THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2012-CP-10-04969
Appellate Case No. 2013-001273

South Carolina Public Interest Foundation and Waring S. Howe, Jr., individually, and on Behalf of all others similarly situated, ... Appellants,

v.

James H. "Jay" Lucas, in his official capacity as Speaker of the South Carolina House of Representatives, Hugh K. Leatherman, Sr., in his official capacity as President of the South Carolina Senate, Representative Peter M. McCoy, Jr., Senator George Campsen, and the State of South Carolina, ... Respondents.

RETURN TO APPELLANTS' MOTION FOR ATTORNEYS' FEES UNDER SC CODE ANN. § 15-77-300

Respondents James H. "Jay" Lucas, in his official capacity as Speaker of the South Carolina House of Representatives, Hugh K. Leatherman, Sr., in his official capacity as President Pro Tempore of the South Carolina Senate, Representative Peter M. McCoy, Jr., Senator George Campsen, and the State of South Carolina ("Respondents") hereby submit the following Return to Appellant's Motion for Attorneys' Fees Under S.C. Code Ann. §15-77-300.[1] Appellants do not meet the statutory requirements

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[1] Rule 222(b) of the South Carolina Appellate Court Rules states that a party seeking recovery of its attorney's fees is limited by Order of the Supreme Court. Under the Supreme Court's current Order, the maximum amount of recovery is $1,000 and not

authorizing an award of attorneys' fees. This Court should therefore deny Appellants' motion.

HISTORY AND STATUS OF CASE

Appellants have not been the "winning" or "prevailing" party at any stage of this litigation. Appellants initially petitioned the Supreme Court to hear this case in its original jurisdiction. (R. pp. 464-478.) On February 8, 2012, the Supreme Court denied Appellants' petition. (R. pp. 533-534.) Subsequently, Appellants commenced a declaratory action in the Court of Common Pleas of Richland County. (R. pp. 68-74.) Upon motion of Respondents, the trial court concluded that Appellants' complaint was brought in an improper venue. Therefore, on July 26, 2012, the trial court granted Respondents' motion and transferred the case to Charleston County. (R. pp. 4-6.)

Following transfer of this case, Respondent Robert W. Harrell, Jr. filed a motion for summary judgment,[2] and on May 13, 2013, the trial court granted Speaker Harrell's motion and dismissed this action in its entirety. In its order, the trial court found that Appellant South Carolina Public Interest Foundation "is collaterally estopped from asserting it has standing to maintain this current challenge to Act 130." (R. p. 18.) Further, the trial court found that "Plaintiff [Appellant] Howe also fails to establish the necessary standing to maintain this action." (*See id.*) After dismissing the complaint due

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the exorbitant amount Appellants seek. Also, Rule 222(d) provides that a party may only seek recovery of its attorney's fees after the issuance of a remittitur. As of this filing, this Court has not yet issued a remittitur; thus, Appellants' Motion is untimely.

[2] At the time the complaint was filed, Harrell was the Speaker of the House of Representatives and, as such, a named party to this action. Subsequent to the filing of the complaint, Speaker Harrell resigned and James H. "Jay" Lucas became Speaker of the House of Representatives and was substituted as a party.

to the Appellants' lack of standing, the trial court "decline[d] to rule on any other issues presented in this action." (R. p. 30.)

On May 24, 2013, Appellants filed a Notice of Appeal. (R. pp. 535-536.) On appeal, Appellants argue the merits of the allegations set forth in their complaint. However, the merits of their complaint allegations are not before this Court on appeal because the trial court solely ruled on the issue of Appellants' standing and, finding Appellants lacked standing, declined to rule on the substantive allegations contained in Appellants' complaint. Thus, the issue solely before this Court is whether Appellants have standing, not the merits of Appellants' constitutional arguments. Yet, Appellants continue to attempt to litigate the issue of the constitutionality of Act 130 before this Court. Specifically, their motion repeatedly references assertions concerning the constitutionality of the local law, which has nothing to do with this appeal and cannot be used to determine whether Appellants are the prevailing party.

After oral argument and prior to a decision by this Court, the General Assembly enacted legislation that moots this appeal and the claims advanced in the Appellants' complaint. Respondents seek to dismiss the appeal and have this Court issue a remittitur. Appellants consent to the dismissal of the appeal. (*See* Appellants' Consent to Dismissal and Mot. For Attorneys' Fees 3.)

At no time have the Appellants been the prevailing party. They have lost at every junction of the litigation. Therefore, Respondents respectfully request the Court deny Appellants' Motion for Attorney's Fees.

