THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
G. Thomas Cooper, Jr., Circuit Court Judge

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S.C. SUPREME COURT

Appellate Case No. 2016-001839
Case No. 2016-CP-40-3102

Richland County, South Carolina,..... Appellant-Respondent,

Central Midlands Regional Transit Authority, ... Respondent,

v.

The South Carolina Department of Revenue and
Rick Reames, III, in his official
capacity as its Director ..... Respondents-Appellants,

v.

Richland PDT, a joint venture consisting of
M.B. Kahn Construction Co., Inc., ICA Engineering, Inc.,
and Brownstone Construction Group, LLC,
as a unit and Individually, ... Third-Party Defendants.

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ARGUMENTS

I. The Circuit Court erred as a matter of law in concluding that the South Carolina Department of Revenue and Rick Reames have standing to pursue their Motion for Injunction or Alternatively for Appointment of a Receiver as well as their counterclaims seeking declaratory, injunctive and monetary relief against Richland County.

A. Standing Based on Right of Defendant to Defend Itself

As one of several bases for conferring standing on the Respondents-Appellants South Carolina Department of Revenue ("SCDOR") and Rick Reames, III, as its former Director, Circuit Court Judge G. Thomas Cooper, Jr. stated as follows: "It is axiomatic that when sued a defendant has standing to fully defend itself and, if necessary, file Counterclaims to accomplish that purpose." (Amended Order, p. 14). The Appellant-Respondent Richland County challenges that ruling by pointing out that (1) no authority was cited for this unusual point of law, and (2) the ruling is flawed in that a party must have standing for any cause of action it asserts – regardless of whether the cause of action is asserted in a complaint or, as here, in a counterclaim.

In response, SCDOR and Reames dispute this notion; yet, it is quite telling that they cite no supporting authority just as Judge Cooper did not. Instead, SCDOR and Reames attack the two cases cited by Richland County as failing to establish some "broad pronouncement" on standing. Of course, the concept that

the County is pointing out is so basic that a "broad pronouncement" is not needed and logically cannot be found in case law.

Quite simply, SCDOR and Reames' contention that a defendant should have the ability to allege counterclaims without a requisite showing of standing for such counterclaims denies basic notions of justiciability. The County fully acknowledges that a defendant has the right to assert affirmative defenses to defend against a plaintiff's claims, but there is no rule or premise recognized in procedural law that a defendant may also assert any counterclaims it wishes purely as a defense strategy. Instead, it is quite evident that any counterclaims alleged must still be justiciable, meaning that the counterclaims are brought by a party with standing and are not moot or premature. Suffice it to say, the concept of standing turns on the capacity to sue and not, as is suggested, on the capacity to be sued.

B. Statutory Standing

In their response brief, SCDOR and Reames suggest that Judge Cooper found that "statutory standing" existed. Statutory standing is, of course, one of the three types of standing recognized under South Carolina law. *See*, *ATC South, Inc. v. Charleston County*, 380 S.C. 191, 669 S.E.2d 337, 339 (2008) ("[s]tanding may be acquired: (1) by statute; (2) through the rubric of 'constitutional standing'; or (3) under the 'public importance' exception"). The typical analysis of statutory standing requires the suing party to identify a specific statutory provision expressly

conferring a right to sue. *See*, *Freemantle v. Preston*, 398 S.C. 186, 728 S.E.2d 40 (2012) (recognizing statutory standing based on provisions set forth in the Freedom of Information Act). However, in this case, neither the lower court nor SCDOR and Reames have identified any statute that *expressly* confers upon SCDOR the right to sue a political subdivision such as Richland County on its own behalf or, as here, on behalf of the taxpayers of Richland County. *See*, *Youngblood v. South Carolina Department of Social Services*, 402 S.C. 311, 741 S.E.2d 515, 518 (2013) ("[s]tatutory standing exists, as the name implies, when a statute confers a right to sue on a party, and determining whether a statute confers standing is an exercise in statutory interpretation").[1]

