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 REPLY BRIEF

October 17, 2014

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Appellants submit this Reply Brief to address matters raised by the Respondents' Brief and to point out several arguments that the Respondents did not address.

I. LEGISLATIVE IMMUNITY DOES NOT PROHIBIT AN AWARD OF ATTORNEYS' FEES AS COSTS.

Respondents argue that legislative immunity prevents an award of attorneys' fees as costs in this action. Respondents cite *Tenney v. Brandhove*, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951) and *Bogan v. Scott Harris*, 523 U.S. 44, 118 S.Ct. 966 (1998) in support of their arguments for legislative immunity.

A. Common Law Legislative Immunity Does Not Govern These Facts.

In *Tenney*, the Supreme Court of the United States traced the origins of legislative immunity from the English common law through the speech and debate clause of Article 1, section 6 of the United States Constitution. The Supreme Court described legislative immunity as "the privilege of legislators to be free from arrest or civil process for what they do or say **in legislative proceedings**." *Id.*, 341 U.S. 367, 372, 71 S.Ct. 783, 786 (emphasis added).

In *Tenney*, the plaintiff asserted that legislators had **conducted legislative hearings** in violation of his constitutional rights. He sought compensatory and punitive damages under one of the Civil Rights Acts. In explaining the rationale for legislative immunity, the Supreme Court stated,

> Legislators are immune from deterrents to the **uninhibited discharge of their legislative duty**, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives.

Id., 341 U.S. 367, 377, 71 S.Ct. 783, 788 (emphasis added). The *Tenney* Court found that the defendant legislators were "acting in the sphere of legitimate legislative activity." *Id.*, 341 U.S.

367, 376, 71 S.Ct. 783, 788. The Court ruled that the defendants were entitled to legislative immunity because "Investigations, whether by standing or special committees, are an **established part of representative government**." *Id.,* 341 U.S. 367, 377, 71 S.Ct. 783, 789 (emphasis added).

In *Bogan*, the plaintiff sought to recover damages under 42 U.S.C. § 1983 for violation of her First Amendment rights. The plaintiff argued that local legislators had proposed, voted on, and signed legislation eliminating her government employment position in retaliation for her exercise of First Amendment rights. In *Bogan*, the Supreme Court ruled that legislative immunity barred not only the damages, but also granted absolute immunity from suit for all legitimate legislative activities. The Court summarized its holding:

> [Defendants below] further argue that their acts of **introducing, voting for, and signing an ordinance** eliminating the government office held by respondent constituted **legislative activities**. We agree on both counts and therefore reverse the judgment below.

Id., 523 U.S. 44, 46, 118 S.Ct. 966, 969 (1998) (emphasis added). In referring to *Tenney*, the *Bogan* Court ruled, "We explained that legislators were entitled to absolute immunity from suit in common law." *Bogan v. Scott Harris*, 523 U.S. 44, 49, 118 S.Ct. 966, 970.

South Carolina adopted the rule of legislative immunity from the English common law, as demonstrated by S.C. Code Ann. § 14-1-50: "All, and every part, of the common law of England, where it is not altered by the Code or inconsistent with the Constitution or laws of this State, is hereby continued in full force and effect in the same manner as before the adoption of this section." Judge Hemphill recited the history of its adoption in *Bruce v. Riddle*, 464 F. Supp. 745 (D.S.C. 1979).

> The applicability of the legislative immunity defense in South Carolina was not at issue in *Tenney v. Brandhove*, [341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951)], but the Court did make some enlightening observations about its availability here and in virtually all other states. After discussing the evolution of legislative immunity in the English common law, the Court observed in footnote 3 that the South Carolina Constitution of 1776 had protected the privilege by a general

> provision in Art. VII preserving English law. Although that provision no longer exists in the current South Carolina Constitution, the same purpose is served by § 14-1-50 of the S.C. Code which, provides that "All, and every part of, the common law of England, where it is not altered by the Code or inconsistent with the Constitution or laws of this State, is hereby continued in full force and effect in the same manner as before the adoption of this section." Thus, the holdings in *Tenney v. Brandhove* and in other decisions based on legislative immunity as it evolved from the common law of England are fully applicable to actions brought in any federal or state court of South Carolina alleging causes of action arising out of the constitutions or statutes of either the United States or the State of South Carolina.

Id. 464 F. Supp. at 747-48.

