus of the public importance exception, whether being applied to the standing doctrine or mootness doctrine, is future guidance, both to the public at large and to the governing body involved in the action. In the Prior Action the County received such guidance in an order of the Trial Judge ruling, among other things, that the Council Reserves did not impermissibly delegate legislative authority. Sloan argues in his brief, however, that the County acted without justification because of the intervening 2003 AG Opinion. See Sloan Brief at 24-26. See also id. at 25-26 (noting that Sloan “attached a copy of the Attorney General opinion to the Complaint”). Sloan fails to address, however, the Order from the Prior Action.

Instead, he would have the County disregard that Order in favor of the AG Opinion. If Sloan is correct, then local governments involved in cases like these will in the future be faced with a difficult choice: disregard an order of the trial court – notwithstanding the fact that the Supreme Court has stated that opinions in such cases are

to be used for future guidance – or acquiesce to AG opinions that have no binding effect. In this case the County chose to rely upon the 1998 Order which found that the Council Reserves did not improperly delegate authority. With respect to this decision, in particular the County's decision to not follow Sloan's suggestion that it follow the AG Opinion, the following points bear repeating. First, the AG opinion concerned a Florence County ordinance, the text of which was not presented in this case. Second, as noted in the County's Opening Brief at 17-18, the AG Opinion presented no new law.

In summary, the County respectfully submits that it was substantially justified in defending Sloan's lawsuit.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the County's opening brief, the County respectfully requests that the Court reverse the Trial Court's Merits Order and the Trial Court's Fees Order.

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November 14, 2011
Greenville, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

John C. Few, Circuit Court Judge

Case No. 06-CP-23-4637

The South Carolina Public Interest Foundation, and Edward D. Sloan,
Jr., individually, and on behalf of all others similarly situated, ... Respondents,

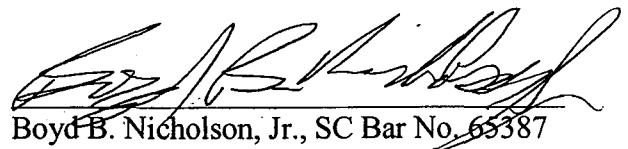
v.

Greenville County, Herman G. Kirven, Jr., Judy Gilstrap, Eric
Bedingfield, Jim Burns, Scott Case, Joseph Dill, Cort Flint, Lottie
Gibson, Mark Kingsbury, Xanthene Norris, Robert Taylor, and
Tony Trout, ... Appellants.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Reply Brief complies with Rule 211(b), SCACR.

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November 14, 2011
Greenville, South Carolina

ATTORNEYS FOR APPELLANTS

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The South Carolina Public Interest Foundation and
Edward D. Sloan, Jr., individually, and on behalf of all
others similarly situated, Respondents,

v.

Greenville County, Herman G. Kirven, Jr., Judy Gilstrap,
Eric Bedingfield, Jim Burns, Scott Case, Joseph Dill,
Cort Flint, Lottie Gibson, Mark Kingsbury, Xanthene
Norris, Robert Taylor, and Toney Trout, Appellants.

Appellate Case No. 2010-154507

Appeal From Greenville County
John C. Few, Circuit Court Judge
D. Garrison Hill, Circuit Court Judge

Opinion No. 5016
Heard June 7, 2012 – Filed August 1, 2012

REVERSED

Boyd B. Nicholson, Jr. and Bonnie A. Lynch, both of
Haynsworth Sinkler Boyd, PA, of Greenville, for
Appellants.

James G. Carpenter and Jennifer J. Miller, both of
Carpenter Law Firm, PC, of Greenville, for Respondents.

GEATHERS, J.: Respondents, South Carolina Public Interest Foundation and
Edward D. Sloan, Jr. (collectively, SCPIF), brought this declaratory judgment

action against Appellants, Greenville County and the individual members of Greenville County Council (Council) (collectively, the County), challenging the County's establishment of the "County Council Reserves" account as an unlawful delegation of legislative authority. The County seeks review of the trial court's order granting summary judgment to SCPIF, arguing that the account in question is lawful and SCPIF's current action is barred by res judicata. The County also seeks review of a second order granting SCPIF's request for attorney's fees and costs. We reverse.

FACTS/PROCEDURAL HISTORY

For its 1994-95 fiscal year, the County established an account in its annual operating budget entitled "County Council Reserves." Funds in this account were set aside to enable Council to address "special community needs not normally falling with [sic] the operational purview of County government" and to "provide for nonrecurring community requests." In 1996, Council adopted a resolution limiting the use of the Council Reserves account to "infrastructure purposes such as flooding and drainage, roads, lights, sewer, and public buildings and grounds."

In 1996, Edward D. Sloan, Jr. (Sloan), filed an action against the County challenging the legality of the Council Reserves account, beginning with fiscal year 1994-95. Sloan's Third Amended Complaint listed donations from the County to several private organizations and political subdivisions spanning "from 1994 through September, 1997." The complaint, which set forth eleven causes of action, took issue with the use of Council Reserves for non-county matters. The complaint also cited perceived procedural irregularities in the continued use of Council Reserves without Council voting on each expenditure or appropriation.

The complaint sought a declaration that establishing the Council Reserves account and disbursing public funds as described in the complaint violated "the applicable statutes, Constitutions, ordinances, and policies." The complaint also sought preliminary and permanent injunctions against the County's "appropriation, expenditure, disbursement, and donation of public funds from the 1996-97 'Council Reserves' in violation of the S.C. Constitution and Code and the Greenville County Codes [sic] regarding procedures for appropriation and expenditures."

Sloan subsequently filed a motion for summary judgment. In his supporting memorandum, Sloan explained his allegation that the Council Reserves account violated section 7-81 of the County of Greenville, South Carolina Code of Ordinances (Greenville County Code) as follows:

[Section 7-81(b) requires that] all "requests for county funds will be submitted to council for review during the regular county budget process" Rather than the *entire council* reviewing "requests for county funds" that are "submitted for council review during the regular county budget process," *individual council members* receive requests throughout the year and respond to them by submitting *individual requisitions* to the clerk of county council

(emphases added). The summary judgment motion and supporting memorandum requested, among other relief, an order enjoining Council's appropriations of public funds to entities when: (1) the appropriations were not made by County Council as a whole, but rather by individuals in violation of section 7-81(a) of the Greenville County Code, and (2) the requests were not submitted to Council during the regular county budget process, in violation of section 7-81(b) of the Greenville County Code. On February 10, 1998, the circuit court conducted a bench trial on stipulated facts. The circuit court subsequently issued an order concluding that the County was entitled to judgment in its favor, with one exception not relevant to this case.¹ Sloan did not appeal this order.

Subsequently, on August 2, 2005, the County passed an ordinance adopting its budget for the 2006-07 fiscal year. Included in the operating expenses for the County Council Division of the Legislative and Administrative Services Department were line items for the Council Reserves, which included a separate line item for each Council member. Each individual Council member's routine expenses were funded from these line items. The line items were also available to fund costs "associated with special, non-recurring community requests for infrastructure purposes" and for "contributions to local governments in Greenville County for community projects." More specifically, these expenses and costs, designated as "Council District Expense," were described by the County as follows:

Funds for a Council Member to address:

¹ The circuit court addressed in a separate order a proposed disbursement to the Crestwood Forest Village Committee. The court found that this proposed disbursement was in violation of Council's guidelines for use of Council Reserves.

- Cost of general business supplies such as pens, paper, stationary, . . . ;
- Cost of special documents, incentives and awards given either to the public or county employees . . . ;
- Cost of periodicals, professional journals, and reference books;
- Cost of per diem and mileage involved in the conduct of county business;
- Costs associated with community functions, conferences and training seminars . . . ;
- Costs associated with special, non recurring [sic] community requests for infrastructure purposes such as:
 - Flooding
 - Roads
 - Lights
 - Sewer and drainage
 - Public buildings and grounds
 - Infrastructure related studies
- Contributions to local governments in Greenville County for community projects;

In 2006, SCPIF filed the present action, challenging the Council Reserves account, a/k/a the "Council District Expense" account, within the County's 2006-07 budget.² In its complaint, SCPIF specifically challenged "[c]osts associated with special, non[-]recurring community requests for infrastructure purposes[.]" The complaint's sole cause of action states, "Council's delegation of legislative power to an individual member . . . is unconstitutional and illegal, as explained in a South Carolina Attorney General opinion dated November 13, 2003[.]"³

² The complaint indicates that this account has been "variously known as the Council District Expense Fund, Council Reserves, Discretionary Funds, or the Slush Fund." Likewise, in its appellate brief, the County indicates that several years after creating the Council Reserves account, it began using the name "Council District Expense" for the account. For the remainder of this opinion, we refer to the account as "Council Reserves."

³ Attorney General opinions are persuasive but not binding authority. *Charleston Cnty. Sch. Dist. v. Harrell*, 393 S.C. 552, 560-61, 713 S.E.2d 604, 609 (2011); *Anders v. S.C. Parole and Cmty. Corr. Bd.*, 279 S.C. 206, 209-10, 305 S.E.2d 229, 231 (1983).

SCPIF attached a copy of the November 13, 2003 Attorney General opinion to its complaint as an exhibit. The opinion addressed the use of separate funds created by the Florence County Council for each individual district of Florence County, to be spent for "road paving or infrastructure improvements" at the discretion of the council member for each respective district. The opinion concluded, "[A] court would likely conclude that the delegation of discretion to individual members of county council to determine how these funds are spent is unconstitutional." In footnote 2, the Attorney General stated, "The constitutional principle of separation of powers applicable to state government by Article I, § 8 of the [South Carolina] Constitution has been held inapplicable to local political subdivisions of the State[,]""⁴ and "County Councils typically exercise the powers of all three branches of government." Nevertheless, the Attorney General concluded, "the legislative and discretionary decision-making authority may not be delegated."

In its complaint, SCPIF sought injunctive relief as well as a declaration that Council's "delegation of [its] discretionary spending authority" was "illegal, invalid, and unconstitutional[.]" The County submitted a motion to dismiss, and the parties submitted cross-motions for summary judgment. In its motion to dismiss, the County asserted that the present action was barred by res judicata and collateral estoppel. However, at the motions hearing, the County expressly waived its collateral estoppel defense.

Relying on *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591 (1948), the circuit court concluded that the action was not barred by res judicata by reasoning that the County's different fiscal years were comparable to the different tax years at issue in *Sunnen*. The circuit court also ruled that the creation of the Council Reserves account constituted an illegal delegation of legislative authority by Council to its individual members. However, the court declined to base its ruling on constitutional grounds, stating: "Plaintiffs have alleged a Constitutional basis for the legal proposition that County Council may not delegate legislative authority. However, Defendants' concession that County Council may not delegate legislative authority makes it unnecessary to decide whether this prohibition is based on the Constitution or not."

⁴ Article I, § 8 states: "In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other."

In a separate hearing, the circuit court received evidence on SCPIF's attorney's fees, pursuant to section 15-77-300 of the South Carolina Code (Supp. 2011).⁵ The court subsequently issued an order granting SCPIF's request for \$60,084.15 in fees and costs incurred through January 31, 2010. The court also allowed SCPIF to "file an affidavit addressing fees incurred after January 31, 2010." This appeal followed.⁶

ISSUES ON APPEAL

1. Did the circuit court err in concluding that the present action was not barred by res judicata?
2. Did the circuit court err in concluding that the creation of the Council Reserves account unlawfully delegated legislative authority to Council members in their individual capacities?
3. Did the circuit court err in awarding attorney's fees and costs to SCPIF?

STANDARD OF REVIEW

Summary Judgment

This court reviews the grant of a summary judgment motion under the same standard applied by the trial court pursuant to Rule 56(c), SCRCP. *Jackson v. Bermuda Sands, Inc.*, 383 S.C. 11, 14 n.2, 677 S.E.2d 612, 614 n.2 (Ct. App. 2009). Rule 56(c), SCRCP, provides that summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." "The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder." *Matsell v. Crowfield Plantation Cmty. Servs. Ass'n, Inc.*, 393 S.C. 65, 70, 710 S.E.2d 90, 93 (Ct. App. 2011) (citing *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001)).

⁵ In a case brought by a party contesting "state action," section 15-77-300 authorizes an award of attorney's fees to the prevailing party, other than the State or a political subdivision of the State, under certain circumstances.

⁶ The County timely filed a Notice of Appeal following each of the two orders issued by the circuit court; the appeals were consolidated.

In the present case, the circuit court noted in its order: "The parties agree that the case presents questions of law to be decided on undisputed facts." Neither party challenges this statement on appeal. Therefore, this court need not determine whether there are genuine issues of fact. The court need only concern itself with the resolution of questions of law.

Attorney's Fees

In a case brought by a party who is contesting state action, a court may award attorney's fees to the prevailing party, unless the prevailing party is the State or any political subdivision of the State, if (1) the court finds that the agency acted without substantial justification in "pressing its claim against the party[;]" and (2) the court finds that there are no special circumstances that would make the award of attorney's fees unjust. S.C. Code Ann. § 15-77-300 (Supp. 2011). An appellate court may not disturb such an award unless the appellant shows that the trial court abused its discretion in considering the applicable factors. *Heath v. Cnty. of Aiken*, 302 S.C. 178, 182, 394 S.E.2d 709, 711 (1990).

LAW/ANALYSIS

I. Res Judicata

The County maintains the circuit court erred in concluding that the present action was not barred by res judicata. Specifically, the County argues that the circuit court's reliance on *Sunnen* was misplaced because: (1) *Sunnen* involved an assertion of collateral estoppel, also referred to as issue preclusion, rather than res judicata, also referred to as claim preclusion; (2) after *Sunnen* was decided, the United States Supreme Court limited the reach of *Sunnen*; and (3) Sloan could have asserted (and in fact, did assert) a claim challenging the legality of the Council Reserves account in the prior action. We agree.

A. The *Sunnen* Decision

In the present case, the circuit court relied on the reasoning of *Sunnen* in concluding, "Because the 'Council District Expense Fund' appears in each annual budget for Greenville County, the enactment of each budget creates separate legal claims." The circuit court further stated:

As the United States Supreme Court has explained in the context of federal income taxes levied on an annual basis,

'[e]ach year is the origin of a new liability and a separate cause of action.' *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591, 598 (1948). The same reasoning applies here. The fact that Mr. Sloan might have, or even did, challenge the legality of an identical line item in a previous budget does not bar Plaintiffs from the causes of action brought in this case.

In *Sunnen*, the United States Supreme Court held,

[W]here a question of fact essential to the judgment is actually litigated and determined in the first tax proceeding, the parties are bound by that determination in a subsequent proceeding even though the cause of action is different. And if the very same facts and no others are involved in the second case, a case relating to a different tax year, the prior judgment will be conclusive *as to the same legal issues* which appear, assuming no intervening doctrinal change. But if the relevant facts in the two cases are separable, even though they be similar or identical, *collateral estoppel* does not govern the legal issues which recur in the second case.

333 U.S. at 601 (emphases added) (citation omitted). The Court concluded: "Before a party can invoke the *collateral estoppel* doctrine[,] . . . the legal matter raised in the second proceeding must involve the same set of events or documents and the same bundle of legal principles that contributed to the rendering of the first judgment." *Sunnen*, 333 U.S. at 601-02 (emphasis added) (citations omitted).

Therefore, the County is correct in asserting that *Sunnen* addressed collateral estoppel rather than res judicata.⁷ Further, the County is correct that after *Sunnen*

⁷ "Res judicata bars relitigation of the same cause of action while collateral estoppel bars relitigation of the same facts or issues necessarily determined in the former proceeding." *Pye v. Aycock*, 325 S.C. 426, 436, 480 S.E.2d 455, 460 (Ct. App. 1997). In *Beall v. Doe*, this court distinguished the two concepts as follows:

The doctrines of res judicata and collateral estoppel are, of course, two different concepts. A final judgment on the merits in a prior action will conclude the parties and

was decided, the United States Supreme Court limited its application. The County asserts that in *Montana v. United States*, 440 U.S. 147, 161 (1979), the Court limited the reach of *Sunnen* by noting only major changes in the law would require departure from the doctrine of collateral estoppel. While we have reservations about the County's interpretation of *Montana*, the Court unequivocally limited the reach of *Sunnen* in *United States v. Stauffer Chemical Co.*, 464 U.S. 165 (1984):

[T]he government's argument essentially is that two cases presenting the same legal issue must arise from the very same facts or transaction before an estoppel can be applied. Whatever applicability that interpretation may have in the tax context; *see* [*Sunnen*] (refusing to apply an estoppel when two tax cases presenting the same issue arose from 'separable facts'), *we reject its general applicability outside of that context.*

464 U.S. at 172 n.5 (emphasis added).

Based on the foregoing, the circuit court erred in applying the principles set forth in *Sunnen* to the present case.

