

# The Supreme Court of South Carolina

Margaret Stroud and D5 Citizens Ensuring the  
Implementation of the Referendum, Inc., Respondents,

v.

Kim Murphy, Appellant.

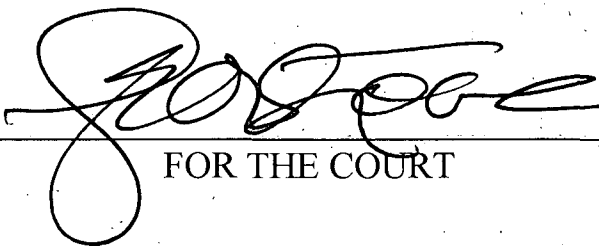
Appellate Case No. 2011-202407

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## ORDER

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Pursuant to Rule 204(b) of the South Carolina Appellate Court Rules, this appeal is hereby certified for review by the South Carolina Supreme Court. Upon receipt of this order, the Court of Appeals is hereby directed to forward the case file, all records and briefs and any exhibits on file to this Court.

  
C.J.  
FOR THE COURT

Columbia, South Carolina

November 27, 2012

cc:

Robert Guild

Katie Renee Parham

Todd Raymond Ellis

Jerry Jay Bender

Scott Thomas Price

Kenneth L. Childs

John Marshall Reagle

Tyler Ryan Turner

The Honorable Jenny Abbott Kitchings

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY  
L. Casey Manning, Circuit Court Judge

**RECEIVED**  
APR 23 2012  
SC Court of Appeals

Case No. 2011-CP-40-2926

Margaret Stroud and D5 Citizens Ensuring the Implementation of  
the Referendum, Inc.,.....Respondents

v.

Kim Murphy,.....Appellant

**CERTIFICATE OF COUNSEL**

I, Jay Bender, certify that the final brief of appellant complies with Rule 211(b), SCACR.



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ATTORNEYS FOR APPELLANT

**THE STATE OF SOUTH CAROLINA**  
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY  
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Case No. 2011-CP-40-2926

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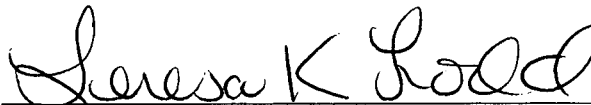
v.

Kim Murphy,.....Appellant.

**PROOF OF SERVICE**

I, Teresa K. Todd, Legal Assistant to Jay Bender, an employee of Baker, Ravenel & Bender, L.L.P., hereby certify that I have, on the date indicated below, served counsel below with the Certificate of Counsel by mailing a copy of same via United States Mail, postage pre-paid and return address clearly indicated on said envelope, to counsel at the following address:

Todd R. Ellis, Esquire  
7911 Broad River Road, Suite 100  
Irmo, South Carolina 29063



Teresa K. Todd

April 23, 2012



## The South Carolina Court of Appeals

JENNY ABBOTT  
KITCHINGS  
CLERK

V. CLAIRE ALLEN  
DEPUTY CLERK

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May 17, 2012

Mr. Scott Thomas Price  
1027 Barnwell St.  
Columbia SC 29201

Re: Stroud, Margaret v. Murphy, Kim  
Appellate Case No. 2011-202407

Dear Counsel:

Attached is an Order of the Court for the above case on appeal. Amicus briefs and all response and reply briefs should be in their final form and must comply with Rules 211 and 267 of the South Carolina Appellate Court Rules. An original and fourteen (14) copies must be filed with the Court of Appeals.

Copies of the Amicus Curiae Brief must be bound in green covers, response briefs in red covers and reply briefs in gray covers. The originals should be unbound and may be secured with rubber bands, clips or by other similar means that will keep the pages together without binding or hole punching.

Very truly yours,

*V. Claire Allen, Deputy*

CLERK

cc: Robert Guild  
Katie Renee Parham  
Todd Raymond Ellis  
Jerry Jay Bender

# The South Carolina Court of Appeals

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v.

Kim Murphy, Appellant.

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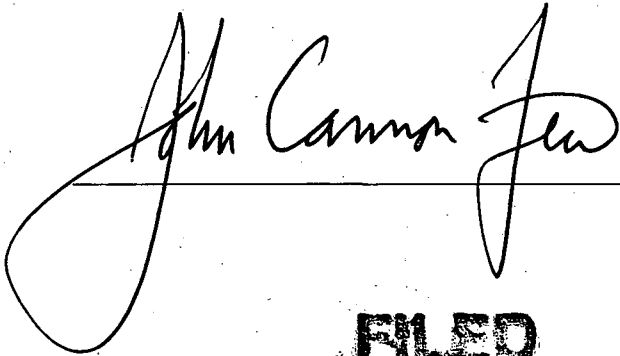
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## ORDER

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The South Carolina School Board Association and School District Five of Lexington and Richland Counties move for leave to file *amicus curiae* briefs in support of Respondents. Appellant did not file a return to either motion. The motions are granted. The conditionally-filed-and-served *amicus curiae* briefs are hereby accepted, and Appellant is granted thirty days from the date of this order to file a response to each.


IT IS SO ORDERED.

  
\_\_\_\_\_ J.

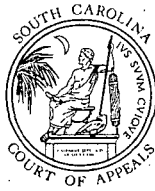
Columbia, South Carolina

cc: Jay Bender, Esquire  
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Robert Guild, Esquire  
Todd Raymond Ellis, Esquire  
Scott T. Price, Esquire  
Kenneth L. Childs, Esquire  
John M. Reagle, Esquire

**FILED**

5/17/12 

Tyler R. Turner, Esquire



# The South Carolina Court of Appeals

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April 13, 2012

Jay Bender, Esquire  
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P.O. Box 8057  
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Re: Stroud, Margaret v. Murphy, Kim  
Case #2011202407

Dear Mr. Bender:

We have received the Final Brief of the Appellant in the above case on appeal. However, a Certificate of Compliance with Rule 211 (b) was not included. Please provide this Court with a Certificate of Compliance with Rule 211 (b) within ten (10) days from the date of this letter.

Very truly yours,

*V. Claire Allen, Deputy*  
CLERK

JAK/jt

cc: Katie Renee Parham, Esquire  
Robert Guild, Esquire  
Todd R. Ellis, Esquire

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

C.A. No.: 2011-CP-40-2926

MARGARET STROUD AND D5 CITIZENS ENSURING THE IMPLEMENTATION  
OF THE REFERENDUM, INC. .... Respondents,

v.

KIM MURPHY ..... Appellant.

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF  
SOUTH CAROLINA SCHOOL BOARDS ASSOCIATION

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**RECEIVED**

MAR 14 2012

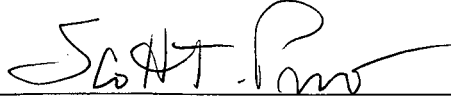
**SC Court of Appeals**

The South Carolina School Boards Association ("SCSBA"), by and through its undersigned counsel, hereby moves the Court for leave to file an amicus curiae brief pursuant to Rule 213, SCACR. Consistent with Rule 213, SCSBA is hereby conditionally filing an amicus curiae brief along with this motion.

As a non-profit organization serving as a source of information and a statewide voice for public school boards, SCSBA is interested in the outcome of this case due to the potential effect a ruling in this case could have on the operation of public school boards statewide. As explained in the attached amicus curiae brief, SCSBA desires to focus the Court's attention on legal arguments related to a public school board member's standing to challenge, through legal process, decisions of the public school board which he or she serves.

SCSBA, therefore, respectfully asks leave of this Court to file the attached Brief of Amicus Curiae.

Respectfully submitted,

By:   
\_\_\_\_\_  
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March 14, 2012  
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

The Honorable L. Casey Manning, Circuit Court Judge

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MARGARET STROUD AND D5 CITIZENS ENSURING THE IMPLEMENTATION  
OF REFERENDUM, INC. .... Respondents

v.