The facts of the Supreme Court cases *Tenney* and *Bogan* are distinguishable from the facts of the case at bar. In *Tenney* and *Bogan*, the activities that were the subject of the claims against the legislators were activities that the legislators carried out as part of their legislative duties. The legislators in *Tenney* were "acting in the sphere of legitimate legislative activity." *Id.,* 341 U.S. 367, 376, 71 S.Ct. 783, 788. In *Bogan*, the Defendants were accused of proposing, voting on, and signing a piece of legislation to eliminate the plaintiff's governmental position. Proposing, voting on, and signing a piece of legislation are all inherently "legislative activities," and again, the defendants were entitled to absolute legislative immunity.

In the case at bar, the award of attorneys' fees would not be based on any legislative activity of the Respondents. Rather, the award of attorneys' fees is a part of an award of costs, and derives not from legislative activity, but from the Respondents' conduct in litigation. Legislative immunity does not apply in this context.

There are other reasons why legislative immunity does not apply to the Respondent Senators. First, legislative immunity is a privilege or exemption for a legislator sued in his individual capacity. Respondents were sued in their official capacities as representatives of the government of South Carolina. Second, legislative immunity prevents an award of compensatory or punitive damages. The Plaintiffs did not seek compensatory or punitive damages from these

Senators. Plaintiffs sought only declaratory judgment to challenge the constitutionality of an Act of the General Assembly. Third, as demonstrated below, legislative immunity is an affirmative defense which these Respondent Senators failed to plead, and it should be deemed waived. This Court should rule that legislative immunity does not prevent an award of attorneys' fees, awarded as costs in this action.

B. Respondents Did Not Plead Common Law Legislative Immunity in a Timely Manner.

The South Carolina Constitution does not contain a speech and debate clause, as does the U.S. Constitution, but it does grant a constitutional exemption from civil litigation to **individual** members of the General Assembly while that body is in session. South Carolina Constitution, Art. III, § 14. That section provides an affirmative defense that must be pled, and if it is not pled timely, it is waived.

> An exemption or privilege from service of civil process is regarded as a personal privilege or exemption which may be and generally is waived if not claimed at the proper time by the person in whose favor it runs. 62 Am.Jur.2d, *Process,* § 156.
>
> Here, the husband plainly waived any right to protection he had, afforded by the constitutional provision. He participated freely and voluntarily and subjected himself to cross-examination. Several other hearings were held between February 23 and October 1, 1982 in which he participated.

Eaddy v. Eaddy, 283 S.C. 582, 584, 324 S.E.2d 70 (1984). The Court ruled that the defendant had waived his privilege. Likewise, these Respondents failed to plead legislative immunity as an affirmative defense in their answer, and therefore this affirmative defense is waived.

C. Respondents Did Not Claim Absolute Immunity as a Defense.

Respondents do not argue that they were immune from suit (absolute immunity); instead, they appear to have conceded that they are subject to suit for declaratory judgment that an Act of the General Assembly is unconstitutional, and rightly so. Indeed, the appellate courts of this State have heard and adjudicated many such cases.

The Supreme Court of South Carolina ruled that members of the Williamsburg County Legislative Delegation were absolutely immune from an award of damages for allegedly slanderous statements, on the basis of legislative immunity.

> A sound public policy has long recognized an absolute immunity of members of legislative bodies for acts of the performance of their duties. Accordingly, an absolute privileges recognized as to defamatory statements made by legislators in the course of their functions, if such statements are connected with, or relevant or material to, the matter under inquiry.

Richardson v. McGill, 273 S.C. 142, 146, 255 S.E.2d 341, 343 (1979). The immunity at issue in *Richardson* was the immunity from compensatory and punitive damages for the tort of defamation, but the Supreme Court of South Carolina also ruled that the legislators were absolutely immune from suit.

Judge Anderson, writing for the Court of Appeals in his customary scholarly manner, explained **absolute immunity** in the context of prosecutorial immunity in *Williams v. Condon*, 347 S.C. 227, 553 S.E.2d 496 (2001). Absolute immunity is immunity from suit, not simply immunity from an award of damages. "There are weighty reasons why judicial officers should be shielded and the proper discharge of their official duties from harassing litigation at the suit of those who think themselves wronged by their decisions and that injustice has been done." *Id.* 347 S.C. 227, 235, 553 S.E.2d 496, 501 *quoting Yaselli v. Goff*, 12 F.2d 396, 399 (2d Cir. 1926), *affirmed in toto*, 275 U.EcoS. 503, 48 S.Ct. 155, 72 L.Ed 395 (1927).