I. Appellants Fail to Meet the Statutory Prerequisites for an Award of Attorney's Fees.

Generally in South Carolina, "attorney's fees are not recoverable unless authorized by contract or statute." *JASDIP Props. S.C., LLC v. Estate of Richardson*, 395 S.C. 633, 642, 720 S.E.2d 485, 489 (S.C. App. 2011) (citing *Baron Data Sys., Inc. v. Loter*, 297 S.C. 382, 383, 377 S.E.2d 296, 297 (1989)). Appellants seek fees under Section 15-77-300 (Supp. 2014) of the South Carolina Code which provides the following:

> (A) In any civil action brought by the State, any political subdivision of the State or any party who is contesting state action, unless the prevailing party is the State or any political subdivision of the State, *the court may allow the prevailing party* to recover reasonable attorney's fees to be taxed as court costs against the appropriate agency if:
>
> (1) the court finds that the agency acted without substantial justification in pressing its claim against the party; and
>
> (2) the court finds that there are no special circumstances that would make the award of attorney's fees unjust.
>
> 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.

Section 15-77-300 and Rule 222, *supra*, do not authorize this Court to process an attorneys' fee motion under that statute. Appellants do not request that this case be remanded to the Circuit Court for such action or remittitur or otherwise, nor could they do so. They are not prevailing parties as discussed below, and the Circuit Court would

lack jurisdiction to consider this motion due to its conclusion that Appellants lack standing. This Motion therefore should be dismissed outright.

In *Heath v. County of Aiken*, 295 S.C. 416, 368 S.E.2d 904 (1988), citing to Section 15-77-300, the Supreme Court held that there are three prerequisites to the recovery of attorney's fees and costs by a party contesting state action:

> [F]irst, the contesting party must be the 'prevailing' party; second, the court must fond 'that the agency acted without substantial justification in pressing its claim against the party'; and third, the court must find 'that there are no special circumstances that would make the award of attorney's fees unjust.

Id. at 420, 368 S.E.2d at 906.

As set forth below, Appellants fail to meet any of the statutory prerequisites for an award of attorneys' fees.

A. <u>Appellants are not prevailing parties.</u>

Under section 15-77-300, a prevailing party is defined as "'[t]he one who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of the original contention *[and] is the one in whose favor the decision or verdict is rendered and judgment entered.*'" *Sloan v. Friends of the Hunley*, 393 S.C. 152, 156, 711 S.E. 2d 895, 897 (2011) *citing Heath v. County of Aiken*, 302 S.C. 178, 182-83, 394 S.E.2d 709, 711 (1990) (emphasis added) (quoting *Buza v. Columbia Lumber Co.*, 395 P.2d 511, 514 (Alaska 1964)). "A court determines the prevailing party by evaluating the degree of success obtained." *Heath*, 302 S.C. at 183, 394 S.E.2d at 711 (citing *Comm'r, Immigration & Naturalization v. Jean*, 496 U.S. 154 (1990)). Appellants did not prosecute successfully the action or prevail on any of the main issues in the case. The trial court did not render a decision in favor of the

Appellants or enter judgment in their favor. Instead, the trial court dismissed this action in its entirety (which led to the subsequent appeal) for lack of standing. It is therefore inconceivable that Appellants Howe or the Foundation can be considered a prevailing party by any definition.

According to Appellants, "[j]ust as the Supreme Court ruled in the *Friends of the Hunley* case . . . this Court should also rule that the Appellants are the prevailing parties, because the Respondents made a unilateral change in positon (repealing Act 130) long after suit was filed, and thereby provided the Appellants the very relief sought through litigation." (Appellants' Consent to Dismissal and Mot. For Attorneys' Fees 6.) Appellants' reliance on Friends is misguided and unavailing.

In *Friends*, plaintiff contended he was entitled to the recovery of attorneys' fees pursuant to section 30-4-100(b) of the South Carolina Freedom of Information Act ("FOIA"). At some point, plaintiff propounded a FOIA request on Friends. When Friends did not comply, plaintiff sued Friends pursuant to FOIA. After the litigation commenced, Friends fully complied with plaintiff's document request and produced the requested documents. *Friends*, 393 S.C. at 155, 711 S.E.2d at 896. Plaintiff then sought attorneys' fees and costs from Friends under the FOIA arguing he was the "prevailing party." *Id.* The Supreme Court agreed and awarded plaintiff attorney's fees even though plaintiff did not have a verdict or judgment entered in his favor. The Supreme Court held that "this approach is in harmony with legislative intent, as expressed in the preamble to our FOIA statute[.]" *Id.* at 158, 711 S.E.2d at 898.

