

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM YORK COUNTY  
Court of Common Pleas

**SC Court of Appeals**

Stonewall Jackson Kimball, Special Circuit Court Judge

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Case No. 2014-CP-46-1425  
Appellate Case No. 2014-002578

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Ryan Powell, ..... Appellant,

v.

Amy Boheler d/b/a York County Auditor,  
Beth Latham d/b/a York County Treasurer, and  
Robert Kiser d/b/a York County Delinquent Tax Collector,  
each in their individual and official capacities, ..... Respondents.

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REPLY BRIEF OF APPELLANT

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Ryan Powell, Appellant  
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## INTRODUCTION

Unfortunately for Appellant, ("Ryan" hereinafter) almost everyone holds the untenable position that "*everyone has to pay property taxes*". They hold this position because that is what they have heard their entire lives. However, this position is incorrect and based on their failure to study the principles of law, taxation, and history. For anyone who has so studied, learns that property taxes (like all other taxation) are and must be based on contracts and agreements, otherwise they would be unconstitutional. Respondents and their attorney fall into this camp of "believers" who refuse to accept the truth found in the actual written laws because their cognitive dissonance blinds them. The theory of Ryan's case can be summarized as follows-> since Ryan did not record a deed for his land (i.e., did not enter into a contract/agreement with County of York) then according to the written laws he does not have any liability for the payment of taxes on his land and Respondents have no legal authority to interfere with his property.

Respondents failed to brief their opposition to most of the issues that Ryan raised and argued in his opening brief, effectively conceding all those unopposed issues. In fact, Respondents choose to stay totally silent on the CRUCIAL issues of this entire appeal, the legal basis of Ryan's case. Ryan devoted almost half of his opening brief to these issues as they touch every allegation in his complaint, every claim for damages, every legal argument put forth by the parties, and every finding and conclusion of law made by the trial judge, yet Respondents decided not to even address these issues!

Respondents then state in their brief that their failure to address the legal merits of Ryan's case should not be construed as their agreement with Ryan's positions (Respondents' Brief, pg 6, footnote #7). But how can Respondents silence and refusal to

address the legal merits of Ryan's case (especially since Respondents carried the burden of proof since they raised this matter as an issue) be construed as anything BUT Respondent's tacit agreement with Ryan's positions? It cannot.

### STATEMENT OF THE CASE

Respondents' counterstatement of the facts and the procedural history of this case fails to comply with the requirements for an accurate, unbiased and supported recitation. The following are but a few examples of Respondents false, biased and unsupported statements they included in their statement of the case and procedural history of the case.

First, Respondents state that "*York County appeared on behalf of the County Employees*" (Respondents' brief pg 2, second para). That statement, and many others like it found throughout Respondents' brief, gives the impression that York County is a party to this action or involved in this case. However, the record shows this is not the case. The reason Respondents are making these statements seems to be their desire to convince this Court that Respondents have sovereign immunity to Ryan's action because Ryan's action somehow involves York County, a "governmental entity", but it does not.

Second, Respondents go into a discussion of remedies Ryan sought from this Court in its original jurisdiction during his unsuccessful attempts to stop the Respondents from their continuing attempts to steal his property (Respondents brief page 2, footnote #1 and pg 4 second para). These facts were never raised to or ruled upon by the lower court and are wholly immaterial to Ryan's action or to this appeal.

Third, in Respondents statement of facts they refer to their motion for sanctions and supporting affidavit<sup>1</sup> that they filed into the case **after** the case had been **finally decided**

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<sup>1</sup> The affidavit is from the county attorney "Kendree" and contains over **100 pages** of hodgepodge, dubious, and wholly irrelevant exhibits

**and totally disposed of** and was never heard by the trial court, so it is immaterial to this appeal (Respondents' brief, pg 2, fn #1). Respondents also included that motion for sanctions and supporting affidavit in their "Designation of Matter to be included in the Record on Appeal" (see #6 and #7 of that document) even though they admit in their brief that their motion was never heard by the trial court - "*That motion is pending, but has been stayed by this appeal*" (Respondents' Brief page 4). Therefore, it cannot be included in the record, yet they designated it in violation of the rules and their attorneys certification.