KIM MURPHY ..... Appellant.

PROOF OF SERVICE

I certify that I have served the Motion for Leave to File Amicus Curiae Brief by depositing a copy of it in the United States Mail, postage prepaid, on March 14, 2012, addressed to the attorneys for Appellant, Jay Bender, Esq., Baker, Ravenel & Bender, LLP, 3710 Landmark Drive, Suite 400, P.O. Box 8057, Columbia, SC 29202, Katie R. Parham, Esq., The Parham Law Firm, P.O. Box 2904, Irmo, SC 29063, and Robert Guild, Esq., 314 Pall Mall Street, Columbia, SC 29201, and Todd Ellis, S.C. Bar No. 6488, The Law Office of Todd Ellis, P.A., 7911 Broad River Road, Suite 100, Irmo, SC 29063

Respectfully submitted,

By Scott T. Price  
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MAR 14 2012  
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March 14, 2012  
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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v.

KIM MURPHY.....Appellant

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MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF  
SCHOOL DISTRICT FIVE OF LEXINGTON AND RICHLAND COUNTIES

---

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Attorneys for School District Five of  
Lexington and Richland Counties

**RECEIVED**

MAR 14 2012

**SC Court of Appeals**

School District Five of Lexington and Richland Counties ("District Five"), by and through its undersigned counsel, hereby moves the Court for leave to file an amicus curiae brief pursuant to Rule 213, SCACR. Consistent with Rule 213, District Five is hereby conditionally filing an amicus curiae brief along with this motion.

As a public school district governed by the public school board on which Ms. Murphy, Appellant, serves, District Five is interested in the outcome of this case due to the potential effect a ruling in this case could have on the operation of its school board. As explained in the attached amicus curiae brief, District Five desires to focus the Court's attention on legal arguments related to a public school board member's fiduciary duties to the school board, and a public school board member's standing to challenge, through legal process, decisions of the public school board which he or she serves.

District Five, therefore, respectfully asks leave of this Court to file the attached Brief of Amicus Curiae.

Respectfully submitted,

By: 

CHILDS & HALLIGAN, P.A.

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Attorneys for School District Five of Lexington  
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March 14, 2012  
Columbia, South Carolina

**THE STATE OF SOUTH CAROLINA  
In The Court of Appeals**

**APPEAL FROM RICHLAND COUNTY  
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**The Honorable L. Casey Manning, Circuit Court Judge**

**C.A. No. 2011-CP-40-2926**

MARGARET STROUD AND D5 CITIZENS ENSURING THE IMPLEMENTATION  
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KIM MURPHY ..... Appellant.

**PROOF OF SERVICE**

I certify that I have served the Motion for Leave to File Amicus Curiae Brief by depositing a copy of it in the United States Mail, postage prepaid, on March 14, 2012, addressed to the attorneys for Appellant, Jay Bender, Esq., Baker, Ravenel & Bender, LLP, 3710 Landmark Drive, Suite 400, P.O. Box 8057, Columbia, SC 29202, Katie R. Parham, Esq., The Parham Law Firm, P.O. Box 2904, Irmo, SC 29063, and Robert Guild, Esq., 314 Pall Mall Street, Columbia, SC 29201.

Respectfully submitted,

By: *Tyler R. Turner*

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Attorneys for School District Five of Lexington  
and Richland Counties

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KIM MURPHY ..... Appellant.

BRIEF OF AMICUS CURIAE  
SOUTH CAROLINA SCHOOL BOARDS ASSOCIATION

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Attorney for South Carolina School  
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MAR 14 2012

**SC Court of Appeals**

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**I. STATEMENT OF ISSUES ON APPEAL**

Amicus Curiae adopt the Statement of Issues on Appeal of the Respondents.

**II. STATEMENT OF THE CASE**

Amicus Curiae adopt the Statement of the Case of the Respondents.

**III. STATEMENT OF FACTS**

Amicus Curiae adopt the Statement of Facts of the Respondents.

**IV. The Circuit Court Properly Enjoined Kim Murphy From Filing Any Further Appeals, Actions, Or Challenges.**

This Court should uphold the injunction against Murphy because a member of the governing board of a public body does not have standing to challenge a decision of the board. *Newman v. Richland County Historic Pres. Comm'n*, 325 S.C. 79, 480 S.E.2d 72 (1997). *See also Randolph v. Cantrell*, 707 P.2d 48 (Okla. Ct. App. 1985) (an individual board member does not have standing to appeal a district court decision which the board did not vote to appeal). In analyzing this issue, the Supreme Court of South Carolina explained the importance of the legislative process:

We have never concluded that individual commission members are aggrieved for the purpose of appealing the decision of the very agency upon which they sit. Inherent in such a state of the law is the notion that the legislation function of any agency, by its very nature, involves the interaction of competing ideas that eventually resolve themselves in a decision that may not satisfy all of the agency's members. This is the essence of the legislative process, a process that should not be compromised by ready access to a supplemental forum for those dissenting members who are disappointed in the outcome.

*Id.* at 74 (quoting *Munhall v. Inland Wetlands Comm'n*, 602 A.2d 566, 568-69 (Conn. 1992) (concluding that dissenting agency members do not have standing to challenge agency decision because they have no interests adverse to agency)). *See also Anders v. S.C. Parole & Cmty. Corr. Bd.*, 279 S.C. 206, 305 S.E.2d 229 (1983) (solicitor lacked standing to sue the State because such a suit would be tantamount to a solicitor suing himself)). As noted by several Courts, permitting such challenges would create judicial as well as political chaos. *Newman* at 74. *See also Munhall*, 602 A.2d at 569 ("[C]haos would result if any dissenting member of a state board or agency had standing to appeal from any board or agency decision") (quoting *McTaggart v. Pub. Serv. Comm'n*, 541

P.2d 778 (Mont. 1975)). For these reasons, a board member does not have standing to challenge decisions of the board which he or she serves.<sup>1</sup>

Significantly, where a governmental employee cannot maintain a suit in her official capacity because the posture of the suit is such that she is suing herself, she also cannot proceed with the matter under the guise of appearing as a citizen and taxpayer. *Newman* at 74 (citing *Anders* at 211, 305 S.E.2d at 231). The denial of a board member's right to sue does not insulate review of the decision, which could be challenged by a non-board-member citizen affected by the decision. *Newman* at 74 (citing *Control Data Corp. v. Controlling Bd. of Ohio*, 474 N.E.2d 336, 341 (Ohio 1983)). For example, in the present case, a student at Chapin High School or an adjoining property owner, among others, may be able to challenge DHEC's issuance of permits. See S.C. Code Ann. Regs. 61-101(G) (discussing notice of DHEC's proposed decision and standing to contest the decision).

School boards carry out numerous important functions in ensuring the State fulfills its constitutional responsibility to provide a free system of public schools and education to the children of South Carolina. S.C. Const. art. XI, § 3. The authorities cited above reinforce the sanctity of the legislative process and the fundamental principal of majority rule, which all public school boards in this state use to make decisions and conduct business. Allowing individual board members a separate forum to challenge decisions of the board on which they serve would result in political chaos and would seriously jeopardize the ability of school boards statewide to carry out their constitutional purpose, to the detriment of the students, parents, staff, and citizens of our State. This

---

<sup>1</sup> In a dissenting opinion, Justice Toal wrote that the board member in *Newman* would have standing to contest alleged particularized *ultra vires* actions by the board. *Newman* at 75-76. Even assuming that an exception to the standing rule exists for alleged *ultra vires* acts, such an exception is not applicable in the present case.

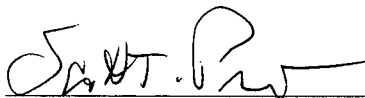
Court should affirm the rule that individual public school board members do not have standing to challenge decisions of the board on which they serve.

