

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge
John C. Few, Circuit Court Judge

Case No. 06-CP-23-4637

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

v.

Greenville County, Herman G. Kirven, Jr., Judy Gilstrap, Eric Bedingfield, Jim
Burns, Scott Case, Joseph Dill, Cort Flint, Lottie Gibson, Mark Kingsbury,
Xanthene Norris, Robert Taylor and Tony TroutAppellants.

**RESPONDENTS' PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING *EN BANC***

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Petitioners South Carolina Public Interest Foundation and Edward D. Sloan, Jr. hereby petition the Court of Appeals for a Rehearing of this Appeal, and respectfully suggest a Rehearing *en Banc*.

STATEMENT OF THE CASE

For at least ten years, Appellants authorized and operated a fund variously known as the "Council District Expense Fund," "Council Reserves," "Discretionary Funds," or the "Slush Fund." A member of County Council publicly called it the "Slush Fund" in the 1990's (R. P. 711). The County Council adopts an annual budget, in which each council member was allocated a fund from which to make expenditures, without the approval of the rest of County Council. It began as \$5,000 per member (R. p. 50), and by 2010, it was more than \$23,000 per member (R. p. 69).

Beginning in 1996, Edward D. Sloan, Jr. brought an action challenging expenditures from the "Slush Fund" by individual Council members during fiscal year 1994-1997 ("Slush Fund I") (R. pp. 49-61). The Court considered (1) Mr. Sloan's challenge of the expenditure of Council Reserves to a tenant's association for computers in violation of Council Guidelines governing the Reserves; (2) whether some of Council members' donations to religious non-profit groups violated the First Amendment's Establishment Clause; and (3) whether the payment of Council members' Rotary Club dues was money that had been spent for a "public purpose" as required by the S.C. Code. (R. pp. 1-13). Mr. Sloan also challenged Council members' voting to circumvent the guidelines that they had established to govern expenditures from the Slush Fund.

The Circuit Court ruled that claims related to the expenditures already made were moot and that the Fund did not violate the First Amendment Establishment Clause (R. p.

5). The Circuit Court ruled that the County had not paid Rotary Club dues from Council Reserves and dismissed the claims related to that issue (R. p. 12). By separate order, issued February 23, 1998, the Circuit Court also ruled that the expenditure for the computers for a tenants' association required a preliminary injunction barring the expenditure (R. pp. 1-2). Later, the Circuit Court made the preliminary injunction permanent enjoining the expenditure on the computers, and awarded attorneys' fees (R. p. 14).

Mr. Sloan also sought to challenge additional violations of the County Guidelines by other expenditures not addressed in the initial complaint, but the Court required Mr. Sloan to file a separation action (R. pp. 16-17).

Mr. Sloan then filed a second action challenging those new expenditures made in 1998: (1) money to Slater Marietta Health & Human Services for renovations to a privately owned building that housed public agencies and (2) \$5,000 for a night watchman's patrol car ("Slush Fund II"). After ruling on these matters, the Court enjoined County Council from voting to circumvent its own guidelines (R. pp. 19-21) and later issued a permanent declaratory judgment that circumventing its own guidelines was illegal. By Order entered January 3, 2001, the Court also ordered a review of the County's compliance after two years (R. pp. 22-26).

Four and a half years later, on August 2, 2005, Appellants enacted Ordinance No. 3940, which appropriated funds "for the operation of county government for the fiscal year beginning July 1, 2006 and ending June 30, 2007," and included an appropriation for "Council District Expense," an annual appropriation of more than \$23,000 per council member in "Funds for a Council Member to address," among other things: costs

associated with special, nonrecurring community requests for infrastructure purposes such as: flooding; roads; lights; sewer and drainage; public buildings and grounds; infrastructure related studies” (R. p. 69).

July 20, 2006, the South Carolina Public Interest Foundation (“SCPIF” or “Foundation”) and Mr. Sloan filed this present action (“Slush Fund III”) alleging, “County Council’s delegation of legislative power to an individual member, as described herein, is unconstitutional and illegal, as explained in a South Carolina Attorney General opinion dated November 19, 2003 (R. pp. 68-70).

