

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

---

**RECEIVED**

APPEAL FROM RICHLAND COUNTY

MAY 22 2017

Court of Common Pleas

**SC Court of Appeals**

G. Thomas Cooper, Circuit Court Judge

---

Appellate Case No. 2014-001412

---

South Carolina Public Interest Foundation and William B. DePass, Jr., individually, and on behalf of all others similarly situated, ..... Appellants,

v.

Senator John E. Courson, Senator Darrell Jackson, Senator Joel Lourie, Senator John L. Scott, Jr., and The State of South Carolina, ..... Respondents.

---

**PETITION FOR REHEARING**

---

May 17, 2017

THE CARPENTER LAW FIRM, P.C  
James G. Carpenter, S.C. Bar No. 1136  
819 E. North Street  
Greenville, South Carolina 29601  
(864) 235-1269  
Attorneys for Appellants

Other Counsel of Record:  
Edward H. Bender  
Kenneth M. Moffett  
P.O. Box 142  
Columbia, SC 29202  
Attorney for Defendant Senators

J. Emery Smith, Jr.  
PO Box 11549  
Columbia, SC 29211  
Attorney for Defendant  
State of South Carolina

Appellants submit this Petition for Rehearing pursuant to SCACR 221(a) to address points “overlooked or misapprehended” by the Court. The Court’s decision was based on two points: the definition of “agency” in S.C. Code Ann. § 15-77-300, and the doctrine of legislative immunity.

**I. THE STATE AND POLITICAL SUBDIVISIONS ARE “AGENCIES.”**

This Court ruled that the statutory phrase, “the appropriate agency,” means only an agency of the Executive Department. By focusing on “agency” or “appropriate agency” instead of “the State or any political subdivision of the State,” under the Court’s analysis, the tail is wagging the dog. This statute gives a right to fees to anyone litigating with “the State or a political subdivision of the State.”

(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.

S.C. Code Ann. § 15-77-300 (emphasis added). Petitioners suggest that a fair reading of the statute is that “appropriate agency” refers back to “the State [or] any political subdivision of the State.” Instead of repeating those same words for a third and a fourth time, the General Assembly simply substituted “appropriate agency” and “agency” as a shorter term.

Under the plain language of the statute, the **State itself** can be liable for attorneys’ fees under S.C. Code Ann. § 15-77-300. Furthermore, the statute explicitly contemplates that a **political subdivision** can be liable for attorneys’ fees under this section. Accordingly, the term

“agency” or “appropriate agency” must mean something other than a subdivision in the Executive Department as the Court ruled.

This interpretation was confirmed when the Supreme Court awarded attorneys’ fees against **the State itself** in *Layman v State*, 376 S.C. 434, 658 S.E.2d 320 (2008). The State itself is not a subset of the Executive Department. Accordingly, Petitioners respectfully suggest that the terms “agency” and “appropriate agency” are generic terms referring back to the statutory language in the previous section: “the State or any political subdivision of the State.” Petitioners respectfully suggest that construction is the only one that makes sense in the context of the statute.

Furthermore, South Carolina Courts have also awarded attorneys’ fees against **political subdivisions** under § 15-77-300. *Heath v. County of Aiken*, 302 S.C. 178, 394 S.E.2d 709 (1990) (Court awarded attorney’s fees under § 15-77-300 against the County and County Council members); *Eargle v. Horry County*, 344 S.C. 449, 545 S.E.2d 276 (2001) (Court awarded attorney’s fees under § 15-77-300 against the County and County Administrator); *Simpkins v. City of Gaffney*, 315 S.C. 26, 431 S.E.2d 592 (1993) (Court awarded attorney’s fees under § 15-77-300 against the City, City Council members, and City Administrator); *see also Cornelius v. Oconee County*, 369 S.C. 531, 633 S.E.2d 492, 497 (2006); *Burton v. York County Sheriff’s Dept.*, 358 S.C. 339, 357, 594 S.E.2d 888, 898 (Ct. App. 2004). Political subdivisions are not a subset of the Executive Department. Petitioners respectfully suggest that this Court failed to consider these many authorities that are **contrary** to its opinion.