B. Application of Res Judicata

"Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties." *Judy v. Judy*, 393 S.C. 160, 172, 712 S.E.2d 408, 414 (2011) (citation omitted). "Under the doctrine of res judicata, a litigant is barred from raising any issues which were adjudicated in the former suit and any issues which

their privies under the doctrine of res judicata in a second action based on the same claim as to issues actually litigated and as to issues which might have been litigated in the first action. Under the doctrine of collateral estoppel, on the other hand, the second action is based upon a different claim and the judgment in the first action precludes relitigation of only those issues actually and necessarily litigated and determined in the first suit.

281 S.C. 363, 369 n.1, 315 S.E.2d 186, 190 n.1 (Ct. App. 1984) (citations and quotation marks omitted).

might have been raised in the former suit." *Id.* (citation and quotation marks omitted).

"Res judicata's fundamental purpose is to ensure that no one should be twice sued for the same cause of action." *Yelsen Land Co. v. State*, 397 S.C. 15, 22, 723 S.E.2d 592, 596 (2012) (citation and quotation marks omitted). "The doctrine [of res judicata] flows from the principle that *public interest* requires an end to litigation and no one should be sued twice for the same cause of action." *Duckett v. Goforth*, 374 S.C. 446, 464, 649 S.E.2d 72, 81 (Ct. App. 2007) (emphasis added) (citation omitted); *see also S.C. Dep't of Soc. Servs. v. Basnight*, 346 S.C. 241, 248, 551 S.E.2d 274, 278 (Ct. App. 2001) ("The doctrine of res adjudicata (or res judicata) in the strict sense of that time-honored Latin phrase had its origin in the principle that it is in the public interest that there should be an end of litigation and that no one should be twice sued for the same cause of action." (quoting *First Nat'l Bank of Greenville v. U.S. Fid. & Guar. Co.*, 207 S.C. 15, 24, 35 S.E.2d 47, 56 (1945))).

"The doctrine of collateral estoppel, or issue preclusion, on the other hand, rests generally on equitable principles." *Town of Sullivan's Island v. Felger*, 318 S.C. 340, 344, 457 S.E.2d 626, 628 (Ct. App. 1995) (citing *Watson v. Goldsmith*, 205 S.C. 215, 31 S.E.2d 317 (1944)). In *Watson*, our supreme court contrasted the origin of the doctrine of collateral estoppel with the origin of res judicata:

Estoppel rests generally on equitable principles, which res judicata does not, but upon the two maxims which were its foundation in the Roman law, *nemo debet bis vexari pro eadem causa* (no one ought to be twice sued for the same cause of action) and *interest reipublicae ut sit finis litium* (it is the interest of the state that there should be an end of litigation[])[.] . . . Res judicata is rather a principle of public policy than the result of equitable considerations, which [the] latter estoppel is.

205 S.C. at 221-22, 31 S.E.2d at 319-20 (citations omitted); *see also First Nat'l Bank of Greenville*, 207 S.C. at 24, 35 S.E.2d at 56-57 (citing *Watson*) (contrasting the origins of res judicata and collateral estoppel).

In the present case, there is no dispute that the 1996 action involved the same parties or their privies—Sloan brought the 1996 action; and, along with the foundation he chaired (SCPIF), he brought the present action. However, SCPIF

maintains that in the 1996 action, the circuit court neither ruled on nor could have ruled on the County's 2006 and 2007 appropriations and expenditures. SCPIF argues that *res judicata* does not bar its challenge to these specific appropriations because "the allegations arise from different fiscal years." We find this argument unavailing. In the present action, SCPIF's complaint challenges the legality of the *practice* underlying these expenditures, i.e., maintaining the Council Reserves account in the County's budget, a practice continuing from year to year since the 1994-95 fiscal year. Likewise, the Third Amended Complaint in the 1996 action challenged this same practice with regard to multiple fiscal years: "*In the last three budgets, [the County] has not 'distinctly state[d] [each] public purpose' for which Council Reserves funds would be spent.*" (emphasis added).

In determining whether allegations arising from different fiscal years must be brought in the same action, the *Restatement (Second) of Judgments* is instructive:

(1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar . . . the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to *all or any part of the transaction, or series of connected transactions, out of which the action arose.*

(2) *What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.*

Restatement (Second) of Judgments § 24 (1982 & Supp. 2012) (emphases added). The plaintiff's claim is extinguished even when the plaintiff is "prepared in the second action (1) [t]o present evidence or *grounds or theories of the case* not presented in the first action, or (2) [t]o seek remedies or forms of relief not demanded in the first action." *Id.* at § 25 (emphasis added).

Here, Sloan's 1996 claim that the practice of maintaining the Council Reserves account in the County's budget was illegal was grounded on an alleged violation of section 7-81 of the Greenville County Code. The assertion of this ground

effectively challenged the Council Reserves account as an illegal delegation of legislative authority. *See* Greenville County Code § 7-81 (requiring the appropriation of public funds to be made only by Council as a body); *Gregory v. Rollins*, 230 S.C. 269, 274, 95 S.E.2d 487, 490 (1956) ("It is fundamental that the appropriation of public funds is a legislative function."). The circuit court, in the 1996 action, addressed section 7-81 and concluded that Sloan had not carried his burden of showing any illegal acts on the part of the County. In the present action, SCPIF bases its claim challenging the legality of the Council Reserves account on the ground that it is "unconstitutional."⁸

Even assuming arguendo that the unconstitutionality theory was neither raised nor ruled on in the 1996 action, the theory could have been brought in the prior action challenging the legality of the Council Reserves account. Hence, both the claim and this theory of relief are barred in the present action. *See Restatement (Second) of Judgments* §§ 24, 25 (1982 & Supp. 2012) (applying claim preclusion "with respect to all or any part of the transaction, or series of connected transactions, out of which the [first] action arose" even when the plaintiff is prepared to present a theory in the second action not presented in the first action).

In *Judy*, our supreme court addressed the question of whether a claim should have been raised in a prior action and stated:

Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties. Under the doctrine of res judicata, "[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit."

393 S.C. at 172, 712 S.E.2d at 414 (quoting *Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999)) (emphasis added). The court also explained the term "cause of action" for res judicata purposes:

⁸ Neither SCPIF's pleadings nor its appellate brief cite any specific constitutional provision supporting the general assertion that the Council Reserves account is unconstitutional. Further, at oral argument, counsel did not articulate any specific constitutional provision on which SCPIF may rely for its assertion.

[F]or purposes of res judicata, "cause of action" is not the form of action in which a claim is asserted but, rather the cause for action, meaning the underlying facts combined with the law giving the party a right to a remedy of one form or another based thereon.

Id. (emphases added) (citations and quotation marks omitted).

Here, SCPIF's claim challenging the County's inclusion of the Council Reserves account in its budget, constitutes the "same transaction or occurrence" that was the subject of the prior case, i.e., inclusion of the Council Reserves account in the County's annual budget. Although the budget years and dollar amounts differ, the "cause for action," as defined in *Judy*, is the same in both the 1996 action and the present action. In both actions, Sloan has sought a judicial remedy for the inclusion of the Council Reserves account in the County's annual budgets.

Our application of res judicata to bar SCPIF's present action does not prevent another person, who has the requisite standing and is not in privity with Sloan, from filing an action challenging the Council Reserves account, as might have been the case had Sloan's action been certified as a class action. As to Sloan, he has already had his day in court. Therefore, the public interest would not be served by allowing him, or his privies, to have another bite at the apple.

Our supreme court's recent discussion of res judicata in *Judy* acknowledged that there are certain circumstances in which the policy underlying the doctrine of res judicata is outweighed by a more compelling policy; there, the court looked to the *Restatement (Second) of Judgments* § 26 for guidance on those circumstances in which courts should decline to apply res judicata. 393 S.C. at 168 n.5, 712 S.E.2d at 412 n.5 (quoting *Restatement (Second) of Judgments* § 26(1)(a)-(c) (1982 & Supp. 2011)); see also *Wright v. Marlboro Cnty. Sch. Dist.*, 317 S.C. 160, 165, 452 S.E.2d 12, 15 (Ct. App. 1994) (holding that the public policy considerations which form the basis for application of res judicata do not apply where an administrative tribunal must be asked to judge allegations of its own wrongdoing and its own retaliation in response to a report of that wrongdoing); *Restatement (Second) of Judgments* § 26(1)(a)-(f) cmts. a-j (1982 & Supp. 2012) (discussing exceptions to the general rule against claim splitting). Nonetheless, in *Judy*, the court did not find any of these exceptions applicable to the plaintiff's filing of a claim for waste in circuit court after having raised a waste claim in his probate court pleadings. 393 S.C. at 168-74, 712 S.E.2d at 412-15.

Likewise, we find none of these exceptions applicable to SCPIF's present claim. The parties have not cited, nor have we found, any binding authority applying any of these exceptions to a case with facts similar to this case. Here, the record shows no procedural anomalies, and any person having standing who is not in privity with Sloan may file his own claim challenging the Council Reserves account.

While the potential adverse impact on the public interest has been recognized as a reason to depart from the doctrine of collateral estoppel,⁹ the parties have not cited, nor have we found, any binding authority recognizing a comparable exception for res judicata.¹⁰ Rather, the doctrine of res judicata itself is a doctrine founded upon the objective of preserving and protecting the public interest. *See, e.g., Duckett*, 374 S.C. at 464, 649 S.E.2d at 81 ("The doctrine [of res judicata] flows from the principle that public interest requires an end to litigation and no one should be sued twice for the same cause of action.").

Previous opinions of this court have addressed circumstances in which it was inappropriate to apply the doctrine of res judicata. In *Mr. T v. Ms. T*, the plaintiff filed a paternity action naming his ex-wife as a defendant and alleging that she committed fraud in leading him to believe he was the biological father of her children. 378 S.C. 127, 130-32, 662 S.E.2d 413, 415-16 (Ct. App. 2008). The plaintiff also sought relief from the parties' prior decree of divorce, which had incorporated the parties' settlement agreement and had found that two children were born of the marriage. *Id.* at 130-32, 662 S.E.2d at 414-16. The family court had found that the plaintiff's paternity action was barred by "res judicata/collateral

⁹ *See Restatement (Second) of Judgments* § 28(5) (1982 & Supp. 2012) (referencing the "public interest" exception to collateral estoppel).

¹⁰ We see no injustice in this dichotomy because the reach of issue preclusion is broader than that of claim preclusion. Unlike claim preclusion, issue preclusion can affect the outcome of a different, unrelated claim and can also affect a party in a second action with an unrelated third party. *See Restatement (Second) of Judgments* § 27 (1982 & Supp. 2012) ("When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim."); *Restatement (Second) of Judgments* § 29 (1982 & Supp. 2012) ("A party precluded from relitigating an issue with an opposing party, in accordance with §§ 27 and 28, is also precluded from doing so with another person unless the fact that he lacked full and fair opportunity to litigate the issue in the first action or other circumstances justify affording him an opportunity to relitigate the issue.").

estoppel." *Id.* at 131, 662 S.E.2d at 415. On appeal, the plaintiff argued that the family court erred in this regard. *Id.* at 132, 662 S.E.2d at 415-16. This court reversed the family court's dismissal of the case and remanded the case for further development of the record. *Id.* at 139, 662 S.E.2d at 419.

Also, in *Johns v. Johns*, this court held a consent order's finding that the parties had a common-law marriage should not be given res judicata effect because the marriage was bigamous and South Carolina's policy of not recognizing bigamous marriages had been expressed in a statute declaring them to be void. 309 S.C. 199, 201-03, 420 S.E.2d 856, 858-59 (Ct. App. 1992). Likewise, in *Jennings v. Dargan*, this court held that an order approving a settlement regarding paternity and child support was void and thus did not have a preclusive effect against the child in her action for support because the record did not indicate the family court had complied with statutes requiring a finding that the settlement was in the best interest of the minor and requiring review and approval of the settlement. 308 S.C. 317, 320-21, 417 S.E.2d 646, 647-48 (Ct. App. 1992). The court acknowledged the policy respecting finality of judgments but stated that the policy expressed in the cited statutes (protecting minors) was the overriding concern. *Id.*

We find these opinions to be consistent with the requirement that a judgment must be "valid" in order to preclude a second action concerning the same transaction, and this requirement is already built into the doctrine of res judicata. *See Basnight*, 346 S.C. at 248-49, 551 S.E.2d at 278 (citing *Griggs v. Griggs*, 214 S.C. 177, 184, 51 S.E.2d 622, 626 (1949)) ("Under the doctrine of res judicata, a final judgment on the merits rendered by a court of competent jurisdiction, *without fraud or collusion*, is conclusive as to the rights of the parties and their privies." (emphasis added)); *Restatement (Second) of Judgments* § 24(1) (1982 & Supp. 2012) (conditioning the extinguishment of the second claim on the validity and finality of the prior judgment); *Restatement (Second) of Judgments* § 26(1) cmt. j (1982 & Supp. 2012) (discussing the defendant's fraud, misrepresentation, or mistake as a factor contributing to the prior judgment). Therefore, these three cases do not necessarily represent exceptions to res judicata, but rather they demonstrate circumstances in which res judicata does not apply. In each of these cases, there existed a specific, compelling, and logical reason for not applying the doctrine of res judicata. No such reason has been presented in the present case.

Further, in keeping with the principles of judicial restraint and adherence to precedent, we are reluctant to create a new "public interest" exception that will swallow the rule of res judicata. Such an exception could be used in any case in which the court expresses moral indignation over the outcome, regardless of the plaintiff's failure to demonstrate truly extraordinary circumstances justifying a

departure from res judicata. Rather than seeking to create new public policy, this court best fulfills its mission by enforcing those policies already in existence as expressed by the legislature or our state's highest court.

Based on the foregoing, the circuit court erred in holding that the present action was not barred by res judicata.

II. Attorney's Fees

The County asserts that the trial court abused its discretion in awarding attorney's fees to SCPIF. We agree. In a case brought by a party who is contesting state action, a court may award attorney's fees to the prevailing party under certain circumstances. S.C. Code Ann. § 15-77-300 (Supp. 2011). Because the present action is barred by res judicata, SCPIF does not qualify as the prevailing party. Therefore, we reverse the award of attorney's fees and costs.

CONCLUSION

Accordingly, we reverse the orders granting summary judgment and attorney's fees and costs to SCPIF.

REVERSED.¹¹

PIEPER, J., and CURETON, A.J., concur.

¹¹ Because this action is barred by res judicata, we decline to address the merits of SCPIF's challenge to the Council Reserves account. *See, e.g., Duckett*, 374 S.C. at 464, 649 S.E.2d at 81 (holding that res judicata flows from the principle that public interest requires an end to litigation); *see also Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address an issue when a decision on a prior issue is dispositive).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge
John C. Few, Circuit Court Judge

Case No. 06-CP-23-4637

The South Carolina Public Interest Foundation, and Edward D. Sloan, Jr.,
individually and on behalf of all others similarly situated,.....Respondents,

v.

Greenville County, Herman G. Kirven, Jr., Judy Gilstrap, Eric Bedingsfield, Jim
Burns, Scott Case, Joseph Dill, Cort Flint, Lottie Gibson, Mark Kingsbury,
Xanthene Norris, Robert Taylor and Tony Trout Appellants.

**RESPONDENTS' PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING *EN BANC***

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Petitioners South Carolina Public Interest Foundation and Edward D. Sloan, Jr. hereby petition the Court of Appeals for a Rehearing of this Appeal, and respectfully suggest a Rehearing *en Banc*.