The County moved to dismiss based on *res judicata* and collateral estoppel (R. pp. 86-87). The County also filed an Answer and moved for Summary Judgment, again based on *res judicata* (R. p. 390-391).

But in their memorandum of law and at oral argument on the Motion, the County focused *solely* on *res judicata*, and in fact affirmatively *waived* its collateral estoppel argument (R. pp. 716-719).

The Court: He just admitted it too. . . . [W]hether it is collateral estoppel or not is not an issue. Mr., uh, Nicholson is not claiming that you are barred by collateral estoppel.

Mr. Carpenter: He has waived that. He raised it twice –

The Court: It is either *res judicata* or we are ready to go forward.

Mr. Carpenter: That’s right.

The Court: Right?

Mr. Carpenter: I believe so.

Mr. Nicholson: I’ve made that statement. I don’t plan to go back on it.

(R. pp. 718-719).

The County maintained that legal position throughout the hearing on the Motion

to Dismiss or for Summary Judgment. After hearing argument on *res judicata*, the Court offered to hear arguments on the merits of the case (Transcript of Record, October 27, 2007, pages 43, ll. 13-17) (R. p. 750). Counsel for Mr. Sloan declined the offer, at the request of the County.

Mr. Carpenter: . . . [Mr. Nicholson] asked that we not pursue that today because he wanted to focus the Court simply on the *res judicata*. I'm happy to accommodate him on that. I just don't want him to come back and once we've argued *res judicata* and he's refused to argue collateral estoppel, I don't want him to come back next time and argue I was wrong on collateral estoppel.

The Court: That would be *res judicata*.

(Transcript of Record, October 27, 2007, p. 43, l. 20 –p. 44, l. 2) (R. pp. 750-751).

The Circuit Court, Judge John C. Few presiding, denied the County's Motion to Dismiss. The Court said:

Well, I'm going to tell you that I'm inclined to rule that the thing is 1995 or 1996 and not the validity of the ordinance and therefore the *res judicata* would not preclude the litigation of this challenge. . . .

I'm going to go ahead and ask Mr. Carpenter to draw a short order that addresses this and denies the motion to dismiss.

(R. pp. 752, 754).

The Court denied the County's motion, based primarily on the holding and rationale of *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591, 597-600, 68 S.Ct. 715, 719-720 (1948). As demonstrated below, *Sunnen* addressed **both** collateral estoppel **and** *res judicata*. The Circuit Court, Judge Few presiding, properly relied on the parts of *Sunnen* that addressed *res judicata*, and not the parts of the opinion that addressed collateral estoppel, because the County explicitly **waived** any reliance on collateral estoppel (issue preclusion) (R. pp. 718-719).

On October 7, 2008, the Circuit Court, Judge Few presiding, held a hearing on

cross motions for summary judgment, on the merits of the case, and after extensive discussion, stated the following:

I think the relative importance to the people of Greenville County of spending money on sewer and drainage as opposed to spending money on roads should be made by the council itself and not by the council member. This thing allows individual council members to decide for their own districts which is more important. That, to me, using your authority is this absolute, unregulated, undefined discretion.

There's nothing in here that restricts that. It says funds may be encumbered for viable projects only. Clearly, spending money on sewer and drainage is a viable project. I mean, that's good for the county. Nobody's going to dispute that. It doesn't seem to me that if one council member is all fired up about sewer and drainage and another council member is all fired up about roads that there's any way for the council to say no, y'all need to spread it out a little bit more.

So it does seem to me like this is the . . . equivalent of giving [an] individual council member a legislative responsibility. But I want to go back and do some more reading.

Transcript of Record, Case No. 03-CP-23-3785 (October 7, 2008), pp. 47-48 (R. pp. 695-696).

A month later, the attorney for the County conceded that the County Council must exercise legislative power of the County. Transcript of Record, Case No. 03-CP-23-3785 (November 7, 2008), p. 26.

The Court: Let me ask you this—you actually agree, don't you, that there is a requirement that legislative power of the county be exercised by the county council?

Mr. Nicholson: I do.

The Court: As opposed to something that is not—

Mr. Nicholson: Your hypothetical would not work, would be unconstitutional.

The Court: Right. So, so, so the problem that I have been posing over the last ten or fifteen minutes is really not something we need to focus on. Everybody agrees that the council can't delegate a legislative power to an

individual council member. And the question that we're actually going to turn this case on is whether or not what was delegated was in fact legislative, right?