Finally, Petitioners respectfully suggest that reasoning from the greater to the lesser, if the State itself can be liable for attorneys’ fees under § 15-77-300, then certainly a subdivision of the State, namely the Senate and the named Senators in their official capacities can be liable for attorneys’ fees under § 15-77-300. *See Layman v State*, 376 S.C. 434, 658 S.E.2d 320 (2008).

## II. LEGISLATIVE IMMUNITY DOES NOT PROHIBIT AN AWARD OF ATTORNEYS' FEES AS COSTS.

This Court ruled that legislative immunity prevents an award of attorneys' fees as costs in this action. This Court cited *Tenney v. Brandhove*, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951) and *Bogan v. Scott Harris*, 523 U.S. 44, 118 S.Ct. 966 (1998) in support of its ruling based upon legislative immunity. Petitioners respectfully suggest that the court misapprehended or overlooked the following points:

### A. Legislative Immunity Does Not Govern These Facts.

Legislative immunity protects individual members of the General Assembly from compensatory or punitive damages arising from discretionary or legislative acts in the General Assembly. The attorneys' fees statute, § 15-77-300, does not authorize attorneys' fees to be paid for acts of legislative discretion, and the Appellants are not seeking attorneys' fees for acts of legislative discretion.

Respondents conceded that "government fee-shifting statutes also constitute a waiver of sovereign immunity. *M. A. Mortenson Co. v. U.S.* 996 F.2d 1177, 1180 (D.C. Cir. 1993)." Respondent's Brief, p. 11. *Mortenson* held that the United States was subject to monetary sanctions under Rule 37 for violations of orders related to discovery. In that case, the United States and argued that such sanctions were in violation of its sovereign immunity. The federal Equal Access to Justice Act ("EAJA") allows an award of fees to a litigant, if the government litigates without a good faith basis in fact and law. The *Mortenson* court found that EAJA was a sufficient statutory waiver of sovereign immunity and authorization for an award of attorneys' fees and costs under Rule 37. Similarly, in the case at bar, the South Carolina fee-shifting statute, § 15-77-300, constitutes a waiver of sovereign immunity for an award of attorneys' fees and costs in litigation in which the State is a party.

The statute, like EAJA, authorizes payment of attorneys' fees for **conducting litigation** without a good faith basis in fact and in law to support the position taken by the government. That is exactly the situation in this case. The Respondents attempted to defend the indefensible. Such conduct is the explicit statutory reason for an award of attorneys' fees under § 15-77-300. Legislative immunity does not prevent an award of attorneys' fees under this section.

In *Tenney*, the Supreme Court of the United States traced the origins of legislative immunity from the English common law through the speech and debate clause of Article 1, section 6 of the United States Constitution. The Supreme Court described legislative immunity as “the privilege of legislators to be free from arrest or civil process for what they do or say **in legislative proceedings**.” *Id.*, 341 U.S. 367, 372, 71 S.Ct. 783, 786 (emphasis added).

In *Tenney*, the plaintiff asserted that legislators had **conducted legislative hearings** in violation of his constitutional rights. He sought compensatory and punitive damages under one of the Civil Rights Acts. In explaining the rationale for legislative immunity, the Supreme Court stated,

Legislators are immune from deterrents to the **uninhibited discharge of their legislative duty**, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives.

*Id.*, 341 U.S. 367, 377, 71 S.Ct. 783, 788 (emphasis added). The *Tenney* Court found that the defendant legislators were “acting in the sphere of legitimate legislative activity.” *Id.*, 341 U.S. 367, 376, 71 S.Ct. 783, 788. The Court ruled that the defendants were entitled to legislative immunity because “Investigations, whether by standing or special committees, are an **established part of representative government**.” *Id.*, 341 U.S. 367, 377, 71 S.Ct. 783, 789 (emphasis added).

