

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

Case No. 2012-CP-40-07790

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AUG 22 2014

SC Court of Appeals

South Carolina Public Interest Foundation and William B. DePass, Jr., Individually, and on behalf of all others similarly situated, Appellants,

vs.

Senator John E. Courson, Senator Darrell Jackson, Senator Joel Lourie, Senator John L. Scott, Jr. and The State of South Carolina, Respondents.

RESPONDENTS' INITIAL REPLY BRIEF

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ATTORNEYS FOR RESPONDENT
SENATORS COURSON, JACKSON,
LOURIE, AND SCOTT, IN THEIR
OFFICIAL CAPACITIES AS MEMBERS
OF THE SOUTH CAROLINA SENATE

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STATEMENT OF ISSUES ON APPEAL

- I. DOES THE DOCTRINE OF LEGISLATIVE IMMUNITY PROHIBIT THE RECOVERY OF COSTS AND FEES AGAINST MEMBERS OF THE SENATE?

- II. DOES THE APPLICATION OF THE WELL SETTLED RULES OF STATUTORY CONSTRUCTION CLEARLY DEMONSTRATE THAT SECTION 15-77-300 IS INTENDED TO APPLY TO STATE ACTION UNDERTAKEN BY EXECUTIVE BRANCH AGENCIES AND NOT TO APPLY TO THE EXERCISE OF LEGISLATIVE AUTHORITY BY MEMBERS OF THE SENATE?

- III. ARE THE APPELLANTS PROHIBITED FROM RECOVERING FEES AND COSTS AGAINST THE RESPONDENTS BECAUSE THE APPELLANTS WOULD NOT HAVE BEEN ENTITLED TO RECOVER FEES AND COSTS AGAINST THE APPROPRIATE AGENCY CHARGED WITH EXECUTING ACT 17 OF 2011?

STATEMENT OF THE CASE

The Appellants originally initiated this action to challenge the constitutionality of Act 17 of 2011 as a local or special law in violation of Article III, § 34(IX) and Article VIII, § 7 of the South Carolina Constitution. Act 17 of 2011 amended Section 7-27-405 of the South Carolina Code to provide for a combined Board of Registration and Election in Richland County. The facts of the case were not in dispute and only presented questions of law that were appropriately addressed at Summary Judgment.

Section 7-5-10 of the South Carolina Code governs the appointment of members of county boards of registration and Section 7-13-70 provides for the appointment of members of county commissioners of election. Prior to the enactment of Act 312 of 2008, the General Assembly passed numerous local acts combining the boards of registration and election in individual counties. In 2008, the General Assembly passed Act 312 which codified these various local acts in Chapter 27 of Title 7.

In regards to Richland County, Act 312 of 2008 provided in Section 7-27-405 that Richland would not have a combined board, but rather would continue to have separate boards of registration and election appointed pursuant to Section 7-5-10 and Section 7-13-70 respectively. Act 17 of 2011 amended Section 7-27-405 to provide for the current combined board in Richland County. The Appellants asserted that by amending Section 7-27-405 to combine the boards of registration and election for Richland County, the General Assembly enacted a special law when a general law was already applicable.

The parties filed cross motions for Summary Judgment along with supporting memorandums of law. The Circuit Court granted Appellants' motion by order filed on August 26, 2013, which found Act 17 to be unconstitutional on the grounds asserted by the Appellants.

The Respondents filed a Motion to Alter or Amend the Judgment on September 9, 2013, so that the Court's order would be stayed as to not interfere with the conducting of local city and county elections in the fall of 2013. Subsequent to the elections, the Court denied the motion to reconsider by order filed December 30, 2013. The Respondents did not appeal the Court's granting of the Appellants' Summary Judgment motion or the denial of the Motion to Reconsider.