If Respondent's statement of the facts and procedural history of the case do not comply with the rules and their attorney's certification is clearly a **false certification**, can any other part of their brief be trusted?

### **STANDARD OF REVIEW**

Respondents raised no objection to any of the standards of review proposed by Ryan, so Respondents must agree with them all.

### **ARGUMENT**

- I. **Because S.C. Code of Laws § 12-37-610 is the statute that lays the liability for taxes and assessments on real property, and not S.C. Code of Laws § 12-37-210, it was error for the trial judge to find that Ryan is liable for taxes and assessments on his land simply because his land is within the boundaries of South Carolina and therefore conclude that Ryan's case is *entirely frivolous*.**

Ryan demonstrated in his opening brief pgs 1-19 that the following issues he briefed are correct and applicable to this case and Respondents briefed no opposition, so they must agree:

1. That according to S.C. Code of Laws § 12-37-610 taxes and assessments on real property are assessed and collected ONLY from owners of property who have recorded their deeds with the register of deeds in the County wherein their real property is located.

2. That contrary to Respondents' position, which the trial judge erroneously accepted, all land found within the boundaries of South Carolina is not liable for taxes and assessments under S.C. Code of Laws § 12-37-210 simply because it can be found within those geographic boundaries. In other words, it is the recorded owner of the land who is made liable to pay a tax (per S.C. Code of Laws § 12-37-610) and not the land that is liable by virtue of its location.
3. That all taxes and assessments on real property are contractual obligations of the owner of the recorded property (the contract is created by the recordation of the deed).
4. That there is no law that mandates Ryan must record his deed.
5. That since the record shows that Ryan did NOT record a deed for his land then Ryan is NOT liable for any taxes (i.e., contractual obligation) to Respondents.
6. That Respondents' have no legal authority to interfere with the property of a man who is not liable for the payment of any tax to them which means Respondents lack any legal authority to list, lien, levy, advertise for sale, possess, trespass on, post threatening notices on, take, or sell Ryan's property.
7. That Respondents' have violated Ryan's natural, constitutional, and property rights and in doing so are liable in their individual capacity to Ryan for their wrongs.

Respondent state their reason for not addressing any of these above listed issues. i.e., the legal basis of Ryan's case, is that *"those arguments were never substantively addressed by the circuit court, because the circuit court determined that it did not have subject matter jurisdiction to hear Powell's arguments... On Appeal, this court cannot review rulings the circuit court never made."* [**emphasis** added] (Respondents Brief, pg 7 sec I, para 1).

First, a dismissal on a Rule 12 (b)(1) SCRCF motion for want of subject matter jurisdiction is done by a court without reaching the merits of the case, so had the case ended after the trial judge found he was wanting subject matter jurisdiction, the Respondents would be absolutely correct. See "Normally, Rule 12(b)(6) judgments are dismissals on the merits and Rule 12(b)(1) dismissals are not.", Wilkins v. Jakeway, 183

F. 3d 528 (6th Circuit 1999). However, in this case the trial judge determined that he **retained** just enough subject matter jurisdiction after his dismissal for want of subject matter jurisdiction to be able to hear the merits of the case in order to decide Respondents' other Rule 12 (b)(6) SCRCF motions to dismiss and to substitute the defendants. In deciding those Rule 12 (b)(6) SCRCF motions, the trial judge both heard and determined the merits of Ryan's case including the legal basis of Ryan's claims.

Second, to preserve an issue for review the issue only needs to be raised to and ruled upon by the trial judge. See "At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge.", Herron v. CENTURY BMW, 719 SE 2d 640 (SC Sup Ct 2011). Respondents are the ones who raised these issues in their Rule 12(b)(6) SCRCF motion to dismiss Ryan's case on the grounds that Ryan allegedly "misinterpreted the laws" that Ryan's claims are entirely based upon, alleging that Ryan's claims are therefore "frivolous" [MTD, pg 4 #10]. Respondents argued that motion to the trial judge [transcript, pgs 1-13]. Ryan presented his opposition to that motion in his written response [response in opposition, pgs 15-17] and his oral arguments [transcript, pgs 15-31]. The trial judge granted Respondents motion to dismiss, concluding that Ryan's case is "*entirely frivolous*" [order, Rule 12(b)(6) S.C.R.P., last para, last sentence]. Then Ryan addressed these issue again, since they are so crucial to and touch every aspect of his case, in his motion to alter or amend [MTAA, pgs 3-4] and argued these issues exclusively during the hearing of that motion [transcript, pgs 4-9]. The trial judge's conclusions that he reached after considering all the arguments and law raised by the parties was that Ryan's claims are *entirely frivolous* because, as argued by the Respondents, Ryan's **land** is liable for the tax by the fact it is within the boundaries of

