

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No. 2012-CP-40-1560

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APR 13 2015

SC Court of Appeals

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

v.

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

**REPLY IN SUPPORT OF
APPELLANTS' PETITION FOR REHEARING**

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Appellants, South Carolina Public Interest Foundation and Edward D. Sloan, Jr., individually and on behalf of all others similarly situated, hereby submit this Reply in Support of their Petition for Rehearing.

This Reply will address three main points: (1) even in their Return to the Petition for Rehearing, Respondents do not admit that their conduct violated a constitutional prohibition, and therefore this case needs a judicial decision on whether this use of public resources for private purposes was unconstitutional, and Plaintiffs should be granted public importance standing; (2) the request that the Respondents inspect and report on the privately built, privately maintained, privately owned bridges in a private, gated community came not from the City of Aiken, but from a homeowner in the private gated community who was in a dispute with the developer, and therefore this wrongful expenditure of public funds for private purposes is sufficient to support the Plaintiff's taxpayer standing, because he contributed to the fund at issue; and (3) the request to inspect the bridges was unconstitutional, whether it originated from a private homeowner or from the City of Aiken; neither the City nor the Department is permitted to expend public funds for private purposes, and that unlawful expenditure is sufficient to support both taxpayer standing and public importance standing.

I. RESPONDENTS DO NOT ADMIT THAT THEIR CONDUCT VIOLATED A CONSTITUTIONAL PROHIBITION.

In their Petition for Rehearing, Petitioners argued that the Respondent had not admitted that their conduct was unconstitutional (Petition, pp 6-8). In their Return to the Petition, the Respondents are careful **not** to admit that their conduct violated a constitutional prohibition. Instead, Respondents contend that the DOT "agrees that it is unconstitutional to provide services to private parties," in general terms; and argues, in general terms, that "the Department of Transportation does not use its employees, equipment, or other resources to improve private

property.” However, in this case, Respondents did exactly that. They used public funds to inspect and report on private bridges and they gave their report, **not to the City**, but to resident of the gated community, who had a dispute with the developer.

Respondents also argue, “Employees who [use public funds for private purposes] are subject to discipline under the Department’s progressive discipline policy.” Then, the Respondents engage in wholesale supplementation of the Record without seeking the permission of the Court to do so, but even in their abundant citation of matters outside the record, they do **not** say that anyone **was disciplined** for the conduct at issue in this case. The Record is bare of any such disciplinary action by the Respondents against any DOT employee. Indeed, had the DOT attempted to discipline its inspector, the inspector would have had a strong defense that he had objected to the unconstitutional directive, but was ordered to proceed with the unconstitutional inspection over his objections.

Respondents do not admit any unconstitutional conduct. Instead, they argue that they were simply assisting the City in its alleged duty to maintain the safety of the bridges. As demonstrated below, the City had repeatedly disclaimed any responsibility for those bridges. When Mr. Ebner made his request to the Department of Transportation, he included copies of his prior correspondence with the City in which the City refused to take responsibility for the design or inspection of the bridges, and instead directed Mr. Ebner to the developer or the property owners association of the private, gated community. The City’s explicit statements declining (properly) to spend public funds to intervene in a private dispute are included in the Record. (*See* Section II, below.) Because the Respondents do not admit that their expenditure of taxpayer funds was unconstitutional, this case needs judicial guidance on whether this expenditure violated the Constitution, and this Court should grant plaintiffs public importance standing.

II. THE REQUEST CAME FROM A HOMEOWNER, NOT THE CITY OF AIKEN.

Respondents contend that they were simply assisting a municipality in its request for assistance as a matter of public safety. Therefore, they reason that the expenditure of taxpayer funds was not for a private purpose, and therefore there should be no taxpayer standing and furthermore, this taxpayer action should be found moot. However the record demonstrates that the request came not from the City, but from a private citizen who had a dispute with private residential development in which he lived.