Judge Anderson also quoted Judge Learned Hand explaining the justification for absolute immunity from suit, and not merely immunity from damages.

> ***The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.*** Again and again the public interest calls for action which may turn out to be founded on a mistake, in Conthe face of which an official may later find himself hard put to it to satisfy a

> jury of his good faith. ***There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors.*** As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. ***In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.***

Id. 347 S.C. 227, 238, 553 S.E.2d 496, 502, *quoting, Gregoire v. Biddle*, 177 F.2d 579, 581 ((2d Cir. 1949) (*emphasis added by S.C. Court of Appeals*). Thus, legislative immunity, when properly applied is absolute immunity from suit, not just from damages.

Respondents do not argue that legislative immunity prohibits the Court from **hearing** this case (as it did in *Bogan*), but merely from **awarding attorneys' fees** as a part of the **costs** under S.C. Code Ann. § 15-77-300. If legislative immunity applied, it would provide immunity not only from an award of compensatory and punitive damages, but also an **absolute** immunity from suit. Appellants were awarded declaratory judgment. The award of attorneys' fees, as costs, inherently follows the award of declaratory judgment.

Respondents did not appeal the Circuit Court's ruling that the act in question was unconstitutional. They opposed Plaintiffs' claim for attorneys' fees. After the Respondents litigated the merits of the case and lost, a tardy claim of legislative immunity does not bar an award of costs, including attorneys' fees under § 15-77-300.

II. THE STATUTORY EXCEPTION FOR THE BOARD DOES NOT PREVENT AN AWARD OF ATTORNEYS' FEES AGAINST THE RESPONDENTS.

The General Assembly recently enacted a limitation on the award of attorneys' fees by redefining "substantially justified." The statutory limitation states: "**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(A). Appellants did not sue the Richland County Board of Elections and Voter Registration. The Appellants do not seek to recover attorneys' fees from the Board under § 15-77-300, but from the Senators in their official capacities.

Respondents argue that the recent statutory exception prevents an award of attorneys' fees against the Board, and therefore that this Court should rule that this exception also prevents an award of attorneys' fees these Respondents. Respondents' argument is not justified by the text of the statute, and their interpretative gloss on the statute would invite the Court to attempt to "leap the chasm in two bounds."

First, Respondent Senator have not argued that this statutory protection applies **to them** in this case. Instead, they argue that **if** the Appellants had brought suit against the Board, **the Board** could have asserted this statutory defense (Respondents' Brief, p. 14). The Respondents proffer policy reasons for the enactment of the statutory exception, but the policy reasons do not support an extra-statutory application of the exception to Respondent Senators.

Second, Respondents have not shown that they have met statutory prerequisites to claim this statutory exception. Respondents do not argue that they were following "a statutory or constitutional mandate" in the conduct of this litigation. The Attorney General did not view defending this unconstitutional act to be "a statutory or constitutional mandate" to the State. The Attorney General, representing the State of South Carolina, in keeping with his prior opinions, **conceded** that the act was unconstitutional. These Respondents could have just as easily conceded that the act was unconstitutional. These Respondents have no "constitutional or statutory mandate" to defend an unconstitutional act.

Third, Respondents have not pled, asserted, or demonstrated that they were entitled to claim the statutory exception, either in their arguments to the Circuit Court, or in their arguments

to this Court. The statutory exception is in the nature of an affirmative defense. These Respondents have not cited any particular "constitutional or statutory mandate" requiring them to defend this unconstitutional act. If they had pled or asserted some "constitutional or statutory mandate," the Appellants could have challenged that assertion, and the issue could have been joined, debated, and litigated. As it is, the Respondents have made no such pleading or assertion. Therefore, they are not entitled to take advantage of the statutory exception.

III. RESPONDENTS FAILED TO ADDRESS SEVERAL IMPORTANT ARGUMENTS IN THE APPELLANTS' BRIEF.

A. The Supreme Court of South Carolina Previously Awarded Attorneys' Fees and Costs to Mr. Sloan against the Members of the General Assembly.