STATEMENT OF THE CASE

For at least ten years, Appellants authorized and operated a fund variously known as the “Council District Expense Fund,” “Council Reserves,” “Discretionary Funds,” or the “Slush Fund.” A member of County Council publicly called it the “Slush Fund” in the 1990’s (R. P. 711). The County Council adopts an annual budget, in which each council member was allocated a fund from which to make expenditures, without the approval of the rest of County Council. It began as \$5,000 per member (R. p. 50), and by 2010, it was more than \$23,000 per member (R. p. 69).

Beginning in 1996, Edward D. Sloan, Jr. brought an action challenging expenditures from the “Slush Fund” by individual Council members during fiscal year 1994-1997 (“Slush Fund I”) (R. pp. 49-61). The Court considered (1) Mr. Sloan’s challenge of the expenditure of Council Reserves to a tenant’s association for computers in violation of Council Guidelines governing the Reserves; (2) whether some of Council members’ donations to religious non-profit groups violated the First Amendment’s Establishment Clause; and (3) whether the payment of Council members’ Rotary Club dues was money that had been spent for a “public purpose” as required by the S.C. Code. (R. pp. 1-13). Mr. Sloan also challenged Council members’ voting to circumvent the guidelines that they had established to govern expenditures from the Slush Fund.

The Circuit Court ruled that claims related to the expenditures already made were moot and that the Fund did not violate the First Amendment Establishment Clause (R. p.

5). The Circuit Court ruled that the County had not paid Rotary Club dues from Council Reserves and dismissed the claims related to that issue (R. p. 12). By separate order, issued February 23, 1998, the Circuit Court also ruled that the expenditure for the computers for a tenants' association required a preliminary injunction barring the expenditure (R. pp. 1-2). Later, the Circuit Court made the preliminary injunction permanent enjoining the expenditure on the computers, and awarded attorneys' fees (R. p. 14).

Mr. Sloan also sought to challenge additional violations of the County Guidelines by other expenditures not addressed in the initial complaint, but the Court required Mr. Sloan to file a separation action (R. pp. 16-17).

Mr. Sloan then filed a second action challenging those new expenditures made in 1998: (1) money to Slater Marietta Health & Human Services for renovations to a privately owned building that housed public agencies and (2) \$5,000 for a night watchman's patrol car ("Slush Fund II"). After ruling on these matters, the Court enjoined County Council from voting to circumvent its own guidelines (R. pp. 19-21) and later issued a permanent declaratory judgment that circumventing its own guidelines was illegal. By Order entered January 3, 2001, the Court also ordered a review of the County's compliance after two years (R. pp. 22-26).

Four and a half years later, on August 2, 2005, Appellants enacted Ordinance No. 3940, which appropriated funds "for the operation of county government for the fiscal year beginning July 1, 2006 and ending June 30, 2007," and included an appropriation for "Council District Expense," an annual appropriation of more than \$23,000 per council member in "Funds for a Council Member to address," among other things: costs

associated with special, nonrecurring community requests for infrastructure purposes such as: flooding; roads; lights; sewer and drainage; public buildings and grounds; infrastructure related studies” (R. p. 69).

July 20, 2006, the South Carolina Public Interest Foundation (“SCPIF” or “Foundation”) and Mr. Sloan filed this present action (“Slush Fund III”) alleging, “County Council’s delegation of legislative power to an individual member, as described herein, is unconstitutional and illegal, as explained in a South Carolina Attorney General opinion dated November 19, 2003 (R. pp. 68-70).

The County moved to dismiss based on *res judicata* and collateral estoppel (R. pp. 86-87). The County also filed an Answer and moved for Summary Judgment, again based on *res judicata* (R. p. 390-391).

But in their memorandum of law and at oral argument on the Motion, the County focused *solely* on *res judicata*, and in fact affirmatively *waived* its collateral estoppel argument (R. pp. 716-719).

The Court: He just admitted it too. . . . [W]hether it is collateral estoppel or not is not an issue. Mr., uh, Nicholson is not claiming that you are barred by collateral estoppel.

Mr. Carpenter: He has waived that. He raised it twice –

The Court: It is either *res judicata* or we are ready to go forward.

Mr. Carpenter: That’s right.

The Court: Right?

Mr. Carpenter: I believe so.

Mr. Nicholson: I’ve made that statement. I don’t plan to go back on it.

(R. pp. 718-719).

The County maintained that legal position throughout the hearing on the Motion

to Dismiss or for Summary Judgment. After hearing argument on *res judicata*, the Court offered to hear arguments on the merits of the case (Transcript of Record, October 27, 2007, pages 43, ll. 13-17) (R. p. 750). Counsel for Mr. Sloan declined the offer, at the request of the County.

Mr. Carpenter: . . . [Mr. Nicholson] asked that we not pursue that today because he wanted to focus the Court simply on the *res judicata*. I'm happy to accommodate him on that. I just don't want him to come back and once we've argued *res judicata* and he's refused to argue collateral estoppel, I don't want him to come back next time and argue I was wrong on collateral estoppel.

The Court: That would be *res judicata*.

(Transcript of Record, October 27, 2007, p. 43, l. 20 –p. 44, l. 2) (R. pp. 750-751).

The Circuit Court, Judge John C. Few presiding, denied the County's Motion to Dismiss. The Court said:

Well, I'm going to tell you that I'm inclined to rule that the thing is 1995 or 1996 and not the validity of the ordinance and therefore the *res judicata* would not preclude the litigation of this challenge. . . .

I'm going to go ahead and ask Mr. Carpenter to draw a short order that addresses this and denies the motion to dismiss.

(R. pp. 752, 754).

The Court denied the County's motion, based primarily on the holding and rationale of *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591, 597-600, 68 S.Ct. 715, 719-720 (1948). As demonstrated below, *Sunnen* addressed **both** collateral estoppel **and** *res judicata*. The Circuit Court, Judge Few presiding, properly relied on the parts of *Sunnen* that addressed *res judicata*, and not the parts of the opinion that addressed collateral estoppel, because the County explicitly **waived** any reliance on collateral estoppel (issue preclusion) (R. pp. 718-719).

On October 7, 2008, the Circuit Court, Judge Few presiding, held a hearing on

cross motions for summary judgment, on the merits of the case, and after extensive discussion, stated the following:

I think the relative importance to the people of Greenville County of spending money on sewer and drainage as opposed to spending money on roads should be made by the council itself and not by the council member. This thing allows individual council members to decide for their own districts which is more important. That, to me, using your authority is this absolute, unregulated, undefined discretion.

There's nothing in here that restricts that. It says funds may be encumbered for viable projects only. Clearly, spending money on sewer and drainage is a viable project. I mean, that's good for the county. Nobody's going to dispute that. It doesn't seem to me that if one council member is all fired up about sewer and drainage and another council member is all fired up about roads that there's any way for the council to say no, y'all need to spread it out a little bit more.

So it does seem to me like this is the . . . equivalent of giving [an] individual council member a legislative responsibility. But I want to go back and do some more reading.

Transcript of Record, Case No. 03-CP-23-3785 (October 7, 2008), pp. 47-48 (R. pp. 695-696).

A month later, the attorney for the County conceded that the County Council must exercise legislative power of the County. Transcript of Record, Case No. 03-CP-23-3785 (November 7, 2008), p. 26.

The Court: Let me ask you this—you actually agree, don't you, that there is a requirement that legislative power of the county be exercised by the county council?

Mr. Nicholson: I do.

The Court: As opposed to something that is not—

Mr. Nicholson: Your hypothetical would not work, would be unconstitutional.

The Court: Right. So, so, so the problem that I have been posing over the last ten or fifteen minutes is really not something we need to focus on. Everybody agrees that the council can't delegate a legislative power to an

individual council member. And the question that we're actually going to turn this case on is whether or not what was delegated was in fact legislative, right?

Mr. Nicholson: That's the issue, Judge.

The Court: Well, then I've spoken to that issue and I think we're done unless there's any further arguments. I would like Mr. Carpenter to begin to prepare an order.

(R. 832-833).

The parties could not agree on the wording of a proposed order.

Even though the Court had announced its ruling, six months later, on May 14, 2009, Greenville County Council made two more appropriations for the Council District Expense for fiscal years 2010 and 2011 using the same guidelines and procedures. Responses to Plaintiffs' Second Set of Requests for Admission 6, 7, and 8 (R. 867-868). Thus, Appellants ignored both the Attorney General Opinion and the oral ruling of the Circuit Court that this was an unlawful delegation of legislative authority. The prior ruling had not addressed this issue.

On February 10, 2010, the Circuit Court issued its written Order ruling, "The 'Council District Expense Fund' portion of the 2006-2007 budget for Greenville County is declared to be illegal" (R. p. 33).

Thereafter, Judge Few joined the Court of Appeals, and the Circuit Court, the Honorable D. Garrison Hill presiding, awarded Plaintiffs attorneys' fees pursuant to S.C. Code Ann. § 15-77-300 ff. (R. pp. 36-43).

The County appealed both the ruling on the merits and the award of attorneys' fees.

In its briefs in the Court of Appeals, the County did not make a collateral estoppel argument overtly, but instead confused *res judicata* and collateral estoppel by citing and

relying on cases that addressed collateral estoppel, not *res judicata*. The Panel of the Court of Appeals appears to have followed the County's misguided arguments.

I. APPELLANTS ILLEGALLY DELEGATED LEGISLATIVE AUTHORITY.

“When an authority is given jointly to several persons, *they must generally act jointly or their acts are invalid.*” *Abbeville v. McMillan*, 52 S.C. 60, 72 (1897) quoting *Cooley v. O'Connor*, 12 Wall. 391 at 398 (1871). In *State ex rel. McLeod v. McInnis*, the Court ruled that the General Assembly could not delegate its spending power, “legislative authority,” to the Joint Appropriation Review Committee, composed of 12 legislators). *Id.*, 278 S.C. 307, 317-18, 295 S.E.2d 633, 639 (1982).

A municipal governing body cannot delegate . . . to one of its own committees the power to decide legislative matters properly resting in the judgment and discretion of that body or to one member of the governing body. . . . The members of the governing body are chosen by the people to represent the municipality and they are charged with a public trust and the faithful performance of their duties and the public is entitled to the judgment and discretion of each member.

56 Am.Jur.2d, Municipal Corporations, § 134.

The rule is well settled that legislative power cannot be delegated by a municipality, unless expressly authorized by the statute conferring the power. So, judicial, as distinguished from ministerial, functions cannot be delegated. So far as the powers of a municipal corporation are legislative they rest in the discretion and judgment of the municipal body entrusted with them, and the general rule is that that body cannot delegate or refer the exercise of such powers to the judgment of a committee of the council, or to an administrative board or officer of the city, or to arbitrators under an agreement for binding arbitration. If the legislature confers power on a municipal corporation, the exercise of discretion by the governing body of the municipality cannot be delegated to a municipal officer or other person or body.

2A McQuillin, Mun. Corp. § 10:43 (3rd ed.)

While *legislative or discretionary powers* or trusts *devolved* by charter or law *on a council or governing body*, or a specified board or officer

cannot be delegated to others. [...] The council by ratification finally determines and thus fulfills the duty imposed by law.

2A McQuillin, Mun. Corp. § 10:45 (3rd ed.).

II. JUDGE FEW PROPERLY RULED THAT *RES JUDICATA* DID NOT BAR THE PRESENT ACTION.

The Circuit Court, Judge Few presiding, held several arguments on the issues of *res judicata*, and the merits of the case. The Circuit Court properly ruled that *res judicata* did not bar the present action. The Court of Appeals reversed, and in this Petition for Rehearing and Suggestion for Rehearing en Banc, Plaintiff will make the following points, presented here in summary.

First, the Panel of Court of Appeals in this action (“Panel”) misreads the County’s argument. The Circuit Court relied on *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591, 597-600, 68 S.Ct. 715, 719-720 (1948) and cases that follow it for the proposition that *res judicata* does not bar SCPIF’s claim in Slush Fund III. The Panel “agreed” with the County that *Sunnen* involved an assertion of collateral estoppel *rather than res judicata* (Slip Opinion, page 7). The County did not make this argument. The County’s briefs simply confused *res judicata* and collateral estoppel.

Second, and more importantly, the Panel misreads *United States v. Sunnen*. *Sunnen* explicitly and extensively addresses both *res judicata* and collateral estoppel, and distinguishes the two legal rules.

Third, the Panel misreads South Carolina law. *Res judicata* does not bar the action when there is no “identity of subject matter,” when the “underlying facts” are different, or when the claims do not “arise out of the same transaction or occurrence.” *Judy v. Judy*, 393 S.C. 160, 712 S.E.2d 408 (2011). The “transaction or occurrence”

addressed in Slush Fund I arose from 1994-97. The “transaction or occurrence” addressed in Slush Fund III arose from 2005-06, and subsequent years. (The policies governing the Slush Fund were amended from time to time over the years.)

Fourth, the Panel ruled that the United States Supreme Court limited the holding of *Sunnen*. The Supreme Court did limit the holding of *Sunnen* as it pertains to collateral estoppel, but **not** as it pertains to *res judicata*. *Sunnen*’s holding as to *res judicata* stands.

Fifth, the Panel uses collateral estoppel analysis, but calls it *res judicata*.

Sixth, because the County had waived its collateral estoppel argument, Petitioners had **no notice** that the County or the Panel would address collateral estoppel, and the lack of notice violates due process.

Finally, the Circuit Court had awarded attorneys fees pursuant to S.C. Code Ann. § 15-77-300. In granting attorneys fees, the Circuit Court ruled, “The Court finds that this Attorney General Opinion accurately states the law regarding delegation of legislative authority as it has been understood for at least 100 years, and if Defendants did not know this legal principle, they were willfully ignorant of it” (R. p. 38). Because the Panel reversed on the *res judicata* or collateral estoppel analysis, the Panel also wrongfully reversed the Circuit Court’s award of attorneys’ fees.

A. The Panel Misreads the County’s Argument.

First, the Panel misreads the County’s argument. The Panel “agreed” with the County that *Sunnen* involved an assertion of collateral estoppel **rather than** *res judicata* (Slip Opinion, page 7).

Contrary to the Panel’s statement, the County did **not** argue “that *Sunnen* addressed collateral estoppel **rather than** *res judicata*” (Slip Opinion, page 8). The County **never** argued that *Sunnen* did not address *res judicata*. The County’s briefs

simply confused *res judicata* and collateral estoppel. The County spent a large portion of its brief relying on *State Dep't. of Revenue v. Hoover, Inc.*, 993 So.2d 889 (Ala. Civ. App. 2007) (*Hoover II*), a case from the Alabama Court of Appeals, which was a collateral estoppel (or issue preclusion) decision. *Hoover* was not a claim preclusion (*res judicata*) decision. *Hoover II* mentions *res judicata* only one time, and that reference is **directly contrary** to the County's entire *res judicata* argument: "The Court [in *Sunnen*] explained that . . . the doctrine of *res judicata* **does not apply** to tax litigation involving **different tax years**." *Id.*, 993 So.2d 889, 895 (emphasis added). *Hoover II* actually confirms the holding of *Sunnen* on *res judicata*.

The County's brief contained an extensive discussion about a "change in the law," which is an analysis for issue preclusion (collateral estoppel), not claim preclusion (*res judicata*). The County's arguments simply reflect a significant confusion of the two rules.

This memorandum will demonstrate below in Section C. that an argument of claim preclusion (*res judicata*) addresses an attempt to reargue the same claim, which arises out of the same **fact** pattern. Collateral estoppel, which the County waived, addresses an attempt to apply a rule of law to a new fact situation. The County was simply confused, and as a consequence, confused the Court.

B. The Panel Misreads *Commissioner of Internal Revenue v. Sunnen*.

The Court of Appeals misreads *Commissioner of Internal Revenue v. Sunnen*, the most important case on which the trial court and Petitioners rely for their *res judicata* argument. *Sunnen* addressed **both** *res judicata* **and** collateral estoppel; and articulated different rules for the two theories. *Sunnen* ruled that *res judicata* applies to the relitigation of a particular **cause of action**. This is a fact-based analysis.