**V. CONCLUSION**

For the reasons set forth above, this Court should uphold the preliminary injunction against Murphy.

Respectfully submitted,

South Carolina School Boards Association

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March 14, 2012  
Columbia, South Carolina

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KIM MURPHY.....Appellant

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**BRIEF OF AMICUS CURIAE  
SCHOOL DISTRICT FIVE OF LEXINGTON AND RICHLAND COUNTIES**

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Attorney for Respondents  
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Attorneys for School District Five of  
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*Davis v. Greenwood Sch. Dist. 50*, 365 S.C. 629, 620 S.E.2d 65 (2005).....2

*Newman v. Richland County Historic Pres. Comm'n*, 325 S.C. 79, 480 S.E.2d 72  
(1997).....4

**STATUTES**

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**OTHER AUTHORITIES**

63C Am. Jur. 2d Public Officers & Employees § 241 (2011).....2

**STATEMENT OF ISSUES ON APPEAL**

Amicus Curiae adopt the Statement of Issues on Appeal of the Respondents.

**I. STATEMENT OF THE CASE**

Amicus Curiae adopt the Statement of the Case of the Respondents.

**II. STATEMENT OF FACTS**

Amicus Curiae adopt the Statement of Facts of the Respondents.

### **III. The Circuit Court Properly Enjoined Kim Murphy From Filing Any Further Appeals, Actions, or Challenges.**

As a member of the District Five Board, Murphy breached her fiduciary duties to the District by filing legal challenges to decisions of the Board in support of her own personal and political interests, and in opposition to the interests of the District as expressed by the Board. Murphy's breach of her fiduciary duties to the District has cost the District in excess of \$12,000,000.00 in legal fees, architectural fees, staff time, and construction costs.

"A 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 to the interests of the one imposing the confidence." *Davis v. Greenwood Sch. Dist. 50*, 365 S.C. 629, 635, 620 S.E.2d 65, 68 (2005) (fiduciary relationship between school district and its employees). As a member of the District Five Board, Murphy has a fiduciary relationship with the school district she serves. See *Anderson County v. Griffin*, 164 S.C. 75, 161 S.E. 875, 876 (1932) ("A public officer is a trustee and acts in a fiduciary as well as an official capacity."); *Chicago Park Dist. v. Kenroy, Inc.*, 402 N.E.2d 181, 186 (Ill. 1980) ("It is well established that a public officer occupies a fiduciary relationship to the political entity of whose behalf [s]he serves."); *Consol. Sch. Dist. No. 42 of Scott County v. Powell*, 221 S.W.2d 508, 510 (Mo. 1949) ("Appellants as members of the school board occupied a fiduciary relationship to the said school district."); 63C Am. Jur. 2d Public Officers & Employees § 241 (2011) ("[A] public officer occupies a fiduciary relationship to the political entity on whose behalf he or she serves."). Accordingly, Murphy is required to act in good faith and with due regard to the interests of the District. *Davis* at 635, 620 S.E.2d. at 68.

Obviously, it is in the District's interests that the Board fulfills its statutory duties and that Board members comply with Board policies. Under South Carolina law, the

Board has a statutory duty to manage and control the District. S.C. Code Ann. § 59-19-10. The Board's statutory duties include providing schoolhouses and controlling school property of the District. S.C. Code Ann. § 59-19-90. These statutory duties are given explicitly to the Board as a whole, as opposed to any individual member of the Board. S.C. Code Ann. §§ 59-19-10 & § 59-19-90. *See also* Board Policy BB, *available at* <http://www.lexrich5.org/about.cfm?subpage=28337> ("All powers of the board lie in its action as a body. Board members acting as individuals have no authority over personnel or school affairs.").

Further, to ensure that Board members act ethically and in the best interests of the District in fulfilling their duties, the Board's Code of Ethics requires its members to (1) represent, at all times, the entire school district, (2) refuse to play politics in either the traditional partisan or any petty sense, (3) recognize that authority rests only with the board in official meetings and that the individual has no legal status to bind the board outside of such meetings, and (4) respect the opinion of others and graciously conform to the principal of majority rule. Board Policy BCA, *available at* <http://www.lexrich5.org/about.cfm?subpage=28337>. Moreover, the Board is responsible to the community it serves and represents, and it is "the duty of the board to carry out the will of the community in matters of public education." Board Policy BB.

In this case, Murphy violated her fiduciary duties to the District by placing her own personal and political interests above the interests of the District. In 2008, the citizens of District Five approved a bond referendum authorizing the District to complete renovation and expansion projects at various schools, including Chapin High School. The Board, as a whole and on behalf of the District, pursued the necessary construction permits with the South Carolina Department of Health and Environmental Control ("DHEC"). Murphy filed legal challenges against DHEC's issuance of the necessary

permits based on her personal political beliefs and in direct opposition to the desire of the Board, as a whole. By intentionally acting against the will of the Board and the community, and thereby costing the District more than \$12,000,000.00 over the course of numerous appeals, Murphy breached her fiduciary duties to the District.

Additionally, Murphy lacked standing to challenge Board decisions through legal process. *Newman v. Richland County Historic Pres. Comm'n*, 325 S.C. 79, 480 S.E.2d 72 (1997). One of the fundamental reasons for prohibiting public board members from challenging decisions of their boards through legal process is avoiding the type of political and judicial chaos that Murphy has sought to create. *Newman* at 74. Obviously, it is not desirable for public officers to initiate multiple legal proceedings against the public entities they represent for personal and political reasons, and thereby cost those public entities millions of dollars. Accordingly, Murphy lacked standing to challenge board decisions, both as a board member and individual citizen. *Newman* at 74.

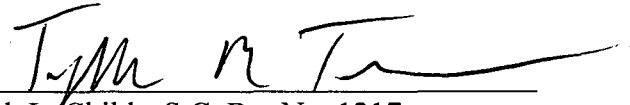
Under these circumstances, the Circuit Court properly enjoined Murphy from filing any further appeals, actions, or challenges. The preliminary injunction granted by the Circuit Court is reasonably necessary to avoid further harm to the District and its students, whom the District's building program is intended to benefit. Additionally, the preliminary injunction protects the proper functioning of the Board, consistent with its obligations under S.C. Code Ann. § 59-19-90 and its policies. For the reasons set forth above, the preliminary injunction issued by the Circuit Court is supported by the applicable laws, sound public policy, and equity.

#### **IV. CONCLUSION**

Accordingly, this Court should affirm the preliminary injunction prohibiting Murphy from pursuing any further appeals, actions, or challenges.

Respectfully submitted,

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Attorneys for School District Five of Lexington  
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March 14, 2012  
Columbia, South Carolina

**THE STATE OF SOUTH CAROLINA  
In The Court of Appeals**

---

**APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas**

**The Honorable L. Casey Manning, Circuit Court Judge**

---

**C.A. No.: 2011-CP-40-2926**

---

MARGARET STROUD AND D5 CITIZENS ENSURING THE IMPLEMENTATION OF  
REFERENDUM, INC..... Respondents

v.

KIM MURPHY.....Appellant

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**RESPONDENTS' INITIAL DESIGNATION OF MATTER  
TO BE INCLUDED IN THE RECORD ON APPEAL**

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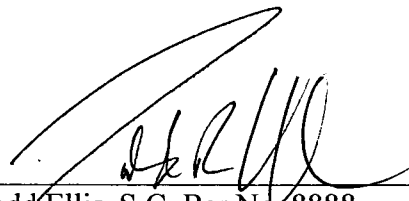
Respondents propose the following to be included in the Record On Appeal:

1. Order (Sept. 1, 2011)
2. Order (Oct. 10, 2011)
3. Complaint
4. Notice and Motion for Injunction
5. Notice and Motion to Dismiss
6. Notice and Motion for Reconsideration

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JAN 30 2012  
SC Court of Appeals

I certify that this designation contains no matter which is irrelevant to the appeal.

