THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

Appellate Case No. 2014-001412

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

v.

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

APPELLANTS' FINAL BRIEF

October 17, 2014

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Statement of the Case

Appellant South Carolina Public Interest Foundation is a not for profit corporation organized and existing under the laws of the State of South Carolina and dedicated to the public interest, including the proper application and enforcement of the South Carolina Constitution (R. p. 4). Appellant William B. DePass, Jr. is a citizen, resident, taxpayer, and registered elector of Richland County (R. p. 4) He served as a member of the State Election Commission during the years 1988 through 1997, and he served as its Chairman during the years 1990 through 1997 (R. p. 4). He regularly serves as a volunteer poll worker on election days (R. p. 4). Mr. DePass claimed standing on all the foregoing bases (R. p. 4). He brought this action individually on his behalf and on behalf of all others similarly situated (R. p. 4).

Respondents John E. Courson, Darrell Jackson, Joel Lourie, and John Scott, Jr. are South Carolina Senators elected by Richland County voters; and they are named in their official capacities (R. p. 4). These senators, all from Richland County, were instrumental in the passage of the Act at issue (R. p. 24, par. 10).

Prior to the enactment of Act 312 of 2008, the General Assembly had enacted various local acts combining the boards of voter registration and boards of election in individual counties (R. p. 5). In 2007, the Attorney General issued an opinion to Senator Glenn McConnell that the General Assembly's very similar action with regard to Charleston County in 2003 was unconstitutional. Op. S.C. Atty. Gen., August 14, 2007 (2007 WL 3244888). The Attorney General quoted an earlier opinion from 1977 arriving at that conclusion:

> In an opinion of this Office issued in 1977, we considered generally whether the General Assembly can introduce legislation merging county boards of

> voter registration and county election commissions on a county-by-county basis. Op. S.C. Atty. Gen., January 5, 1977. We concluded "such legislation would most probably be violative of that portion of Article VIII, section 7 of the South Carolina Constitution of 1985, as amended, which proscribes laws for a specific county." *Id.*

Id. at *4.

Accordingly, early in the next term of the General Assembly, on February 14, 2008, Senators McConnell and Campsen introduced the bill that became Act 312 of 2008. Act 312 addressed all forty-six counties in the state (R. p. 5). Act 312 did not change the substance of the previous local and special acts for individual counties, but amounted to the General Assembly's attempt to use one act to correct the Constitutional defects in all the special and single county acts related to county election commissions and county boards of voter registration (R. p. 5).

Act 312 of 2008 was codified at Title VII, Chapter 27 of the South Carolina Code. Section 7–27–110 stated: "Those counties that do not have combined boards of registration and election commissions must have their members appointed and powers of their boards and commissions as provided by Sections 7–5–10 and 7–13–70." Likewise, as initially enacted, Section 7–27–405 stated: "The Richland County Election Commission and the Richland County Board of Registration must have their members appointed and powers of their board and commission as provided by Sections 7–5–10 and 7–13–70."

South Carolina Code Annotated § 7-5-10 authorized the Governor to appoint members of county boards of registration, with the advice and consent of the Senate. South Carolina Code Annotated § 7-13-70 authorized the Governor to appoint county commissioners of election, "upon the recommendation of the senatorial delegation and at

least half of the members of the House of Representatives from the respective counties." *Id.*

Three years later, at the urging of the Richland County legislative delegation, including the Respondents, the General Assembly enacted and the Governor signed Act 17 of 2011, which merged the Richland County Election Commission and the Richland County Board of Voter Registration into one body known as the Board of Elections and Voter Registration for Richland County (*Id.*, p. 5). Act 17 changed the way the Chairman of the Board was appointed and reappointed, provided for a minimum budget for the newly formed Board, changed the way that persons were appointed to this body, and established various other criteria for the subsequent appointments and retention of the members of this Board (*Id.*). Act 17 of 2011 also abolished the Richland County Board of Voter Registration and the Richland County Election Commission (*Id.*).

The Attorney General, representing the State in this action, did not dispute that Act 17 was unconstitutional. (R. p. 32, par. 15 and 17). Furthermore, the Attorney General had repeatedly warned the Respondent Senators that this Act and others like it were plainly unconstitutional. In addition to the letter to Senator McConnell in 2007, (Op. S.C. Atty. Gen., August 14, 2007 (2007 WL 3244888)) and the previous opinion cited therein, in 2012, the Attorney General issued a third opinion, this one to Senator Tim Scott, concerning Act 17 of 2011, the act at issue in this case, and reiterated his opinion that Act 17 of 2011 was likewise unconstitutional (2012 WL 6061812).

> We do not address herein the constitutionality of Act 17 of 2011 under Art. VIII, § 7 of the South Carolina Constitution, which prohibits "laws for a specific county ...." However, we note that in an Opinion, dated August 14, 2007, we concluded that ***a similar local law***, Act 127 of 2003, a statute which abolished the Charleston County Board of Voter Registration and the Charleston County Election Commission and created instead the Board of

> Elections and Voter Registration for Charleston County ***was likely unconstitutional*** as being in violation of Art. VIII, § 7. See *Op. S.C. Atty. Gen.*, August 14, 2007 (2007 WL 3244888).