In *Bogan*, the plaintiff sought to recover damages under 42 U.S.C. § 1983 for violation of her First Amendment rights. The plaintiff argued that local legislators had **proposed, voted on, and signed legislation** eliminating her government employment position in retaliation for her exercise of First Amendment rights. In *Bogan*, the Supreme Court ruled that legislative immunity barred not only the damages, but also granted absolute immunity from suit for all legitimate legislative activities. The Court summarized its holding:

[Defendants below] further argue that their acts of **introducing, voting for, and signing an ordinance** eliminating the government office held by respondent constituted **legislative activities**. We agree on both counts and therefore reverse the judgment below.

*Id.*, 523 U.S. 44, 46, 118 S.Ct. 966, 969 (1998) (emphasis added). In referring to *Tenney*, the *Bogan* Court ruled, “We explained that legislators were entitled to absolute immunity from suit in common law.” *Bogan v. Scott Harris*, 523 U.S. 44, 49, 118 S.Ct. 966, 970.

South Carolina adopted the rule of legislative immunity from the English Common Law, as demonstrated by S.C. Code Ann. § 14-1-50: “All, and every part, of the common law of England, where it is not altered by the Code or inconsistent with the Constitution or laws of this State, is hereby continued in full force and effect in the same manner as before the adoption of this section.” Judge Hemphill recited the history of its adoption in *Bruce v. Riddle*, 464 F. Supp. 745 (D.S.C. 1979).

The applicability of the legislative immunity defense in South Carolina was not at issue in *Tenney v. Brandhove*, [341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951)], but the Court did make some enlightening observations about its availability here and in virtually all other states. After discussing the evolution of legislative immunity in the English common law, the Court observed in footnote 3 that the South Carolina Constitution of 1776 had protected the privilege by a general provision in Art. VII preserving English law. Although that provision no longer exists in the current South Carolina Constitution, the same purpose is served by § 14-1-50 of the S.C. Code which, provides that “All, and every part of, the common law of England, where it is not altered by the Code or inconsistent with the Constitution or laws of this State, is hereby continued in full force and effect in the same manner as before the adoption of this section.” Thus, the holdings in *Tenney*

*v. Brandhove* and in other decisions based on legislative immunity as it evolved from the common law of England are fully applicable to actions brought in any federal or state court of South Carolina alleging causes of action arising out of the constitutions or statutes of either the United States or the State of South Carolina.

Id. 464 F. Supp. at 747-48.

The facts of the Supreme Court cases *Tenney* and *Bogan* are distinguishable from the facts of the case at bar. In *Tenney* and *Bogan*, the activities that were the subject of the claims against the legislators were activities that the legislators carried out **as part of their legislative duties**. The legislators in *Tenney* were “acting in the sphere of legitimate legislative activity.” *Id.*, 341 U.S. 367, 376, 71 S.Ct. 783, 788. In *Bogan*, the Defendants were accused of proposing, voting on, and signing a piece of legislation to eliminate the plaintiff’s governmental position. Proposing, voting on, and signing a piece of legislation are all inherently “legislative activities,” and again, the defendants were entitled to absolute legislative immunity.

In the case at bar, the award of attorneys’ fees would not be based on any legislative activity of the Respondents. Rather, the award of attorneys’ fees is a part of an award of costs, and derives not from legislative activity, but from the Respondents’ **conduct in litigation**. Legislative immunity does not apply in this context.

**B. Legislative Immunity Does Not Prevent Official Capacity Lawsuits.**

Another reason why legislative immunity does not apply to the Respondent Senators is that legislative immunity is a privilege or exemption for a legislator sued in his **individual** capacity. Respondents were sued in their **official** capacities as representatives of the government of South Carolina. Second, legislative immunity prevents an award of compensatory or punitive damages. The Plaintiffs did not seek compensatory or punitive damages from these Senators. Plaintiffs sought only declaratory judgment to challenge the constitutionality of an Act of the General Assembly. Third, as demonstrated below, legislative immunity is an affirmative defense which

these Respondent Senators failed to plead, and it should be deemed waived. Petitioners respectfully suggest that legislative immunity does not prevent an award of attorneys' fees, awarded as costs in this action.