Respondents failed to address the Supreme Court's prior award of costs and attorneys' fees to Mr. Sloan in another action in which he challenged an unconstitutional act of the General Assembly, *Sloan v. Wilkins*, 362 S.C. 430, 608 S.E.2d 579 (2005). If the Circuit Court and the Respondents had been correct in their position on legislative immunity, then surely the Supreme Court of South Carolina would not have so cavalierly ordered the House and the Senate to pay costs and attorneys' fees to Mr. Sloan in 2005. This prior award goes to the heart of Respondents' argument that they are immune from the award of costs and attorneys' fees, but the Respondents failed to address this important argument.

Furthermore, in 2005, both the South Carolina House of Representatives and the South Carolina Senate **paid the award** of costs and attorneys' fees to Mr. Sloan, without protest, and without making a Motion to Alter or Amend the judgment of fees and costs, as awarded by the Supreme Court of South Carolina. If they had been immune from such an award, surely they would have raised an objection..

B. The State Itself and Political Subdivisions Are Not Subdivisions of the Executive Department, but § 15-77-300 Subjects Them to an Award of Attorneys' Fees.

Respondents argue that the statutory phrase, "the appropriate agency," means only an agency of the Executive Department. Appellants demonstrated in their brief that the State itself can be liable for attorneys' fees under S.C. Code Ann. § 15-77-300. Furthermore, a political subdivision can be liable for attorneys' fees under this section. Respondents failed to address Appellants' argument that the term "agency" or "appropriate agency" must mean something other than a subdivision in the Executive Department as the Respondents contend. Section 15-77-300 explicitly allows attorneys' fees against "**the State or any political subdivision of the State**." *Id.* the Supreme Court awarded attorneys' fees against the State itself in *Layman v State*, 376 S.C. 434, 658 S.E.2d 320 (2008). The State itself is not a subset of the Executive Department.

Courts have also awarded attorneys' fees against political subdivisions. *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). Political subdivisions are not a subset of the Executive Department. Respondents failed to address these many authorities that are contrary to their position.

Despite their argument that "appropriate agency" means a subdivision of the Executive Department, Respondents are not consistent on this point. Respondents also argue that the Richland County Board of Elections and Voter Registration, is "the appropriate agency" when

they argue that that the Board would have been entitled to take advantage of the statutory exception to the award of attorneys' fees (Respondents' Brief, p. 14). The Board is not an agency of the Executive Department; it is a part of Richland County. Nevertheless, the Respondents assert that it is "the appropriate agency" for purposes of utilizing the statutory exception to an award of attorney's fees under this section. "Appropriate agency" is not limited to an agency of the Executive Department.

C. Respondents Failed to Object to Any Particular Entry of Attorneys' Fees or to Total the Amount of Attorneys' Fees Claimed.

Appellants incurred total attorneys' fees and costs of $33,824.57 in prevailing in the Circuit Court. In response to the fee petition, Respondents did not object to any specific entry Appellants claimed as attorneys' fees, nor did Respondents argue that the total fee claimed was unreasonable in any way (R. pp. 105-111). On appeal, Respondents have also made no objection to any particular entry or to the total claimed by the Appellants. In their Brief, Respondents failed to address Appellants' arguments on this point.

Appellants' actual attorneys' fees and costs were reasonable, and Appellants are entitled to an award of attorneys' fees and costs.

IV. SOVEREIGN IMMUNITY DOES NOT PREVENT AN AWARD OF ATTORNEYS' FEES AS COSTS.

Respondents concede that "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)." Respondent's Brief, p. 11. *Mortenson* held that the United States was subject to monetary sanctions under Rule 37 for violations of orders related to discovery. In that case, the United States and argued that such sanctions were in violation of its sovereign immunity. The federal Equal Access to Justice Act ("EAJA") allows an award of fees to a litigant, if the government litigates

without a good faith basis in fact and law. The *Mortenson* court found that EAJA was a sufficient statutory waiver of sovereign immunity and authorization for an award of attorneys' fees and costs under Rule 37. Similarly, in the case at bar, the South Carolina fee-shifting statute, § 15-77-300, constitutes a waiver of sovereign immunity for an award of attorneys' fees and costs in litigation in which the State is a party.