The Appellants subsequently petitioned the Court for costs and fees pursuant to Section 15-77-300. The parties filed memorandums of law and a hearing was held on the matter. The Court subsequently denied Appellants' Petition by order filed March 19, 2014, on the grounds that the Doctrine of Legislative Immunity shields members of the General Assembly from a recovery of costs and fees, Section 15-77-300 does not apply to members of the General Assembly, and the Appellants were not entitled to recover costs and fees against the Respondents pursuant to Section 15-77-300 because the Appellants would not have been entitled to a recovery of costs and fees against the agency charged with executing Act 17.

The Appellants filed a Motion to Reconsider which was denied by order dated June 3, 2014.

The Appellants now appeal the Circuit Court's denial of costs and fees.

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ARGUMENT

I.

THE DOCTRINE OF LEGISLATIVE IMMUNITY PROHIBITS THE RECOVERY OF COSTS AND FEES AGAINST MEMBERS OF THE SENATE.

The Circuit Court was correct when it held that individual members of the General Assembly are immune from a recovery for attorney's fees and costs under Sections 15-77-300 and 15-37-10 of the South Carolina Code.

As the trial court correctly indicates, the Doctrine of Legislative Immunity provides federal, state, and local officials with immunity for any action taken "in the sphere of legitimate legislative activity." *Tenney v. Brandhove*, 341 U.S. 367 (1951); *Bogan v. Scott-Harris*, 523 U.S. 44 (1998). As Justice Frankfurter stated in *Tenney*: "Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good."

The South Carolina Supreme Court agrees with the United States Supreme Court on this issue and has recognized that legislators enjoy Legislative Immunity for their actions taken within the scope of their legislative duties. *Richardson v. McGill*, 273 S.C. 142, 255 S.E.2d 341 (1979). In *Richardson*, a local official sued a state legislator for defamatory remarks. The Court held that the state legislator was protected by Legislative Immunity because he made the statement during the performance of his legislative duties. The Court stated: "A sound public policy has long recognized an absolute immunity of members of legislative bodies for acts in the performance of their duties." *Id.* at 146, 255 S.E.2d at 343.

In the present case, the actions taken by the Respondents were wholly within the context of their legislative duties. The present action simply challenges the constitutionality of Act 17 of

2011 and does not allege that the Respondents took any action other than their involvement in the legislative process. The actions of the Respondents were limited to the introduction of the bill that ultimately became Act 17 of 2011 and voting for the bill on the floor of the Senate, which wholly and completely falls within the scope of their legislative activities.

However, the Appellants argue that the Respondents waived the defense of Legislative Immunity with respect to the award of attorney's fees because the Respondents did not plead Legislative Immunity in their Answer. However, attorney's fees sought pursuant to Section 15-77-300 occurs not as part of the underlying action but after the matter is concluded and is undertaken by separate petition pursuant to Section 15-77-300. As a result, the Respondents were entitled to present any applicable defense to the subsequent Petition for attorney's fees and failure to plead this defense in the underlying action should not serve as a waiver in a subsequent separate proceeding.

Therefore, the Circuit Court correctly ruled that the Doctrine of Legislative Immunity would apply and prevents the recovery of fees and costs against individual members of the Senate.

II.

SECTION 15-77-300 APPLIES TO STATE ACTION UNDERTAKEN BY EXECUTIVE BRANCH AGENCIES AND DOES NOT APPLY TO MEMBERS OF THE SENATE.

The Circuit Court correctly ruled that Section 15-77-300 applies to state agencies and simply does not apply to members of the General Assembly.

Section 15-77-300 provides in relevant part:

(A) In any civil action brought by the State, any political subdivision of the State or **any party who is contesting state action**, unless the prevailing party is the State or any political subdivision of the State, the court may allow the prevailing party to recover reasonable attorney's fees to be taxed as court costs against **the appropriate agency** 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.

The agency is presumed to be substantially justified in pressing its claim against the party if the agency follows a statutory or constitutional mandate that has not been invalidated by a court of competent jurisdiction. [emphasis added]

S.C. Code Ann. § 15-77-300 (Supp. 2013).