South Carolina and therefore Respondents were just doing their jobs collecting a tax that Ryan's land owes. These conclusions were clearly the basis for not only the trial judge's decision to dismiss Ryan's claims as "*entirely frivolous*", but also his decision that the Respondents were just "*acting within the scope of their official duties*", and his decision that Ryan is a *taxpayer* who must pursue his remedy within the Revenue Procedures Act ("RPA" hereinafter). The trial judge's ruling to dismiss Ryan's case as "*entirely frivolous*" alone preserves this issue for appellate review as frivolous means "without any legal merit" so the legal merit of Ryan's case is absolutely open to appellate review.

Third, the issue of Ryan's liability for the payment of any taxes on his land and the Respondents legal authority to interfere with Ryan's property are ALL based on the construction of the real property taxing statutes. And the standard of review pertaining to the construction of any statute is - "de novo". "The issue of interpretation of a statute is a question of law for the court. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000)." This Court undertakes a de novo review of all issues of law, and is free to decide matters of law with no particular deference to the trial court. Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 564, 658 S.E.2d 80, 90 (2008). As mentioned above, Respondents raised no objection or opposition to the de novo standard of review that Ryan proposed in his brief.

In summary, Respondents are the ones who raised the issue that this case is frivolous to the trial court, argued this issue to the trial court, and got a favorable ruling. Now their position is that the legal merits of Ryan's case weren't **substantively** addressed by the trial court nor were the trial judge's specific findings documented in his order that support his conclusions, *inter alia*, that Ryan's case is *entirely frivolous*, so that decision

can't be reviewed by this Court. That position is nonsensical. This Court should see Respondents silence on this issue for what it is - Respondents' **inability** to disprove Ryan's well supported legal position showing he is not liable to Respondents so they have no legal authority to interfere with his property and no immunity for their wrongs done to him.

**II. Because the Revenue Procedures Act does not divest the circuit court of subject matter jurisdiction it was error for the trial judge to dismiss Ryan's claims finding that the circuit court is without subject matter jurisdiction.**

Ryan demonstrated in pages 19-24 of his opening brief that the following issues are correct and applicable to this case and Respondents briefed no opposition so they must agree:

1. The Revenue Procedures Act is not an impediment to the circuit court's jurisdiction over tort claims, so it was error for the trial judge to dismiss Ryan's tort claims under Rule 12 (b)(1) SCRCF for want of subject matter jurisdiction.
2. A trial court can not both be wanting subject matter jurisdiction to hear a tort claim but at the same time have the authority to order the substitution of the parties or hear and decide the case on its merits.

Notwithstanding Respondents' apparent agreement with Ryan's above stated positions, Respondents did make many frivolous arguments, mostly based on false recitation of facts which the record does not support, including this one - "*if Powell truly believes that York County is wrongly assessing taxes against his property or wrongly attempting to collect taxes from him, then Powell's remedy is under the RPA*" (Respondents brief, pg 8, para 1). Respondents continually and intentionally misstate the facts of the case in order to hide the truth. Ryan's complaint clearly alleges that Respondents have NEVER assessed a tax against Ryan or his property<sup>2</sup>, nor have they

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<sup>2</sup> Ryan made abundantly clear in his brief that taxes are not assessed against land they are assessed against the person of the recorded owner of recorded property.

ever attempted to collect a tax from Ryan as he is not liable for any taxes [Complaint all pages]. Ryan quoted at length in his opening brief from Economy Plumbing & Heating Co., Inc. v. United States, 470 F. 2d 585 (Court of Claims 1972) which conclusively demonstrates that the administrative tax procedures like the RPA were created for the **benefit** of *taxpayers* so it can **ONLY BE USED** by taxpayers and cannot be used by non-taxpayers<sup>3</sup>. Ryan conclusively demonstrated that he is a non-taxpayer (Appellant's Brief pg 1-24) and Respondents remained silent and refused to even address that issue much less disproved it, so they must agree.