Nonetheless, SCDOR and Reames continue to insist that the general statutory authority granted to SCDOR to "administer and enforce" tax laws somehow confers statutory standing or "special interest" standing to "oversee" and "regulate" the expenditure of tax revenues collected under the Transportation Act. Yet, SCDOR's cursory citation of those statutes does not refute the County's detailed analysis which shows that those statutes, individually and in *toto*, do not create oversight authority in SCDOR of a county's expenditure of tax revenues. *See*, County's Appellant's Brief, pp. 32-37. Moreover, SCDOR and Reames fail to

[1] It bears repeating that the only statutory standing to bring suit under Title 12 is actually granted to the Attorney General – not to SCDOR or its Director. It is the Attorney General who is authorized to bring an action "in the name of the State, to recover taxes, penalties, and interest due under this title." S.C. Code Ann. § 12-54-17.

point to any provision in the Transportation Act and specifically S.C. Code Ann. § 4-37-30 bestowing SCDOR with the authority to enforce the provisions of the Act. Importantly, SCDOR's authority is limited to the "administration" and "collection" of the Penny Tax "in the same manner that other sales and use taxes are collected." S.C. Code Ann. § 4-37-30(A)(8). SCDOR and its Director have no authority to oversee the expenditure of "other sales and use taxes" as are collected. The same is true with the Penny Tax. There is simply no authority granted to SCDOR and Reames to oversee Richland County's use of the Penny Tax revenues as Judge Cooper erroneously concluded.[2]

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[2] As the Court is aware from prior filings, SCDOR has attempted to oversee and direct the expenditure of Penny Tax Revenues with its recent promulgation of Proposed Regulation 117-338 which mandates that counties adopt Internal Revenue Code (IRC) § 263A (or an alternative standard to be approved by SCDOR) as a standard for determining eligible expenditures to be funded with the Penny Tax revenues. On November 29, 2016, the Administrative Law Court issued its Public Hearing Report pursuant to S.C. Code Ann. §§ 1-23-110 and 1-23-111 to address the "need and reasonableness" of the Proposed Regulation 117-338. In that Public Hearing Report, the Administrative Law Court included the following determinations and recommendations:

> While there may be a need to assure taxpayers that counties have a reasonable standard for determining eligible costs, it is not clear DOR, in carrying out its ministerial duties to collect and remit the Transportation Tax to the South Carolina Treasurer, has the authority to create such a requirement or to expand the statute to limit eligible costs to capitalized (or capitalizable) costs. The Transportation Act gives authority to a county to administer and operate the Transportation Tax and to use the Transportation Tax funds exclusively for the purpose stated in a county ordinance. The authority of the Department to audit a county's expenditure of the Transportation Tax and to dictate the permissible uses of the tax is not found in either S.C. Code Ann. §§ 4-37-30 or 12-4-320 (2014).
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> * * * * *

Moreover, in claiming that a "special interest" exists to confer standing, SCDOR and Reames also rely in error on their claim to be a "trustee" of the collected tax revenue. As previously discussed in the County's Respondent's Brief, SCDOR places undue reliance on the 1939 case of *Sumter County v. Hurst*, 189 S.C. 316, 1 S.E.2d 242 (1939), where this Court wrote: "when a public officer receives money for the public use, he is a trustee to receive such monies and to pay them to the public official or function for whom or which they were intended." 1 S.E.2d at 244. That case addressed a scenario where a sheriff received funds from the federal government to reimburse the costs of housing federal prisoners in a county detention facility. The sheriff had refused to remit those funds to the county to which the money was to be paid. This Court stated that the sheriff "was the trustee of the Federal Government and of Sumter County to receive and pay

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> In essence, the Department is attempting to create for itself a similar oversight authority, but without the necessary statutory authority to do so. The Department's authority derives from the Legislature's mandate to promulgate regulations "necessary to implement this section." S.C. Code Ann. § 4-37-30(A)(17). However, that mandate is limited to the ministerial duties to collect and remit the Transportation Tax to the South Carolina Treasurer. Allowing the Department to have oversight over the counties' spending of the Transportation Tax without specific legislative authority would use a regulation to expand the statute.