Furthermore, Appellants Initial Brief set out in some detail the explicit waivers of sovereign immunity both by the Supreme Court of South Carolina and the General Assembly. Respondents failed to address these waivers of sovereign immunity. Sovereign immunity, to the extent it still exists, protects the General Assembly from compensatory or punitive damages arising from discretionary or legislative acts of the General Assembly. The attorneys' fees statute at issue, § 15-77-300, does not authorize attorneys' fees to be paid for acts of legislative discretion, and the Appellants are not seeking attorneys' fees for acts of legislative discretion. The statute, like EAJA, authorizes payment of attorneys' fees for conducting litigation without a good faith basis in fact and in law to support the position taken by the government. That is exactly the situation in this case. The Respondents have attempted to defend the indefensible. Such conduct is the explicit statutory reason for an award of attorneys' fees under § 15-77-300. Sovereign immunity does not prevent an award of attorneys' fees under this section.

Respondents failed to plead sovereign immunity as an affirmative defense. Sovereign immunity is an affirmative defense that must be pled and proven. In justification of that failure to plead sovereign immunity as an affirmative defense, the Respondents argue that Appellants sought the attorneys' fees "after the matter [was] concluded" (Respondents Brief, p. 9). Accordingly, Respondents did not, and do not, argue that the defense of sovereign immunity prohibits the Court from **hearing** this case, but merely from **awarding attorneys' fees** as a part of the **costs** under

S.C. Code Ann. § 15-77-300. If sovereign immunity were truly applicable, it would provide Respondents immunity from an award of compensatory and punitive damages. Appellants did not seek, and do not seek, an award of damages.

Respondents appear to have conceded that they are subject to suit for declaratory judgment that an act of the General Assembly is unconstitutional. A ruling that the Respondents are subject to an award of costs (including attorney's fees) seems to be far less of an affront to sovereign immunity than a judgment declaring an act of the General Assembly unconstitutional. Sovereign immunity or legislative immunity does not bar an award of costs, including attorneys' fees under § 15-77-300.

CONCLUSION

Legislative immunity bars an award of compensatory or punitive damages against individual legislators for actions taken in their capacity as legislators. It also would prevent a court from hearing such a lawsuit. However, Appellants did not seek compensatory and punitive damages; they sought and were awarded declaratory judgment. Legislative immunity does not bar an award of attorneys' fees against legislators in their official capacities after they litigated the case to conclusion without raising the affirmative defense of legislative immunity. Furthermore, the Supreme Court of South Carolina previously awarded costs and attorneys' fees against the House and Senate when Mr. Sloan successfully challenged another unconstitutional act.

Because § 15-77-300 explicitly authorizes an award of attorneys' fees against the State itself and against political subdivisions, the interpretation of "agency" advanced by the Respondents in by the Circuit Court cannot be a correct interpretation.

Finally, Respondents have failed to address many important arguments raised by the Appellants. Appellants have demonstrated an entitlement to an award of attorneys' fees.

Appellants pray the Court to reverse the judgment of the Circuit Court and to award Appellants their actual attorneys' fees and costs from these Respondents.

Respectfully submitted,
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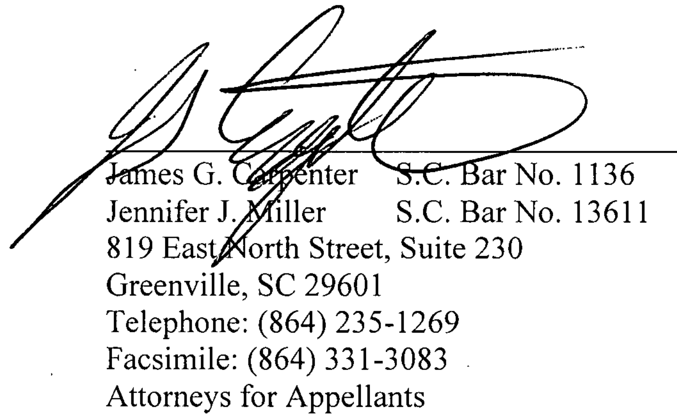

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Certificate of Service

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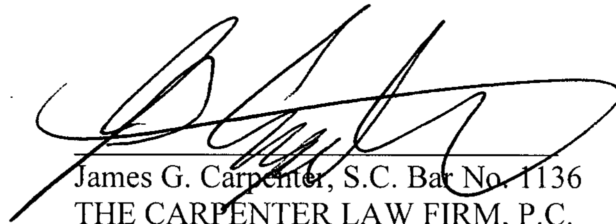

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