As this Court is well aware, the cardinal rule of statutory construction is to ascertain the intent of the General Assembly. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000), citing *Charleston County School District v. State Budget and Control Board*, 313 S.C. 1, 437 S.E.2d 6 (1993). When interpreting a statute, the Court must give words their plain and ordinary meaning. *Id.* The terms must be construed in context and their meaning determined by looking at the other terms used in the statute. *S. Mut. Church Ins. Co. v. South Carolina Windstorm & Hail Underwriting Ass'n*, 306 S.C. 339, 412 S.E.2d 377 (1991). Courts should consider not merely the language of the particular clause being construed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law. *Whitner v. State*, 328 S.C. 1, 492 S.E.2d 777 (1997). Statutes must be read as a whole and sections which are part of

the same general statutory scheme must be construed together and given effect, if it can be done by any reasonable construction. *Higgins v. State*, 307 S.C. 446, 415 S.E.2d 799 (1992).

Further, fee-shifting statutes are an exception to the American Rule that provides that litigants are responsible for their own fees. *Jackson v. Speed*, 326 S.C. 289, 307, 486 S.E.2d 750, 760 (1997) (“Attorney’s fees are not recoverable unless authorized by contract or statute.”) Further, government fee-shifting statutes also constitute a waiver of sovereign immunity. *M.A. Mortenson Co. v. U.S.*, 996 F.2d 1177, 1180 (D.C. Cir 1993). As a result, government fee-shifting statutes should be strictly construed to only provide the relief necessary to serve the purpose of providing litigants access to the courts to challenge governmental action. *See U.S. v. Horn*, 29 F.3d 754, 762 (1st Cir. 1994) (analyzing claim for fees against federal government requires application of rule that “a waiver of sovereign immunity always is to be construed strictly in favor of the federal government, and must not be enlarged beyond such boundaries as its language plainly requires.”)

Section 15-77-300 allows a prevailing party who is contesting “state action” to recover reasonable costs and fees. The deficiency in the Appellants’ argument begins with their misapprehension of the term state action. When the General Assembly exercises its plenary legislative authority, it is not acting on behalf of the State, but rather is acting as representatives of the people in determining the conditions, parameters, and the extent to which an official or agency may act on the State’s behalf. The General Assembly does not engage in state action, but instead empowers an official or agency to undertake state action.

Further, the statute clearly allows fees and costs to be recovered against “the appropriate agency” and only if “the agency” acted without substantial justification. Undoubtedly, the plain and ordinary meaning of “agency” is a “state agency” operating within the executive branch of

government. Other parts of the code clearly indicate that these terms are intended to apply to the executive branch. For example, Section 1-23-10(1) defines "Agency" or "State Agency" "as each state board, commission, department, executive department or officer, other than the legislature, the courts, the South Carolina Tobacco Community Development Board, or the Tobacco Settlement Revenue Management Authority, authorized by law to make regulations or to determine contested cases." S.C. Code Ann. § 1-23-10 (Supp. 2013). Clearly, when the entire statute is construed together, it is intended to allow a prevailing party to recover costs and fees from a state agency or department of the executive branch, not individual members of the General Assembly.

The Appellants are correct that the primary purpose of Section 15-77-300 is to ease access to the courts for litigants who are challenging state action. This purpose does support a sound public policy of allowing litigants aggrieved by a state action to seek redress in the courts when the litigant might not otherwise be able to afford to bring suit. However, it is a challenge to the state action that an agency undertakes pursuant to the General Assembly's grant of authority that this section means to compensate.

The contention that "agency" means "state agency" is also supported by the Court's analysis of substantial justification in *Layman v. State*, 376 S.C. 434, 658 S.E.2d 320 (2008). In that case, the Court reasoned: "in deciding whether a **state agency** acted with substantial justification, the relevant question is whether the **agency's** position in litigating the case had a reasonable basis in law and fact." [emphasis added] *Id.* at 445, 326.