(2012 WL 6061812, n. 2) (emphasis added). Thus, three times the Attorney General has issued opinions that such legislation was unconstitutional. Instead of heeding the Attorney General's warnings, the Respondent Senators chose to burden the Appellants with the unnecessary expense of litigating the unconstitutionality of Act 17 of 2011.

The Circuit Court ruled that Act 17 of 2011 was unconstitutional, finding that Act 17 of 2011 violated Article VIII, § 7 of the Constitution: "No laws for a specific county shall be enacted" (R. p. 10). The Circuit Court also found that Act 17 violated Article III, § 34's restriction on special legislation: "The General Assembly . . . shall not enact local or special laws. . . . IX. . . . Where a general law can be made applicable, no special law shall be enacted . . . ." S.C. Constitution, Article III, § 34" (R. p. 11).

Appellants moved the Court pursuant to SCRCP 54, S.C. CODE ANN. § 15-37-10 and § 15-77-300 for costs and attorneys' fees. (R. pp. 79-104).

> In any civil action brought by . . . any party who is contesting state action, . . . 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."

S.C. CODE ANN. § 15-77-300.

Respondent Senators opposed the motion (R. pp. 105-111). Respondents argued that they were immune from the payment of attorneys' fees. The Respondent Senators failed to plead the affirmative defense of sovereign immunity in their Answer; nevertheless

Appellants will address the substance of the issue. Respondents also argued that § 15-77-300 does not apply to them.

Respondents did not object to the amount of the attorneys' fees claimed by the Appellants, nor did they object to any particular entry or fact in the affidavits in support of the motion for attorneys' fees (R. pp. 105-111).

The Circuit Court denied Appellants' Motion for Attorneys' Fees. The Circuit Court ruled that the members of the General Assembly were immune from a recovery for attorneys' fees and costs under sections 15-77-300 and 15 37-10. The Circuit Court also ruled that section 15-77-300 does not apply to members of the General Assembly, even in their official capacities. Appellants moved the Court, pursuant to SCRCP 59, to alter or amend its Order, and the Court denied the Motion.

Appellants respectfully ask this Court to rule that the Respondent Senators are not immune from the award of costs and attorneys' fees, that S.C. CODE ANN. § 15-77-300 applies to them, and to award Appellants their actual and reasonable attorneys' fees.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN RULING THAT RESPONDENT SENATORS ARE IMMUNE FROM THE AWARD OF COSTS AND ATTORNEYS' FEES.

The Circuit Court ruled that individual members of the General Assembly are immune from recovery for attorneys' fees and costs (R. p. 15).

As a preliminary matter, Respondents not raise sovereign immunity as an affirmative defense, and therefore is waived (R. pp. 34-36). Nevertheless, the Circuit Court accepted the Respondent Senators' argument that they are immune from paying an award of attorneys' fees and costs.

Appellants did not bring this case against private parties, but against members of the South Carolina General Assembly in their official capacities (R. p. 22, par. 3), and the Senators admitted that they were sued in their official capacities (R. p. 34, par. 3). Suing a Senator in his official capacity is simply another way of naming the Senate or the State of South Carolina as a Defendant. "Official capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent." *Monell v. New York City Department of Social Services*, 436 U.S. 658 n. 55, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Appellants alleged nothing against the individual defendants for any personal misconduct. Accordingly, the Senators were named only in their official capacities. Furthermore, Appellants did not seek compensatory or punitive damages from the Respondent Senators. Appellants sought merely a declaratory judgment.

South Carolina courts have awarded fees against other public officials acting in their official capacities under S.C. CODE ANN. § 15-77-300. *Heath v. County of Aiken*, 302 S.C. 178, 394 S.E.2d 709 (1990) (Court awarded attorney's fees under § 15-77-300 against

the County and County Council members); *Eargle v. Horry County*, 344 S.C. 449, 545 S.E.2d 276 (2001) (Court awarded attorney's fees under § 15-77-300 against the County and County Administrator); *Simpkins v. City of Gaffney*, 315 S.C. 26, 431 S.E.2d 592 (1993) (Court awarded attorney's fees under § 15-77-300 against the City, City Council members, and City Administrator). Thus, an award of fees against the Senators in their official capacities would not be unprecedented or even unusual.

A. By Enacting § 15-77-300, the South Carolina General Assembly Abrogated Sovereign Immunity for an Award of Attorneys' Fees.

By enacting S.C. CODE ANN. § 15-77-300, the South Carolina General Assembly statutorily waived the sovereign immunity of the State of South Carolina, including the Senate, for an award of costs and attorneys' fees.

> In any civil action brought by **the State**, any **political subdivision** of the State or any party who is contesting **state** action, . . . the court may allow the prevailing party to recover reasonable attorney's fees to be taxed as court costs against the appropriate agency if:
>
> (3) The court finds that the agency acted without substantial justification in pressing its claim against the party; and
>
> (4) The court finds that there are no special circumstances that would make the award of attorney's fees unjust."