THE LAW OFFICE OF TODD ELLIS, P.A.



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January 30, 2012

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

The Honorable L. Casey Manning, Circuit Court Judge

C.A. No.: 2011-CP-40-2926

MARGARET STROUD AND D5 CITIZENS ENSURING THE IMPLEMENTATION OF  
REFERENDUM, INC..... Respondents

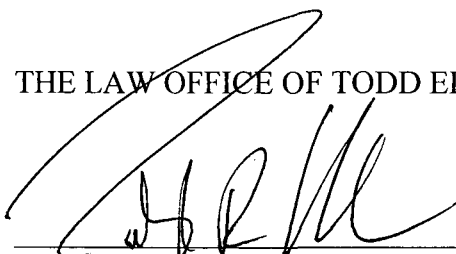
v.

KIM MURPHY.....Appellant

PROOF OF SERVICE

I certify that I have served the **Initial Brief of Respondents and Respondents' Initial Designation of Matter to be Included in the Record On Appeal** by depositing a copy of it in the U.S. Mail, postage prepaid, on January 30, 2012, addressed to the Respondent, Kim Murphy, by depositing a copy of it in the U.S. Mail, postage prepaid, addressed to Jay Bender, Esq., Baker Ravenel & Bender, LLP, PO Box 8057, 3710 Landmark Drive, Suite 400, Columbia, SC 29202.

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SC Court of Appeals

*Attorney for Respondents*

January 30, 2012

**THE STATE OF SOUTH CAROLINA  
In The Court of Appeals**

---

**APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas**

**The Honorable L. Casey Manning, Circuit Court Judge**

---

**C.A. No.: 2011-CP-40-2926**

---

Margaret Stroud and D5 Citizens Ensuring the Implementation of the Referendum, Inc.  
..... Respondents

v.

Kim Murphy..... Appellant.

---

**INITIAL BRIEF OF RESPONDENTS**

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JAN 30 2012  
**SC Court of Appeals**

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## **I. STATEMENT OF ISSUES ON APPEAL**

Issues presented by this appeal from the order of the Honorable L. Casey Manning are:

- (1) Whether the Circuit Court's Order denying Murphy's Motion to Dismiss is immediately appealable;
- (2) Whether the Circuit Court properly determined that Respondents' Complaint stated a cause of action for abuse of process and injunctive relief;
- (3) Whether the Circuit Court properly determined that Respondents' claims did not violate the Constitution of South Carolina; and
- (4) Whether the Circuit Court properly issued a preliminary injunction against Murphy.

## **II. STATEMENT OF THE CASE**

The Respondents, Margaret Stroud ("Stroud") and D5 Citizens Ensuring the Implementation of the Referendum, Inc. ("D5 Citizens"), respectfully submit this brief requesting that this Court affirm the Circuit Court's September 1, 2011, and October 10, 2011, Orders denying Kim Murphy's ("Mrs. Murphy") Motion to Dismiss, and prohibiting Mrs. Murphy, so long as she is a sitting member of the Board of Trustees ("Board") for School District Five of Lexington and Richland Counties ("District"), from filing any further appeals, actions, or challenges to contest permitting for construction projects authorized by the District Board and funded by the 2008 referendum ("Referendum") passed by the citizens of the District.

This case arises out of a Complaint filed by Stroud and D5 Citizens against Mrs. Murphy on May 3, 2011. Stroud is a citizen and resident of the District and was serving as the Student Body President of Chapin High School when this action was filed. D5

Citizens is a South Carolina nonprofit organization made up of citizens of the District whose mission, among others, is to ensure the implementation of the 2008 Referendum funding various renovations and new construction in the District.

Mrs. Murphy is a sitting member of the District Board. Stroud and D5 Citizens pled an abuse of process claim seeking damages and asserting that Mrs. Murphy was filing appeals related to construction projects in the District, not because of a personal harm she may suffer related to the environmental issues but rather for the ulterior purpose of maintaining and garnering political support from those that opposed the Referendum and any new construction and development in the District. (Compl. ¶¶ 15, 19, 25-30 at R. pp. \_\_.)

Respondents also sought injunctive relief. (Compl. ¶¶ 31-42 at R. pp. \_\_.) Stroud and D5 Citizens requested that the lower court require Mrs. Murphy to withdraw her existing appeals and prohibit her from filing any further collateral attacks on decisions of the Board and the approved construction projects authorized by the Referendum. (Compl. ¶ "Wherefore" at R. pp. \_\_.) The injunctive relief was sought on the basis that Mrs. Murphy lacks standing to continue filing challenges to measures passed by the very Board on which she sits. (Compl. ¶¶ 31-42 at R. pp. \_\_.) In response, on June 2, 2011, Mrs. Murphy moved to dismiss the Complaint pursuant to Rules 12(b)(1) and 12(b)(6). (Motion to Dismiss at R. pp. \_\_.)

On August 3, 2011, a hearing was held in the Circuit Court on Respondents' motion for an injunction and Appellant's motion to dismiss. Counsel for each party was heard and supporting memoranda provided. On September 1, 2011, the Circuit Court denied Mrs. Murphy's motion to dismiss and ordered that discovery proceed on the abuse

of process claim. (Order at R. pp. \_\_.) Further, Judge Manning enjoined Mrs. Murphy, so long as she remained a member of the District Board, from filing any further appeals, actions, or challenges to contest permitting for construction projects authorized by the District Board and funded by the Referendum passed by the citizens of the District. (Order at R. pp. \_\_.) The Order did not require Mrs. Murphy to withdraw her existing appeals. (Order at R. pp. \_\_.) Mrs. Murphy moved for reconsideration. (Motion to Reconsider at R. pp. \_\_.) On October 10, 2011, the Circuit Court issued an Order denying Mrs. Murphy's motion to reconsider. (Order at R. pp. \_\_.) On October 31, 2011, Mrs. Murphy served and filed a Notice of Appeal of the Circuit Court's Order dated September 1, 2011, as modified by the Circuit Court's Order dated October 10, 2011.

### **III. STATEMENT OF FACTS**

In November 2008, citizens and residents of the District approved a bond referendum allowing the District to complete renovation and expansion projects at various schools, including Chapin High School. Mrs. Murphy had long opposed the Referendum, and on June 15, 2010, just two months before filing her Notice of Candidacy for the District 5 Board for the second time, she filed her original appeal of a Department of Health and Environmental Control ruling related to the renovations and construction of Chapin High School. Respondents assert that once elected to the Board, Mrs. Murphy lacked standing to continue that appeal or file additional appeals to District projects voted on by the Board on which she sits.

On November 2, 2010, Mrs. Murphy was elected to the District Board, and she continued her appeal in her own name of DHEC's May 6, 2010, issuance of a 401 Water Quality Certification ("401 Certification"). She has since filed two additional appeals in her own name, as indicated in Exhibit A of the Circuit Court's Order of October 10,

2011, and as set forth below:

**AS OF SEPTEMBER 1, 2011**

| DATE   | SUBJECT OF APPEAL                      | CURRENT STATUS OF APPEAL   |
|--|--|--|
| <p>June 15, 2010<br/>Administrative Law Court</p>  | <p>401 Water Quality Certification</p> | <p>Appeal Denied; 401 Certification Affirmed</p>   |
| <p>August 16, 2010<br/>KIM MURPHY<br/>Files Notice of Candidacy To Run District 5 School Board</p>   |  |  |
| <p>November 2, 2010<br/>Kim Murphy Elected to District School Board</p>  |  |  |
| <p>June 24, 2011<br/>SC Court of Appeals<br/>(Appeal of Court Ruling)</p>  | <p>401 Water Quality Certification</p> | <p>Under Consideration at SC Supreme Court</p>   |
| <p>March 10, 2011<br/>Administrative Law Court</p>   | <p>Wastewater Construction Permit</p>  | <p>Declined by DHEC Review Board; Appeal Pending before Administrative Law Court – no hearing date set</p> |
| <p>July 7, 2011<br/>DHEC Request for Review<br/><br/>William Grant<br/><br/>Kim Murphy<br/><br/>Cheryl Vaeth<br/>Leisha Huffstetlar<br/>Wayne Duncan</p> | <p>Stormwater Permit</p>               | <p>Declined By DHEC Review Board; Murphy Has 30 days to appeal to the Administrative Law Court</p>         |

To date, each of Mrs. Murphy's appeals has been denied at every stage.