Further, there is no indication from the plain language of this statute that the General Assembly ever intended to waive legislative immunity and subject individual members of the

General Assembly to a recovery of fees and costs for actions taken solely within the sphere of their legislative duties.

Section 15-77-300 does not even have to be construed in the light most favorable to the Respondents to ascertain that there is no reasonable construction of the terms “appropriate agency” or “agency” that would support any contention that this section applies to an individual or a group of members of the General Assembly. Any construction that attempts to “shoehorn” members of the General Assembly into the meaning of “agency” would simply transverse the bounds of logic and reason.

Further, the existence of the Doctrine of Legislative Immunity in this State’s jurisprudence lends even further credence to the argument that Section 15-77-300 does not apply to legislators. Surely, if the General Assembly intended to waive Legislative Immunity with respect to the award of attorney’s fees against members of the General Assembly they would have used language that more clearly encompassed the exercise of legislative power. However, as argued above, the terms used clearly are intended to apply to the exercise of executive authority by state agencies.

Therefore, the Circuit Court correctly held that Section 15-77-300 is intended to apply to state agencies in the executive branch and does not apply to members of the Senate.

III.

THE APPELLANTS ARE NOT ENTITLED TO RECOVER FEES AND COSTS AGAINST THE RESPONDENTS BECAUSE THE APPELLANTS WOULD NOT HAVE BEEN ENTITLED TO RECOVER FEES AND COSTS AGAINST THE APPROPRIATE AGENCY CHARGED WITH EXECUTING ACT 17 OF 2011.

The Circuit Court correctly found that Appellants would not be entitled to costs and fees even if they had named the “appropriate agency” charged with executing Act 17 of 2011 as a party and, as a result, are not entitled to recover costs and fees against the Respondents.

In the present case, the Appellants named the Defendant Senators and the State of South Carolina as parties, but for some unknown reason, declined to name the combined Richland County Board of Registration and Elections created by Act 17 of 2011. However, even if they had named the combined board, which is “the appropriate agency”, as a party, they would still not be entitled to fees and costs.

In order to be entitled to fees and costs, the Appellants must be the prevailing party and the agency must have been without substantial justification in pressing its claim against the Appellants.

Prior to 2010, Section 15-77-300 provided no guidance to the courts to determine the existence of substantial justification. Correspondingly, the Supreme Court defined substantial justification as: “In deciding whether a state agency acted with substantial justification, the relevant question is whether the agency’s position in litigating the case had a reasonable basis in law and fact.” *Layman v. State*, 376 S.C. 434, 658 S.E.2d 320 (2008).

In *Layman*, the Retirement Systems was simply defending their actions that were mandated by a statute that had not been declared unconstitutional. The difficulty presented with the interpretation of substantial justification in *Layman* is that it put state agencies in the position of determining whether or not to follow a statutory mandate on the basis of whether the agency believed that the statute would eventually be determined to be unconstitutional while under the threat of a substantial award of attorney's fees. This placed state agencies in a position directly counter to the General Assembly's sole constitutional authority to enact laws, not to mention the sole authority of the courts to interpret the constitution. Further, this interpretation could have provided agencies with the justification of refusing to enforce statutes that it determined to be unconstitutional simply to avoid an award of attorney's fees, which would have resulted in an even greater tip in the balance of constitutional power.