Mr. Nicholson: That's the issue, Judge.

The Court: Well, then I've spoken to that issue and I think we're done unless there's any further arguments. I would like Mr. Carpenter to begin to prepare an order.

(R. 832-833).

The parties could not agree on the wording of a proposed order.

Even though the Court had announced its ruling, six months later, on May 14, 2009, Greenville County Council made two more appropriations for the Council District Expense for fiscal years 2010 and 2011 using the same guidelines and procedures. Responses to Plaintiffs' Second Set of Requests for Admission 6, 7, and 8 (R. 867-868). Thus, Appellants ignored both the Attorney General Opinion and the oral ruling of the Circuit Court that this was an unlawful delegation of legislative authority. The prior ruling had not addressed this issue.

On February 10, 2010, the Circuit Court issued its written Order ruling, "The 'Council District Expense Fund' portion of the 2006-2007 budget for Greenville County is declared to be illegal" (R. p. 33).

Thereafter, Judge Few joined the Court of Appeals, and the Circuit Court, the Honorable D. Garrison Hill presiding, awarded Plaintiffs attorneys' fees pursuant to S.C. Code Ann. § 15-77-300 ff. (R. pp. 36-43).

The County appealed both the ruling on the merits and the award of attorneys' fees.

In its briefs in the Court of Appeals, the County did not make a collateral estoppel argument overtly, but instead confused *res judicata* and collateral estoppel by citing and

relying on cases that addressed collateral estoppel, not *res judicata*. The Panel of the Court of Appeals appears to have followed the County's misguided arguments.

I. APPELLANTS ILLEGALLY DELEGATED LEGISLATIVE AUTHORITY.

“When an authority is given jointly to several persons, *they must generally act jointly or their acts are invalid.*” *Abbeville v. McMillan*, 52 S.C. 60, 72 (1897) quoting *Cooley v. O'Connor*, 12 Wall. 391 at 398 (1871). In *State ex rel. McLeod v. McInnis*, the Court ruled that the General Assembly could not delegate its spending power, “legislative authority,” to the Joint Appropriation Review Committee, composed of 12 legislators). *Id.*, 278 S.C. 307, 317-18, 295 S.E.2d 633, 639 (1982).

A municipal governing body cannot delegate . . . to one of its own committees the power to decide legislative matters properly resting in the judgment and discretion of that body or to one member of the governing body. . . . The members of the governing body are chosen by the people to represent the municipality and they are charged with a public trust and the faithful performance of their duties and the public is entitled to the judgment and discretion of each member.

56 Am.Jur.2d, Municipal Corporations, § 134.

The rule is well settled that legislative power cannot be delegated by a municipality, unless expressly authorized by the statute conferring the power. So, judicial, as distinguished from ministerial, functions cannot be delegated. So far as the powers of a municipal corporation are legislative they rest in the discretion and judgment of the municipal body entrusted with them, and the general rule is that that body cannot delegate or refer the exercise of such powers to the judgment of a committee of the council, or to an administrative board or officer of the city, or to arbitrators under an agreement for binding arbitration. If the legislature confers power on a municipal corporation, the exercise of discretion by the governing body of the municipality cannot be delegated to a municipal officer or other person or body.

2A McQuillin, Mun. Corp. § 10:43 (3rd ed.)

While *legislative or discretionary powers* or trusts *devolved* by charter or law *on a council or governing body*, or a specified board or officer

cannot be delegated to others. [...] The council by ratification finally determines and thus fulfills the duty imposed by law.

2A McQuillin, Mun. Corp. § 10:45 (3rd ed.).

II. JUDGE FEW PROPERLY RULED THAT *RES JUDICATA* DID NOT BAR THE PRESENT ACTION.

The Circuit Court, Judge Few presiding, held several arguments on the issues of *res judicata*, and the merits of the case. The Circuit Court properly ruled that *res judicata* did not bar the present action. The Court of Appeals reversed, and in this Petition for Rehearing and Suggestion for Rehearing en Banc, Plaintiff will make the following points, presented here in summary.