**C. Respondents Did Not Timely Plead Legislative Immunity.**

The South Carolina Constitution does not contain a speech and debate clause, as does the U.S. Constitution, but it does grant a constitutional exemption from civil litigation to **individual** members of the General Assembly while that body is in session. South Carolina Constitution, Art. III, § 14. That section provides an affirmative defense that must be pled, and if it is not pled timely, it is waived.

An exemption or privilege from service of civil process is regarded as a personal privilege or exemption which may be and generally is waived if not claimed at the proper time by the person in whose favor it runs. 62 Am.Jur.2d, *Process*, § 156.

Here, the husband plainly waived any right to protection he had, afforded by the constitutional provision. He participated freely and voluntarily and subjected himself to cross-examination. Several other hearings were held between February 23 and October 1, 1982 in which he participated.

*Eaddy v. Eaddy*, 283 S.C. 582, 584, 324 S.E.2d 70 (1984). The Court ruled that the defendant had waived his privilege. Likewise, these Respondents failed to plead legislative immunity as an affirmative defense in their answer, and therefore this affirmative defense is waived.

Respondents did not appeal the Circuit Court's ruling that the Act in question was unconstitutional. They opposed Plaintiffs' claim for attorneys' fees. After the Respondents litigated the merits of the case and lost, a tardy claim of legislative immunity does not bar an award of costs, including attorneys' fees under § 15-77-300.

Respondents appear to have conceded that they are subject to suit for declaratory judgment that an act of the General Assembly is unconstitutional. A ruling that the Respondents are subject to an award of costs (including attorney's fees) seems to be far less of an affront to sovereign

immunity than a judgment declaring an act of the General Assembly unconstitutional. Sovereign immunity or legislative immunity does not bar an award of costs, including attorneys' fees under § 15-77-300.

### **III. THE SUPREME COURT TWICE AWARDED PETITIONERS ATTORNEYS' FEES AND COSTS AGAINST THE MEMBERS OF THE GENERAL ASSEMBLY.**

This Court failed to address the Supreme Court's prior award of costs and attorneys' fees to Mr. Sloan when he challenged an unconstitutional act of the General Assembly, *Sloan v. Wilkins*, 362 S.C. 430, 608 S.E.2d 579 (2005). This Court also failed to address the supplemental authority cited by the Petitioners, the recent ruling of the South Carolina Supreme Court in *South Carolina Public Interest Foundation v. Lucas*, Appellate Case Number 2015-001443, an award of costs and attorneys' fees under § 15-77-300, and the checks evidencing payment from the Speaker of the House, the President of the Senate, and the President pro tem of the Senate. If this Court's opinion on legislative immunity had been correct, then surely the Supreme Court of South Carolina would not have ordered the House and the Senate officials to pay costs and attorneys' fees to Mr. Sloan in 2005 and again on August 25, 2016 under § 15-77-300.

Furthermore, in response to both awards, both the South Carolina House of Representatives and the South Carolina Senate and their officers **paid the award** of costs and attorneys' fees to Mr. Sloan and the South Carolina Public Interest Foundation without protest and without making a Motion to Alter or Amend the judgment of fees and costs. If these officials and these bodies had been immune from such an award, surely they would have raised an objection.

These awards go to the heart of Petitioners' argument that Respondents are not immune from the award of costs and attorneys' fees, but this Court failed to address these awards and their payments.

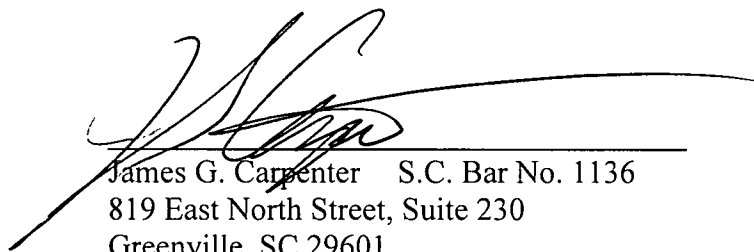
## CONCLUSION

Section 15-77-300 explicitly authorizes an award of attorneys' fees against the State itself and against political subdivisions, neither of which are subdivisions of the Executive Department. Accordingly, this Court's interpretation of "agency" by cannot be correct.