However, in 2010, the General Assembly addressed the practical difficulties highlighted by *Layman* by amending Section 15-77-300 to provide guidance as to what constitutes substantial justification. The General Assembly added the portion of the statute that provides: "The agency is presumed to be substantially justified in pressing its claim against the party if the agency follows a statutory or constitutional mandate that has not been invalidated by a court of competent jurisdiction." S.C. Code Ann. § 15-77-300 (Supp. 2013). The primary deficiency in the Respondents' argument is that they fail to acknowledge or account for this change in the statutory language

The Appellants fail to address and provide no basis to overcome this new presumption. There is no doubt the General Assembly intended to change the analysis by which the Court determines the existence of substantial justification and in doing so intended to provide state agencies with a "safe harbor" when they were simply defending the constitutionality of actions

that are mandated by a statute that is presumed constitutional. As a result, the general rule applies which states that “when the Legislature adopts an amendment to a statute, this Court recognizes a presumption that the Legislature intends to change the existing law.” *Key Corp. Capital v. County of Beaufort*, 373 S.C. 55, 644 S.E.2d 675 (2007). Thus, the Appellants’ reliance on the previous standard is misplaced and is immaterial to a determination of whether costs and fees should be awarded under the current statute.

Further, under the current standard, there is no plausible argument the Appellants could make to overcome the presumption. The Appellants’ entire case centers on whether Act 17 of 2011, which combined the Richland County Boards of Registration and Elections, is constitutional. Even if the combined board were a party, it would simply be defending its authority to exist under a statute that had not been declared unconstitutional. Certainly, this action would fall squarely within the presumption provided by the 2010 amendment to Section 15-77-300.

Thus, even if the combined board, which is the appropriate agency for purposes of Section 15-77-300, had been a party to this suit and defended the constitutionality of Act 17 of 2011, the Appellants would not have been able to recover costs and fees. Therefore, if the Appellants would not be entitled to costs and fees from “the appropriate agency”, the conclusion that they are not entitled to costs and fees from any other party is inescapable.

In order to accept the Appellants’ argument that the Respondents are entitled to fees requires the Court to find that the General Assembly amended Section 15-77-300 in a manner that provides state agencies with a safe harbor but at the same time intended to open themselves up to a recovery of attorneys fees. This interpretation would require the Court to leap a gulf of logic and land on a result that is simply absurd.

Finally, the Supreme Court has long held that questions regarding the constitutionality of an act of the General Assembly “are to be resolved in light of the familiar and well-settled general rule that every presumption must be indulged in favor of the constitutionality of an act of the Legislature, and that courts should not declare a statute unconstitutional unless the invalidity is manifest beyond a reasonable doubt.” *Poulnot v. Cantwell*, 129 S.C. 171, 176, 123 S.E. 651, 654 (1924); *see also, Davis v. Greenville County*, 322 S.C. 73, 504 S.E.2d 307 (1996); *Westvaco Corp. v. S.C. Dept. of Revenue*, 321 S.C. 59, 467 S.E.2d 739 (1995); *State v. Brown*, 317 S.C. 55, 451 S.E.2d 888 (1994); *Henderson v. Evans*, 268 S.C. 127, 232 S.E.2d 331 (1977); *Pelzer, Rodgers & Co. v. Campbell and Co.*, 15 SC 581 (1881). The Respondents simply defended an act entitled to this presumption and were substantially justified in doing so, just like a state agency would be if faced with the same challenge.

Therefore, the Appellants are not entitled to recover fees and costs against the Respondents because the Appellants would not have been entitled to recover fees and costs against the agency charged with executing Act 17 of 2011.

CONCLUSION

Therefore, on the grounds stated above, the decision of the Circuit Court should be affirmed because the Doctrine of Legislative Immunity protects members of the General Assembly from a recovery of costs and fees, Section 15-77-300 does not apply to members of the General Assembly, and the Appellants were not entitled to recover costs and fees against the Respondents pursuant to Section 15-77-300, because the Appellants would not have been entitled to a recovery of costs and fees against the agency charged with executing Act 17 of 2011.

Respectfully submitted,



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PROOF OF SERVICE


I hereby certify that I have served the Initial Reply Brief of Respondent Senators Courson, Jackson, Lourie, and Scott upon counsel for each of the other parties by mailing a copy to them at the addresses below via the United States Mail this August 22, 2014.

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