First, the Panel of Court of Appeals in this action (“Panel”) misreads the County’s argument. The Circuit Court relied on *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591, 597-600, 68 S.Ct. 715, 719-720 (1948) and cases that follow it for the proposition that *res judicata* does not bar SCPIF’s claim in Slush Fund III. The Panel “agreed” with the County that *Sunnen* involved an assertion of collateral estoppel *rather than res judicata* (Slip Opinion, page 7). The County did **not** make this argument. The County’s briefs simply confused *res judicata* and collateral estoppel.

Second, and more importantly, the Panel misreads *United States v. Sunnen*. *Sunnen* explicitly and extensively addresses **both** *res judicata* and collateral estoppel, and distinguishes the two legal rules.

Third, the Panel misreads South Carolina law. *Res judicata* does not bar the action when there is no “identity of subject matter,” when the “underlying facts” are different, or when the claims do not “arise out of the same transaction or occurrence.” *Judy v. Judy*, 393 S.C. 160, 712 S.E.2d 408 (2011). The “transaction or occurrence”

addressed in Slush Fund I arose from 1994-97. The “transaction or occurrence” addressed in Slush Fund III arose from 2005-06, and subsequent years. (The policies governing the Slush Fund were amended from time to time over the years.)

Fourth, the Panel ruled that the United States Supreme Court limited the holding of *Sunnen*. The Supreme Court did limit the holding of *Sunnen* as it pertains to collateral estoppel, but **not** as it pertains to *res judicata*. *Sunnen*'s holding as to *res judicata* stands.

Fifth, the Panel uses collateral estoppel analysis, but calls it *res judicata*.

Sixth, because the County had waived its collateral estoppel argument, Petitioners had **no notice** that the County or the Panel would address collateral estoppel, and the lack of notice violates due process.

Finally, the Circuit Court had awarded attorneys fees pursuant to S.C. Code Ann. § 15-77-300. In granting attorneys fees, the Circuit Court ruled, “The Court finds that this Attorney General Opinion accurately states the law regarding delegation of legislative authority as it has been understood for at least 100 years, and if Defendants did not know this legal principle, they were willfully ignorant of it” (R. p. 38). Because the Panel reversed on the *res judicata* or collateral estoppel analysis, the Panel also wrongfully reversed the Circuit Court’s award of attorneys’ fees.

A. The Panel Misreads the County’s Argument.

First, the Panel misreads the County’s argument. The Panel “agreed” with the County that *Sunnen* involved an assertion of collateral estoppel **rather than** *res judicata* (Slip Opinion, page 7).

Contrary to the Panel’s statement, the County did **not** argue “that *Sunnen* addressed collateral estoppel **rather than** *res judicata*” (Slip Opinion, page 8). The County **never** argued that *Sunnen* did not address *res judicata*. The County’s briefs

simply confused *res judicata* and collateral estoppel. The County spent a large portion of its brief relying on *State Dep't. of Revenue v. Hoover, Inc.*, 993 So.2d 889 (Ala. Civ. App. 2007) (*Hoover II*), a case from the Alabama Court of Appeals, which was a collateral estoppel (or issue preclusion) decision. *Hoover* was not a claim preclusion (*res judicata*) decision. *Hoover II* mentions *res judicata* only one time, and that reference is **directly contrary** to the County's entire *res judicata* argument: "The Court [in *Sunnen*] explained that . . . the doctrine of *res judicata* **does not apply** to tax litigation involving **different tax years.**" *Id.*, 993 So.2d 889, 895 (emphasis added). *Hoover II* actually confirms the holding of *Sunnen* on *res judicata*.

The County's brief contained an extensive discussion about a "change in the law," which is an analysis for issue preclusion (collateral estoppel), not claim preclusion (*res judicata*). The County's arguments simply reflect a significant confusion of the two rules.

This memorandum will demonstrate below in Section C. that an argument of claim preclusion (*res judicata*) addresses an attempt to reargue the same claim, which arises out of the same *fact* pattern. Collateral estoppel, which the County waived, addresses an attempt to apply a rule of law to a new fact situation. The County was simply confused, and as a consequence, confused the Court.