Id. Section 15-77-300 applies to civil actions "brought by **the State** . . . or a party who is contesting **state action**" Id. (emphasis added). This language abrogated sovereign immunity, at least as to an award of attorneys' fees under this statute.

1. An act of the General Assembly is a state action.

The State includes the Senate. The South Carolina Constitution, Art. III, § 1 grants legislative power of this State to the General Assembly, consisting of the House of Representatives and the Senate. The Supreme Court explained this provision:

> To the Legislature of South Carolina, consisting of the House and Senate, is granted the legislative power by the Constitution of 1895, article 3, § 1, in this broad language: 'The legislative power of this State shall be vested in two distinct branches, the one to be styled the 'Senate' and the other the 'House of Representatives,' and both together the 'General Assembly of the State of South Carolina.''
>
> Our courts have held that by the use of this language the people of the state vested the General Assembly with the entire legislative power of the state, subject only to such restrictions upon and regulations of such power as were contained in the Constitution itself. It is the theory and intent of the Constitution of South Carolina that the powers vested in the General Assembly include all powers not specifically reserved by the Constitution. *Massey v. Glenn*, 106 S.C. 53, 90 S.E. 321; *State v. City Council of Aiken*, 42 S.C. 222, 20 S.E. 221, 26 L.R.A. 345; *Mauldin v. City Council of Greenville*, 72 S.C. 293, 20 S.E. 842, 27 L.R.A. 284, 46 Am.St.Rep. 723; *Cathcart v. City of Columbia*, 170 S.C. 362, 170 S.E. 435.

Byrd v. Lawrimore, 212 S.C. 281, 288-289, 47 S.E.2d 728, 731 (1948). Thus, an Act of the General Assembly is a State action.

2. The Supreme Court ruled that § 15-77-300 supports an award of attorneys' fees against the State.

The Supreme Court upheld an award of attorneys' fees against the State under § 15-77-300, and reasoned as follows:

> In our view, separating the **liability of the State** and the Retirement System is simply an attempt by these parties to bar any potential for a fee award, and this Court refuses to compartmentalize the **actions of the State** and the Retirement System in this manner. Instead, we believe the overriding principle of **the state action statute** is that as a state agency, the Retirement System is obligated to carry out the instructions **of the State**. Furthermore, as a governing body, **the State is ultimately responsible** for the actions of its agencies. That the statute plainly recognizes this principle is exhibited by the language purporting to apply to cases in which a party is "**contesting**

> **state action**." S.C. CODE ANN. § 15-77-300. For this reason, we find the attempt to parse the actions of the State and the Retirement System unpersuasive, and therefore hold that **either the State or the Retirement System may be liable for attorneys' fees under the statute**.

Layman v. State, 376 S.C. 434, 446, 658 S.E.2d 320, 326 (2008) (emphasis added). Section 15-77-300 applies to civil actions "brought by **the State** . . . or a party who is contesting **state action**," *Id.* (emphasis added).

The Supreme Court awarded attorneys' fees as "court costs" under S.C. CODE ANN. § 15-77-300 to Appellants who successfully challenged an unconstitutional Act of the General Assembly. *Layman v. State*, 376 S.C. 434, 658 S.E.2d 320 (2008). If the State itself can be held liable for attorneys' fees under § 15-77-300 for its litigation conduct, then surely the Senate can be held liable.

In *Layman*, plaintiffs challenged an unconstitutional act:

> [P]laintiffs filed an action in the circuit court against the State of South Carolina ("State") and the South Carolina Retirement System ("Retirement System") in response to the enactment of the State Retirement System Preservation and Investment Reform Act ("Act 153"). Act 153 amended the Teachers and Employee Retention Incentive (TERI) program and the Working Retiree program by requiring TERI participants and Working Retirees to make pay-period contributions of their salaries into the Retirement System when the statutes codifying these programs did not previously require them to do so.

Id., 376 S.C. 434, 441, 658 S.E.2d 320, 323-24 (2008) (footnotes omitted).

In *Layman*, Defendants' liability under § 15-77-300 was not based on the General Assembly's **enacting** an unconstitutional act. The Supreme Court emphasized that it was the Defendants' **conduct in the litigation** that produced liability. "[T]he substantial justification inquiry in this case is based solely on the State's and the Retirement System's **maintenance of litigation** in which they defended a breach of their contract with the TERI

participants." *Layman v. State*, 376 S.C. 434, 447, 658 S.E.2d 320, 327 (2008) (emphasis added). The Court in *Layman* reasoned further:

> In deciding whether a state agency acted with substantial justification, **courts must only determine whether the agency's position in litigating the case has a reasonable basis in law and in fact**. *Id.* at 542, 405 S.E.2d at 832. For this reason, the factual circumstances surrounding the enactment of Act 153 are irrelevant in deciding whether substantial justification existed for the State's and the Retirement System's **defense** of Act 153's contractual validity **in the underlying litigation**.