Reggie Ebner identified himself as a City Councilman in making his request for assistance. However, Mr. Ebner also attached to his request materials that made it clear not only that Ebner rather than the City was the one making the request, but also that the City had refused to assist Ebner. Ebner wrote to the City Manager on July 26, 2010 requesting documentation under the Freedom of Information Act related to the bridges and culverts in Woodside Plantation (R. pp. 45-46). On August 27, 2010, the City responded to Ebner's request and told him that in 2006, the City had recommended that the Woodside Plantation Property Owners Association ("WPPOA") "have their engineer certify the weight limit on the bridge." As to another repair, the City had instructed WPPOA "to obtain the services of an engineer to design and certify the repair" (R. p. 47). As to the inspection for the repair, the City told WPPOA again "to obtain the services of an Engineer for the project" (R. p. 47). As to the concrete bridge, the City told Ebner, "it is the responsibility of the Development Company to have their structural engineer inspect and certify any bridge construction" (R. p. 47). As to the inspection of code and ordinances related to common areas, the City told Ebner that in Woodside Plantation, "Work in the common areas does not fall under public works observation" (R. p. 47). Finally, as to installation inspection and compliance with the Americans with Disabilities Act, the City told Ebner, "Work on walkways on private

roads does not fall under public works observation” (R. p. 47). Thus, the City made it abundantly clear to Ebner that the City had no responsibility to inspect or approve design of or repairs to bridges or roads in Woodside Plantation. As noted above, Ebner included this correspondence with his request for DOT’s inspection of the same bridges.

On September 8, 2010, Ebner again made a Freedom of Information Act request to Roger LeDuc, of the City. He did not make this request as a member of City Council. He wrote the request on plain letterhead. The City again responded:

Woodside Plantation Property Owners’ Association, Inc. i.e. a South Carolina nonprofit corporation. Typically, a nonprofit Corporation is responsible to its shareholders, not to a governmental entity.

* * *

The City of Aiken does not have any authority to review the actions taken by this corporation unless there is a violation of city ordinance or a state statute that the city is authorized to enforce.

(R. p. 39).

It appears that Ebner already knew the answer from the City before he received the City’s written response. On September 6, 2010, Ebner wrote to Tom Young, “**The City** has advised me in writing they are **not responsible for bridges** . . . ; however they have allowed three wooden bridges and one concrete bridge to be installed in Woodside. It appears that the **Developer got the Woodside Property Owners Association to agree** to install the wooden bridges” (R. p. 41) (emphasis added).

Tom Young wrote back to Ebner: “For bridges on the state highway system, SC DOT would be wholly responsible, however, in this instance, the bridges in question are NOT on the state system” (R. p. 42) (emphasis in original).

Ebner’s dispute with the Woodside Plantation in this developers apparently sat on the back burner for nearly a year until July 13, 2011, when Ebner wrote to John Walsh soliciting the

assistance of the Department of Transportation in his dispute, asking for an expert opinion inspecting the bridges of Woodside Plantation at taxpayer expense (R. pp. 35-37).

When Ebner made his email request to the Respondent John Walsh, he wrote using his own private email account (R. pp. 35-37). He did not use a City email account (R. pp. 35-37). He did not use the City letterhead or logo (R. pp. 35-37). He did not say that the City was making the request (R. pp. 35-37). He did enlist the support of his legislators in his request for an expert opinion at taxpayer expense.

Because the Respondents expended taxpayer funds for purposes unauthorized by law, this taxpayer, who had contribute to the sum jeopardized possesses taxpayer standing to challenge this wrongful use of taxpayer funds.

At a minimum, the foregoing evidence raises a genuine issue of material fact about whether the inspection, performed at the request of Reggie Ebner, was for a public purpose or a private purpose. Plaintiffs contend it plainly was for a private purpose and for a private benefit to a private party. Respondents contend otherwise. This disagreement is a genuine issue of material fact, affecting the outcome of this case, which requires, at a minimum, this Court to reverse of the granting of summary judgment and remand the case for a hearing on the merits.

III. THE USE OF PUBLIC FUNDS FOR PRIVATE PURPOSES WAS WRONGFUL, REGARDLESS OF THE SOURCE OF THE REQUEST.

Respondents contend that they were simply assisting a municipality, at its request, with an issue of **public** safety. Plaintiffs contend the request came from a **private** party who had his own **private** purposes in making the request.

Furthermore, Plaintiffs contend that a request for an expenditure of public funds for a private purpose on private property is unconstitutional regardless of whether the request comes from a private party or a municipality. The Constitution prohibits a municipality and the

Department of Transportation from expending public funds for private purposes. Therefore, even if the Court were to find that the request for inspection of these privately owned bridges came from the City, or that the Defendants reasonably believed that the request came from the City, neither the DOT's belief, reasonable or not, nor the actual source of the request would validate unconstitutional conduct. Such expenditures are unconstitutional whether the acting party is a municipality or the Department of Transportation.