See, Public Hearing Report of Administrative Law Judge, *South Carolina Department of Revenue In Re: Proposed Regulation 117-338*, Docket Number 16-ALJ-17-0270-RH (filed November 29, 2016) (can be found at http://www.scalc.net/search.aspx). *See*, *Freeman v. McBee*, 280 S.C. 490, 313 S.E.2d 325, 327 (Ct. App. 1984) ("[a] court can take judicial notice of its own records, files, and proceedings for all proper purposes including facts established in its records").

these amounts." *Id.* This Court then concluded that the sheriff's refusal to remit those funds "was a breach of a plain ministerial duty, the performance of which could be compelled by mandamus." *Id.*

SCDOR misconstrues the "trustee" language from *Hurst* as establishing what in modern parlance would be a fiduciary relationship. The *Hurst* Court, however, was simply holding that the sheriff had a duty "to receive and pay" the monies received from the federal government. 1 S.E.2d at 244.[3] There was no suggestion in the case that the sheriff had any greater role – such as to make sure the county properly or lawfully spent or allocated those funds once remitted.

Under modern law, courts have held that "[a] confidential or fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard for the interests of the one imposing the confidence." *Richland County v. Carolina Chloride, Inc.*, 382 S.C. 634, 677 S.E.2d 892, 898 (Ct. App. 2009). In *Hendricks v. Clemson University*, 353 S.C. 449, 578 S.E.2d 711 (2003), this Court explained: "Historically, this Court has reserved imposition of fiduciary duties to legal or business settings, often in which one person entrusts money to another, such as with lawyers, brokers, corporate directors, and corporate promoters." 578 S.E.2d at 716. Yet, there are no decisions from South Carolina appellate courts

[3] This duty is equivalent to SCDOR's duty to collect the taxes and remit them to the Treasurer for payment to the County.

holding that a governmental entity is in a fiduciary relationship with another governmental entity or even with its own citizens. Moreover, there is no authority giving SCDOR (or any other tax collector) a fiduciary duty to ensure that taxes collected are properly expended. That duty does not exist under the Transportation Act nor elsewhere.

In sum, Judge Cooper erred in his application of "special interest" standing pursuant to the decision in *Camp v. Board of Public Works*, 238 S.C. 461, 120 S.E.2d 681 (1961).[4] A review of the limited statutory responsibility given to SCDOR under the Transportation Act shows that SCDOR and Reames do not have the requisite "special interest" to confer standing to pursue their claims for declaratory, injunctive and monetary relief as sought in this litigation.

C. Public Importance Standing

On the issue of "public importance" standing, SCDOR and Reames contend that the County's position is "based upon false premises." *See*, SCDOR's Respondents' Brief, p. 20. That is incorrect.

First, SCDOR and Reames assert that this Court has never limited "public importance" standing to private individuals. However, the converse is also true.

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[4] It is interesting that SCDOR and Reames have tried to distance themselves from *Camp* despite Judge Cooper's reliance on the case to confer "special interest" standing. SCDOR and Reames, in fact, state that this Court in *Camp* cited no supporting authority and also point out that *Camp* has never been cited since its issuance in 1961.

This Court has never agreed that governmental entities have standing to sue other governmental entities where they cannot show an "injury-in fact" as required for constitutional standing but instead must rely on the "public importance" exception to general standing principles.