It is first necessary to understand something of the recognized meaning and scope of *res judicata*, a doctrine judicial in origin. The general rule of *res judicata* applies to repetitious suits involving *the same cause of action*. It rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations. The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of *a cause of action*, the parties to the suit and their privies are thereafter bound 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.' *Cromwell v. County of Sac*; 94 U.S. 351, 352, 24 L.Ed. 195. The judgment puts an end to *the cause of action*, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment. See von Moschzisker, 'Res Judicata,' 38 Yale L.J. 299; Restatement of the Law of Judgments, §§ 47, 48.

But where the second action between the same parties is upon *a different cause or demand*, the principle of *res judicata* is applied much more narrowly. In this situation, the judgment in the prior action operates as an *estoppel*, not as to matters which might have been litigated and determined, but 'only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.' *Cromwell v. County of Sac*, *supra*, 353 of 94 U.S. And see *Russell v. Place*, 94 U.S. 606, 24 L.Ed. 214; *Southern Pacific R. Co. v. United States*, 168 U.S. 1, 48, 18 S.Ct. 18, 27, 42 L.Ed. 355; *Mercoid Corp. v. Mid-Continent Co.*, 320 U.S. 661, 671, 64 S.Ct. 268, 273, 88 L.Ed. 376. Since the *cause of action* involved in the second proceeding is *not swallowed by the judgment in the prior suit*, the parties are free to litigate points which were not at issue in the first proceeding, even though such points might have been tendered and decided at that time. But matters which were actually litigated and determined in the first proceeding cannot later be relitigated. Once a party has fought out a matter in litigation with the other party, he cannot later renew that duel. In this sense, *res judicata* is usually and more accurately referred to as *estoppel by judgment*, or *collateral estoppel*. See Restatement of the Law of Judgments, §§ 68, 69, 70; Scott, 'Collateral Estoppel by Judgment,' 56 Harv.L.Rev. 1.

These same concepts are applicable in the federal income tax field. Income taxes are levied on an annual basis. *Each year is the origin of a new liability and of a separate cause of action*. Thus if a claim of liability or non-liability relating to *a particular tax year* is litigated, a judgment on the merits is *res judicata* as to any subsequent proceeding involving *the same claim and the same tax year*. But if the later proceeding is concerned with a similar or unlike claim relating to a *different tax year*, the prior judgment acts as a *collateral estoppel* only as

to those matters in the second proceeding which were actually presented and determined in the first suit. *Collateral estoppel* operates, in other words, to relieve the government and the taxpayer of 'redundant litigation of the identical question of the statute's application to the taxpayer's status.' *Tait v. Western Md. R. Co.*, 289 U.S. 620, 624, 53 S.Ct. 706, 707, 77 L.Ed. 1405.

Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591, 597-599, 68 S.Ct. 715, 719-720, 92 L.Ed. 898, (1948) (emphasis added). *Res judicata* bars relitigating of a ruling on the same set of facts. Collateral estoppel can address applying a ruling to a different set of facts. Slush Fund III (this appeal) addresses a different set of facts than either Slush Fund I or Slush Fund II.

C. The Panel Misreads South Carolina Law.

South Carolina law mirrors *Sunnen*. *Res judicata* does not bar the action when there is no "identity of subject matter;" the "underlying facts" are different; and the claims do not "arise out of the same transaction or occurrence." *Judy v. Judy*, 393 S.C. 160, 712 S.E.2d 408 (2011). Slush Fund I addressed 41 expenditures from 1994-97. Slush Fund II addressed allocations and expenditures in 1998. Slush Fund III challenges expenditures from 2005-06 and subsequent years. In Slush Fund I, Sloan *could not have addressed* the "transactions or occurrences" that he addressed in Slush Fund III. A challenge to illegal expenditures many years ago does not preclude a challenge to new expenditures, which are also illegal, particularly when the policy was amended several times over those years.

The doctrine of *res judicata* originates from the principles that public interest requires an end to litigation and that no one should be sued twice for the same cause of action. *Hayes v. Hayes*, 312 S.C. 141, 439 S.E.2d 305 (Ct.App.1993). The *res judicata* defense requires a showing of three essential elements: (1) the prior judgment must be final, valid and on the merits; (2) the parties in the subsequent action must be identical to those in the first; and (3) *the second action must involve matters properly included in the first action*. *Owenby v. Owens Corning Fiberglas*, 313

S.C. 181, 437 S.E.2d 130 (Ct.App.1993). Under the doctrine of *res judicata*, a final judgment on the merits in a prior action will preclude the parties from relitigating any issues actually litigated or those that might have been litigated in the first action. *Foran v. USAA Casualty Ins. Co.*, 311 S.C. 189, 427 S.E.2d 918 (Ct.App.1993).

Wright, v. Marlboro County School District, 317 S.C. 160, 452 S.E.2d 12 (Ct. App. 1994) (emphasis added).

Similarly, in *Pye v. Aycock*, Judge Anderson writing for the Court explained that *res judicata* is a fact-based determination. The claim must arise out of the same facts in both actions for *res judicata* to bar the second action.

“*Res judicata* also bars subsequent actions by the same parties when the claims arise out of **the same transaction or occurrence** that was the subject of a prior action between those parties.” *Riedman Corp. v. Greenville Steel Structures, Inc.*, 308 S.C. 467, 469, 419 S.E.2d 217, 218 (1992).

Additionally, “[f]or a judgment to bar the maintenance of a subsequent action, **there must be identity of the cause of action as well as identity of the subject matter.**” *Nunnery*, 289 S.C. at 209, 345 S.E.2d at 743. If it is doubtful whether a second action is for the same cause of action as the first, the test generally applied is to consider **the identity of facts essential to their maintenance, or whether the same evidence would sustain both.** *Griggs v. Griggs*, 214 S.C. 177, 51 S.E.2d 622 (1949). When applying principles of *res judicata*, a fundamental test used for comparing causes of action is to determine whether **the primary right and duty and the delict or wrong are the same** in each action. *Nunnery, supra*. ““Under this test, there is but one cause of action where there is but one right in the plaintiff and one wrong on the part of the defendant involving that right.” *Id.* at 210, 345 S.E.2d at 743 (quoting 46 Am.Jur.2d *Judgments* § 406 at 575 (1969)).

Id. 325 S.C. 426, 432-433, 480 S.E.2d 455, 458 (Ct. App. 1997) (emphasis added).

The point of contention is the proper definition or identification of the “res” or the “thing” adjudicated. Plaintiffs contend and the Circuit Court ruled that the “res” adjudicated in the earlier lawsuit was the particular expenditures of taxpayer money in the 1990’s. The County and Panel contend the “res” is the legal theory that Sloan raised, or that he could have raised, to challenge those expenditures in the 1990’s. The argument of the County and the Panel is an argument of collateral estoppel.

Greenville County levies and collects property taxes annually. The County enacts appropriations to the Slush Fund annually. The Council Members made expenditures from their Slush Fund accounts annually. In Slush Fund I, the Circuit Court found some expenditures legal and others illegal. *Res judicata* bars plaintiffs from challenging *those expenditures* a second time. No court had adjudicated the legality of appropriations to the Slush Fund or the expenditures from the Slush Fund in 2006 and 2007. Judge Few properly ruled that the “*res*,” or the “thing” adjudicated in the earlier case was the annual allocations to the Slush Fund, and the specific expenditures of specific sums of money in the 1990’s. “I’m inclined to rule that the thing is 1995 or 1996 and not the validity of the ordinance and therefore the *res judicata* would not preclude the litigation of this challenge” (R. pp. 752, 754). Thus, *res judicata* did not bar Sloan’s challenge to these new appropriations and expenditures.

D. The Panel Misreads the Later Analysis of *Sunnen*.

The Panel also reasoned that after *Sunnen* was decided, the United States Supreme Court limited the reach of *Sunnen*. The Panel cited two cases that limited the effect of *Sunnen*: *Montana v. United States*, 440 U.S. 147, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979) and *United States v. Stauffer Chemical Co.*, 464 U.S. 165, 104 S.Ct. 575, 78 L.Ed.2d 388, (1984). Both were collateral estoppel cases.

In *Montana v. United States*, the Court stated, “Because we find that the constitutional question presented by this appeal was determined adversely to the United States in a prior state proceeding, we reverse on grounds of *collateral estoppel* without reaching the merits.” *Id.* 440 U.S. 147, 152-53, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979). *Montana v. United States* demonstrates that when two cases are “closely aligned in time and subject matter,” *collateral estoppel* should ordinarily apply. *Montana v. United*

States did not limit the holding of *Sunnen*, as it pertains to *res judicata*.

Similarly, *United States v. Stauffer Chemical Co.* was a collateral estoppel decision.

Stauffer also argues that the government should be *estopped* from relitigating the *question* of whether private contractors are “authorized representatives” under the statute because it has already litigated that *question* against Stauffer and lost in connection with an attempted inspection of one of Stauffer’s plants in Wyoming. The Court of Appeals agreed with Stauffer on the merits and also on the *collateral estoppel* issue. Without reaching the merits, we affirm the Court of Appeals’ holding that the government is *estopped* from relitigating the statutory *issue* against Stauffer.

Id., 464 U.S. 165, 166-67, 104 S.Ct. 575, 576, 78 L.Ed.2d 388, (1984) (emphasis added).

Neither *Montana v. United States* nor *United States v. Stauffer Chemical Co.* addressed *res judicata*. The United States Supreme Court may have later limited the holding of *Sunnen* as it pertains to collateral estoppel, but **not** as it pertains to *res judicata*.

E. The Panel Uses Collateral Estoppel Analysis, but Calls it *Res Judicata*.

Fifth, the Panel states that it is making a ruling based upon *res judicata*, but instead, uses collateral estoppel analysis, and calls it *res judicata*. The Panel ruled in essence that because Sloan attempted to challenge the concept of delegation of legislative authority, however inartfully in Slush Fund I, he could not make a similar challenge in Slush Fund III. This analysis is a collateral estoppel analysis. Writing for this Court, Judge Anderson explained this concept in *Pye v. Aycock*, and called it *collateral estoppel*.

Under the doctrine of collateral estoppel, on the other hand, the second action is based upon a *different claim* and the judgment in the first action precludes relitigation of only those issues “actually and necessarily litigated and determined in the first suit.”

Beall, 281 S.C. at 369 n. 1, 315 S.E.2d at 189 n. 1. This Court further held: In order, however, to assert collateral estoppel successfully, the party seeking issue preclusion still must show that the issue was *actually litigated and directly*

determined in the prior action and that the matter or fact directly in issue was *necessary to support the first judgment*.

Beall, 281 S.C. at 371, 315 S.E.2d at 191. See also *St. Philip's Episcopal Church v. South Carolina Alcoholic Beverage Control Comm'n*, 285 S.C. 335, 338, 329 S.E.2d 454, 456 (Ct.App.1985) (“[W]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.”)

[11] Factors to consider in determining the defense of collateral estoppel, notwithstanding a lack of privity, include “whether the doctrine is used offensively or defensively, and whether the party adversely affected had a **full and fair opportunity to litigate the relevant issue** effectively in the prior action.” *Graham v. State Farm Fire & Cas. Ins. Co.*, 277 S.C. 389, 390-91, 287 S.E.2d 495, 496 (1982). See also *South Carolina Property & Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc.*, 304 S.C. 210, 403 S.E.2d 625 (1991) (**collateral estoppel** occurs when party in second action seeks **to preclude party from relitigating issue decided in previous action**; nonmutual collateral estoppel may be asserted unless party precluded lacked full and fair opportunity to litigate issue in first action or other circumstances justify affording him opportunity to relitigate issue).

Id. 325 S.C. 426, 435-436, 480 S.E.2d 455, 459-460 (Ct. App. 1997) (emphasis added).

The analysis asserted by the County on appeal and by the Panel in its decision is collateral estoppel analysis. (Incidentally, Mr. Sloan’s counsel has believed from the beginning that a collateral estoppel analysis provided the County a better chance at preventing a ruling on the merits, but the County expressly and repeatedly waived the collateral estoppel issue.)

Mr. Carpenter: . . . I just don’t want him to come back and once we’ve argued *res judicata* and he’s refused to argue collateral estoppel, I don’t want him to come back next time and argue I was wrong on collateral estoppel.

The Court: That would be *res judicata*.

(Transcript of Record, October 27, 2007, p. 43, l. 20 –p. 44, l. 2) (R. pp. 750-751).

The analysis of the Supreme Court of the United States is similar to that of Judge Anderson.

The contention of the government seems to be that *the doctrine of res judicata* does not apply to questions of law; and, in a sense, that is true. It *does not apply to unmixed questions of law*. Where, for example, a court in deciding a case has enunciated a rule of law, *the parties in a subsequent action upon a different demand are not estopped from insisting that the law is otherwise*, merely because the parties are the same in both cases.

United States v. Moser, 266 U.S. 236, 242, 45 S.Ct. 66 (1924) (emphasis added). See also, *Limbach v. Hooven & Allison Co.* 466 U.S. 353, 104 S.Ct. 1837, 80 L.Ed.2d 356 (1984) (when “the parties were the same, . . . the issue . . . was also the issue in [the earlier case]; that the raw materials and the type of taxation were identical,” but the years and the tax assessments were different, the Court’s analytical framework was not *res judicata*, but collateral estoppel).

The County confused the analysis of the two theories in its brief, and then the Panel followed the County’s confused and mistaken analysis. The County spent a large portion of its brief relying on the *Hoover* case from the Alabama Court of Appeals, which was a collateral estoppel decision (but called it *res judicata*). As noted above, the County had explicitly waived or conceded the collateral estoppel argument in the trial court. In the same manner, the Panel asserts that it is making a ruling based upon *res judicata*, but instead, seems to use collateral estoppel analysis, and wrongly calls it *res judicata*.

F. Petitioners had No Notice that the Panel Would Rely in Collateral Estoppel Analysis.

Sixth, because the County had waived its collateral estoppel argument, Petitioners had **no notice** that the County or the Panel would rely on a collateral estoppel analysis, and the lack of notice violates due process.

III. THE PANEL IMPROPERLY REVERSED THE AWARD OF ATTORNEYS' FEES.

Finally, the Panel reversed the Circuit Court's award of attorneys' fees based on its decision that *res judicata* barred the action. Respondents Petition for Rehearing *en banc* on the issue of *res judicata*, and accordingly, on the issue of attorneys' fees as well.

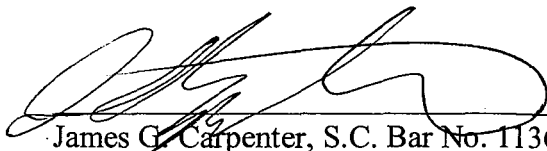
The Circuit Court awarded attorneys' fees and costs to SCPIF under § 15-77-300 (Order entered November, 11, 2010). To recover under this section, a citizen must prove three elements: (1) the citizen must be the prevailing party; (2) the government entity must have acted without substantial justification; and (3) no special circumstances would have made the award of attorney's fees unjust. *Heath v. County of Aiken*, 302 S.C. 178, 182, 394 S.E.2d 709 (1990); *Richland County v. Kaiser*, 351 S.C. 89, 96-97, 567 S.E.2d 260 (Ct. App. 2002). The award of attorneys' fees is discretionary with the trial court. *Heath v. County of Aiken*, 302 S.C. 178, 182, 394 S.E.2d 709 (1990). As demonstrated in its Respondents' Brief, SCPIF and Sloan meet the three elements for an award of attorney's fees, and the Circuit Court properly awarded attorneys' fees, and this award should be affirmed on appeal.

CONCLUSION

Petitioners South Carolina Public Interest Foundation and Edward D. Sloan, Jr. respectfully pray the Court for a Rehearing and a Rehearing en Banc to address the issues raised herein: the Panel's erroneous reading of the arguments made by the County, *United States v. Sunnen*, South Carolina law, the later cases analyzing *Sunnen*; the Panel's erroneous co-mingling of the concepts of *res judicata* and collateral estoppel; and the Panel's wrongful reversal of the award of attorneys' fees.