Stroud and D5 Citizens assert a claim against Mrs. Murphy for abuse of process, stating that she filed the appeals not because of a personal harm related to this construction project but rather because she opposed the 2008 Referendum approved by the citizens of the District, and her efforts are in furtherance of slowing or stopping the implementation of the Referendum for her political gain and that of her political supporters.

Stroud and D5 Citizens also sought an injunction requiring Mrs. Murphy to withdraw her existing appeals and prohibiting future appeals in her own name so long as she was a sitting member of the District Board. The lower court denied Appellant's Motion to Dismiss and granted the Respondents' injunctive relief prohibiting Mrs. Murphy from filing further appeals while a sitting Board member but not requiring her to withdraw her existing appeals.

#### **IV. ARGUMENTS**

##### **A. Murphy's Appeal From The Circuit Court's Order Denying Her Motion To Dismiss Is Interlocutory And Is Not Immediately Appealable.**

In the Circuit Court, Mrs. Murphy moved to dismiss Respondents' Complaint under Rule 12(b)(1) and (6), SCRCPC, on the grounds that Respondents' Complaint violated the separation of powers delineated in the South Carolina Constitution, Respondents' Complaint failed to state a cause of action for abuse of process, and Respondents' lacked standing. (Motion to Dismiss at R. pp. \_\_.) On appeal, Mrs. Murphy does not assert that the lower court wrongfully granted injunctive relief (App.'s Br. pp. 3-10.) Rather, Mrs. Murphy argues that the Circuit Court erred in denying her Motion to Dismiss for the same reasons argued in the lower court. (App.'s Br. 3-10.)

Therefore, Mrs. Murphy's appeal is interlocutory and is not immediately appealable.

"The right of appeal arises from and is controlled by statutory law." *Hagood v. Sommerville*, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005). "An appeal ordinarily may be pursued only after a party has obtained a final judgment." *Id.* See also Rule 201(a), SCACR ("Appeal may be taken, as provided by law, from any final judgment, appealable order, or decision."); Rule 72, SCRCR ("Appeal may be taken, as provided by law, from any final judgment or appealable order."). "The determination of whether a party may immediately appeal an order issued before or during trial is governed primarily by S.C. Code Ann. § 14-3-330." *Hagood* at 195, 607 S.E.2d at 708. "An order generally must fall into one of several categories set forth in that statute in order to be immediately appealable." *Id.*; *Baldwin Constr. Co., Inc. v. Graham*, 357 S.C. 227, 230, 593 S.E.2d 146, 147 (2004). The provisions of § 14-3-330 "have been narrowly construed and immediate appeal of various orders issued before or during trial generally has not been allowed." *Hagood* at 196, 607 S.E.2d at 709.

Specifically, the South Carolina Supreme Court "does not allow immediate appellate review of the *denial* of any Rule 12(b), SCRCR motion." *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 93, 529 S.E.2d 11, 13 (2000). See also *Mid-State Distribs., Inc. v. Century Imps., Inc.*, 310 S.C. 330, 334-35, 426 S.E.2d 777, 780 (1993) ("A party who is denied a dismissal under Rule 12 has forfeited nothing, they must simply continue to trial."). For example, because "an order denying a Rule 12(b)(1) motion to dismiss does not fall into [the categories set forth in § 14-3-330], . . . such orders are not immediately appealable." *Woodard v. Westvaco Corp.*, 319 S.C. 240, 242-43, 460 S.E.2d 392, 393-94 (1995), overruled on other grounds, *Sabb v. S.C. State Univ.*, 350 S.C. 416, 567 S.E.2d 231 (2002). Similarly, "the denial of a Rule 12(b)(6) motion is not directly appealable under S.C. Code Ann. § 14-3-330." *Moyd v. Johnson*, 289 S.C.

482, 482, 347 S.E.2d 97, 98 (1986).

Courts also have consistently held that the issue of standing is not immediately reviewable on interlocutory appeal. See *Carringer v. Tessmer*, 253 F.3d 1322, 1323 (11th Cir. 2001) (issue of standing is not immediately reviewable on interlocutory appeal); *Pineville Forest Homeowners Ass'n v. Portrait Homes Constr. Co.*, 623 S.E.2d 620 (N.C. Ct. App. 2006) (interlocutory order denying motion to dismiss for lack of standing is not immediately appealable); *Ballas v. Missoula City Bd. of Adjustment*, 172 P.3d 1232 (Mont. 2007) (no interlocutory appeal from order denying motion to dismiss for lack of standing); *Haynes v. Edwards*, 698 S.W.2d 97 (Tex. 1985) (judgment overruling motion to dismiss for lack of standing is interlocutory); *Del. Dep't of Ins. v. Am. Ins. Ass'n*, 937 A.2d 139 (Del. 2007) (no interlocutory review of trial court order denying motion to dismiss for lack of standing); *In re D.J.E.*, 744 N.E.2d 1286 (Ill. App. Ct. 2001) (order denying motion to dismiss for lack of standing was interlocutory); *R.J.A. v. K.A.V.*, 611 N.E.2d 729 (Mass. App. Ct. 1993) ("Procedural objections to a plaintiff's right to sue on the ground that he lacks standing are proper subjects of motions to dismiss or for summary judgment; but the denial of such a challenge to standing is a nonappealable interlocutory decision.").

Here, the denial of Mrs. Murphy's motion to dismiss was not a final judgment. Accordingly, Mrs. Murphy's appeal from the Circuit Court's order denying her Motion to Dismiss is interlocutory and is not immediately appealable.

Although courts have, on occasion, accepted appeals of denials of interlocutory orders not ordinarily immediately appealable when these appeals are companion to issues that are reviewable, in the instant case, Mrs. Murphy did not appeal a reviewable

issue.<sup>1</sup> (Appellant's Brief, R. pp. \_\_.) Further, even if Mrs. Murphy had appealed the Circuit Court's granting of a preliminary injunction, the two issues on appeal (the granting of a preliminary injunction prohibiting further appeals by Mrs. Murphy, and the denial of a motion to dismiss a claim for abuse of process) would lack a sufficient nexus or companionship to justify immediate appellate review of the motion to dismiss. *See Brown v. County of Berkeley*, 366 S.C. 354, 362, 622 S.E.2d 533, 538 n.5 (2005); *Supal v. Pelot*, 469 So.2d 949 (Fla. Dist. Ct. App. 1985) (Defendants may not appeal the denial of a motion to dismiss for lack of standing simply because a ruling was made in the same order that granted Plaintiff's request for a temporary injunction).

**B. The Circuit Court Properly Determined That Respondents' Complaint Stated A Cause Of Action For Abuse Of Process And For Injunctive Relief.**

---

Assuming, *arguendo*, that Mrs. Murphy's appeal from the Circuit Court's order denying her motion to dismiss is not interlocutory and is presently reviewable, Respondents' Complaint properly alleges a cause of action for abuse of process and for injunctive relief.