B. The Panel Misreads *Commissioner of Internal Revenue v. Sunnen*.

The Court of Appeals misreads *Commissioner of Internal Revenue v. Sunnen*, the most important case on which the trial court and Petitioners rely for their *res judicata* argument. *Sunnen* addressed **both** *res judicata* **and** collateral estoppel; and articulated different rules for the two theories. *Sunnen* ruled that *res judicata* applies to the relitigation of a particular *cause of action*. This is a fact-based analysis.

It is first necessary to understand something of the recognized meaning and scope of *res judicata*, a doctrine judicial in origin. The general rule of *res judicata* applies to repetitious suits involving *the same cause of action*. It rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations. The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of *a cause of action*, the parties to the suit and their privies are thereafter bound 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.' *Cromwell v. County of Sac*, 94 U.S. 351, 352, 24 L.Ed. 195. The judgment puts an end to *the cause of action*, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment. See von Moschzisker, 'Res Judicata,' 38 Yale L.J. 299; Restatement of the Law of Judgments, §§ 47, 48.

But where the second action between the same parties is upon *a different cause or demand*, the principle of *res judicata* is applied much more narrowly. In this situation, the judgment in the prior action operates as an *estoppel*, not as to matters which might have been litigated and determined, but 'only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.' *Cromwell v. County of Sac*, *supra*, 353 of 94 U.S. And see *Russell v. Place*, 94 U.S. 606, 24 L.Ed. 214; *Southern Pacific R. Co. v. United States*, 168 U.S. 1, 48, 18 S.Ct. 18, 27, 42 L.Ed. 355; *Mercoird Corp. v. Mid-Continent Co.*, 320 U.S. 661, 671, 64 S.Ct. 268, 273, 88 L.Ed. 376. Since the *cause of action* involved in the second proceeding is *not swallowed by the judgment in the prior suit*, the parties are free to litigate points which were not at issue in the first proceeding, even though such points might have been tendered and decided at that time. But matters which were actually litigated and determined in the first proceeding cannot later be relitigated. Once a party has fought out a matter in litigation with the other party, he cannot later renew that duel. In this sense, *res judicata* is usually and more accurately referred to as *estoppel by judgment*, or *collateral estoppel*. See Restatement of the Law of Judgments, §§ 68, 69, 70; Scott, 'Collateral Estoppel by Judgment,' 56 Harv.L.Rev. 1.

These same concepts are applicable in the federal income tax field. Income taxes are levied on an annual basis. *Each year is the origin of a new liability and of a separate cause of action*. Thus if a claim of liability or non-liability relating to *a particular tax year* is litigated, a judgment on the merits is *res judicata* as to any subsequent proceeding involving *the same claim and the same tax year*. But if the later proceeding is concerned with a similar or unlike claim relating to a *different tax year*, the prior judgment acts as a *collateral estoppel* only as

to those matters in the second proceeding which were actually presented and determined in the first suit. *Collateral estoppel* operates, in other words, to relieve the government and the taxpayer of 'redundant litigation of the identical question of the statute's application to the taxpayer's status.' *Tait v. Western Md. R. Co.*, 289 U.S. 620, 624, 53 S.Ct. 706, 707, 77 L.Ed. 1405.

Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591, 597-599, 68 S.Ct. 715, 719-720, 92 L.Ed. 898, (1948) (emphasis added). *Res judicata* bars relitigating of a ruling on the **same** set of facts. Collateral estoppel can address applying a ruling to a **different** set of facts. Slush Fund III (this appeal) addresses a different set of facts than either Slush Fund I or Slush Fund II.

C. The Panel Misreads South Carolina Law.

South Carolina law mirrors *Sunnen*. *Res judicata* does not bar the action when there is no "identity of subject matter;" the "underlying facts" are different; and the claims do not "arise out of the same transaction or occurrence." *Judy v. Judy*, 393 S.C. 160, 712 S.E.2d 408 (2011). Slush Fund I addressed 41 expenditures from 1994-97. Slush Fund II addressed allocations and expenditures in 1998. Slush Fund III challenges expenditures from 2005-06 and subsequent years. In Slush Fund I, Sloan **could not have addressed** the "transactions or occurrences" that he addressed in Slush Fund III. A challenge to illegal expenditures many years ago does not preclude a challenge to new expenditures, which are also illegal, particularly when the policy was amended several times over those years.