Id. at 376 S.C. 434, 449, 658 S.E.2d 320, 328 (2008) (emphasis added). The Respondent Senators' unjustified defense of this action justifies an award of attorneys' fees.

S.C. CODE ANN. § 15-77-300 is remedial. A statute that is remedial in nature should be liberally construed in order to effectuate its remedial purposes. *Sloan Construction Co., Inc. v. Southco Grassing, Inc.*, 377 S.C. 108, 115, 659 S.E.2d 158 (2008); *S.C. Dept. of Mental Health v. Hanna*, 270 S.C. 210, 213, 241 S.E.2d 563, 564 (1978); *Newsom v. Manufacturing Company*, 102 S. C. 77, 86 S. E. 195 (1915); *Trammell v. Manufacturing Company*, 102 S. C. 483, 86 S. E. 1057 91915); *Law v. J. F. Prettyman & Sons*, 149 S. C. 178, 146 S. E. 815 (1929). Therefore, § 15-77-300 should be interpreted broadly to effect its beneficial and remedial purposes.

Appellants possess a common law and constitutional right to challenge an unconstitutional act of the General Assembly. The policy behind § 15-77-300 encourages South Carolinians to challenge unlawful governmental actions in court. Reimbursing citizens' litigation costs when they prevail encourages the citizens to pursue legitimate public interest actions and discourages governments from defending the indefensible in court. Accordingly, the policy behind § 15-77-300 demonstrates that the legislative immunity defense does not apply.

B. The South Carolina Supreme Court Has Previously Awarded Costs and Attorneys' Fees to Mr. Sloan from the House and the Senate.

In 2005, Mr. Sloan successfully challenged an unconstitutional act of the General Assembly. The Defendants were the Speaker of the House in his official capacity and the President of the Senate in his official capacity. The President Pro Tempore intervened as a Defendant. Mr. Sloan prevailed, and the Court declared the Life Sciences Act unconstitutional in large part. *Sloan v. Wilkins*, 362 S.C. 430, 608 S.E.2d 579 (2005).

The full title of that case was:

> Edward D. SLOAN, Jr., individually, and as a Citizen, Resident, Taxpayer and Registered Elector of South Carolina, and on behalf of all others similarly situated, Petitioners,
> v.
> David H. WILKINS, in his officially capacity as Speaker of the S.C. House of Representatives, R. Andre Bauer in his official capacity as Lt. Governor and President of the S.C. Senate, and the State of South Carolina, Respondents.
>
> Glenn F. McConnell, in his capacity as President Pro Tempore of the South Carolina Senate, Intervenor.

Id.

The Supreme Court awarded Mr. Sloan costs and attorneys' fees, implicitly recognizing the abrogation of any claim of sovereign immunity, at least insofar as it addressed costs and attorneys' fees (R. pp. 138-39). Mr. Sloan received a check dated May 12, 2005, for $1,432.01 from the House of Representatives, and a check dated May12, 2005 for $1,432.02 from the Senate (R. p. 140). He also received a third check dated August 17, 2005, was for accumulated interest on the judgment for fees and costs (R. p. 140). Mr. Sloan was awarded costs and fees against the House and Senate. Accordingly, when he successfully challenged an unconstitutional act, sovereign immunity did not prevent an award of costs and attorneys' fees.

C. The South Carolina Supreme Court Abrogated Sovereign Immunity for the State.

1. Judicial decisions created and abrogated sovereign immunity.

In 1788, an English court ruled that the Crown possessed sovereign immunity, because "the king can do no wrong." The South Carolina Supreme Court noted, "The English law has been received here in its full extent, until it may now be considered as constituting a part of the common law of this State." *Duncan v. Course*, 1 Mill Const. 100, 8 S.C.L. 100 (1817). *See* S.C. CODE ANN. § 14-1-50. Justice Chandler observed, "It is anomalous that [sovereign immunity] should become the law of states which only 12 years earlier had fought for liberation from wrongs of the king." *McCall by Andrews v. Batson*, 285 S.C. 243, 253, 329 S.E.2d 741, 746 (1985) (Chandler, J. concurring).

Shortly thereafter, an English court abrogated the doctrine of sovereign immunity, but it remained the law of South Carolina. In 1820, the South Carolina Supreme Court ruled that the State enjoyed sovereign immunity. *Young v. Commissioners of Roads,* 2 Nott and Mc. 537, 11 S.C.L. 215 (1820), c*iting Russell v. Men of Devon,* 2 T.R. 667, 100 Eng.Rep. 359 (1788).

In 1981, the South Carolina Supreme Court abrogated immunity for tortious conduct by a charity. *Fitzer v. Greater Greenville South Carolina Young Men's Christian Association,* 277 S.C. 1, 282 S.E.2d 230 (1981).

The South Carolina Supreme Court abrogated sovereign immunity for contractual obligations in 1978, and for tortious liability in 1985. *McCall by Andrews v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985).