Respondents then made another frivolous, nonsensical argument when they wrote "*The circuit court properly ruled that it did not have jurisdiction to hear Powell's tax protest, and dismissed **that portion of his complaint** without prejudice*" (Respondents' brief, pg 8. para 1). Ryan's case is not a "*tax protest*" as he is not liable for the payment of any tax! Also since Ryan's **entire case** is premised on Respondents' lack of legal authority to interfere with or take Ryan's property for a debt he does not owe, it is impossible to dismiss the legal basis of Ryan's **entire case** which touches **every single allegation** in the complaint without dismissing the entire complaint. So what portion of the complaint did the trial judge dismiss? Which causes of action? Which allegations? What "portion of the complaint" did the trial judge **retain** so that he had **just enough** subject matter jurisdiction to rule on the merits of Ryan's case? Absolute, utter nonsense.

Respondents then made another frivolous, nonsensical argument quoting Key v. Curry 305 S.C. 115, 116, 406 S.E.2d 356, 357 and stating - "*as tempting as it may be, this*

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<sup>3</sup> The RPA doesn't even contemplate the possibility to hearing or deciding issues of liability of the person bringing the claim because one has to be liable in order to invoke the ALJ's jurisdiction nor does it contemplate the possibility of hearing or deciding issues of tort damages because a taxpayer can NEVER be damaged by the collection of their contractual debt that they agreed to pay.

*court should not take that bait*" to hear Ryan's appeal in the court's original jurisdiction! (Respondents' Brief, pg 9 last sentence to pg 10, first sentence) That statement is utterly nonsensical, as this Court is well aware appellate jurisdiction and original jurisdiction are two entirely separate and distinct jurisdictions that cannot be mixed nor has Ryan requested this Court hear his appeal in its original jurisdiction.

Respondents then frivolously argued that S.C. Code of Laws § 12-60-3390 is the authority that allowed the trial judge to dismiss Ryan's case, for lack of subject matter jurisdiction (see Respondents' brief, pg 8, end of para 1). However, Respondents relied upon an entirely different statute in their Rule 12 (b)(1) motion that allegedly gave the authority to the trial court to dismiss for want of jurisdiction [MTD, pg 3, #3] but now they have changed their position. Nonetheless, S.C. Code of Laws § 12-60-3390 clearly states that a "taxpayer's"<sup>4</sup> action can be dismissed<sup>5</sup> for failure to first **exhaust his administrative remedies** if he brings his claims to a circuit court BEFORE taking them to the Administrative Law Court. Ryan showed in his brief that he is not a taxpayer and that S.C. Code of Laws § 12-60-3390 has nothing to do with subject matter jurisdiction.

Respondents then made another false and frivolous argument when they wrote "*Powell strenuously disputes that the RPA applies to him, asserting that he is not a "property taxpayer"*" (see Respondents' brief, pg 8, last para, first sentence). Ryan never argued that he is not a "*property taxpayer*" mostly because to even get to the definition of that term in the RPA one has to first be a *taxpayer* and because that definition of *property*

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<sup>4</sup> S.C. Code of Laws § 12-60-30(29) - "*Taxpayer' means a person who is liable for a tax*".

<sup>5</sup> S.C. Code of Laws § 12-60-3390 - "*if a taxpayer brings an action covered by this chapter in circuit court, the circuit court shall dismiss the case without prejudice.*".

*taxpayer*<sup>6</sup> can be confusing to people who don't understand the property tax laws, and Ryan didn't want to unnecessarily confuse Respondents' attorney. Nonetheless, Ryan did show definitively that he is not a person liable, i.e., a *taxpayer*, and that land is not and cannot be liable for, or subject to any tax **unless** the owner records his deed (Appellant's Brief pgs 1-19), Respondents agreed by their silence.