Under South Carolina law, abuse of process consists of two elements: (1) an ulterior purpose and (2) a willful act in the use of process that is not proper in the regular conduct of the proceeding. *Swicegood v. Lott*, 379 S.C. 346, 352-53, 665 S.E.2d 211, 213 (Ct. App. 2008). Respondents alleged that Mrs. Murphy, without proper standing, filed appeals with DHEC and the South Carolina Appellate Courts to obstruct the

---

<sup>1</sup> Mrs. Murphy's first argument on appeal concerning the separation of powers was asserted as a ground argued by Mrs. Murphy for dismissing the complaint in the Circuit Court. (Motion to Dismiss at R. pp. \_\_.) Moreover, on appeal, Mrs. Murphy concludes her separation of powers argument by stating that the Circuit Court should have dismissed the Complaint pursuant to Rule 12(b)(1) on the grounds that the court lacked subject matter jurisdiction to interfere with an executive branch decision. Thus, Mrs. Murphy's separation of powers argument relates to her motion to dismiss the complaint and is not immediately reviewable.

implementation of the Referendum and achieve political objectives unrelated to and improper in the regular conduct of such DHEC proceedings. The Respondents assert that the appeals have been filed not in furtherance of ensuring the permitting process is done correctly or for the environmental reasons publicly articulated by Mrs. Murphy but rather for the ulterior purpose of political gain Mrs. Murphy will garner from her supporters that want to stop any development or taxation for school services in the District.

Appellant asserts the claim should fail because Respondents have not pled a willful act by Mrs. Murphy that would be improper in the regular conduct of the court proceedings. (App.'s Br. p. 7.) Respondents could not have been more specific in their assertions of what was Mrs. Murphy's willful and wrongful act in the proceedings. Stroud and D5 Citizens state that Mrs. Murphy was "outside the scope and in direct contravention to her duties as a school board member" (Compl. ¶ 3 at R. pp. \_\_), her appeals were "in furtherance of her political objectives and to gain favor with political supporters" (Compl. ¶ 15 at R. pp. \_\_), and that she filed the appeals "because she opposed the 2008 Referendum approved by the citizens of District 5 and her efforts are in furtherance of slowing or stopping the implementation of the Referendum for her political gain and that of her political supporters." (Compl. ¶ 19 at R. pp. \_\_.) Finally, Respondents' assert that Mrs. "Murphy's actions are based on the political objective of a defeated advocate and amount to an attack on the elected body that she serves, the District 5 school board" (Compl. ¶ 23 at R. pp. \_\_), and Mrs. Murphy's appeals are "willful acts of using a lawful process of appeal for an ulterior purpose." (Compl. ¶ 26 at R. pp. \_\_.)

Thus, Respondents could not have been more direct in alleging the willful wrongful acts used by Mrs. Murphy in the court proceedings. For this reason, the Circuit Court properly denied Appellant's motion to dismiss.

Additionally, Respondents alleged sufficient facts and the lower Court considered the correct standard in granting injunctive relief. The grant of an injunction is within the sound discretion of the trial court and will not be reversed absent an abuse of that discretion. *City of Columbia v. Pic-A-Flick Video, Inc.*, 340 S.C. 278, 282, 531 S.E.2d 518, 520–21 (2000); *Peek v. Spartanburg Reg'l Healthcare Sys.*, 367 S.C. 450, 454, 626 S.E.2d 34, 36 (Ct. App. 2005). "An abuse of discretion occurs when the decision of the trial court is unsupported by the evidence or controlled by an error of law." *Peek* at 454, 626 S.E.2d at 36; *County of Richland v. Simpkins*, 348 S.C. 664, 668, 560 S.E.2d 902, 904 (Ct. App. 2002); *AJG Holdings, LLC v. Dunn*, 382 S.C. 43, 49, 674 S.E.2d 505, 507 (Ct. App. 2009). The injunctive relief sought could stand on its own. See *Compton v. S.C. Dep't of Corr.*, 392 S.C. 361, 366, 709 S.E.2d 639, 642 (2011) (referring to cause of action for injunction); *AJG Holdings, LLC v. Dunn*, 382 S.C. 43, 50, 674 S.E.2d 505, 508 (Ct. App. 2009) (referring to cause of action for injunction); *Transcon. Gas Pipe Line Corp. v. Porter*, 252 S.C. 478, 482, 167 S.E.2d 313, 315 (1969) (affirming temporary injunction where "complaint state[d] a cause of action solely for injunction"); *Seabrook v. Carolina Power & Light Co.*, 159 S.C. 1, 156 S.E. 1 (1930) (affirming temporary injunction in action for permanent injunction).

In determining whether or not to grant permanent injunctive relief, a court must consider (1) whether the plaintiff likely will succeed on the merits, (2) whether the plaintiff has an adequate remedy at law, (3) the public interest, and (4) the balance of the equities. *S. Packaging & Storage Co., Inc. v. U.S.*, 588 F. Supp. 532 (D.S.C. 1984).

Judge Manning in the lower court properly analyzed the issues and held that there

“is a likelihood of success on the merits that Plaintiffs will prevail on its challenge to Mrs. Murphy's standing to file appeals or declaratory actions of District 5 decisions in her own name so long as she is a sitting member of the District 5 school board.” (Order at R. pp. \_\_.) Further, in seeing the significant harm that could occur if such actions continued, the lower court held that:

[T]he issue of a public official filing appeals of the directives and decisions of the board on which she sits in her own name is a significant public interest, and, in balancing the harm to the parties by the issuance of an injunction, the Court finds that the Plaintiffs would suffer [irreparable] harm if future appeals were filed. There is little or no harm to Mrs. Murphy in preventing her from individually filing such appeals while she is a sitting board member.

(Order at R. pp. \_\_.) Respondents alleged, and the lower court recognized, that the public interest and the balance of the equities favor Respondents because Respondents seek to ensure that an individual member of a public body does not create political chaos by filing actions, challenges, or appeals to any decision of the public body that the member disagrees with. Therefore, the Circuit Court properly concluded that Respondents alleged a prima facie showing of entitlement to equitable relief.

**C. The Circuit Court Properly Determined That Respondents' Claims Did Not Violate The Constitution Of South Carolina.**

---

Even if Mrs. Murphy's appeal from the Circuit Court's order denying her motion to dismiss is not interlocutory and is presently reviewable, Respondents' claims do not violate the separation of powers delineated in the South Carolina Constitution. Mrs. Murphy argues that Respondents' Complaint should be dismissed pursuant to Rule 12(b)(1), SCRPC, because the requested relief, if granted, would violate the constitutional requirement of separation of powers. (Motion to Dismiss at R. pp. \_\_, App.'s Br. at R. pp. \_\_.) Mrs. Murphy's argument is simply a red herring and has no

merit.

S.C. Code Ann. Regs. 61-101(G), concerning the Water Quality Certification, states that "[p]ersons with legal standing to contest the certification shall have rights to appeal the decision" and that "[d]eterminations of whether a person has legal standing to contest a determination shall be made in the course of the contested case proceeding."

S.C. Code Ann. Regs. 61-101(G) is inapplicable to Respondents' action because Respondents do not seek to appeal DHEC's decision on the Water Quality Certification. Rather, Respondents seek to permanently enjoin Mrs. Murphy from filing any actions, challenges, or appeals to decisions made by the District Board on which she serves, and Respondents brought a separate claim asserting that Mrs. Murphy is using the appeals process for an ulterior purpose. The present action does not challenge any portion of the Administrative Law Court's decision. (Compl. 5-7, R. pp. \_\_.) S.C. Code Ann. Regs. 61-101(G) does not prohibit the Circuit Court from analyzing Mrs. Murphy's standing to challenge decisions of the District Board in Circuit Court. Obviously, DHEC does not have the authority to permanently enjoin Mrs. Murphy from filing any actions, challenges, or appeals to decisions of the District Board. Further, DHEC is not empowered to adjudicate an abuse of process claim. In summary, the scope of 61-101 is limited to appeals of DHEC decisions concerning the Water Quality Certification and, thus, is not applicable to Respondents' lawsuit seeking legal and equitable relief.