SCDOR and Reames do cite to the case of *Town of Arcadia Lakes v. South Carolina Department of Health and Environmental Control*, 404 S.C. 515, 745 S.E.2d 385 (Ct. App. 2013), as "implying" that "public importance" standing "would have been available to a governmental entity challenging an agency's actions." *See*, SCDOR's Respondents' Brief, p. 21. That is a misreading of the case. The Court of Appeals by footnote states that "[t]he ALC did not consider whether the 'public importance' exception could confer standing on any of the Appellants." 745 S.E.2d at 392, n.11. The Court of Appeals does not imply that such a showing could have been made. Moreover, the Appellants in that case included the Town; various residents of Kaminer Station, a nearby subdivision; and various individuals whose properties bordered Cary Lake. 745 S.E.2d at 392. Thus, the Court of Appeals was not implying, at any rate, that the Town of Arcadia Lakes – as opposed to the individual plaintiffs – necessarily could assert "public importance" standing.

Indeed, the most prudent rule would be to limit governmental standing to cases or controversies where a showing of constitutional standing is made, including an "injury-in-fact" or a personal stake in the litigation, or where there is

express statutory standing. That would prevent a governmental entity from seeking to intervene in disputes for which there is not either a concrete and particularized interest or, at the very least, express authority bestowed by the General Assembly. Thus, a governmental entity should not, as a matter of law, enjoy "public importance" standing.

SCDOR and Reames also disregard the critical impact of the Home Rule doctrine.[5] The County does not argue, as suggested, that Home Rule is a license to ignore tax laws. However, the underlying dispute is not an issue of tax law. Instead, this case is about the "oversight" and regulatory authority claimed by SCDOR over a county's expenditure of tax revenues that are collected by SCDOR and remitted for use by the county. SCDOR and Reames seek to impose an accounting standard based on Internal Revenue Code §§ 263 and 263A to restrict expenditures to "capital costs" only, which is contrary to the legislative intent expressed in 1995 Act No. 52 itself, including the title and the express legislative findings. The expenditure of Penny Tax revenues is not limited to "capital costs"

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[5] SCDOR and Reames admit that Richland County argued the impact of the Home Rule doctrine at each stage of the litigation thus far. But they also emphasize that Judge Cooper's discussion of the impact in his Amended Order is scant at best. The County agrees and suggests that the court below did not fully consider the impact of Home Rule on the issue of standing. However, given the comments made in their brief, it is unclear whether SCDOR and Reames are essentially claiming that the issue has not been preserved for appeal. If that is the argument, the County would point out that its position on the impact of Home Rule was also argued in its Rule 59(e) Motion, including where the County wrote: "Thus, an interpretation of these statutes authorizing Defendants to watch and direct the County how to administer the Penny Tax Program (as determined by Defendants) constitutes a violation of Home Rule." (R. ___). Thus, the issue is clearly preserved for appellate review.

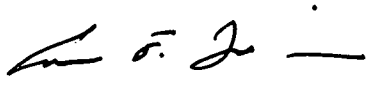
for the construction of "capital improvements." Instead, the Penny Tax revenues may be expended on administrative costs and on the "operation" of transportation-related facilities or projects, which includes the operation of The COMET mass transit system. Under Home Rule, the decision-making regarding the use of the Penny Tax revenues falls on the governing body of Richland County and not on SCDOR and its Director.

In sum, the lower court erred in conferring standing on SCDOR and Reames under the rubric of public importance standing, and that ruling should be reversed.

CONCLUSION

Based on the foregoing discussion and analysis, the Appellant-Respondent Richland County respectfully renews its request that this Court reverse in part the Amended Order of Circuit Court Judge G. Thomas Cooper, Jr., filed August 2, 2016, and direct on remand that the Circuit Court enter an injunction in favor of Richland County thereby enjoining or otherwise prohibiting the Respondents-Appellants from issuing directives, demands, or orders on any matter related to Richland County's use and expenditure of the Penny Tax revenues. In addition, Richland County requests that the Court rule that the Respondents-Appellants lack standing to pursue any declaratory, injunctive and monetary relief against the County.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., counsel for the Appellant-Respondent Richland County, does hereby certify that service of the **Initial Reply Brief of Appellant-Respondent** and the **Appellant-Respondent's Designation of Matter to be Included in the Record on Appeal** in the above-captioned matter was made upon all counsel of record by placing copies in the United

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