Respondents then continued on with their frivolous arguments by writing "*he cannot credibly dispute that his "property or interest in property is subject to, or liable for, a property tax"* (Respondents' brief, pg 9, first para). First, not only **CAN** Ryan credibly dispute that contention, but Ryan has already credibly disputed it many times, including in his brief (Appellant's Brief pgs 1-19). However, Respondents refuse to even brief a position in opposition to Ryan's credible dispute! Second, a **definition** in a statute does not create a liability, it only defines one, so where is any tax liability ever laid against land in any statute? There is none. Third, as shown in footnote #6 the definition of *property taxpayer* is overly complicated to handle a situation that does not apply to Ryan because he is not a *taxpayer*. Fourth, the statutes are clear that a tax **debt** (contractual obligation) is due by the person that it is charged to (i.e., the owner who has recorded his deed). See S.C. Code of Laws § 12-49-10 :- "All taxes, assessments and penalties legally assessed shall be considered and held as a **debt** payable to the State **by**

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<sup>6</sup> The definition of "*property taxpayer*" found in S.C. Code of Laws § 12-60-30(22) can create the potential for confusion because there exists a situation that can arise when a person buys property (which has a lien against it by virtue of an assessment against the previous owner for that tax year) and that person then records his deed (entering into a contract with the County of XX). In that situation the recorded new owner will not become liable for any taxes on his recorded property under S.C. Code of Laws § 12-37-610 until the December 31 following his purchase. During that short time period (always less than a year) the recorded new owner is not YET liable under S.C. Code of Laws § 12-37-610 but because he has contracted with the "County of XX" by recording his deed he has contractually obligated himself to pay the **lien** against the land created by the assessment against the previous owner (i.e., his interests in his land are liable during that short time period before he himself becomes liable under S.C. Code of Laws § 12-37-610) so the legislature has ensured that those persons, in that rare situation, still have access to the remedies provided to all other *taxpayers* in the RPA.

the person against whom they shall be charged". S.C. Code of Laws § 12-49-10

clearly proves that taxes are assessed against "the person" that the taxes are charged to and are not assessed against the land, which Respondents frivolously argued to the trial judge. This statute alone proves that Respondents have no authority to interfere with or take Ryan's property since he has never been assessed, or charged, with any taxes, assessments, or penalties!

Respondents then request this Court only consider "*whether the circuit court properly decided that it lacked subject matter jurisdiction to consider Powell's tax challenge.*" (Respondents' Brief, pg 9, second para). First, Ryan's action is NOT a "*tax challenge*" nor does it contain any "*tax challenge*"; it is a tort case based on Ryan's verified allegations of Respondents violations of his rights and property (which Respondents refuse to cease committing, to this day) by interfering with and attempting to take Ryan's property without any lawful authority to do so. Second, as shown above and in Ryan's opening brief, the gravamen of his entire controversy revolves around whether Ryan is liable for any tax to Respondents which determines whether Respondents have any legal authority to interfere with or take Ryan's property.

In summary, Respondents would have this Court believe that the legal basis of the torts Ryan alleged can somehow be separated from the damages requested in those tort claims - ridiculous nonsense. Either the circuit court has subject matter jurisdiction to hear Ryan's tort case<sup>7</sup> or it does not it cannot be somewhere in the middle as Respondents now frivolously argue (originally they admitted it was all or nothing, see MTD pg 1-2).

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<sup>7</sup> The circuit court obviously does have subject matter jurisdiction, see "*Tort suits are within the circuit court's jurisdiction. Here, on its face, this complaint, alleges a tort and therefore is not subject to dismissal for lack of subject matter jurisdiction.*", McCullar v. Estate of Campbell, 672 SE 2d 784 (SC Sup Ct 2009).