The doctrine of *res judicata* originates from the principles that public interest requires an end to litigation and that no one should be sued twice for the same cause of action. *Hayes v. Hayes*, 312 S.C. 141, 439 S.E.2d 305 (Ct.App.1993). The *res judicata* defense requires a showing of three essential elements: (1) the prior judgment must be final, valid and on the merits; (2) the parties in the subsequent action must be identical to those in the first; and (3) **the second action must involve matters properly included in the first action**. *Owenby v. Owens Corning Fiberglas*, 313

S.C. 181, 437 S.E.2d 130 (Ct.App.1993). Under the doctrine of *res judicata*, a final judgment on the merits in a prior action will preclude the parties from relitigating any issues actually litigated or those that might have been litigated in the first action. *Foran v. USAA Casualty Ins. Co.*, 311 S.C. 189, 427 S.E.2d 918 (Ct.App.1993).

Wright, v. Marlboro County School District, 317 S.C. 160, 452 S.E.2d 12 (Ct. App. 1994) (emphasis added).

Similarly, in *Pye v. Aycock*, Judge Anderson writing for the Court explained that *res judicata* is a fact-based determination. The claim must arise out of the same facts in both actions for *res judicata* to bar the second action.

“*Res judicata* also bars subsequent actions by the same parties when the claims arise out of **the same transaction or occurrence** that was the subject of a prior action between those parties.” *Riedman Corp. v. Greenville Steel Structures, Inc.*, 308 S.C. 467, 469, 419 S.E.2d 217, 218 (1992).

Additionally, “[f]or a judgment to bar the maintenance of a subsequent action, **there must be identity of the cause of action as well as identity of the subject matter.**” *Nunnery*, 289 S.C. at 209, 345 S.E.2d at 743. If it is doubtful whether a second action is for the same cause of action as the first, the test generally applied is to consider **the identity of facts essential to their maintenance, or whether the same evidence would sustain both.** *Griggs v. Griggs*, 214 S.C. 177, 51 S.E.2d 622 (1949). When applying principles of *res judicata*, a fundamental test used for comparing causes of action is to determine whether **the primary right and duty and the delict or wrong are the same** in each action. *Nunnery, supra*. “Under this test, there is but one cause of action where there is but one right in the plaintiff and one wrong on the part of the defendant involving that right.” *Id.* at 210, 345 S.E.2d at 743 (quoting 46 Am.Jur.2d *Judgments* § 406 at 575 (1969)).

Id. 325 S.C. 426, 432-433, 480 S.E.2d 455, 458 (Ct. App. 1997) (emphasis added).

The point of contention is the proper definition or identification of the “res” or the “thing” adjudicated. Plaintiffs contend and the Circuit Court ruled that the “res” adjudicated in the earlier lawsuit was the particular expenditures of taxpayer money in the 1990’s. The County and Panel contend the “res” is the legal theory that Sloan raised, or that he could have raised, to challenge those expenditures in the 1990’s. The argument of the County and the Panel is an argument of collateral estoppel.

Greenville County levies and collects property taxes annually. The County enacts appropriations to the Slush Fund annually. The Council Members made expenditures from their Slush Fund accounts annually. In Slush Fund I, the Circuit Court found some expenditures legal and others illegal. *Res judicata* bars plaintiffs from challenging *those expenditures* a second time. No court had adjudicated the legality of appropriations to the Slush Fund or the expenditures from the Slush Fund in 2006 and 2007. Judge Few properly ruled that the “*res*,” or the “thing” adjudicated in the earlier case was the annual allocations to the Slush Fund, and the specific expenditures of specific sums of money in the 1990’s. “I’m inclined to rule that the thing is 1995 or 1996 and not the validity of the ordinance and therefore the *res judicata* would not preclude the litigation of this challenge” (R. pp. 752, 754). Thus, *res judicata* did not bar Sloan’s challenge to these new appropriations and expenditures.

D. The Panel Misreads the Later Analysis of *Sunnen*.

The Panel also reasoned that after *Sunnen* was decided, the United States Supreme Court limited the reach of *Sunnen*. The Panel cited two cases that limited the effect of *Sunnen*: *Montana v. United States*, 440 U.S. 147, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979) and *United States v. Stauffer Chemical Co.*, 464 U.S. 165, 104 S.Ct. 575, 78 L.Ed.2d 388, (1984). Both were collateral estoppel cases.

