

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM RICHLAND COUNTY

L. Casey Manning, Circuit Court Judge

Appellate Case No. 2012-213599

Opinion No. 5299

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SC Court of Appeals

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

Of whom Edward Sloan is the Appellant,

v.

South Carolina Department of Transportation, and John V. Walsh, Deputy Secretary of Transportation for Engineering, Defendants,

Of whom South Carolina Department of Transportation is the Respondent.

Respondent's Return to Petition for Rehearing

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March 31, 2015

Respondent, the South Carolina Department of Transportation, respectfully submits this Return opposing Appellant's Petition for Rehearing.

I. Guidance by way of declaratory judgment is unneeded because the Department agrees that it is unconstitutional to provide services to private parties.

Appellant seeks rehearing on the grounds that the general rules of standing and mootness should be waived because their case presents an issue of great public importance requiring guidance to the Department for the future. Thus, Petitioner claims his suit is justiciable. We believe the Court correctly decided these issues and should deny the request for rehearing.

The Department of Transportation does not use its employees, equipment, or other resources to improve private property. Employees who do so are subject to discipline under the Department's progressive discipline policy. That policy, enacted pursuant to regulations of the Budget and Control Board, S.C. Code Regulations 19.717 (Amended May 28, 2010)¹, stipulates three relevant offenses: "Mishandling of Department funds or documents," "Unauthorized Use of State Equipment or Property" and "Unauthorized Use of State Equipment or Property for Personal Gain." The first listed offense provides for a written reprimand to termination for the first offense, the second a written reprimand for the first offense, a five-day suspension for the second, and termination for the third. The third listed offense provides for a five-day suspension for the first offense and termination for the second. Additionally, the Department has a Chief Counsel who is well aware that the State Constitution prohibits the use of the State's credit to benefit an individual, company, or association. S.C. Code Const., art. V, §11 (Rev. 2009).

¹ The Board's authority, in turn, is under S.C. Code Ann. §8-11-230 (6). Declaratory relief will ordinarily be refused where a special statutory remedy has been provided or whether another remedy will be more effective or appropriate under the circumstances. Williams Furniture Corp. v. Southern Coatings & Chemical Co., 216 S.C. 1, 56 S.E.2d 576 (1949).

Finally, as we have argued heretofore, neither the Department nor its Deputy Secretary for Engineering have any motivation to use public resources to benefit private property having too few resources available to them to maintain the State Highway System.

A declaratory judgment by the courts is not needed. Appellant has demonstrated no ongoing practice by the Department in improving or benefitting private property. The was the import of Mr. Walsh's affidavit that over a ten-year period only one other inspection of a privately-owned bridge was made—of the bridge to Fripp Island which local authorities had requested that the Department take into its system for future maintenance. R.p. 133. The Department participates in the federal bridge inspection program which requires periodic inspections of all publicly-owned bridges in the State whether or not those bridges are on the State Highway System. 23 U.S.C. §131, 23 C.F.R. Part 650, Subpart C (2011). It does not inspect private bridges at the request of the owner thereof.

The incident in question involved a request by an individual, Reggie Ebner, who identified himself in his email to Representative Young and Mr. Walsh as "City of Aiken Councilman for District 4." R.p. 37. The Councilman noted that the City did not have a qualified bridge inspector nor did its codes contain specifications for bridges. R.p. 36. Thus, through Representative Young and Senator Ryberg, he requested the Department's assistance. *Id.* We have argued and the trial court held herein that the general enabling statute of the Department authorizes and instructs the Department to assist local governments in areas of its expertise. S.C. Code §57-3-110 (7) (Rev. 2006). Local governments are vested with plenary police power to abate public nuisances such as unsafe bridges. Thus, as the trial court correctly held, the City had the authority to make the request and the Department had the authority to respond to it. R. pp. 8-9.

Moreover, it is difficult to interpret the government acts herein a “benefitting” a private party or improving private land. Had the bridges proved unsafe, some governmental entity could have required their repair, destruction, or replacement. In this regard, we do believe the Court was incorrect that Woodside Plantation Property Owners’ Association, Inc. requested the inspection. Rather, that entity, as owner of the bridges, was the party being inspected. The request for assistance originated solely with Mr. Ebner as an official with the City of Aiken. No action of either the Department or the City was unconstitutional.

II. Plaintiffs are not entitled to taxpayer standing under the facts of this case.

Petitioner is incorrect and this Court correct in its pronouncement of the case law precedents regarding taxpayer standing. The fact that Mr. Sloan is a taxpayer is insufficient to confer upon him standing to sue *per se*.