Respectfully submitted, this 15th day of August, 2012,

THE CARPENTER LAW FIRM



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The South Carolina Court of Appeals

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October 17, 2012

Mr. James G. Carpenter
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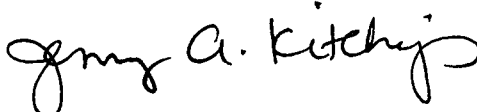
Re: SC Public Interest v. Greenville Co.
Appellate Case No. 2010-154507

Dear Counsel:

This will acknowledge receipt of your Petition for Rehearing.

By copy of this letter, opposing counsel is requested to file an original and six (6) copies of a return to this motion no later than ten (10) days from the date of this letter.

Very truly yours,


CLERK

cc: Jennifer J. Miller
Bonnie Allen Lynch
Boyd Benjamin Nicholson, Jr.

The South Carolina Court of Appeals

The South Carolina Public Interest Foundation, and
Edward D. Sloan, Jr., individually, and on behalf of all
others similarly situated, Respondents,

v.

Greenville County, Herman G. Kirven, Jr., Judy Gilstrap,
Eric Bedingfield, Jim Burns, Scott Case, Joseph Dill,
Cort Flint, Lottie Gibson, Mark Kingsbury, Xanthene
Norris, Robert Taylor, and Toney Trout, Appellants.

Appellate Case No. 2010-154507

The Honorable John C. Few, D. Garrison Hill
Greenville County
Trial Court Case No. 2006CP2304637

ORDER

The time for serving and filing the Return to the Petition for Rehearing is hereby
extended until November 13, 2012.

FOR THE COURT

BY V. Claire Allen, Deputy
CLERK

Columbia, South Carolina

cc:

Jennifer J. Miller

Bonnie Allen Lynch

James G. Carpenter

Boyd Benjamin Nicholson, Jr.

FILED

November 6, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge
John C. Few, Circuit Court Judge

Case No. 06-CP-23-4637

The South Carolina Public Interest Foundation, and Edward D. Sloan,
Jr., individually, and on behalf of all others similarly situated, ... Respondents,

v.

Greenville County, Herman G. Kirven, Jr., Judy Gilstrap, Eric
Bedingfield, Jim Burns, Scott Case, Joseph Dill, Cort Flint, Lottie
Gibson, Mark Kingsbury, Xanthene Norris, Robert Taylor, and
Tony Trout, ... Appellants.

**APPELLANTS' RETURN TO RESPONDENTS'
PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING *EN BANC***

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Attorneys for Appellants Greenville County
and Greenville County Council

Pursuant to Rules 221 and 224, SCACR, Appellants Greenville County and Greenville County Council (collectively the “County”) hereby respond to the Petition for Rehearing and Suggestion for Rehearing En Banc (“Petition”) filed by Respondents Edward D. Sloan, Jr. and the South Carolina Public Interest Foundation (collectively “Sloan”). In his Petition Sloan simply repeats arguments that have been fully considered by this Court.

In order to prevail on a Petition, however, Sloan must demonstrate that the Court overlooked or misapprehended his argument. Rule 221(a), SCACR; Kennedy v. S.C. Ret. Sys., 349 S.C. 531, 532, 564 S.E.2d 322 (S.C. 2001). The Petition is not a vehicle for re-argument of questions which were considered and decided by the Court. Huggins v. Atlantic C. L. R. Co., 96 S.C. 267, 283, 79 S.E. 406 (S.C. 1913). If the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, there is no basis for granting a rehearing, and such petition should be denied. Wellman, Inc. v. Square D Co., 366 S.C. 61, 64, 620 S.E.2d 86 (Ct. App. 2005). As discussed below, there is no basis for granting Sloan’s Petition, as the issues raised therein have been fully considered and decided by the Court.

Sloan does not claim that the Court overlooked any fact or proposition of law, nor could he. Instead, he re-argues the points made in his Brief and at oral argument. In making the same arguments again, however, Sloan claims that this Court was “confused” by the County’s argument and thus, according to Sloan, mis-applied and confused the doctrine of *res judicata*. Specifically, Sloan argues that the Court confused the concepts of collateral estoppel and *res judicata*, applying collateral estoppel principles instead of

those for *res judicata*. As the following discussion and the Court's opinion demonstrate, however, the Court had no confusion over the application of *res judicata*.

I. Sloan's Attempts to Show Confusion in the Court's Opinion Lack any Basis in Law or Fact -- the Court's Opinion is Thorough and Comprehensive, Explaining the Differences between *Res Judicata* and Collateral Estoppel, Accurately Describing the Relevant Law while Correctly Distinguishing those Area of the Law that Do Not Apply, and Correctly Applying the Law of *Res Judicata* to the Facts of the Case.

The Court starts its opinion with a thorough recitation of the facts, describing the Council Reserves Policy from its inception through the Present Case. See Opinion at 2-5. In doing so the Court also explains in detail the relevant procedural histories of not only this case (the "Present Case") but also the 1996 case (the "Prior Action" or "Prior Lawsuit"), detailing the allegations in each case.¹ Id. The Court then accurately summarizes the Trial Court's holdings. See Opinion at 5-6. Of particular importance for this Petition, the Court has this to say about the Trial Court's ruling on *res judicata*: "Relying on Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591, 68 S. Ct. 715, 92 L. Ed. 898 (1948), the circuit court concluded that the action was not barred by *res judicata* by reasoning that the County's different fiscal years were comparable to the different tax years at issue in Sunnen." Id. at 5. This statement accurately depicts the Trial Court's Order, which relied solely on Sunnen as the basis of its *res judicata* ruling. R. p. 29. In contrast, Sloan incorrectly argues that the Trial Court "relied on ... Sunnen ... and cases that follow it for the proposition that *res judicata* does not bar SCPIF's claim."

¹ The caption of the Prior Action was Sloan v. Greenville County, 96-CP-23-2918. See R. p. 61.

Petition at 8 (emphasis added). This statement is not accurate. The Trial Court relied on one case and one case only in its *res judicata* ruling – Sunnen.

The Court then addresses the County's argument that *res judicata* bars Sloan's claims. First, the Court discusses Sunnen, which is logical inasmuch as the Trial Court's Order relies exclusively on Sunnen, while Sloan's Brief cites Sunnen extensively, citing only one other case, an opinion from this Court setting forth basic principles on *res judicata*. See Sloan's Brief at 29 (quoting Wright v. Marlboro County School District, 317 S.C. 160, 452 S.E.2d 12 (Ct. App. 1994)). Sloan complains that the Court misreads the County's Briefs when the Court states "the County is correct in asserting that Sunnen addressed collateral estoppel rather than *res judicata*." Opinion at 8. First, and contrary to Sloan's assertion, the County did argue that Sunnen addressed collateral estoppel rather than *res judicata*. See, e.g., County Reply Brief at 10 (noting that Sloan "conveniently fails to acknowledge that Sunnen itself also involved the application of collateral estoppel when the issue at bar is *res judicata*."). Even if the County was confused about Sunnen, and it was not, the Court has accurately addressed that case, particularly the fact it addressed collateral estoppel, not *res judicata*. Sloan's argument that Sunnen applies to both collateral estoppel and *res judicata* is not accurate.²

Sloan also takes the Court to task for noting, correctly, that "after Sunnen was decided, the United States Supreme Court limited its application." Opinion at 9. Sloan

² The Petition does provide a large block quote from Sunnen discussing in a general sense *res judicata* and how it differs from collateral estoppel. See Petition at 11-12 (quoting Sunnen, 333 U.S. at 597-99). This is no different, however, than the Court's explanation

does not question the accuracy of this statement, and given the Court's quoting the United States Supreme Court's opinion in Stauffer Chemical Co., it is easy to see why. See Opinion at 9 (quoting United States v. Stauffer Chemical Co., 464 U.S. 165, 172, n. 5 (1984), wherein the U.S. Supreme Court rejected the "general applicability" of Sunnen outside of the income tax context). Sloan does question the relevance of Stauffer Chemical Co., arguing that Sunnen was not limited "as it pertains to *res judicata*." Petition at 15. This argument fails, and demonstrates that it is Sloan who has confused *res judicata* and collateral estoppel.

This confusion shows up first in Sloan's Brief at 28, where he states that Sunnen "declined to apply *res judicata*" and then quotes from two paragraphs of the Sunnen opinion that never mention *res judicata*, but instead mention collateral twice. The U.S. Supreme Court did not make *res judicata* a part of its holding, and this Court was correct in stating that "Sunnen addressed collateral estoppel rather than *res judicata*." Opinion at 8. Another illustration of this confusion is Sloan's claim on page 15 of the Petition that the Court "ruled in essence that because Sloan attempted to challenge the concept of delegation of legislative authority, however, inartfully in [the Prior Action], he could not make a similar challenge in [the Present Case]. This analysis is a collateral estoppel analysis." Neither of these statements is accurate. First, as noted above the Court appropriately reviewed the pleadings from both cases and, in doing so, noted that Sloan challenged the Council Reserves Policy on a theory of improper legislative delegation in

in this case of the differences in these two doctrines. See Opinion at 8-10. The key point is that neither Sunnen nor the Court in this case applied *res judicata* in making its ruling.

both cases. Second, the Court noted that even if Sloan did not plead such a claim in the Prior Action, he certainly could have. This question – whether a claim could have been brought in a prior case – is one of the three elements required in a *res judicata* analysis. See Judy v. Judy, 393 S.C. 160, 712 S.E.2d 408 (S.C. 2011). It is not, as Sloan contends, a collateral estoppel analysis, which requires that a matter was actually litigated. On this point, then, it is Sloan who confuses the “actually litigated” element of collateral estoppel – which is not an issue here – with the “could have been litigated” analysis that is required for *res judicata*.

Anticipating the arguments that Sloan would make in his Petition, the Court explains in detail the differences between *res judicata* and collateral estoppel. Opinion at 8-10. Clearly, the Court has addressed the differences in these doctrines, and the Court has no confusion about them.

The Court also has no confusion as to how the facts of this case apply to the relevant *res judicata* principles that the South Carolina Supreme Court has adopted. Sloan tries to skirt around this issue in his Petition by pointing to individual expenditures that he challenged in the Prior Action. See Petition at 12 (“The Prior Action addressed 41 expenditures from 1994-97. [A subsequent case involving the Council Reserves] addressed allocations and expenditures in 1998. [The Present Action] challenges expenditures from 2005-06 and subsequent years.”). The Court’s opinion disposes of this argument, comparing the pleadings of the Prior Action with those of the Present Case, finding:

In the present case, there is no dispute that the 1996 action involved the same parties or their privies--Sloan brought the 1996 action;

and, along with the foundation he chaired (SCPIF), he brought the present action. However, SCPIF maintains that in the 1996 action, the circuit court neither ruled on nor could have ruled on the County's 2006 and 2007 appropriations and expenditures. SCPIF argues that *res judicata* does not bar its challenge to these specific appropriations because "the allegations arise from different fiscal years." We find this argument unavailing. In the present action, SCPIF's complaint challenges the legality of the practice underlying these expenditures, i.e., maintaining the Council Reserves account in the County's budget, a practice continuing from year to year since the 1994-95 fiscal year. Likewise, the Third Amended Complaint in the 1996 action challenged this same practice with regard to multiple fiscal years: "In the last three budgets, [the County] has not 'distinctly state[d] [each] public purpose' for which Council Reserves funds would be spent."

Opinion at 10-11 (emphasis in the original). Moreover, Sloan's counsel admitted that nothing prevented Sloan from challenging Council Reserves in the Prior Action in the same manner as he did in the Present Case. See October 27, 2007 Transcript at p. 7, ll. 6-14 (R. p. 714) ("THE COURT: Well, let's -- I don't think there's any dispute that Mr. Sloan, taking it step by step, could have made the constitutional argument against the delegation of spending authority in the '96 case that he now makes in this case. No dispute about that, right, Mr. Carpenter? MR. CARPENTER: If I had been smarter, I could have done it, Judge.").

After quoting the Restatement (Second) of Judgments, see Opinion at 11 (quoting §§ 24 and 25 of the Restatement), the Court compares the pleadings from the Prior Action and Present Case further:

Here, Sloan's 1996 claim that the practice of maintaining the Council Reserves account in the County's budget was illegal was grounded on an alleged violation of section 7-81 of the Greenville County Code. The assertion of this ground effectively challenged the Council Reserves account as an illegal delegation of legislative authority. See Greenville County Code § 7-81 (requiring the appropriation of public funds to be made only by Council as a body); Gregory v. Rollins, 230 S.C. 269, 274,

95 S.E.2d 487, 490 (1956) ("It is fundamental that the appropriation of public funds is a legislative function."). The circuit court, in the 1996 action, addressed section 7-81 and concluded that Sloan had not carried his burden of showing any illegal acts on the part of the County. In the present action, SCPIF bases its claim challenging the legality of the Council Reserves account on the ground that it is "unconstitutional."

Even assuming arguendo that the unconstitutionality theory was neither raised nor ruled on in the 1996 action, the theory could have been brought in the prior action challenging the legality of the Council Reserves account. Hence, both the claim and this theory of relief are barred in the present action. See Restatement (Second) of Judgments §§ 24, 25 (1982 & Supp. 2012) (applying claim preclusion "with respect to all or any part of the transaction, or series of connected transactions, out of which the [first] action arose" even when the plaintiff is prepared to present a theory in the second action not presented in the first action).

Opinion at 11-12 (quotation of footnote omitted).

The Court then discusses the foregoing facts and Restatement sections in light of Judy v. Judy, 393 S.C. 160, 712 S.E.2d 408 (S.C. 2011). Opinion at 12-13. In Judy, James had raised the issue of waste in the Probate Court, but then specifically asked the Probate Court not to consider waste in its Order. See id. at 165, 712 S.E.2d at 410. Therefore, the issue of waste was not actually decided in the Probate Court. The test for res judicata, however, is not whether or not an issue was actually decided, but whether or not the issue could have been decided. Clearly in Judy, the issue of waste could have been decided in the partition action inasmuch as James raised that issue himself. Likewise for this case, in the Prior Action Sloan clearly could have raised the issue of whether or not Council Reserves is an improper delegation of legislative authority. Indeed, the County has argued, see, e.g., County Opening Brief at 20-26, and this Court has found that Sloan did make this argument. Opinion at 10.

Finally, the Court examines the Restatement (Second) of Judgments as well as South Carolina case law to determine whether an exception to *res judicata* exists based upon the facts of this case. Opinion at 13-14. The Court also examines prior South Carolina cases where the application of *res judicata* was unwarranted. Opinion at 14-15. As the Court notes, there are no exceptions that address Sloan's claims. Opinion at 16. The fact that Sloan has cited to no authority in either his Brief or his Petition supports the Court's own research.

The Court did not confuse the issue. It very clearly based its ruling upon *res judicata* and the relevant principles of law concerning it, namely, the Restatement which the South Carolina Supreme Court has adopted and South Carolina precedent, including the recent Judy case. The Court knows the differences between *res judicata* and collateral estoppel, and it explained the differences in the Opinion. Just as there was no confusion by the Court, there could be no surprise to Sloan about the use of collateral estoppel as he claims in his baseless due process argument in Section II(F), p.18, of his Petition. *Res judicata*, not collateral estoppel, is the legal principle upon which the court bases its Opinion. The Court did not misapprehend the law.

II. Sloan's Petition Points to No Facts that the Court Overlooked, But It Does Make Statements of Fact that Have No Basis in or Misstate the Record.

Nowhere in his Petition does Sloan argue that the Court misapprehended or overlooked any facts in this case. Sloan does make several characterizations of the facts, however, that either have no support in the Record or that misstate portions of the Record.