In *Montana v. United States*, the Court stated, “Because we find that the constitutional question presented by this appeal was determined adversely to the United States in a prior state proceeding, we reverse on grounds of *collateral estoppel* without reaching the merits.” *Id.* 440 U.S. 147, 152-53, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979). *Montana v. United States* demonstrates that when two cases are “closely aligned in time and subject matter,” *collateral estoppel* should ordinarily apply. *Montana v. United*

States did not limit the holding of *Sunnen*, as it pertains to *res judicata*.

Similarly, *United States v. Stauffer Chemical Co.* was a collateral estoppel decision.

Stauffer also argues that the government should be *estopped* from relitigating the *question* of whether private contractors are “authorized representatives” under the statute because it has already litigated that *question* against Stauffer and lost in connection with an attempted inspection of one of Stauffer’s plants in Wyoming. The Court of Appeals agreed with Stauffer on the merits and also on the *collateral estoppel* issue. Without reaching the merits, we affirm the Court of Appeals’ holding that the government is *estopped* from relitigating the statutory *issue* against Stauffer.

Id., 464 U.S. 165, 166-67, 104 S.Ct. 575, 576, 78 L.Ed.2d 388, (1984) (emphasis added).

Neither *Montana v. United States* nor *United States v. Stauffer Chemical Co.* addressed *res judicata*. The United States Supreme Court may have later limited the holding of *Sunnen* as it pertains to collateral estoppel, but **not** as it pertains to *res judicata*.

E. The Panel Uses Collateral Estoppel Analysis, but Calls it *Res Judicata*.

Fifth, the Panel states that it is making a ruling based upon *res judicata*, but instead, uses collateral estoppel analysis, and calls it *res judicata*. The Panel ruled in essence that because Sloan attempted to challenge the concept of delegation of legislative authority, however inartfully in Slush Fund I, he could not make a similar challenge in Slush Fund III. This analysis is a collateral estoppel analysis. Writing for this Court, Judge Anderson explained this concept in *Pye v. Aycock*, and called it *collateral estoppel*.

Under the doctrine of collateral estoppel, on the other hand, the second action is based upon a *different claim* and the judgment in the first action precludes relitigation of only those issues “actually and necessarily litigated and determined in the first suit.”

Beall, 281 S.C. at 369 n. 1, 315 S.E.2d at 189 n. 1. This Court further held: In order, however, to assert collateral estoppel successfully, the party seeking issue preclusion still must show that the issue was *actually litigated and directly*

determined in the prior action and that the matter or fact directly in issue was *necessary to support the first judgment*.

Beall, 281 S.C. at 371, 315 S.E.2d at 191. See also *St. Philip's Episcopal Church v. South Carolina Alcoholic Beverage Control Comm'n*, 285 S.C. 335, 338, 329 S.E.2d 454, 456 (Ct.App.1985) (“[W]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.”)

[11] Factors to consider in determining the defense of collateral estoppel, notwithstanding a lack of privity, include “whether the doctrine is used offensively or defensively, and whether the party adversely affected had a **full and fair opportunity to litigate the relevant issue** effectively in the prior action.” *Graham v. State Farm Fire & Cas. Ins. Co.*, 277 S.C. 389, 390-91, 287 S.E.2d 495, 496 (1982). See also *South Carolina Property & Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc.*, 304 S.C. 210, 403 S.E.2d 625 (1991) (**collateral estoppel** occurs when party in second action seeks **to preclude party from relitigating issue decided in previous action**; nonmutual collateral estoppel may be asserted unless party precluded lacked full and fair opportunity to litigate issue in first action or other circumstances justify affording him opportunity to relitigate issue).

Id. 325 S.C. 426, 435-436, 480 S.E.2d 455, 459-460 (Ct. App. 1997) (emphasis added).

The analysis asserted by the County on appeal and by the Panel in its decision is collateral estoppel analysis. (Incidentally, Mr. Sloan’s counsel has believed from the beginning that a collateral estoppel analysis provided the County a better chance at preventing a ruling on the merits, but the County expressly and repeatedly waived the collateral estoppel issue.)