Standing may be acquired: (1) by statute; (2) through the rubric of “constitutional standing;” or (3) under the “public importance” exception. ATC South, Inc. v. Charleston County, 380 S.C. 191, 669 S.E.2d 337 (2008). Appellant asserts constitutional standing. Constitutional standing is “an essential and unchanging part of the case or controversy requirement of Article III.” ATC, supra, citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed2d 351 (1992). To have standing, one must generally have a personal stake in the subject matter of the lawsuit, *i.e.*, one must be a *real party in interest*. Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999). Additionally, a private person may not invoke the judicial power to determine the validity of executive or legislative action unless he has sustained, or is in immediate danger of sustaining, prejudice therefrom. Such imminent prejudice must be of a personal nature to the party laying claim to standing and not merely of

general interest common to all members of the public. Baird, supra, citing Citizens of Lee County, Inc. v. Lee County, 308 S.C. 23, 416 S.E.2d 641 (1992). A taxpayer lacks constitutional standing when he “suffers in some *indefinite* way in common with people *generally*.” Freemantle v. Preston, 398 S.C. 186, 193, 728 S.E.2d 40, 43 (2012) citing ATC South, 380 S.C. at 198, 669 S.E.2d at 341 quoting Frothingham v. Mellon, 262 U.S. 447, 488, 43 S.Ct. 597, 67 L.Ed. 1078 (1923) (emphasis added); see, also, Bodman v. State of S.C. and SCDOR, (Shearouse Adv. Sh., May 8, 2013). Here, as the trial court correctly noted, the plaintiff, Mr. Sloan, is a resident of Greenville. The events at issue took place in Aiken. He never asserted that he had ever used the bridges in question nor that he is a member of the Woodside Plantation HOA. Thus, his only interest in the matter is as a payer of the 16 cents per gallon gas that went to pay the inspectors’ wages. The trial court was correct that this interest was not concrete and particularized to the extent that it would justify the court in inserting itself into routine discretionary decisions by the State Highway Engineer.

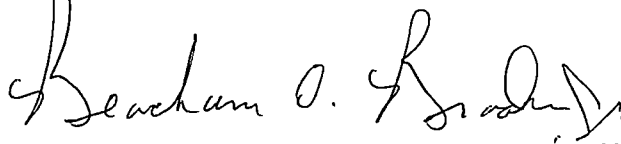
Nevertheless, an exception to the general standing rule has often been recognized where an issue is of such public importance that its resolution is required for future guidance. Baird, supra; Freemantle, supra. As we outlined above, the Department needs no such guidance in that its policy is to follow the Constitution as well as all statutes applicable to it. The issue does not need resolution because the Department agrees that it may not use its resources for private benefit. This includes providing inspection services for private bridge owners. This distinguishes this case from those cited in Petitioner’s brief and in this Court’s opinion, Sloan v. Dep’t of Transportation, 365 S.C. 299, 618 S.E.2d 876 (2005) (Ravenel Bridge) and Sloan v. Dep’t of Transportation, 379 S.C. 160, 666 S.E.2d 236 (2008) (Ladson Road). In those cases, the Department argued that the statutes governing its procurement allowed it to enter into design-

build contracts or utilize emergency procurement procedures to avoid competitive bidding respectively. Here, Respondent does not contest Appellant's view of the general law.

III. Conclusion.

The Court correctly denied Appellant standing to sue in that there is no justiciable controversy between the parties. The Appellant has not demonstrated a particularized interest in the subject matter and the events complained of are moot. We ask that rehearing be denied.

Respectfully submitted,



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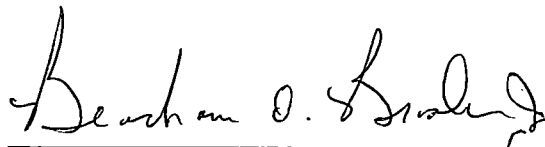
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Case No. 2012-CP-40-1560

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served the South Carolina Public Interest Foundation and Edward D. Sloan, Jr., Petitioners, with the **Respondent's Return to Petition for Rehearing** by U.S. Mail, postage prepaid, this 31st day of March, 2015, as follows:

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Claims Office 737-1260

March 31, 2015

Honorable Jenny Abbott Kitchings
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RE: South Carolina Public Interest Foundation and Edward D. Sloan, Jr.
vs. South Carolina Department of Transportation and John V. Walsh
Appellate Case No. 2012-213599

Dear Ms. Kitchings:

Enclosed for filing, please find the original and one copy of the Respondent's Return to Petition for Rehearing in the above captioned matter along with a Certificate of Service of this pleading on opposing counsel. Please return a filed copy of each pleading to me using the envelope provided.

Thank you for your assistance in this matter.

Very truly yours,

Beacham O. Brooker, Jr.

BOB, JR.:jmt
Enclosures

cc: James G. Carpenter, Esq.
(w/enclosure)