III. **Because Ryan did not bring his claims under the Tort Claims Act against any governmental entity it was error for the trial judge to substitute “York County” for the Defendants/Respondents.**

Ryan demonstrated in his opening brief that the trial judge erred when he interpreted S.C. Code of Laws § 15-78-70 (c) to mean that any time a plaintiff brings an action against any agent or employee of any governmental entity, some governmental entity must be substituted for the named agent or employee, even if the action is brought against them in their individual capacity (Appellant's Brief pgs 26 -28). Respondents spent an entire one sentence in their brief to rebut Ryan's well supported position. Their opposition consists of a restatement of the one sentence that they cherry picked out of context from S.C. Code of Laws § 15-78-70 (c) while adding no additional authority or discussion to demonstrate that their cherry picked sentence applies to the facts of this case (Respondents Brief, pg 11 last sentence). Respondents' would like this Court to believe that no agent or employee of any governmental entity could ever be individually sued after 1989. However, that is a preposterous position, and this Court is well aware that there have been innumerable cases brought against agents and employees of governmental entities in the State of South Carolina since 1989.

IV. **Because Ryan brought his claims against the Respondents in their individual capacity for actions alleged to have been taken outside the scope of their official duties it was error for the trial judge to dismiss all of Ryan's claims with prejudice based on his finding that Respondents have *sovereign immunity*.**

Ryan demonstrated in his opening brief on pgs 28-32 that the following positions are correct and applicable to this case and Respondents briefed no opposition so they must agree:

1. The Tort Claims Act does NOT apply to an action that is brought against agents of a governmental entity in their individual capacity for actions alleged to have been taken outside the scope of their official duties.

Respondents frivolously argue for the majority of their brief that Respondents have absolute, unqualified, sovereign immunity for their actions in this case **no matter how they may have harmed Ryan**<sup>8</sup> or no matter what capacity they are being sued in. They also argue that they cannot even be required to go through discovery or stand trial to determine if they were acting within the scope of their official duties for that would defeat the purpose of their unqualified, absolute immunity. But to reach these conclusion Respondents totally and completely ignored the actual facts of the case; those being that Ryan brought his tort claims against them under the common law (not the Tort Claims Act) in their "**individual capacity**" with personal liability for actions alleged to have been taken **outside the scope of their official duties**. The following are but a few examples of how the Respondents have failed to actually dispute the actual facts and actual issues raised by Ryan pertaining to the trial judge's erroneous dismissal of Ryan's case based on his conclusions that Respondents have immunity to his action:

1. Respondents actually support Ryan's position during most of their "opposition" because they often rely upon cases and statutes that admit that the immunity provided by the Tort Claims Act only covers actions of governmental employees while they are "acting within the scope of their official duties". For example, Respondents cite Ashcroft v. Iqbal, 556 U.S. 662, 672 (2009) and include this quote from that case - "First, it 'shields government officials' from liability for civil damages **insofar as their conduct does not violate clearly established statutory or constitutional rights**," [emphasis added] (Respondents brief, pg 15, 2nd para). Respondent also rely upon Mitch v. Forsyth,

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<sup>8</sup> "The relevant inquiry is whether Powell seeks to impose liability where the County and its employees are entitled to immunity. If so, his claims are barred - **irrespective of his theories of liability** or the labels placed on his causes of action", (Respondents Brief, pg 13, 1st para).

472 U.S. 511, 530 (1985) to support their premise that they don't even have the obligation to prove they were acting within the scope of their official duties because to do so would negate their absolute immunity. They quote from Mitch v. Forsyth supra "unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery". First, as Ryan demonstrated in his opening brief, Respondents have not even answered yet, so they have not plead anything nor have they entered any evidence denying Ryan's allegations. Second, it should be clear to this Court that a government agent taking someone's property who is not liable for a debt without first providing that person with "*due process of law*" would violate both the 5th Amendment of the Constitution of the United States and also Article 1, § 3 of the Constitution of the State of South Carolina! Ryan's complaint alleges Respondents violated many established laws and his rights including rights specifically protected to him by the State and federal Constitutions and, therefore, according to the cases the Respondents themselves rely upon, Respondents do not have any immunity for their wrongs.

2. Respondents obfuscate the truth by ignoring language in some of their case and statutory citations that show there are exceptions to the immunity given in the Tort Claims Act. For example, Respondents cite Flateau v. Harrelson, 584 SE 2d 413 in their brief (Respondents brief, pg 11, para A) but they failed to show the language that demonstrates that there are exceptions to the general rule of immunity.