> South Carolina formerly afforded immunity to both governmental and charitable entities. **We eliminated the State's immunity from suit based upon its contractual obligations** in *Kinsey Construction Company Inc. v.*

> *S.C. Department of Mental Health.* 272 S.C. 168, 249 S.E.2d 900 (1978). Thereafter, we abolished charitable immunity in *Fitzer v. Greater Greenville South Carolina Young Men's Christian Association,* 277 S.C. 1, 282 S.E.2d 230 (1981). This Court's view of **the antiquated doctrine of sovereign immunity** was foreshadowed in the dissents in *Boyce v. Lancaster County Natural Gas Authority,* 266 S.C. 398 at 403, 223 S.E.2d 769 at 771 (1976) and *Belue v. The City of Spartanburg,* 276 S.C. 381 at 384, 280 S.E.2d 49 at 50 (1981).
>
> The trend towards abolition of sovereign immunity in other jurisdictions was recognized by the South Carolina Court of Appeals in *Shea v. State Department of Mental Retardation,* 279 S.C. 604, 310 S.E.2d 819 (App.Ct.1983). As noted in *Shea,* **thirty-six other jurisdictions have abolished sovereign immunity** in whole or in part-some judicially, some legislatively.
>
> More than twenty years ago this Court noted that the doctrine had come under fire as being "**archaic and outmoded**." *McKenzie v. City of Florence,* 234 S.C. 428, 435, 108 S.E.2d 825, 828 (1959). The Court suggested that any change of the doctrine should come from the legislature. *Id.* The Court has expressly urged the legislature to address the rule. *Copeland v. Housing Authority of Spartanburg,* 282 S.C. 8, 316 S.E.2d 408 (1984); *Belton v. Richland Memorial Hospital,* 263 S.C. 446, 211 S.E.2d 241 (1975). The exceptions that have been carved out by the legislature reflect a **scattered patchwork of sovereign liability that lacks continuity, logic or fairness**.
>
> Even in affirming the continued validity of the rule, the Court has heretofore expressed "**serious reservations about the soundness and fairness of the doctrine**." *Belton v. Richland Memorial Hospital,* 263 S.C. at 451, 211 S.E.2d 241.
>
> It is not necessary to laboriously analyze the doctrine and its inequities. Few principles of modern law have been so uniformly criticized. *See, Holytz v. Milwaukee,* 17 Wis.2d 26, 115 N.W.2d 618 (Wis.1962). **Sovereign immunity can no longer be tolerated in this State**.

McCall by Andrews v. Batson, 285 S.C. 243, 244-46, 329 S.E.2d 741, 742 (1985) (emphasis added, footnote omitted). In *McCall*, the Supreme Court explicitly overruled at least 122 South Carolina cases preceding it since 1820. Justice Chandler, concurring, summarized the Court's justification for exercising this authority: "The doctrine, being court-created, may be court-abrogated." *McCall by Andrews v. Batson*, 285 S.C. 243, 258, 329 S.E.2d

749, 746 (1985) (Chandler, J. concurring).

An overriding principle in our jurisprudence is that "**liability follows tortious conduct.**" *McCall by Andrews v. Batson*, 285 S.C. 243, 253, 329 S.E.2d 741, 746 (1985) (Chandler, J. concurring) (emphasis added). If the members of the General Assembly can flagrantly violate the Constitution and defend that violation in litigation, no matter how indefensible, without consequence, then liability would **not** follow the wrongful conduct. Furthermore, such a holding would emasculate § 15-77-300, which authorizes reimbursement of costs and attorneys' fees to any South Carolinian who challenges State action and prevails when the State is acting without substantial justification.

Justice Chandler agreed with the Florida Supreme Court that sovereign immunity frustrated "our constitutional guarantee that the courts shall always be open to redress wrongs" and "there should be a remedy for every wrong committed." *McCall by Andrews v. Batson*, 285 S.C. 243, 254, 329 S.E.2d 741, 747 (1985) (Chandler, J. concurring), *citing Hargrove v. Town of Cocoa Beach,* 96 So.2d 130 (Fla.1957). Justice Chandler also agreed with the New Jersey court: "It is plainly unjust to refuse relief to persons injured by the wrong conduct of the State." *McCall by Andrews v. Batson*, 285 S.C. 243, 254, 329 S.E.2d 741, 747 (1985) (Chandler, J. concurring), *citing Willis v. Dept. of Conservation and Economic Development,* 55 N.J. 534, 264 A.2d 34, 36 (1970).

A significant justification for the Court's rationale in *McCall* was the widespread availability of insurance. Appellants respectfully suggest that the Respondents at bar possess liability insurance coverage, and Respondents present no good reason to make them immune from the application of § 15-77-300.

The Court in *McCall* also reasoned that the General Assembly had been debating the bills that would become the South Carolina Tort Claims Act as the Court was ruling in *McCall*. In addition, the General Assembly considered Act 44 of 1985, codified as § 15-77-300. It was signed by the Governor April 29, 1985. The Supreme Court issued the decision in *McCall* April 18, 1985. The policies of the South Carolina Tort Claims Act also support Act 44, and they support an award of attorneys' fees in this case.