On pages 2 and 3 of his Petition, Sloan describes in part the claims that he made in the Prior Action. Not surprisingly, Sloan focuses on the challenges that he made to individual expenditures from the Council Reserves. These quotations to the Record, however, leave out those portions of Sloan's Complaint in the Prior Action that dealt with Sloan's improper delegation claim, or as he pled it in the Prior Action, the County's alleged violation of County Code Section 7-81. See R. pp. 56-59. See also County's Opening Brief at pp. 5-8 and pp. 21-23 (discussing Sloan's allegations in the Prior Action). These claims were focused not so much on individual expenditures but upon the Council Reserves policy as a whole. Indeed, Sloan's prayer for relief in the prior case is illustrative of this point, seeking, among other things, a "declaratory judgment that Defendants establishing 'Council Reserves' and appropriating, spending, disbursing, and donating public funds as described above violates applicable statutes, constitutions, ordinances, and policies." R. p. 61. Furthermore, in paragraph 52 of Sloan's Summary Judgment Memorandum in the Prior Action, he claims that the "Defendant has continued to draw upon Council Reserves without voting on each expenditure or appropriation." R. p. 171. In neither the Summary Judgment Motion nor his Complaint did Sloan make any claims with regard to any particular expenditure as it related to the improper delegation issue. Instead, his focus with respect to the improper delegation challenge was the Council Reserves as a whole, both in the Prior Action and the Present Case.

Sloan's Petition also states that in the Prior Action the Trial Court ruled that the Council Reserves did not violate the First Amendment clause, but his Petition states nothing about the Trial Court's ruling on the improper delegation argument in the Prior

Action. See Petition at 1-2. The Trial Court in the Prior Action, however, ruled upon Sloan's improper delegation claim and ruled in favor of the County. See R. p. 10 (trial court Prior Action finding that the "County's actions have been consistent with the constitutional statutory power granted county governments"). See also County's Opening Brief at 23-26 (discussing the Cross-Motions for Summary Judgment in the Prior Action and the Trial Court's ruling on them).

Sloan also states in his Petition that the "parties could not agree on the wording of a proposed order." Petition at 6. Sloan points to no Record evidence on this point. Moreover, this statement has no bearing upon the Court's Opinion.

Sloan also claims, in arguing that *res judicata* does not apply to this case, that the Council Reserves policy has been "amended several times over [the] years." Sloan cites to nothing in the Record to support this statement, and there is none. As the Record shows, in 1996, prior to the Prior Action, County Council amended the Council Reserves to limit the use of Council Reserves to infrastructure projects such as flooding and draining, roads, lights, sewer, and public buildings and grounds. See R. p. 4 (Order from Prior Action describing amendment to Council Reserves policy). This is the policy that Sloan challenged not only in the Prior Action, but it is also the policy he challenged in the Present Case. While the name of the policy may have changed over the years, the policy remains the same.

III. Sloan Merely Re-Argues Points Made in his Brief.

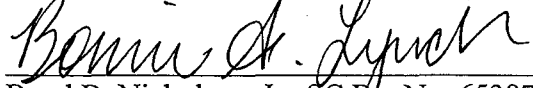
In Sections I and III of his Petition Sloan merely re-states what he argued in his Brief about, respectively, his improper delegation argument and his claim for attorneys'

fees. Given the Court's ruling that Sloan's claims should be dismissed pursuant to the doctrine of *res judicata*, the Court properly dealt with both of these issues. To the extent a response is required to those arguments, the County respectfully incorporates herein by reference the arguments that it made in its Opening and Reply Briefs on those issues: See County Opening Brief at 27-38 (improper delegation claim) and 39-45 (attorneys' fees), and County Reply Brief at 12-18 (improper delegation claim) and 18-20 (attorneys' fees).

CONCLUSION

For the foregoing reasons the County respectfully requests that the Court deny Sloan's Petition.

HAYNSWORTH SINKLER BOYD, P.A.



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November 5, 2012
Greenville, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge
John C. Few, Circuit Court Judge

Case No. 06-CP-23-4637

The South Carolina Public Interest Foundation, and Edward D. Sloan, Jr.,
individually and on behalf of all others similarly situated,.....Respondents,

v.

Greenville County, Herman G. Kirven, Jr., Judy Gilstrap, Eric Bedingfield, Jim
Burns, Scott Case, Joseph Dill, Cort Flint, Lottie Gibson, Mark Kingsbury,
Xanthene Norris, Robert Taylor and Tony Trout Appellants.

**RESPONDENTS' REPLY TO APPELLANT'S RETURN TO PETITION
FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC***

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STATEMENT OF THE CASE

Petitioners South Carolina Public Interest Foundation ("SCPIF" or "Foundation") and Edward D. Sloan, Jr. ("Sloan") (collectively, "Petitioners" or "Plaintiffs") filed an action ("Slush Fund III") against Greenville County and members of the County Council ("the County" or "Appellants"). Petitioners alleged County Council's annual appropriations of money to a Slush Fund to be distributed by individual Council members and the delegation of legislative power over its expenditure to an individual member was unconstitutional and illegal, as explained in a South Carolina Attorney General opinion dated November 19, 2003 (R. pp. 68-70).

The County moved to dismiss (R. pp. 86-87) and moved for Summary Judgment, based on *res judicata* (R. p. 390-391). The County also initially argued that collateral estoppel barred the Petitioners' claims, but later explicitly waived its collateral estoppel argument (R. pp. 716-719, 750-751). (Several years earlier, Mr. Sloan had filed suit contesting the legality of other appropriations and expenditures from other years.) The Circuit Court, Judge John C. Few presiding, denied the County's motions to dismiss and for summary judgment, relying upon the holding and rationale of *Commissioner of Internal Revenue v. Sunnen. Id.* at 333 U.S. 591, 597-600, 68 S.Ct. 715, 719-720 (1948).

As to the merits, the County conceded that the County Council must exercise the County's legislative power rather than delegating it to individual members (R. 832-833). The Circuit Court then ruled that the power that was delegated in this case was legislative. The Court ruled for the Plaintiffs. "The 'Council District Expense Fund' portion of the 2006-2007 appropriations ordinance is declared to be illegal." Order entered February 10, 2010, (R. p. 33). Thereafter, the Circuit Court, the Honorable D.

Garrison Hill presiding, awarded Plaintiffs attorneys' fees pursuant to S.C. Code Ann. § 15-77-300 ff. because Appellants were not substantially justified in litigating their defenses (R. pp. 36-43).

The County appealed both Judge Few's ruling on the merits and Judge Hill's award of attorneys' fees.

Petitioners contend that in its Appellants' Brief, the County confused the doctrines of *res judicata* and collateral estoppel by citing and relying on cases that addressed collateral estoppel, but identifying these as principles of *res judicata*. The Panel of the Court of Appeals ("Panel") followed the County's arguments, rather than the Circuit Court's reasoning and reversed the Circuit Court.

The Foundation and Mr. Sloan petitioned for rehearing. In response to the Petition for Rehearing, this Court invited a Return from the County. Appellants submitted Appellants' Return to Respondents' Petition for Rehearing and Suggestion for Rehearing En Banc ("Return").

Petitioners now submit this Reply to the Return.

DISCUSSION

In its Return, County asserts that the Petitioners failed to meet the standard for a Petition for Rehearing. A Petition for Rehearing “shall state with particularity the points supposed to have been overlooked or misapprehended by the court.” SCACR 221(a). Petitioners respectfully submit that the grounds they raised in their Petition qualify as “points . . . misapprehended by the court.”

First, the Panel misapprehended the County’s argument. The Circuit Court relied on *Commissioner of Internal Revenue v. Sunnen*, in ruling that *res judicata* did not bar SCPIF’s claim in Slush Fund III. *Id.* at 333 U.S. 591, 597-600, 68 S.Ct. 715, 719-720 (1948). The Panel agreed with the County’s assertion that *Sunnen* involved collateral estoppel *rather than res judicata* (Slip Opinion, page 7). The County did not make this argument, either at the Circuit Court or the Court of Appeals, and it is factually incorrect. The County’s brief simply proffered a collateral estoppel analysis but mistakenly identified it as “*res judicata*.”

Second, and more importantly, the Panel misapprehended *United States v. Sunnen*. *Id.* at 333 U.S. 591, 597-600, 68 S.Ct. 715, 719-720 (1948). *Sunnen* explicitly and extensively addressed both *res judicata* and collateral estoppel, and specifically distinguished the two legal rules.

Third, the Panel misapprehended South Carolina law. *Res judicata* does not bar the action when there is no similar “identity of subject matter,” when the “underlying facts” are different, or when the claims do not “arise out of the same transaction or occurrence.” *Judy v. Judy*, 393 S.C. 160, 712 S.E.2d 408 (2011). The “transaction or occurrence” addressed in Slush Fund I arose sometime in 1994 through 1997. Slush

Fund II addressed the legality of expenditures in 1998. The “transaction or occurrence” addressed in Slush Fund III arose sometime in 2005 or 2006, and continued in subsequent years.

Fourth, the Panel misapprehended the United States Supreme Court limitations on the holding of *Sunnen*. The Supreme Court did limit the holding of *Sunnen* as it pertains to collateral estoppel, but not as it pertains to *res judicata*. *Sunnen*’s holding as to *res judicata* stands.

Fifth, the Panel misapprehended the difference between collateral estoppel and *res judicata*, by following the County’s erroneous brief and applying a collateral estoppel analysis, but calling it *res judicata*.

Finally, the Circuit Court awarded attorneys’ fees pursuant to S.C. Code Ann. § 15-77-300. Because the Panel reversed the Circuit Court on the *res judicata* or collateral estoppel analysis, it also reversed the award of attorneys’ fees. If this Court adopts the analysis of the Petitioners on *res judicata*, it should also reinstate the Petitioners’ attorneys’ fees award.

The crux of the Petitioners’ argument in the Petition for Rehearing is the proper identification of the “res,” or the “thing” adjudicated in Slush Fund I and Slush Fund II. Judge Few properly ruled that the “res” or the “thing” adjudicated was the legality of specific appropriations to the Slush Fund and the specific expenditures of specific sums from the Slush Fund in the 1990’s. “I’m inclined to rule that *the thing is 1995 or 1996 and not the validity of the ordinance*, and therefore the *res judicata* would *not* preclude the litigation of this challenge” (R. pp. 752, 754) (emphasis added). The “res” at issue in Slush Fund III is the legality of the appropriations and expenditures in 2005 through

2009. Neither the Court nor the Plaintiffs could have addressed the 2005-2009 appropriations and expenditures in either Slush Fund I or Slush Fund II, both decided in the 1990s. Accordingly, *res judicata* did not bar Sloan's challenge to these new illegal appropriations and expenditures, and this theory does not bar Slush Fund III.

The County's Return does not address the heart of the Petition. The County provides *no authority* to contradict the main argument that the "res" adjudicated in Slush Fund I and Slush Fund II was the allocations and expenditures in the 1990s.

The County continues to confuse the doctrine of *res judicata*, which requires a comparison of the factual claims in the two actions, with the doctrine of collateral estoppel, which requires a comparison of the legal theories in the two actions. The County provides no authority—State, Federal, or scholarly—to contravene this fundamental proposition. In the main, the County recites the Panel's opinion, and concludes in a cursory manner that the Panel was correct.

The County does make several substantive assertions. First, in referring to *Commissioner of Internal Revenue v. Sunnen*, the County argues, "The U.S. Supreme Court did not make *res judicata* a part of its holding (Return, p. 5). *Id.* at 333 U.S. 591, 68 S.Ct. 715, 92 L.Ed. 898 (1948). The County's argument is simply wrong.

The *Sonnen* Court held:

The general rule of *res judicata* applies to repetitious suits involving the same cause of action. . . . The judgment puts an end to the cause of action Each year is the origin of a new liability and a separate cause of action. Thus if a claim of liability or non-liability relating to a particular year is litigated, a judgment on the merits is *res judicata* as to any subsequent proceeding involving the same claim and the same year.

Id., at 333 U.S. 591, 597-99, 68 S.Ct. 715, 719-20, 77 L.Ed. 1405. The Supreme Court rejected the application of *res judicata* as to claims made for different tax years. It ruled,

“Each year is the origin of a new liability and a separate cause of action.” *Id.* Despite this clear statement from the United States Supreme Court, the Panel followed the County’s continued misreading of the law.

The County’s second argument is that Sloan could have brought the theory of improper delegation of legislative authority in its earlier action, Slush Fund I, and “This question – whether a claim could have been brought in a prior case – is one of the three elements required in a *res judicata* analysis.” Return, p. 6. Again, the County is simply mistaken. Here, the County is making an argument based on preclusion of a legal theory, a collateral estoppel argument. However, as demonstrated repeatedly, the County had explicitly waived its collateral estoppel argument (R. pp. 716-719, 750-751). “An issue conceded in a lower court may not be argued on appeal.” *TNS Mills, Inc. v. South Carolina Dept. of Revenue*, 331 S.C. 611, 617, 503 S.E.2d 471, 474 (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.” *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Appellants waived collateral estoppel in open court (and never discussed it overtly again there or on appeal), and the Circuit Court recognized the waiver and refrained from ruling on collateral estoppel. The Panel also refrained from overtly discussing collateral estoppel in its opinion as Appellants did not include it in their issues on appeal and never referenced it in briefing the Court.

The United States Supreme Court explained collateral estoppel in *Sunnen*.

Since the cause of action involved in the second proceeding is not swallowed by the judgment in the prior suit, the parties are free to litigate [legal] points which were not at issue in the first proceeding, even though such points might have been tendered and decided at that time.

Id. It is collateral estoppel, and not *res judicata*, that prohibits the repetitive assertion of a *legal* theory decided adversely to the one asserting it.

In response to the Petitioners arguments concerning the “misapprehended” points in the Petition for Rehearing, the County offers little substantive analysis. The County cited no authority that supports the argument that the “res” was anything other than a factual or transactional inquiry. The County merely recited certain passages from the Panel’s opinion and agreed. Unfortunately, the Panel opinion simply follows the confused analysis presented in Appellant’s Brief.

In its Opinion, this Court aptly cited the Restatement (Second) of Judgments §§ 24, 25 (1982 & Supp. 2012) which applies claim preclusion or *res judicata* “with respect to all or any part of the *transaction or series of connected transactions*, out of which the [first] action arose.” Opinion at 11-12 (emphasis added). The inquiry for *res judicata* is the identity of the facts litigated in the earlier transaction, “even when the plaintiff is prepared to present a theory in the second action not presented in the first.” *Id.* This is a *res judicata* (factual) analysis.

Petitioners have demonstrated that Slush Fund III did *not* address the “transactions or series of connected transactions out of which [Slush Fund I and Slush Fund II] arose.” Restatement (Second) of Judgments §§ 24, 25 (1982 & Supp. 2012). Slush Fund III addressed transactions that arose several years later. Thus, although the Panel quoted the relevant sections of the Restatement, a proper application of the Restatement to the *facts* claimed in the actions (rather than the legal theory) would result in a judgment affirming the judgment of the Circuit Court.

Instead, the Panel applied Appellant's confused version of a collateral estoppel analysis and labeled it *res judicata*. The United States Supreme Court defined it well: "Collateral estoppel operates, in other words, to relieve the government and the taxpayer of 'redundant litigation of the *identical question* of the statute's application of the taxpayer's status," in other words, an inquiry into the application of the legal theory. *Sunnen*, 333 U.S. 591, 599, 68 S.Ct. 715, 720, 77 L.Ed. 1405.

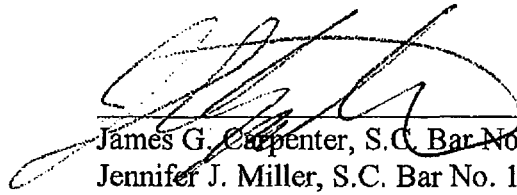
CONCLUSION

Had the County not explicitly waived collateral estoppel in the Circuit Court, this case would be different, and the issues would be different. *TNS Mills, Inc. v. South Carolina Dept. of Revenue*, 331 S.C. 611, 617, 503 S.E.2d 471, 474 (1998). However, the issue before the Court is the application of *res judicata*, and the result should be clear: Slush Fund III addressed a different set of facts, or series of transactions than Slush Fund I or Slush Fund II, and *res judicata* does not bar the claims in Slush Fund III.

Petitioners respectfully pray the Court for a Rehearing or a Rehearing *en Banc*, and pray the Court to affirm the judgment of the Circuit Court.

Respectfully submitted, this 20th day of November, 2012,

THE CARPENTER LAW FIRM, P.C.