Mr. Carpenter: . . . I just don’t want him to come back and once we’ve argued res judicata and he’s refused to argue collateral estoppel, I don’t want him to come back next time and argue I was wrong on collateral estoppel.

The Court: That would be res judicata.

(Transcript of Record, October 27, 2007, p. 43, l. 20 –p. 44, l. 2) (R. pp. 750-751).

The analysis of the Supreme Court of the United States is similar to that of Judge Anderson.

The contention of the government seems to be that *the doctrine of res judicata* does not apply to questions of law; and, in a sense, that is true. It *does not apply to unmixed questions of law*. Where, for example, a court in deciding a case has enunciated a rule of law, *the parties in a subsequent action upon a different demand are not estopped from insisting that the law is otherwise*, merely because the parties are the same in both cases.

United States v. Moser, 266 U.S. 236, 242, 45 S.Ct. 66 (1924) (emphasis added). See also, *Limbach v. Hooven & Allison Co.* 466 U.S. 353, 104 S.Ct. 1837, 80 L.Ed.2d 356 (1984) (when “the parties were the same, . . . the issue . . . was also the issue in [the earlier case]; that the raw materials and the type of taxation were identical,” but the years and the tax assessments were different, the Court’s analytical framework was not *res judicata*, but collateral estoppel).

The County confused the analysis of the two theories in its brief, and then the Panel followed the County’s confused and mistaken analysis. The County spent a large portion of its brief relying on the *Hoover* case from the Alabama Court of Appeals, which was a collateral estoppel decision (but called it *res judicata*). As noted above, the County had explicitly waived or conceded the collateral estoppel argument in the trial court. In the same manner, the Panel asserts that it is making a ruling based upon *res judicata*, but instead, seems to use collateral estoppel analysis, and wrongly calls it *res judicata*.

F. Petitioners had No Notice that the Panel Would Rely in Collateral Estoppel Analysis.

Sixth, because the County had waived its collateral estoppel argument, Petitioners had **no notice** that the County or the Panel would rely on a collateral estoppel analysis, and the lack of notice violates due process.

III. THE PANEL IMPROPERLY REVERSED THE AWARD OF ATTORNEYS' FEES.

Finally, the Panel reversed the Circuit Court's award of attorneys' fees based on its decision that *res judicata* barred the action. Respondents Petition for Rehearing *en banc* on the issue of *res judicata*, and accordingly, on the issue of attorneys' fees as well.

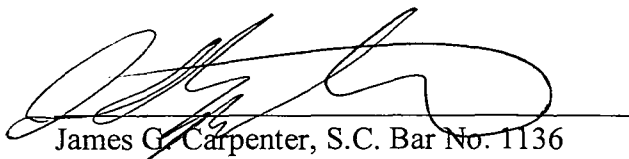
The Circuit Court awarded attorneys' fees and costs to SCPIF under § 15-77-300 (Order entered November, 11, 2010). To recover under this section, a citizen must prove three elements: (1) the citizen must be the prevailing party; (2) the government entity must have acted without substantial justification; and (3) no special circumstances would have made the award of attorney's fees unjust. *Heath v. County of Aiken*, 302 S.C. 178, 182, 394 S.E.2d 709 (1990); *Richland County v. Kaiser*, 351 S.C. 89, 96-97, 567 S.E.2d 260 (Ct. App. 2002). The award of attorneys' fees is discretionary with the trial court. *Heath v. County of Aiken*, 302 S.C. 178, 182, 394 S.E.2d 709 (1990). As demonstrated in its Respondents' Brief, SCPIF and Sloan meet the three elements for an award of attorney's fees, and the Circuit Court properly awarded attorneys' fees, and this award should be affirmed on appeal.

CONCLUSION

Petitioners South Carolina Public Interest Foundation and Edward D. Sloan, Jr. respectfully pray the Court for a Rehearing and a Rehearing en Banc to address the issues raised herein: the Panel's erroneous reading of the arguments made by the County, *United States v. Sunnen*, South Carolina law, the later cases analyzing *Sunnen*; the Panel's erroneous co-mingling of the concepts of *res judicata* and collateral estoppel; and the Panel's wrongful reversal of the award of attorneys' fees.

Respectfully submitted, this 15th day of August, 2012,

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