Recognizing the logistical and practical difficulties of the waiver of sovereign immunity, the Supreme Court issued its decision April 18, 1985, and ruled that sovereign immunity would not bar any case then pending or filed before July 1, 1986, provided the defendant had liability insurance coverage. Thereafter, sovereign immunity would not apply to ***any*** case filed after July 1, 1986, **other than for official discretionary or legislative acts**. *Id.* at 285 S.C. 243, 246, 329 S.E.2d 741, 743.

2. The Respondent Senators were not performing discretionary or legislative duties.

In *McCall*, the Court continued to allow limited sovereign immunity for official legislative and discretionary acts. *Id.* at 285 S.C. 243, 246, 329 S.E.2d 741, 743. However, the Respondent Senators' litigating an indefensible position is not a discretionary or legislative act of the General Assembly in its official capacity, and the litigation strategy was not something arising out of legislative responsibilities.

The Circuit Court ruled that the Respondent Senators were performing their "legitimate legislative activity" in **enacting** the unconstitutional act (R. pp. 15-16) and are therefore sovereignly immune to § 15-77-300.

The award of attorneys' fees is not based on the conduct of the Senators acting as legislators, but rather it is based on the conduct of the Senators in defending an indefensible

lawsuit. "Rather, the substantial justification inquiry in this case is based solely on the State's and the Retirement System's **maintenance of litigation** in which they defended a breach of their contract with the TERI participants." *Layman v. State*, 376 S.C. 434, 447, 658 S.E.2d 320, 327 (2008) (emphasis added). The Court in Layman reasoned further:

> [T]he factual circumstances surrounding the **enactment** of Act 153 are **irrelevant** in deciding whether substantial justification existed for the State's and the Retirement System's defense of Act 153's contractual validity in the underlying litigation. The circuit judge's finding that the State's enactment of Act 153 lacked substantial justification was not only **completely unrelated to the relevant inquiry** in this case, it also unnecessarily implicated separation of powers principles which recognize that the authority to carry out the legislative process rests exclusively with the legislature. Although a court may issue the final judgment with regard to the constitutionality or enforceability of a law currently in effect, there is no similar judicial authority for reviewing the basis for the legislature's enactment of a law in the first instance. *See Keyserling v. Beasley,* 322 S.C. 83, 86, 470 S.E.2d 100, 101 (1996) ("We do not sit as a super legislature to second guess the wisdom or folly of decisions of the General Assembly."). For these reasons, **the actions of the General Assembly in passing Act 153 into law was an incorrect basis on which to find a lack of substantial justification**.

Id. at 376 S.C. 434, 449-450, 658 S.E.2d 320, 328 (2008) (emphasis added). It is the action of the Respondent Senators in this litigation that justifies an award of attorneys' fees.

The Attorney General agreed with the Appellants that the act in question was unconstitutional (R. p. 32, par. 15 and 17). The Attorney General has also issued three prior opinions on essentially the same question, each time concluding that the act in question was unconstitutional. The Senators had access to the Attorney General opinions, just as did the Appellants. The Circuit Court found the Act to violate two separate provisions of the South Carolina Constitution (R. pp. 2-11). As State officers, they took a solemn oath to uphold the South Carolina Constitution, yet the Senators persisted in defending an unconstitutional Act.

Section § 15-77-300 and its remedy of attorneys' fees targets "acting without substantial justification in **pressing [a] claim**," rather than for the legislating. *Id.* (emphasis added) If the Respondent Senators had admitted that the Act was unconstitutional, the fees would not have been incurred. This waste and stonewalling is exactly what § 15-77-300 is designed to prevent and remedy. Defending a patently unconstitutional Act falls outside the "discharge of their legislative duty" and "legislative acts," *McCall*, but rather constitutes "acting without substantial justification in pressing its claim." *Id.* at 285 S.C. 243, 246, 329 S.E.2d 741, 743; S.C. CODE ANN. § 15-77-300.

D. The Court Possesses Authority to Award Costs to or from Any Litigant under Section 15-37-10.

A court possesses statutory power to award court costs.

> In **every civil action** commenced or prosecuted in the courts of record in this State, except cases in chancery, the attorneys for the plaintiff or defendant shall be entitled to recover costs and disbursements of the adverse party . . . , **such costs to be allowed as of course** to the attorneys for the plaintiff or defendant and all officers of the court thereto entitled accordingly as the action may terminate and to be inserted in the judgment against the losing party. **In cases in chancery the same rule as to costs shall prevail** unless otherwise ordered by the court.

S.C. CODE ANN. § 15-37-10 (emphasis added).

S.C. CODE ANN. § 15-77-300 empowers a Court to award attorneys' fees as "court costs" against representatives of the State who have pursued unjustified litigation. *Id.* In the case at bar, the Senators are not immune from the payment of costs or attorneys' fees.