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Attorneys for Petitioners

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge
John C. Few, Circuit Court Judge

Case No. 06-CP-23-4637

The South Carolina Public Interest Foundation, and Edward D. Sloan, Jr.,
individually and on behalf of all others similarly situated,.....Respondents,

v.

Greenville County, Herman G. Kirven, Jr., Judy Gilstrap, Eric Bedingfield, Jim
Burns, Scott Case, Joseph Dill, Cort Flint, Lottie Gibson, Mark Kingsbury,
Xanthene Norris, Robert Taylor and Tony Trout Appellants.

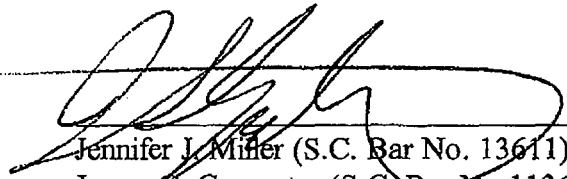
**PETITION TO FILE RESPONDENTS' REPLY TO APPELLANT'S
RETURN TO PETITION FOR REHEARING AND SUGGESTION
FOR REHEARING *EN BANC* OUT OF TIME**

Respondents hereby petition this Court pursuant to SCACR 234(b) to file
Respondent's Reply to Appellant's Return to Petition for Rehearing and Suggestion for Rehearing
En Banc seven days out of time. Appellant's counsel, Boyd Nicholson, has given his consent to
this Petition on behalf of Appellants. This petition is based upon appellant's immediate good faith
effort at first notice to remedy this tardiness in serving the Reply.

Respondents certainly regret this oversight and the inconvenience it has caused the Court
and the Clerk and requests the Court's forbearance to allow Appellant to file this Reply out of
time.

Should the Court grant Appellant's Petition, counsel certifies that he will promptly "provide material that complies with the Rules and facilitates appellate review." *Henning v. Kaye*, 307 S.C. 436, 415 S.E. 2d 794 (1992). Accordingly, Appellant asks the Court to reinstate the appeal in this case.

November 20, 2012

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

Jennifer J. Miner (S.C. Bar No. 13611)
James G. Carpenter (S.C. Bar No. 1136)
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Attorney for Appellants

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge
John C. Few, Circuit Court Judge

Case No. 06-CP-23-4637

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Xanthene Norris, Robert Taylor and Tony Trout Appellants.

PROOF OF SERVICE

I certify that I have served Respondent's Reply to Appellant's Return to Petition for Rehearing
and Suggestion for Rehearing *En Banc* Out of Time upon the Appellant by first class mail,
postage prepaid addressed

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The South Carolina Court of Appeals

The South Carolina Public Interest Foundation and
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others similarly situated, Respondents,

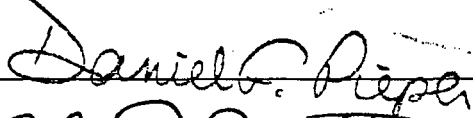
v.

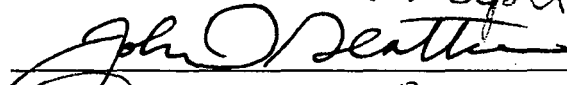
Greenville County, Herman G. Kirven, Jr., Judy Gilstrap,
Eric Bedingfield, Jim Burns, Scott Case, Joseph Dill,
Cort Flint, Lottie Gibson, Mark Kingsbury, Xanthene
Norris, Robert Taylor, and Toney Trout, Appellants.

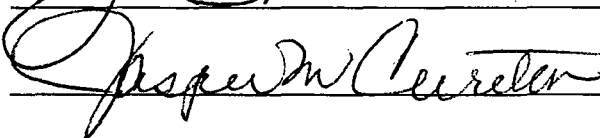
Appellate Case No. 2010-154507

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied. However, Opinion Number 5016, filed August 1, 2012, is withdrawn and the attached opinion is substituted.



J.


J.


A. J.

Columbia, South Carolina

cc: Jennifer J. Miller
Bonnie Allen Lynch
James G. Carpenter
Boyd Benjamin Nicholson, Jr.

FILED

January 23, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The South Carolina Public Interest Foundation and
Edward D. Sloan, Jr., individually, and on behalf of all
others similarly situated, Respondents,

v.

Greenville County, Herman G. Kirven, Jr., Judy Gilstrap,
Eric Bedingfield, Jim Burns, Scott Case, Joseph Dill,
Cort Flint, Lottie Gibson, Mark Kingsbury, Xanthene
Norris, Robert Taylor, and Toney Trout, Appellants.

Appellate Case No. 2010-154507

Appeal From Greenville County
John C. Few, Circuit Court Judge
D. Garrison Hill, Circuit Court Judge

Opinion No. 5016
Heard June 7, 2012 – Filed August 1, 2012
Withdrawn, Substituted, and Refiled January 23, 2013

REVERSED

Boyd B. Nicholson, Jr. and Bonnie A. Lynch, both of
Haynsworth Sinkler Boyd, PA, of Greenville, for
Appellants.

James G. Carpenter and Jennifer J. Miller, both of
Carpenter Law Firm, PC, of Greenville, for Respondents.

GEATHERS, J.: Respondents, South Carolina Public Interest Foundation (SCPIF) and Edward D. Sloan, Jr., brought this declaratory judgment action against Appellants, Greenville County and the individual members of Greenville County Council (Council) (collectively, the County), challenging the County's establishment of the "County Council Reserves" account as an unlawful delegation of legislative authority. The County seeks review of the trial court's order granting summary judgment to Respondents, arguing that the account in question is lawful and Respondents' current action is barred by res judicata. The County also seeks review of a second order granting Respondents' request for attorney's fees and costs. We reverse.

FACTS/PROCEDURAL HISTORY

For its 1994-95 fiscal year, the County established an account in its annual operating budget entitled "County Council Reserves." Funds in this account were set aside to enable Council to address "special community needs not normally falling with [sic] the operational purview of County government" and to "provide for nonrecurring community requests." In 1996, Council adopted a resolution limiting the use of the Council Reserves account to "infrastructure purposes such as flooding and drainage, roads, lights, sewer, and public buildings and grounds."

In 1996, Edward D. Sloan, Jr. (Sloan), filed an action against the County challenging the legality of the Council Reserves account, beginning with fiscal year 1994-95. Sloan's Third Amended Complaint listed donations from the County to several private organizations and political subdivisions spanning "from 1994 through September, 1997." The complaint, which set forth eleven causes of action, took issue with the use of Council Reserves for non-county matters. The complaint also cited perceived procedural irregularities in the continued use of Council Reserves without Council voting on each expenditure or appropriation. In the complaint's "Sixth Cause of Action," Sloan alleged that the creation and use of the Council Reserves account violated section 7-81 of the Greenville County Code.

In the complaint, Sloan sought a declaration that establishing the Council Reserves account and disbursing public funds as described in the complaint violated "the applicable statutes, Constitutions, ordinances, and policies." Sloan also sought preliminary and permanent injunctions against the County's "appropriation, expenditure, disbursement, and donation of public funds from the 1996-97 'Council Reserves' in violation of the S.C. Constitution and Code and the Greenville County Codes [sic] regarding procedures for appropriation and expenditures."

Sloan subsequently filed a motion for summary judgment. In his supporting memorandum, Sloan explained his allegation that the Council Reserves account violated section 7-81 of the County of Greenville, South Carolina Code of Ordinances (Greenville County Code) as follows:

[Section 7-81(b) requires that] all "requests for county funds will be submitted to council for review during the regular county budget process" Rather than the *entire council* reviewing "requests for county funds" that are "submitted for council review during the regular county budget process," *individual council members* receive requests throughout the year and respond to them by submitting *individual requisitions* to the clerk of county council

(emphasis added). The summary judgment motion and supporting memorandum requested, among other relief, an order enjoining Council's appropriations of public funds to entities when: (1) the appropriations were not made by County Council as a whole, but rather by individuals in violation of section 7-81(a) of the Greenville County Code, and (2) the requests were not submitted to Council during the regular county budget process, in violation of section 7-81(b) of the Greenville County Code. On February 10, 1998, the circuit court conducted a bench trial on stipulated facts. The circuit court subsequently issued an order ruling that the County was entitled to judgment in its favor, with one exception not relevant to this case.¹ The circuit court concluded that Council had complied with section 7-81. The circuit court stated that there was nothing in the record to support a finding that the County's actions rose "to the level of illegality in violation of the County Code." Sloan did not appeal this order.

Subsequently, on August 2, 2005, the County passed an ordinance adopting its budget for the 2006-07 fiscal year. Included in the operating expenses for the County Council Division of the Legislative and Administrative Services Department were line items for the Council Reserves, which included a separate line item for each Council member. Each individual Council member's routine expenses were funded from these line items. The line items were also available to fund costs "associated with special, non-recurring community requests for

¹ The circuit court addressed in a separate order a proposed disbursement to the Crestwood Forest Village Committee. The court found that this proposed disbursement was in violation of Council's guidelines for use of Council Reserves.

infrastructure purposes" and for "contributions to local governments in Greenville County for community projects." More specifically, each Council member's expenses and costs, designated as "Council District Expense," were described by the County as follows:

Funds for a Council Member to address:

- Cost of general business supplies such as pens, paper, stationary, . . . ;
- Cost of special documents, incentives and awards given either to the public or county employees . . . ;
- Cost of periodicals, professional journals, and reference books;
- Cost of per diem and mileage involved in the conduct of county business;
- Costs associated with community functions, conferences and training seminars . . . ;
- Costs associated with special, non recurring [sic] community requests for infrastructure purposes such as:
 - Flooding
 - Roads
 - Lights
 - Sewer and drainage
 - Public buildings and grounds
 - Infrastructure related studies
- Contributions to local governments in Greenville County for community projects;

In 2006, Sloan, along with SCPIF, the foundation he chaired, filed the present action, challenging the Council Reserves account, a/k/a the "Council District Expense" account, within the County's 2006-07 budget.² In their complaint, Respondents specifically challenged "[c]osts associated with special, nonrecurring community requests for infrastructure purposes[.]" The complaint's sole cause of

² The complaint indicates that this account has been "variously known as the Council District Expense Fund, Council Reserves, Discretionary Funds, or the Slush Fund." Likewise, in its appellate brief, the County indicates that several years after creating the Council Reserves account, it began using the name "Council District Expense" for the account. For the remainder of this opinion, we refer to the account as "Council Reserves."

action states, "Council's delegation of legislative power to an individual member . . . is unconstitutional and illegal, as explained in a South Carolina Attorney General opinion dated November 13, 2003[.]"³

In their complaint, Respondents also sought injunctive relief as well as a declaration that Council's "delegation of [its] discretionary spending authority" was "illegal, invalid, and unconstitutional." The County submitted a motion to dismiss, and the parties submitted cross-motions for summary judgment. In its motion to dismiss, the County asserted that the present action was barred by res judicata and collateral estoppel. However, at the motions hearing, the County expressly waived its collateral estoppel defense.

Relying on *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591 (1948), the circuit court concluded that the action was not barred by res judicata by reasoning that the County's different fiscal years were comparable to the different tax years at issue in *Sunnen*. The circuit court also ruled that the creation of the Council Reserves account constituted an illegal delegation of legislative authority by Council to its individual members. However, the court declined to base its ruling on constitutional grounds, stating: "Plaintiffs have alleged a Constitutional basis for the legal proposition that County Council may not delegate legislative authority. However, Defendants' concession that County Council may not delegate legislative authority makes it unnecessary to decide whether this prohibition is based on the Constitution or not."

In a separate hearing, the circuit court received evidence on Respondents' attorney's fees, pursuant to section 15-77-300 of the South Carolina Code (Supp. 2011).⁴ The court subsequently issued an order granting Respondents' request for \$60,084.15 in fees and costs incurred through January 31, 2010. The court also allowed Respondents to "file an affidavit addressing fees incurred after January 31, 2010." This appeal followed.⁵

ISSUES ON APPEAL

³ Attorney General opinions are persuasive but not binding authority. *Charleston Cnty. Sch. Dist. v. Harrell*, 393 S.C. 552, 560-61, 713 S.E.2d 604, 609 (2011).

⁴ In a case brought by a party contesting "state action," section 15-77-300 authorizes an award of attorney's fees to the prevailing party, other than the State or a political subdivision of the State, under certain circumstances.

⁵ The County timely filed a Notice of Appeal following each of the two orders issued by the circuit court; the appeals were consolidated.

1. Did the circuit court err in concluding that the present action was not barred by res judicata?
2. Did the circuit court err in concluding that the creation of the Council Reserves account unlawfully delegated legislative authority to Council members in their individual capacities?
3. Did the circuit court err in awarding attorney's fees and costs to Respondents?

STANDARD OF REVIEW

Summary Judgment

This court reviews the grant of a summary judgment motion under the same standard applied by the trial court pursuant to Rule 56(c), SCRCF. *Jackson v. Bermuda Sands, Inc.*, 383 S.C. 11, 14 n.2, 677 S.E.2d 612, 614 n.2 (Ct. App. 2009). Rule 56(c), SCRCF, provides that summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." "The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder." *Matsell v. Crowfield Plantation Cmty. Servs. Ass'n, Inc.*, 393 S.C. 65, 70, 710 S.E.2d 90, 93 (Ct. App. 2011) (citing *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001)).

In the present case, the circuit court noted in its order: "The parties agree that the case presents questions of law to be decided on undisputed facts." Neither party challenges this statement on appeal. Therefore, this court need not determine whether there are genuine issues of fact. The court need only concern itself with the resolution of questions of law.

Attorney's Fees

In a case brought by a party who is contesting state action, a court may award attorney's fees to the prevailing party, unless the prevailing party is the State or any political subdivision of the State, if (1) the court finds that the agency acted without substantial justification in "pressing its claim against the party[;]" and (2) the court finds that there are no special circumstances that would make the award of attorney's fees unjust. S.C. Code Ann. § 15-77-300 (Supp. 2011). An appellate

court may not disturb such an award unless the appellant shows that the trial court abused its discretion in considering the applicable factors. *Heath v. Cnty. of Aiken*, 302 S.C. 178, 182, 394 S.E.2d 709, 711 (1990).

LAW/ANALYSIS

I. Res Judicata

The County maintains the circuit court erred in concluding that the present action was not barred by res judicata. We agree.

A. South Carolina Law

"Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties." *Judy v. Judy*, 393 S.C. 160, 172, 712 S.E.2d 408, 414 (2011) (citation omitted). "Under the doctrine of res judicata, a litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit." *Id.* (citation and quotation marks omitted).

"Res judicata bars relitigation of the same cause of action while collateral estoppel bars relitigation of the same facts or issues necessarily determined in the former proceeding." *Pye v. Aycock*, 325 S.C. 426, 436, 480 S.E.2d 455, 460 (Ct. App. 1997). In *Beall v. Doe*, this court distinguished the two concepts as follows:

The doctrines of res judicata and collateral estoppel are, of course, two different concepts. A final judgment on the merits in a prior action will conclude the parties and their privies under the doctrine of res judicata in a second action based on the same claim as to issues actually litigated and as to issues which might have been litigated in the first action. Under the doctrine of collateral estoppel, on the other hand, the second action is based upon a different claim and the judgment in the first action precludes relitigation of only those issues actually and necessarily litigated and determined in the first suit.

281 S.C. 363, 369 n.1, 315 S.E.2d 186, 190 n.1 (Ct. App. 1984) (citations and quotation marks omitted).

"Res judicata's fundamental purpose is to ensure that no one should be twice sued for the same cause of action." *Yelsen Land Co. v. State*, 397 S.C. 15, 22, 723 S.E.2d 592, 596 (2012) (citation and quotation marks omitted). "The doctrine [of res judicata] flows from the principle that *public interest* requires an end to litigation and no one should be sued twice for the same cause of action." *Duckett v. Goforth*, 374 S.C. 446, 464, 649 S.E.2d 72, 81 (Ct. App. 2007) (emphasis added) (citation omitted); see also *S.C. Dep't of Soc. Servs. v. Basnight*, 346 S.C. 241, 248, 551 S.E.2d 274, 278 (Ct. App. 2001) ("The doctrine of res adjudicata (or res judicata) in the strict sense of that time-honored Latin phrase had its origin in the principle that it is in the public interest that there should be an end of litigation and that no one should be twice sued for the same cause of action." (quoting *First Nat'l Bank of Greenville v. U.S. Fid. & Guar. Co.*, 207 S.C. 15, 24, 35 S.E.2d 47, 56 (1945))).