In the matter presently before this Court, Appellants do not have a claim under the attorneys' fees provisions of the FOIA statute. In *Friends*, the defendant was the culprit,

i.e., the entity that did not turn over the documents. Thus, when Friends did comply with plaintiff's document request, the Supreme Court held that the plaintiff was entitled to receive its fees because plaintiff's "complaint prompted Friends to do what a series of FOIA letter-requests could not accomplish—produce the requested documents." *Id.*

Here, the trial court found that Appellants lacked standing to sue. Standing is a prerequisite for a plaintiff to have its day in court. *Youngblood v. S.C. Dep't of Soc. Servs.*, 402 S.C. 311, 317, 741 S.E.2d 515, 518 (2013). Without proper standing, a plaintiff may not prosecute its action. The core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III. See, *e.g., Allen v. Wright,* 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984). Over the years, our cases have established that the *irreducible constitutional minimum* of standing contains three elements. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992).

In its order dated May 13, 2013, the trial court concluded that both Appellants lacked standing, and consequently, dismissal of this matter in its entirety was warranted. (*See* R. pp. 14-31.) The only verdict in this matter was summary judgment in favor of Respondent Harrell. No court has made a determination on the merits concerning Appellants' substantive arguments.

Appellants have challenged the constitutionality of a statute by suing the Senate President Pro Tempore, the Speaker of the House of Representatives, an individual Senator, an individual House member, and the State of South Carolina, none of which have the authority individually to enact or repeal a statute. The four members of the

General Assembly do not sit in the same seat as the Friends, and thus, the reasoning of the Supreme Court opinion does not apply in this appeal.

In the present case, the General Assembly passed a general law, S. 376, in May, 2015, which repealed the law Appellants challenged. Due to a vote by the General Assembly as a legislative body, this appeal immediately became moot. Appellants do not now somehow morph into a "prevailing party" due to the actions of the General Assembly. Respondents successfully argued Appellants do not have standing in the trial court, prompting this appeal by Appellants. If this Court issues a remittitur, the trial court's order will remain the law of the case—*i.e.*, Appellants do not have standing to bring this constitutional challenge.

Further, the Respondent members of the General Assembly represent only four of the total membership of the General Assembly. Thus, Appellants' statement that "Respondents made a unilateral change in position" (Appellants' Consent to Dismissal and Mot. For Attorneys' Fees 6) is inaccurate. Respondents' vote on S.376 represents only four members of the General Assembly, and their intent to vote on a piece of legislation cannot be imputed to all members of the General Assembly.[3] Moreover, there is no legislative history to imply that the General Assembly passed the law due to the current appeal by the Appellants.

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[3] Additionally, the doctrine of legislative immunity provides state legislators with immunity for any action taken in the sphere of legitimate legislative activity. See *Tenney v. Brandhove*, 341 U.S. 367, 377-78 (1951); *Bogan v. Scott-Harris*, 523 U.S. 44, 49 (1998). The South Carolina Supreme Court is in accord with the United States Supreme Court and has recognized that legislators enjoy immunity for their actions taken within the scope of their legislative duties. *Richardson v. McGill*, 273 S.C. 142, 146, 255 S.E.2d 341, 343 (1979). In *Richardson*, the Court stated that "[a] sound public policy has long recognized an absolute immunity of members of legislative bodies for acts in the performance of their duties." *Id.* Clearly, voting on legislation falls squarely as an "act in the performance of their duties."

Additionally, in *City of Charleston v. Masi,* 362 S.C. 505, 609 S.E.2d 301 (2005), the Supreme Court held that plaintiff was not entitled to attorneys' fees when its case was dismissed and became moot. The court reasoned, "the District is not a prevailing party because its degree of success is nonexistent . . . because this case is dismissed as moot." *Id.* at 510, 609 S.E.2d at 304. Clearly, in this case the General Assembly's passage of a new law moots the appeal and obviates any potential degree of success for the Appellants. *See Heath v. Cnty. of Aiken*, 302 S.C. 178, 183, 394 S.E.2d 709, 711 (1990) ("A court determines the prevailing party by evaluating the degree of success obtained.").

In conclusion, Appellants do not meet the statutory definition of prevailing parties. The trial court dismissed Appellants' complaint on the grounds that Appellants lacked standing, and Appellants' substantive arguments have not been addressed by the any court. Amending the law by the General Assembly makes this appeal moot, but it does not morph Appellants into prevailing parties under the statute. This Court should therefore deny Appellants' motion.

B. Respondents acted with substantial justification.

Respondents acted with substantial justification as demonstrated by the trial court ruling in their favor that Appellants lacked standing. In their motion, Appellants argue that "Respondents continued to litigate this matter without having a good faith basis for arguing that the Act was unconstitutional." (Appellants' Consent to Dismissal and Mot. For Attorneys' Fees 7.) Again, Appellants seek to argue the merits when the trial court clearly indicated this ruling was based solely on standing and did not address the allegations of unconstitutionality.