Legislative immunity does not bar declaratory judgment; nor does it bar an award of attorneys' fees against legislators in their official capacities, for their conduct in litigation, particularly when they failed to raise it timely, as an affirmative defense.

Finally, the Supreme Court has twice awarded Petitioners attorneys' fees and costs to against members of the General Assembly. Petitioners pray the Court to reverse its judgment, reverse the judgment of the Circuit Court, and award Petitioners their attorneys' fees and costs.

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



---

James G. Carpenter S.C. Bar No. 1136  
819 East North Street, Suite 230  
Greenville, SC 29601  
Telephone: (864) 235-1269  
Facsimile: (864) 331-3083  
Attorneys for Petitioners

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

---

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

---

Appellate Case No. 2014-001412

---

**RECEIVED**

MAY 22 2017

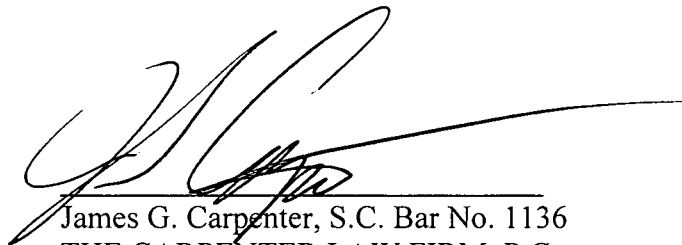
SC Court of Appeals

**Certificate of Service**

The undersigned attorney hereby certifies that he has served a copy of the foregoing Petition for Rehearing on counsel for Defendants by US Mail, postage prepaid on Wednesday, May 17, 2017 to the following persons:

J. Emery Smith, Jr.  
PO Box 11549  
Columbia, SC 29211

Edward H. Bender  
Kenneth M. Moffett  
P.O. Box 142  
Columbia, SC 29202



James G. Carpenter, S.C. Bar No. 1136  
THE CARPENTER LAW FIRM, P.C.  
819 E. North Street  
Greenville, South Carolina 29601  
Tel. (864) 235-1269  
Fax (864) 331-3083  
Attorneys for Plaintiffs



WHEN IT'S WORTH FIGHTING FOR

JAMES G. CARPENTER  
james.carpenter@carpenterlawfirm.net  
SERVING S.C. AND N.C.

May 17, 2017

The Honorable Jenny Abbott Kitchings  
Clerk of SC Court of Appeals  
PO Box 11629  
Columbia, SC 29211

RECEIVED

MAY 22 2017

SC Court of Appeals

Re: *South Carolina Public Interest Foundation et al. vs. Courson, et al*  
Appellate Case Number 2014-01412

Dear Ms. Kitchings:

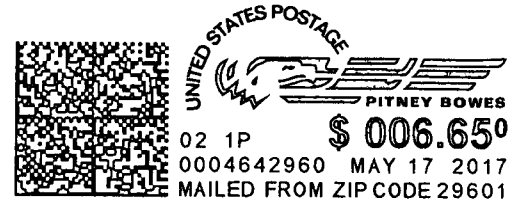
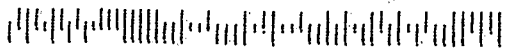
Petitioners enclose an original and six copies of this Petition for Rehearing pursuant to SCACR 221(a). The Court filed its opinion May 11, 2017. Please stamp the extra copy and return it in the enclose envelope.

Thank you very much. If you need anything else, please telephone me.

Sincerely yours,  
THE CARPENTER LAW FIRM, PC

James G. Carpenter

CC: J. Emery Smith, Jr.  
Edward H. Bender  
Kenneth M. Moffett



THE CARPENTER LAW FIRM, P.C.  
819 EAST NORTH STREET GREENVILLE, SC 29601

**RECEIVED**  
MAY 22 2017  
SC Court of Appeals

The Honorable Jenny Abbott Kitchings  
Clerk of SC Court of Appeals  
PO Box 11629  
Columbia, SC 29211