**D. The Circuit Court Properly Issued A Preliminary Injunction Against Murphy As Stroud And D5 Citizens Have Standing and Correctly Pled Their Claims.**

Even assuming Mrs. Murphy contested the preliminary injunction on appeal, this Court should affirm the Circuit Court's issuance of the preliminary injunction. A preliminary injunction is properly granted where Plaintiffs (1) will suffer immediate, irreparable harm without the injunction, (2) have made a sufficient prima facie showing

of entitlement to relief, and (3) have no adequate remedy at law. *Compton* at 366, 709 S.E.2d at 642. "An applicant for a preliminary injunction must allege sufficient facts to state a cause of action for injunction and demonstrate that this relief is reasonably necessary to preserve the rights of the parties during the litigation." *Id.* "Before granting an injunction, the trial court should balance the equities: the court should look at the particular facts of each case and the equities of each party and determine which side, if any, is more entitled to equitable relief." *AJG Holdings, LLC v. Dunn*, 382 S.C. 43, 51, 674 S.E.2d 505, 508-09 (Ct. App. 2009) "Whether or not to grant a preliminary injunction is left to the sound discretion of the trial court and will not be overturned unless it is clearly erroneous." *Compton* at 366, 709 S.E.2d at 642.

Here, the Circuit Court properly balanced the competing interests. First, Respondents alleged that students and citizens of the District would suffer irreparable harm if a preliminary injunction was not granted. To the contrary of Appellant's position in her Initial Brief, Stroud and D5 Citizens asserted in their Complaint that they had individual claims and distinct damages against Mrs. Murphy. Stroud and D5 Citizens both asserted "a direct and intrinsic interest in the case in controversy" and they would "further suffer actual damages as a result of the actions of Kim Murphy." (Compl. ¶ 2 at R. pp. \_\_.)

Specifically, Respondents alleged that citizens of the District approved a 2008 Referendum funding the renovation and expansion of Chapin High School and that Mrs. Murphy's appeals have slowed or stopped the implementation of the Referendum, imposed costs on the students and citizens of the District, caused the loss of educational opportunities, and circumvented the will of the people of the District. (Compl. ¶¶ 19-22, 36-37 at R. pp. \_\_.) Accordingly, the Circuit Court properly concluded that Respondents would suffer irreparable harm if a preliminary injunction was not granted.

Second, the Circuit Court properly determined that Respondents have made a sufficient prima facie showing of entitlement to relief. Respondents assert that in filing the appeals, Mrs. Murphy sought to create the type of "political chaos" that the Supreme Court attempted to avoid in *Newman v. Richland County Historic Preservation Commission*, 325 S.C. 79, 480 S.E.2d 72 (1997). The *Newman* Court searched for any precedent allowing an elected official to attack decisions by the board on which she sits and held:

We have been unable to find any case which permits a disappointed legislator to attack a decision of her own body, either through a declaratory judgment or through a direct "appeal" of the decision. See, e.g., *Munhall v. Inland Wetlands Comm'n*, 221 Conn. 46, 602 A.2d 566 (1992); *Randolph v. Cantrell*, 707 P.2d 48 (Ok.App.1985); *Control Data Corp. v. Controlling Bd. of Ohio*, 16 Ohio App.3d 30, 16 OBR 32, 474 N.E.2d 336 (1983); cf., *Anders v. South Carolina Parole and Community Corrections Bd.*, 279 S.C. 206, 305 S.E.2d 229 (1983) (statute denying solicitor right to sue the state reflects rule that governmental employee cannot sue his employer because that is tantamount to suing himself).

*Id.* The *Newman* Court quotes *Randolph*, an Oklahoma Court of Appeals case, which held that "individual member of a governing body does not have the power to institute lawsuits, or file appeals in his or her own name." *Newman* at 74.

Appellant also argues that the lower court erred because process has never been served on Respondents in this case. Respondents are not a party in name in the five appeals Mrs. Murphy filed to halt or slow the permitting of construction projects in the District which had been approved by the Referendum and Board on which she sits. However, the Respondents are citizens and residents of the District who plead individual and unique harms from the process used by Mrs. Murphy. Stroud was a student at the

effected Chapin High School and D5 Citizens is made up of parents and business owners in the District that have suffered harm.

As the court in *Sierra v. Skelton*, 307 S.C. 217, 222, 414 S.E.2d 169, 172 (Ct. App. 1991) held, when considering an abuse of process claim, there must be wayward acts committed in furtherance of seeking a collateral advantage. As citizens, taxpayers, parents, and students of the District Mrs. Murphy served, there is no doubt that Respondents are directly and intrinsically a party to the acts committed by Mrs. Murphy for the purpose of seeking a collateral political advantage.

If Respondents were precluded from being able to assert an abuse of process claim against an elected official purportedly charged with serving their interest when that official is using the courts to thwart the will of those people she serves, there would be no redress for citizens who elect officials that fail to work within the bodies to which they are elected. This of course is another reason that courts have found officials filing actions in their own name to lack standing.

Third, in moving for a preliminary injunction, Respondents alleged that there was no adequate remedy at law. (Compl. ¶¶ 31-42 at R. pp. \_\_.) Specifically, no legal remedy will prohibit Mrs. Murphy from filing additional appeals, imposing additional costs, and further delaying the implementation of the Referendum to the detriment of the students and citizens of the District. Therefore, the Circuit Court's granting of a preliminary injunction was proper and not clearly erroneous.

## **V. CONCLUSION**

For the reasons set forth above, this Court should dismiss Mrs. Murphy's appeal.

Respectfully submitted,

Law Office of Todd Ellis, P.A.

By: 

Todd Ellis, S.C. Bar No. 8888

todd@toddelislaw.com

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Attorney for Respondents

Margaret Stroud and D5 Citizens Ensuring the

Implementation of the Referendum, Inc.

January 30, 2012  
Columbia, South Carolin

# The South Carolina Court of Appeals

Margaret Stroud and D5 Citizens  
Ensuring the Implementation of the  
Referendum, Inc.,

Respondents,

v.

Kim Murphy,

Appellant.

The Honorable L. Casey Manning  
Richland County  
Trial Court Case No. 2011-CP-40-02926

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## ORDER

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For good cause having been shown, the time for serving and filing the Respondents' Initial Brief and Designation of Matter in the above entitled matter is hereby extended until January 30, 2012.

IT IS SO ORDERED.

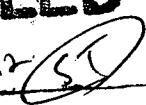
JOHN CANNON FEW, CHIEF JUDGE  
For the Court

BY V. Claire Allen, Deputy  
CLERK

Columbia, South Carolina  
cc: Jay Bender, Esquire  
Katie Renee Parham, Esquire  
Robert Guild, Esquire  
Todd R. Ellis, Esquire

**FILED**

1/29/12





# BAKER RAVENEL BENDER

ATTORNEYS AT LAW

January 11, 2012

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MARIEL D. NORTON

\*\*\*PATRICK D. QUINN

CHARLES E. BAKER  
(1935-2010)

\*OF COUNSEL

\*\*ALSO ADMITTED IN GEORGIA

\*\*\*ALSO ADMITTED IN VIRGINIA

The Honorable Tonya A. Gee  
Clerk of the South Carolina Court of Appeals  
Court of Appeals Building  
P.O. Box 11629  
Columbia, South Carolina 29211

Re: Margaret Stroud and D5 Citizens v. Murphy  
Our File No. 9269.3  
CASE NO. 2011-CP-40-2926

Dear Tonya:

In response to an inquiry from a member of your staff, I am writing to confirm that there was no trial transcript in the above-referenced appeal. The appeal is from an order granting an injunction that was determined on documents and not testimony. I filed a designation of matters to be included in the record with my initial brief, and Todd Ellis, counsel for respondents, has sought and received an enlargement of time in which to respond.