CONCLUSION

Respondents have not admitted their conduct violated a Constitutional prohibition, and the Court needs to rule and provide guidance about the unconstitutional conduct and grant Plaintiffs public importance standing.

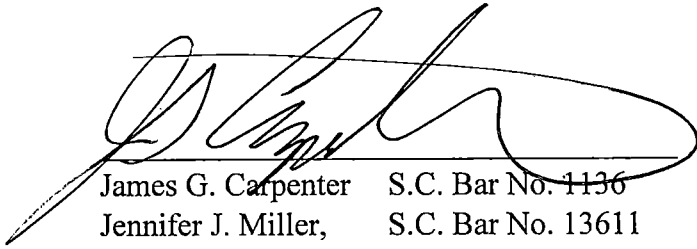
The request was not a legitimate request for assistance from a municipality. The request for inspection services came from a private citizen, in a private dispute with the managers of a private, gated community. The results of the inspection were reported to a private party. The expenditure was an unconstitutional use of taxpayer funds, and it is sufficient to support the Plaintiffs' taxpayer standing.

Finally, it is equally unconstitutional for a municipality to expend public funds for private purposes, as it is for the DOT. The source of the request does not validate an unconstitutional expenditure.

WHEREFORE, Appellants pray the Court to:

1. withdraw its prior opinion,
2. reverse the judgment of the Circuit Court,
3. rule for the Appellants on issues of standing and mootness, and
4. remand for trial on the merits of the alleged constitutional violation.

Respectfully submitted,
THE CARPENTER LAW FIRM, P.C.

A large, stylized handwritten signature in black ink, appearing to read 'J.G. Carpenter', is written over a horizontal line.

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April 6, 2015

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY

Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No. 12-CP-40-1560

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

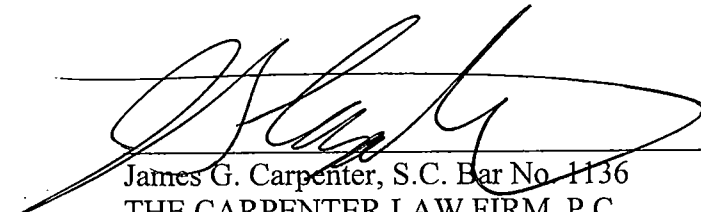
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South Carolina Department of Transportation, and John V. Walsh, Deputy Secretary of Transportation for Engineering, Respondents.

PROOF OF SERVICE

The undersigned attorney hereby certifies that he served a copy of Appellant's Reply in Support of Petition for Rehearing counsel for the Respondents by US Mail, postage prepaid this Monday, April 06, 2015, addressed as follows:

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April 6, 2015

The Honorable Jenny Abbott Kitchings
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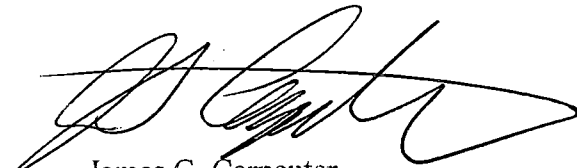
Re: *South Carolina Public Interest Foundation et al. v. South Carolina Department of Transportation, and John V. Walsh, Deputy Secretary of Transportation for Engineering*
Civil Action No. 2012-CP-40-1560;
Appellate Case No. 2012-213599

Dear Ms. Kitchings:

I enclose an original and six copies of a Reply in Support of Petition for Rehearing, and a proof of service, with a filing fee.

If you need anything else, please telephone me.

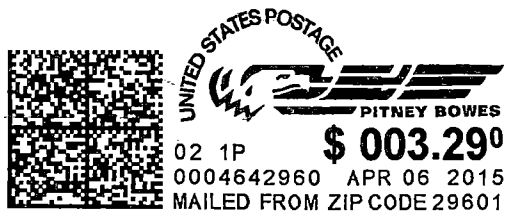
Sincerely yours,
THE CARPENTER LAW FIRM, PC



James G. Carpenter

Enclosures

cc w/enclosure: Beecham O. Brooker, Jr.



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