II. SECTION 15-77-300 APPLIES TO RESPONDENTS.

The Circuit Court ruled that § 15-77-300 did not apply to the Respondents holding that the statute applied only to a "state agency," a subdivision of the executive branch of state government. The Circuit Court relied on the statutory language allowing costs to be

taxed against "the appropriate agency" under certain circumstances. The Circuit Court also relied on the criteria that costs should be awarded if the court finds that "the agency" acted without substantial justification in defending the lawsuit. The Circuit Court ruled, "The plain and ordinary meaning of 'agency' is 'state agency' operating within the executive branch of government." In so ruling, the Circuit Court eviscerated the strength and heart of the statute. Appellants respectfully suggest that in focusing on this term, "agency," and not on the overall import or effect of the statute, the Circuit Court erred.

The entire purpose and effect of § 15-77-300 is to award attorneys' fees against a state actor who unjustifiably maintains litigation against a private party. It explicitly allows attorneys' fees to any party that is in litigation against "**the State or any political subdivision of the State**." *Id.* "The State" itself is subject to the statute. *Layman v State*. However, "the State" not a person or entity "operating within the executive branch of government," as required by the Circuit Court (R. p. 18). Furthermore, "any political subdivision of the State" is subject to the statute, but is not a person or entity "operating within the executive branch of government" (R. p. 18). Yet the statute covers a "political subdivision of the State." *Heath v. County of Aiken*, 302 S.C. 178, 394 S.E.2d 709 (1990) (Court awarded attorney's fees under § 15-77-300 against the County and County Council members); *Eargle v. Horry County*, 344 S.C. 449, 545 S.E.2d 276 (2001) (Court awarded attorney's fees under § 15-77-300 against the County and County Administrator); *Simpkins v. City of Gaffney*, 315 S.C. 26, 431 S.E.2d 592 (1993) (Court awarded attorney's fees under § 15-77-300 against the City, City Council members, and City Administrator); *see also Cornelius v. Oconee County*, 369 S.C. 531, 633 S.E.2d 492, 497 (2006); *Burton v. York County Sheriff's Dept.*, 358 S.C. 339, 357, 594 S.E.2d 888, 898 (Ct. App. 2004).

Thus, the word "agency" in the statute cannot be limited to those divisions of the executive branch, as the Circuit Court holds. Therefore, the meaning of the term "the appropriate agency" is not limited to a subdivision of the executive branch, but rather it is used in a generic sense, meaning any representative of "the State [or] any political subdivision of the State." § 15-77-300 (A). As such, it applies to these Respondents, and the Circuit Court erred in holding that the statute did not apply to them.

III. APPELLANTS SATISFY THE STATUTORY CRITERIA.

A citizen must prove three elements to claim attorneys' fees: (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, 394 S.E.2d 709 (1990); *Richland County v. Kaiser*, 351 S.C. 89, 567 S.E.2d 260 (Ct. App. 2002). Appellants satisfied these three criteria.

A. Appellants Are Prevailing Parties.

The Circuit Court found that Act 17 of 2011 violates Article VIII, § 7 of the Constitution: "No laws for a specific county shall be enacted" (R. p. 9). The Supreme Court has repeatedly found such actions of the General Assembly unconstitutional.

The Circuit Court also found that Act 17 violates Article III, § 34's restriction on special legislation: "The General Assembly . . . shall not enact local or special laws. . . . IX. . . . Where a general law can be made applicable, no special law shall be enacted . . . ." S.C. Constitution, Article III, § 34. Act 17 fails to state or relate to any reason why a general law could not address those matters. (R. pp. 10-11). Under these circumstances, the Appellants have prevailed.

B. Respondents Acted Without Substantial Justification.

Respondent Senators acted without substantial justification in pressing their claims in this lawsuit, with the knowledge of three opinions of the Attorney General that Act 17 was unconstitutional. In analyzing this element, courts look to whether the governmental defendant had a reasonable basis in law and fact. *Video Gaming Consultants, Inc. v. South Carolina Dept. of Revenue*, 358 S.C. 647, 595 S.E.2d 890 (Ct. App. 2004).

Respondents did not have a reasonable basis in law and fact. Act 17 applied only to Richland County. The Senators are under no constitutional or statutory mandate to defend an Act that is so clearly unconstitutional. Like the defendants in *Cornelius v. Oconee County*, these Respondents "cited **no viable authority** supporting [their] position" that the Act was constitutional, and therefore in this litigation, they "acted **without substantial justification.**" *Id.*, 369 S.C. 531, 633 S.E.2d 492, 497 (2006) (emphasis added). Respondents had no mandate to defend the indefensible. Respondents were not

"substantially justified" in pressing their claims in this lawsuit, and an award of attorneys' fees is warranted.

C. No Special Circumstances Make An Award Of Fees Unjust.

No special circumstances make an award of fees unjust. Appellants brought this action to uphold the Constitution. The State benefits 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." Appellants' action benefitted the citizens of South Carolina by upholding the Constitution.