In *Heath*, the Supreme Court defined "substantial justification" to not mean "justified to a high degree, but rather 'justified in substance or in the main'—that is, justified to a degree that could satisfy a reasonable person.'" *Id.* at 183, 394 S.E.2d at 712 (citing *Pierce v. Underwood,* 487 U.S. 552 (1988)). *Heath* provides further guidance by observing, "to say that there was no substantial justification is not the same as determination that a claim was frivolous." *Id.* at 183, 394 S.E.2d at 712. In the case at hand, Respondents clearly had substantial justification to argue that Appellants did not have standing as evidenced by the trial court order. Thus, this Court should deny Appellants' motion.

C. Awarding attorneys' fees would be unjust.

Awarding attorneys' fees to parties who lack standing to bring this constitutional challenge would be unjust. Appellants argue the State of South Carolina benefits when citizens such as the Appellants bring these constitutional challenges. (Appellants' Consent to Dismissal and Mot. For Attorneys' Fees 7-8.) But again, Appellants fail to address the issue that they lack standing in the first place to bring a constitutional challenge. Therefore, this Court should deny Appellants' motion.

II. Appellants' Request for Fees and Costs is not Reasonable.

For all the reasons articulated above, Respondents maintain Appellants are not the "prevailing parties" because the General Assembly as a whole acted to repeal the law Appellants challenged, not the individual defendants named in the complaint.[4] Further,

[4] Respondents do not take a position on the reasonableness of the attached affidavit of counsel. Respondents argue that the Court does not need to get to this point to determine reasonableness since Respondents are not "prevailing parties" and not entitled to an award of attorneys' fees. However, *arguendo,* if the Court was to entertain the notion of awarding fees, Respondents would request the opportunity to address the

this Court should not award fees because Appellants did not prevail at any level. Appellants' request for original jurisdiction in the Supreme Court was rejected; Appellants' selection of Richland County as the proper venue was rejected; and Appellants' argument opposing summary judgment due to lack of standing was rejected. Appellants simply are not prevailing parties. Further, if the Court did address the reasonableness of Appellants' request, the amount of fees expended at stages of the litigation where the Appellants were unsuccessful should reduce substantially any award of attorneys' fees.

For the reasons set forth above, this Court respectfully should deny Appellants' Motion for Attorneys' Fees.

Respectfully submitted,

SOWELL GRAY STEPP & LAFFITTE, L.L.C.

By: _____

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Attorneys for Respondent Representative Peter M. McCoy, Jr.

And with the consent to sign on behalf of counsel for Hugh K. Leatherman, Sr., in his official capacity as President Pro Tempore of the South Carolina Senate, and Senator George Campsen.

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amount by further briefing as Appellants would not be entitled to any amount close to the amount they are requesting.

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Attorneys for the Respondent State of South Carolina

Columbia, South Carolina
June 8, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2012-CP-10-04969
Appellate Case No. 2013-001273

South Carolina Public Interest Foundation and Waring S. Howe, Jr., individually, and on Behalf of all others similarly situated, ... Appellants,

v.

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PROOF OF SERVICE

I certify that I have caused to be served a Return to Appellants' Motion for Attorneys' Fees Under SC Code Ann. § 15-77-300 on the Petitioners and co-Respondents by depositing a copy in the United States Mail, postage prepaid, on June 8, 2015, addressed to their counsel of record, and electronically mailed as follows:

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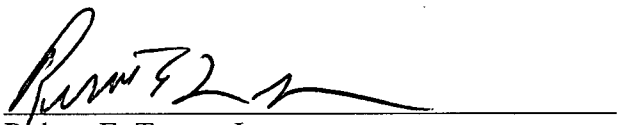

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June 8, 2015

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June 8, 2015

VIA HAND-DELIVERY
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
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Columbia, South Carolina 29201

RE: South Carolina Public Interest Foundation and Waring S. Howe, Jr., individually, and on behalf of all others similarly situated v. James H. "Jay" Lucas, in his official capacity as Speaker of the South Carolina House of Representatives, Hugh K. Leatherman, Sr., in his official capacity as President of the South Carolina Senate, Representative Peter M. McCoy, Jr., Senator George Campsen, and the State of South Carolina
Civil Action No.: 2012-CP-10-04969
SC Court of Appeals Case No. 2013-001273
Our File No.: 6426/1500

Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of the Return to Appellants' Motion for Attorneys' Fees Under SC Code Ann. § 15-77-300 in the above-referenced matter. I would appreciate your filing as appropriate and returning a clocked-in copy via our courier.

By copy of this letter and as evidenced by the Proof of Service, I am serving all counsel of record.

Sincerely,

Robert E. Tyson, Jr.

RETjr:mto

Enclosures

SOWELL S|G GRAY

Litigation is our Business.

cc: **(by email and US Mail)**
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Jennifer J. Miller, Esquire
C. Mitchell Brown, Esquire
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