Respondents cited from Flateau v. Harrelson :- "Act governs all tort claims against governmental entities and is the exclusive civil remedy available in an action against a governmental entity or its employees"

Immediately below the above cite in Flateau v. Harrelson is:- "The remedy provided by [the Tort Claims Act] is the exclusive civil remedy available *for any tort*

committed by a governmental entity, its employees, or its agents **except as provided in § 15-78-70(b)**. S.C. Code Ann. § 15-78-70(b) (Supp.2002)" [emphasis added].

The exceptions to immunity discussed in S.C. Code of Laws § 15-78-70(b) includes those in this case. See S.C. Code of Laws § 15-78-70(b) - "Nothing in this chapter may be construed to give an employee of a governmental entity immunity from suit and liability if it is proved that the employee's conduct was not within the scope of his official duties or that it constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude."

3. Respondents rely upon cases and statutes that are factually dissimilar to this case, i.e., all the cases and statutes they rely upon pertain to an action against a governmental entity and not against an agent in his individual capacity.

4. Respondents displayed a list of exceptions to the State's waiver of immunity from S.C. Code of Laws § 15-78-60 that they argue apply to this case BUT those exceptions to waiver of immunity **APPLY ONLY** to actions brought against "governmental entities", see S.C. Code of Laws § 15-78-60 - "Exceptions to waiver of immunity. The **governmental entity**<sup>9</sup> is not liable for a loss resulting from: ...". Respondents also rely on Adkins v. Varn, 439 SE 2d 822 (1993) to prove Respondents fall under this waiver stated in S.C. Code of Laws § 15-78-60 and also to prove their position that Ryan has to bring his claims under the Tort Claims Act however in Adkins v. Varn supra the plaintiff in that case was suing **Greenville County**, which clearly is a governmental entity covered by the exception to waiver listed in S.C. Code of Laws § 15-78-60. Again, Ryan has not sued any *governmental entity* no matter how much Respondents want this Court to believe otherwise.

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<sup>9</sup> S.C. Code of Laws § 15-78-60 30(d) " 'Governmental entity' means the State and its political subdivisions."

In summary, Respondents entire brief pertaining to immunity totally ignores the crux of the issue - that is - do agents of governmental entities have immunity to an action brought against them in their individual capacity for actions alleged to have been taken outside the scope of their official duties, which actions violated both well established laws and Ryan's property, natural, and constitutionally protected rights! Respondents remain totally silent on this, the actual issue.

V. **Because Respondents failed to demonstrate any defects in the individual causes of action in their Rule 12 (b)(6) motions it was error for the trial judge to find that Ryan failed to allege facts sufficient to state a valid claim.**

Ryan demonstrated in his opening brief on pages 32-35 that the following position is correct and applicable to this case and Respondents briefed no opposition so they must agree:

1. That the trial court did not find any defects in Ryan's compliant under Respondents Rule 12(b)(6) SCRCF failure to state a claim motions except in Ryan's "breach of contract" cause of action because the trial judge dismissed the entire complaint under Rule 12 (b)(6) SCRCF based on his finding that Respondents have absolute immunity to Ryan's action.

Respondents did however, dispute the assignment of error Ryan argued in his brief (Appellant's Brief, Pgs 33-35) showing the trial judge erred when he found that there is no allegations of a binding and enforceable contract in place, but Respondents opposition consisted of their restatement of that contention, and of the trial judge's conclusions, that Ryan did not alleged a binding and enforceable contract, without providing any additional authority or further argument to support that position.

VI. **Because the facts found by the trial judge are not based on the record all the findings are unsupported and all the conclusions of law based on those unsupported findings are erroneous.**

Ryan demonstrated in his opening brief on pages 35-38 that the following position is correct and applicable to this case and Respondents briefed no opposition so they must agree:

1. That all the factual findings by the trial judge are without any evidentiary support and therefore all the conclusions of law based on those unsupported findings are erroneous and must be reversed.