"The doctrine of collateral estoppel, or issue preclusion, on the other hand, rests generally on equitable principles." *Town of Sullivan's Island v. Felger*, 318 S.C. 340, 344, 457 S.E.2d 626, 628 (Ct. App. 1995) (citing *Watson v. Goldsmith*, 205 S.C. 215, 31 S.E.2d 317 (1944)). In *Watson*, our supreme court contrasted the origin of the doctrine of collateral estoppel with the origin of res judicata:

Estoppel rests generally on equitable principles, which res judicata does not, but upon the two maxims which were its foundation in the Roman law, *nemo debet bis vexari pro eadem causa* (no one ought to be twice sued for the same cause of action) and *interest reipublicae ut sit finis litium* (it is the interest of the state that there should be an end of litigation[.][.]). . . . Res judicata is rather a principle of public policy than the result of equitable considerations, which [the] latter estoppel is.

205 S.C. at 221-22, 31 S.E.2d at 319-20 (citations omitted) (emphasis added); see also *First Nat'l Bank of Greenville*, 207 S.C. at 24, 35 S.E.2d at 56-57 (citing *Watson*) (contrasting the origins of res judicata and collateral estoppel).

In the present case, the parties do not dispute that the 1996 action involved the same parties or their privies—Sloan brought the 1996 action; and, along with

SCPIF, the foundation he chaired, he brought the present action.⁶ See *Yelsen*, 397 S.C. at 22, 723 S.E.2d at 596 (holding that the concept of privity rests on each party's relationship to the subject matter of the litigation); *Richburg v. Baughman*, 290 S.C. 431, 434, 351 S.E.2d 164, 166 (1986) ("The term 'privity', when applied to a judgment or decree, means one so identified in interest with another that he represents the same legal right. One in privity is one whose legal interests were litigated in the former proceeding.").

However, Respondents maintain that in the 1996 action, the circuit court neither ruled on nor could have ruled on the County's 2006 and 2007 appropriations and expenditures. Respondents argue that res judicata does not bar their challenge to these specific appropriations because "the allegations arise from different fiscal years." We find this argument unavailing. In the present action, Respondents' complaint challenges the legality of the *practice* underlying these expenditures, i.e., use of the Council Reserves account as a delegation of legislative authority to individual Council members, a practice continuing from year to year since the 1994-95 fiscal year. Likewise, the Third Amended Complaint in the 1996 action challenged this same practice with regard to multiple fiscal years.

In determining whether allegations arising from different fiscal years must be brought in the same action, the *Restatement (Second) of Judgments* is instructive:

(1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar . . . the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to *all or any part of the transaction; or series of connected transactions; out of which the action arose.*

(2) *What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation; whether they form a convenient trial unit, and whether their treatment as a*

⁶ In his affidavit dated February 19th, 2007, Sloan stated that he was the Chairman of the Board of Directors and President of SCPIF.

unit conforms to the parties' expectations or business understanding or usage.

Restatement (Second) of Judgments § 24 (1982 & Supp. 2012) (emphasis added). The plaintiff's claim is extinguished even when the plaintiff is "prepared in the second action (1) [t]o present evidence or *grounds or theories of the case* not presented in the first action, or (2) [t]o seek remedies or forms of relief not demanded in the first action." *Id.* at § 25 (emphasis added).

Here, the "Sixth Cause of Action" in Sloan's 1996 complaint effectively challenged the creation and use of the Council Reserves account as an illegal delegation of legislative authority in violation of section 7-81 of the Greenville County Code. *See* Greenville County Code § 7-81 (requiring the appropriation of public funds to be made only by Council as a body); *Gregory v. Rollins*, 230 S.C. 269, 274, 95 S.E.2d 487, 490 (1956) ("It is fundamental that the appropriation of public funds is a legislative function."). The circuit court, in the 1996 action, concluded that Council had complied with section 7-81. The circuit court stated that there was nothing in the record to support a finding that the County's actions rose "to the level of illegality in violation of the County Code." Sloan did not appeal the circuit court's ruling. In the present action, Respondents base their claim challenging the creation and use of the Council Reserves account on the ground that the Council's delegation of legislative power to its individual members is "unconstitutional."⁷

Even if a constitutional challenge to the Council's delegation of authority to individual members through the Council Reserves account was neither raised nor ruled on in the 1996 action, the theory could have been brought in the prior action. Hence, both the cause of action and this theory of relief are barred in the present action: *See Restatement (Second) of Judgments* §§ 24, 25 (1982 & Supp. 2012) (applying claim preclusion "with respect to all or any part of the transaction, or series of connected transactions, out of which the [first] action arose" even when the plaintiff is prepared to present a theory in the second action not presented in the first action).

⁷ Neither Respondents' pleadings nor their appellate brief cite any specific constitutional provision supporting the general assertion that the use of the Council Reserves account is unconstitutional. Further, at oral argument, counsel did not articulate any specific constitutional provision on which Respondents may rely for their assertion.

In *Judy*, our supreme court addressed the question of whether a claim should have been raised in a prior action and stated:

Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties. Under the doctrine of res judicata, "[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit."

393 S.C. at 172, 712 S.E.2d at 414 (quoting *Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999)) (emphasis added). The court also explained the term "cause of action" for res judicata purposes: "[F]or purposes of res judicata, "cause of action" is not the form of action in which a claim is asserted but, rather the cause for action, meaning the underlying facts combined with the law giving the party a right to a remedy of one form or another based thereon." *Id.* (emphasis added) (citations and quotation marks omitted).

Here, Respondents' claim, which challenges the County's use of the Council Reserves account to delegate spending authority to its individual members, constitutes the "same transaction or occurrence" that was the subject of the prior case. Although the budget years and dollar amounts differ, the "cause for action," as defined in *Judy*, is the same in both the 1996 action and the present action.

Our supreme court's recent discussion of res judicata in *Judy* acknowledged that there are certain circumstances in which the policy underlying the doctrine of res judicata is outweighed by a more compelling policy; there, the court looked to the *Restatement (Second) of Judgments* § 26 for guidance on those circumstances in which courts should decline to apply res judicata. 393 S.C. at 168 n.5, 712 S.E.2d at 412 n.5 (quoting *Restatement (Second) of Judgments* § 26(1)(a)-(c) (1982 & Supp. 2011)); see also *Restatement (Second) of Judgments* § 26(1)(a)-(f) cmts. a-j (1982 & Supp. 2012) (discussing exceptions to the general rule against claim splitting). Nonetheless, in *Judy*, the court did not find any of these exceptions applicable to the plaintiff's filing of a claim for waste in circuit court after having raised a waste claim in his probate court pleadings. 393 S.C. at 168-74, 712 S.E.2d at 412-15. Likewise, we find none of these exceptions applicable to Respondents' present claim. The parties have not cited, nor have we found, any binding authority applying any of these exceptions to a case with facts similar to the present case.

While the potential adverse impact on the public interest has been recognized as a reason to depart from the doctrine of collateral estoppel,⁸ the parties have not cited, nor have we found, any binding authority recognizing a comparable exception for res judicata.⁹ Rather, the doctrine of res judicata itself is a doctrine founded upon the objective of preserving and protecting the public interest. *See, e.g., Duckett*, 374 S.C. at 464, 649 S.E.2d at 81 ("The doctrine [of res judicata] flows from the principle that public interest requires an end to litigation and no one should be sued twice for the same cause of action.").

Previous opinions of this court have addressed circumstances in which it was inappropriate to apply the doctrine of res judicata. In *Mr. T v. Ms. T*, the plaintiff filed a paternity action naming his ex-wife as a defendant and alleging that she committed fraud in leading him to believe he was the biological father of her children. 378 S.C. 127, 130-32, 662 S.E.2d 413, 415-16 (Ct. App. 2008). The plaintiff also sought relief from the parties' prior decree of divorce, which had incorporated the parties' settlement agreement and had found that two children were born of the marriage. *Id.* at 130-32, 662 S.E.2d at 414-16. The family court had found that the plaintiff's paternity action was barred by "res judicata/collateral estoppel." *Id.* at 131, 662 S.E.2d at 415. On appeal, the plaintiff argued that the family court erred in this regard. *Id.* at 132, 662 S.E.2d at 415-16. This court reversed the family court's dismissal of the case and remanded the case for further development of the record. *Id.* at 139, 662 S.E.2d at 419.

⁸ *See Restatement (Second) of Judgments* § 28(5) (1982 & Supp. 2012) (referencing the "public interest" exception to collateral estoppel).

⁹ We see no injustice in this dichotomy because the reach of issue preclusion is broader than that of claim preclusion. Unlike claim preclusion, issue preclusion can affect the outcome of a different, unrelated claim and can also affect a party in a second action with an unrelated third party. *See Restatement (Second) of Judgments* § 27 (1982 & Supp. 2012) ("When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim."); *Restatement (Second) of Judgments* § 29 (1982 & Supp. 2012) ("A party precluded from relitigating an issue with an opposing party, in accordance with §§ 27 and 28, is also precluded from doing so with another person unless the fact that he lacked full and fair opportunity to litigate the issue in the first action or other circumstances justify affording him an opportunity to relitigate the issue.").

Also, in *Johns v. Johns*, this court held a consent order's finding that the parties had a common-law marriage should not be given res judicata effect because the marriage was bigamous and South Carolina's policy of not recognizing bigamous marriages had been expressed in a statute declaring them to be void. 309 S.C. 199, 201-03, 420 S.E.2d 856, 858-59 (Ct. App. 1992). Likewise, in *Jennings v. Dargan*, this court held that an order approving a settlement regarding paternity and child support was void and thus did not have a preclusive effect against the child in her action for support. 308 S.C. 317, 320-21, 417 S.E.2d 646, 647-48 (Ct. App. 1992). The court so ruled because the record did not indicate the family court had complied with statutes requiring a finding that the settlement was in the best interest of the minor and requiring review and approval of the settlement. *Id.* The court acknowledged the policy respecting finality of judgments but stated that the policy expressed in the cited statutes (protecting minors) was the overriding concern. *Id.*

We find these opinions to be consistent with the requirement that a judgment must be "valid" in order to preclude a second action concerning the same transaction, and this validity requirement is already built into the doctrine of res judicata. See *Basnight*, 346 S.C. at 248-49, 551 S.E.2d at 278 (citing *Griggs v. Griggs*, 214 S.C. 177, 184, 51 S.E.2d 622, 626 (1949)) ("Under the doctrine of res judicata, a final judgment on the merits rendered by a court of competent jurisdiction, *without fraud or collusion*, is conclusive as to the rights of the parties and their privies." (emphasis added)); *Restatement (Second) of Judgments* § 24(1) (1982 & Supp. 2012) (conditioning the extinguishment of the second claim on the validity and finality of the prior judgment); *Restatement (Second) of Judgments* § 26(1) cmt. j (1982 & Supp. 2012) (discussing the defendant's fraud, misrepresentation, or mistake as a factor contributing to the prior judgment). In each of these cases, there existed a specific, compelling concern as to the validity of the prior judgment. No such concern has been presented in the present case.

B. The *Sunnen* Decision

In concluding that the present action was not barred by res judicata, the circuit court relied primarily on the reasoning of *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591 (1948). The circuit court stated:

Because the 'Council District Expense Fund' appears in each annual budget for Greenville County, the enactment of each budget creates separate legal claims. As the United States Supreme Court has explained in the context

of federal income taxes levied on an annual basis, '[e]ach year is the origin of a new liability and a separate cause of action.' *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591, 598 (1948). The same reasoning applies here. The fact that Mr. Sloan might have, or even did, challenge the legality of an identical line item in a previous budget does not bar Plaintiffs from the causes of action brought in this case.

(emphasis added).

The circuit court's reliance on the tax-year analysis in *Sunnen* was misplaced; *Sunnen*'s explanation of res judicata in the context of differing tax years is not binding outside of the tax context. See *United States v. Stauffer Chemical Co.*, 464 U.S. 165, 172 n.5 (1984) (rejecting the general applicability of *Sunnen*'s collateral estoppel analysis outside of the tax context); see also *Peugeot Motors of Am., Inc. v. E. Auto Distribs., Inc.*, 892 F.2d 355, 359 (4th Cir. 1989) ("We do not believe that the mere fact that Peugeot's questioned policies continued after the 1981 litigation allows Eastern to make the same legal claim about the same policies that were litigated and on account of which relief was denied in prior litigation."). Compare *Grp. Health Inc. v. United States*, 662 F. Supp. 753, 764 (S.D.N.Y. 1987) (holding the plaintiff's claim that a Medicare regulation was unconstitutional did not depend "on the specific cost year involved") and *Carroll Twp. Auth. v. Mun. Auth. of City of Monongahela*, 518 A.2d 337, 341 (Pa. Commw. Ct. 1986) (holding that a township authority's 1985 complaint against a city's municipal authority challenging the inclusion of legal fees as an operating expense in utility rates presented a claim that was identical to the claim in the township authority's 1983 complaint because it did not appear that the 1985 complaint challenged "the actual amount paid or to be paid by [the city] for legal services as being excessive" and the ultimate issue in both actions appeared to be "one and the same, to wit, whether any legal fees incurred by [the city] in defending its rate charges may be passed on to [the township authority] through their inclusion in operating expenses") with *M.C.G. v. Hillsborough Cnty. Sch. Bd.*, 927 So. 2d 224, 227 (Fla. Dist. Ct. App. 2006) ("A cause of action to establish *entitlement to services* under the IDEA by its nature pertains to a particular period of time and is based on the factual circumstances at that time." (emphasis added)).

Like the claims challenging a regulation in *Group Health*, the claim in the present case does not depend on any specific budget year; the complaint states "*for several years* Defendants have authorized and operated a fund variously known as the

Council District Expense Fund, Council Reserves, Discretionary Funds, or the Slush Fund." (emphasis added). The complaint further states "County Council's delegation of legislative power to an individual member, as described herein, is unconstitutional and illegal, as explained in a South Carolina Attorney General opinion dated November 13, 2003" The complaint's prayer seeks injunctive relief as well as an order "Declaring that the delegation of the discretionary spending authority is illegal, invalid, and unconstitutional[.]"

Further, as in *Carroll Township Authority*, the complaint in the present case does not challenge specific dollar amounts as excessive. Hence, no specific budget or monetary amount constituted the "res" in the 1996 action or the present action. Rather, the complaint challenges the practice underlying the Council Reserves account, i.e., the delegation of authority to individual council members. Moreover, unlike the relief sought in *M.C.G.*, i.e., the provision of educational services by a local school board, the relief sought in the present case does not depend on any one time period; rather, the complaint challenges the creation and continued use of the Council Reserves account as an illegal delegation of legislative authority.

In sum, *Sunnen* does not alter our application of South Carolina preclusion principles to the present action. Therefore, the circuit court erred in holding that the present action was not barred by res judicata.

II. Attorney's Fees

The County asserts that the trial court abused its discretion in awarding attorney's fees to Respondents. We agree. In a case brought by a party who is contesting state action, a court may award attorney's fees to the prevailing party under certain circumstances. S.C. Code Ann. § 15-77-300 (Supp. 2011). Because the present action is barred by res judicata, Respondents do not qualify as prevailing parties. Therefore, we reverse the award of attorney's fees and costs.

CONCLUSION

Accordingly, we reverse the orders granting summary judgment and attorney's fees and costs to Respondents.

REVERSED.¹⁰

PIEPER, J., and CURETON, A.J., concur.

¹⁰ Because this action is barred by res judicata, we decline to address the merits of the present action. *See, e.g., Duckett*, 374 S.C. at 464, 649 S.E.2d at 81 (holding that res judicata flows from the principle that public interest requires an end to litigation); *see also Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address an issue when a decision on a prior issue is dispositive).