Accordingly, Appellants meet the qualifications for an award of attorneys' fees under S.C. CODE ANN. § 15-77-300.

IV. APPELLANTS' ACTUAL ATTORNEYS' FEES AND COSTS WERE REASONABLE.

Appellants incurred total attorneys' fees and costs of $33,824.57 in pursuing this matter. Appellants' counsel attached an affidavit, a supplemental affidavit, and statements documenting attorneys' fees and costs (R. pp. 86-104). The Defendant Senators did not object to any specific entry claimed as Appellants' attorneys' fees, nor did they argue that the total fee claimed was unreasonable in any way (R. pp. 105-111). Appellants' actual attorneys' fees and costs were reasonable, and Appellants are entitled to an award of attorneys' fees and costs.

"There are six factors for the trial court to consider when determining an award of attorneys fees: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services." *Burton v. York County Sheriff's Dept.*, 358 S.C. 339, 357, 594 S.E.2d 888, 898 (Ct. App. 2004) *citing Jackson v. Speed*, 326 S.C. 289, 486 S.E.2d 750 (1997). "Upon request for attorneys fees that are authorized by contract or statute, the trial court should make specific findings of fact on the record for each of these factors." *Id. citing Jackson*, 326 S.C. at 308, 486 S.E.2d at 760 and *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 494.

First, as to the nature, extent and difficulty of the case, Appellants brought this action and spent significant time, effort and money challenging these Senators to uphold the Constitution.

Second, as to the time necessarily devoted to the case, as shown by the affidavit of Appellants' counsel, Appellants spent significant time in proving the unconstitutional nature of the Act.

Third, Appellants' counsel are experienced attorneys of high professional standing and well known to the courts of this State. *See, inter alia, South Carolina Public Interest Foundation v. Harrell*, 378 S.C. 441, 663 S.E.2d 52 (2008); *Sloan v. Department of Transportation*, 379 S.C. 160, 666 S.E.2d 236 (2008); *Sloan v. Hardee,* 371 S.C. 495, 640 S.E.2d 457 (2007); *Sloan v. Department of Transportation*, 365 S.C. 299, 618 S.E.2d 876 (2005), *Sloan v. Wilkins,* 362 S.C. 430, 608 S.E.2d 579 (2005), *Sloan v. Sanford,* 357 S.C. 431, 593 S.E.2d 470 (2004), *Sloan v. Greenville County,* 356 S.C. 531, 590 S.E.2d 338 (Ct.

App. 2003), *Sloan v. School District of Greenville County*, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000).

Fourth, counsel did not work on a contingency fee, but these fees were paid as they accrued.

Fifth, Appellants obtained beneficial results. Upholding the Constitution was the Appellants' objective. Furthermore, Appellants' litigation benefits every citizen by requiring the General Assembly to comply with the Constitution.

Sixth, as to the customary legal fees for similar services, Appellants have presented Counsel's affidavit supported by detailed time records showing that Plaintiff incurred attorneys' fees and costs. Appellants respectfully suggest that based upon counsel's affidavit and the Court's familiarity with attorney fees customarily charged in this legal community, the time spent and the hourly rates requested by Counsel are reasonable. In fact, Plaintiff's Counsel have discounted their normal rates due to the public interest nature of this litigation. The Court should find that Appellants' actual attorneys' fees and costs were reasonable, and that Appellants are entitled to a full award of attorneys' fees and costs.

CONCLUSION

The South Carolina General Assembly abrogated sovereign immunity for the award of attorneys' fees and costs in enacting section 15-77-300, and the South Carolina Supreme Court abrogated sovereign immunity in *McCall by Andrews v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985), and in *Layman v. State*, 376 S.C. 434, 446, 658 S.E.2d 320, 326 (2008), for the award of attorneys' fees and costs under § 15-77-300. The statute applies to these Respondents, as they were acting for the State.

Appellants have met the statutory criteria for an award of fees. They prevailed. The Respondents were not substantially justified in pressing their claims. No other factors make an award of attorneys' fees unjust. Respondents made no objection to any particular entry, nor to the amount of the fees claimed. Appellants' attorneys' fees are reasonable.

Wherefore, Appellants pray the Court to reverse the judgment of the Circuit Court and award Appellants their actual attorneys' fees and costs from the Respondent Senators.

Respectfully submitted,
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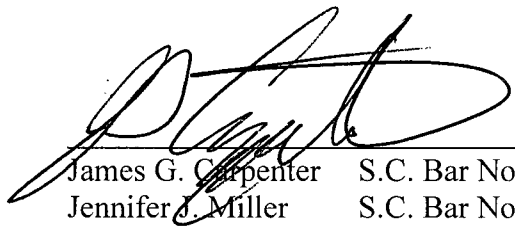

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October 17, 2014

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

Appellate Case No. 2014-001412

Certificate of Service

The undersigned attorney hereby certifies that he has served a copy of the foregoing Appellants' Final Brief on counsel for Defendants by US Mail, postage prepaid on Friday, October 17, 2014 to the following persons:

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