VII. **Because the trial judge does not have the authority to find that Ryan's mother is engaged in the "unauthorized practice of law" or interfere in the obligations of their contract it was error for him to disallow her from providing Ryan "assistance of counsel".**

Ryan showed in his opening brief on pgs 38-41 that not only was this issue raised to the trial judge but that the trial judge ruled on it. However, Respondents position is that because this ruling was not reduced to writing and put in the order that it is not preserved for appellate review. Not only did Respondents NOT support that position with any authority or argument, but clearly such position cannot be true. For there are hundreds of issues that can be raised and ruled upon during a hearing or trial that don't make it into the written order. Just because an issue is not reduced to writing and included in the order does not mean the issue is not preserved for review. See "At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge.", Herron v. CENTURY BMW, 719 SE 2d 640 (SC Sup Ct 2011).

Further there is what is known as the doctrine of **futility**. When Ryan's mother attempted to explain why she should be allowed to assist Ryan she was threatened by the trial judge with a felony charge and contempt [transcript, pgs 14- 15]. Then the trial judge ordered Ryan's mother to sit down and be quiet while she was attempting to argue her objections [transcript, pg 14 #14 - pg 15 #5]. The appellate courts of this State have held that no one is required to undertake a futile act in order to preserve an issue for

review. See Staubes v. City of Folly Beach, 529 SE 2d 543 (SC Sup Ct 2000) - "This Court does not require parties to engage in futile actions in order to preserve issues for appellate review". See also State v. Pace, 447 SE 2d 186 (SC Sup Ct 1994) - "As to counsel's failure to raise an objection, the tone and tenor of the trial judge's remarks concerning her gender and conduct were such that any objection would have been futile. Accordingly, we find no waiver of this issue".


In this case, Ryan's mother DID specifically raise an objection to the trial judges ruling that she could not assist Ryan or present Ryan's case but she was ordered to sit down and be quiet under a threat of contempt if she did not do so [transcript. pg 15 #6-7] therefore she was not given an opportunity to argue her objection of why she should be allowed to assist Ryan or present Ryan's case.

### CONCLUSION

This Court must conclude that Respondents' silence on the key aspect of this case - the legal basis of Ryan's claims- and Respondents refusal to argue the actual issues of the case means Respondents' cannot oppose Ryan's well demonstrated positions. Accordingly, this Court must reverse both the orders appealed and the case must be remanded for a determination by a jury of the damages Respondents are liable to Ryan for, with instructions to the lower court that Ryan's mother may provide Ryan with assistance of counsel upon remand.

Respectfully submitted,

March 20, 2015



Ryan Powell, Appellant  
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THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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MAR 23 2015  
**SC Court of Appeals**

APPEAL FROM YORK COUNTY  
Court of Common Pleas

Stonewall Jackson Kimball, Special Circuit Court Judge

Case No. 2014-CP-46-1425  
Appellate Case No. 2014-002578

Ryan Powell, ..... Appellant,

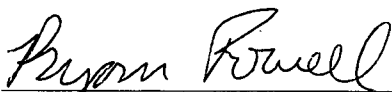
v.

Amy Boheler d/b/a York County Auditor,  
Beth Latham d/b/a York County Treasurer, and  
Robert Kiser d/b/a York County Delinquent Tax Collector,  
each in their individual and official capacities, ..... Respondents.

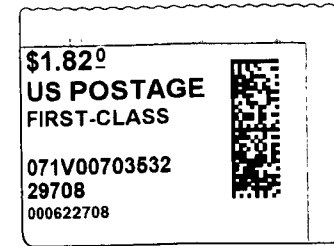
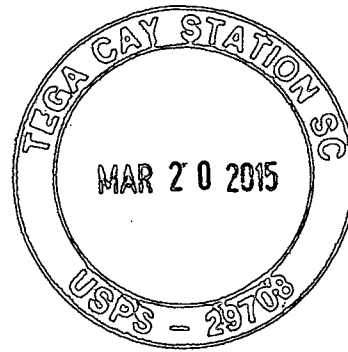
Certificate of Service

I certify that I have served on all Respondents the Reply Brief of Appellant by and through their attorney of record by First Class Mail with proper postage affixed on the date below shown addressed to W, Keith Martens of HAMILTON, MARTENS, BALLOU & CARROLL, LLC, P.O. Box 10940, Rock Hill, SC 29731

March 20, 2015

  
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MAR 23 2015  
**SC Court of Appeals**

Jenny Kitchings, Clerk of Court  
South Carolina Court of Appeals  
P.O. Box 11629  
Columbia, SC 29211