Should you need additional information, please do not hesitate to contact me.

Best regards.

Yours very truly,

Jay Bender

JJB/tkt

cc: Robert Guild, Esquire  
Katie R. Parham, Esquire  
Todd Ellis, Esquire

RECEIVED  
JAN 13 2012  
SC COURT OF APPEALS

**TODD ELLIS**

LAW OFFICE OF TODD ELLIS, P.A.

7911 BROAD RIVER ROAD, SUITE 100  
IRMO, SOUTH CAROLINA 29063

January 9, 2012

**RECEIVED**

JAN 10 2012

**SC Court of Appeals**

South Carolina Court of Appeals  
Attn: Tanya Gee, Clerk of Court  
1015 Sumter Street  
Columbia, SC 29201

RE: Margaret Stroud and D5 Citizens Ensuring the  
Implementation of the Referendum, Inc. vs. Kim Murphy  
Civil Action No.: 2011-CP-40-2926  
Todd Ellis File No.: 0214/11-0022

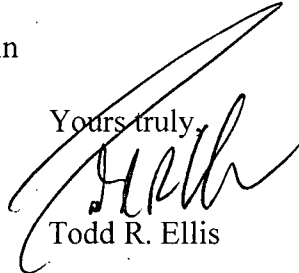
Dear Clerk Gee:

I represent the Respondents, Margaret Stroud and D5 Citizens Ensuring the Implementation of the Referendum, Inc., in the referenced matter. Enclosed please find a copy of my letter dated December 19, 2011 that I hand delivered to the Court of Appeals office regarding my request for extension in which to file Respondent's Initial Brief. I have also enclosed a check in the amount of Twenty-Five and 00/100 (\$25.00) Dollars for the filing fee made out to the South Carolina Court of Appeals.

Thank you for your consideration of this request. I will contact the Court this week to confirm the extension.

With kind regards, I remain

Yours truly,



Todd R. Ellis

TRE:jm

cc: D5 Citizens (via email only)  
Jay Bender, Esq. (via email only)

**TODD ELLIS**  
LAW OFFICE OF TODD ELLIS, P.A.

7911 BROAD RIVER ROAD, SUITE 100  
IRMO, SOUTH CAROLINA 29063

December 19, 2011

**VIA HAND DELIVERY ONLY**

South Carolina Court of Appeals  
Attn: Tanya Gee, Clerk of Court  
1015 Sumter Street  
Columbia, SC 29201

RE: Margaret Stroud and D5 Citizens Ensuring the  
Implementation of the Referendum, Inc. vs. Kim Murphy  
Civil Action No.: 2011-CP-40-2926  
Todd Ellis File No.: 0214/11-0022

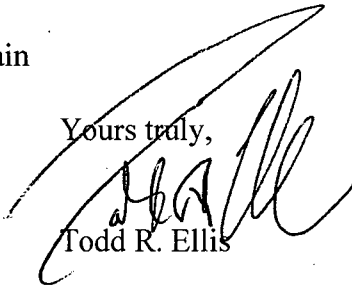
Dear Clerk Gee:

I represent the Respondents, Margaret Stroud and D5 Citizens Ensuring the Implementation of the Referendum, Inc., in the referenced matter. I write requesting a 30-day extension in which to file Respondent's Initial Brief. I have spoken to Jay Bender, counsel for the Appellant, and the Appellant consents to the extension. By my calculation, the Initial Brief was due on December 30, 2011. With the extension, Respondent's Initial Brief would be due on January 30, 2012.

Thank you for your consideration of this request. I will contact the Court this week to confirm the extension.

With kind regards, I remain

Yours truly,



Todd R. Ellis

TRE:jm

cc: D5 Citizens (via email only)  
Jay Bender, Esq. (via email only)

GRANTED  
JOHN CANNON FEW, C.J.  
FOR THE COURT

By: V. Claire Allen  
(Clerk) (Deputy Clerk)

**RECEIVED**

DEC 21 2011

**SC Court of Appeals**

12/30/11

1/30/12

1st EXT

**THE STATE OF SOUTH CAROLINA**  
In the Court of Appeals

---

APPEAL FROM RICHLAND COUNTY  
L. Casey Manning, Circuit Court Judge

---

Case No. 2011-CP-40-2926

---

Margaret Stroud and D5 Citizens Ensuring the Implementation of  
the Referendum, Inc.,.....Respondents

v.

Kim Murphy,.....Appellant

---

**DESIGNATION OF MATTER  
TO BE INCLUDED IN THE RECORD ON APPEAL**

---

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803.252.1419

ATTORNEYS FOR APPELLANT

**RECEIVED**

NOV 30 2011

**SC Court of Appeals**

Appellant proposes the following to be included in the Record on Appeal:

1. Order of September 1, 2011
2. Order of October 10, 2011
3. Complaint
4. Notice of Motion and Motion for Injunction
5. Notice and Motion to Dismiss
6. Notice and Motion for Reconsideration

I certify that this designation contains no matter which is irrelevant to this appeal.

November 30, 2011

Jay Bender

A handwritten signature in black ink, appearing to read "JB", is written over a horizontal line. The signature is stylized and cursive.

**THE STATE OF SOUTH CAROLINA**  
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY  
L. Casey Manning, Circuit Court Judge

Case No. 2011-CP-40-2926

Margaret Stroud and D5 Citizens Ensuring the Implementation of  
the Referendum, Inc.,..... Respondents.

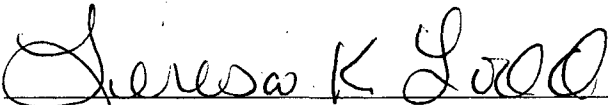
v.

Kim Murphy,..... Appellant.

**PROOF OF SERVICE**

I, Teresa K. Todd, Legal Assistant to Jay Bender, an employee of Baker, Ravenel & Bender, L.L.P., hereby certify that I have, on the date indicated below, served counsel below with an Initial Brief of Appellant and Designation of Matter to be Included in the Record on Appeal by having a copy of same hand delivered to counsel at the following address:

Todd R. Ellis  
7825 Broad River Road, Suite 300  
Irmo, SC 29063

  
Teresa K. Todd

November 30, 2011

**RECEIVED**

NOV 30 2011

**SC Court of Appeals**

**THE STATE OF SOUTH CAROLINA**  
In the Court of Appeals

---

APPEAL FROM RICHLAND COUNTY  
L. Casey Manning, Circuit Court Judge

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Case No. 2011-CP-40-2926

---

Margaret Stroud and D5 Citizens Ensuring the Implementation of  
the Referendum, Inc.,..... Respondents

v..

Kim Murphy,.....Appellant

---

**INITIAL BRIEF OF APPELLANT**

---

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ATTORNEYS FOR APPELLANT

**RECEIVED**  
NOV 30 2011  
SC Court of Appeals

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## ISSUES ON APPEAL

1. DID THE COURT BELOW ERR IN BARRING APPELLANT FROM OBTAINING REVIEW OF PERMIT DECISIONS OF THE SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL ON GROUNDS THAT APPELLANT LACKED STANDING TO SEEK SUCH REVIEW WHEN THE JUDICIAL DETERMINATION SOUGHT RELATIVE TO APPELLANT'S STANDING TO MAINTAIN APPEALS OF EXECUTIVE BRANCH DECISIONS WAS IN CONTRAVENTION OF THE SEPARATION OF POWERS DELINEATED IN THE SOUTH CAROLINA CONSTITUTION?
2. DID THE COURT BELOW ERR IN DENYING APPELLANT'S MOTION TO DISMISS RESPONDENTS' CLAIM FOR ABUSE OF PROCESS WHERE THE COMPLAINT FAILED TO ALLEGE FACTS SUFFICIENT TO STATE A CAUSE OF ACTION FOR ABUSE OF PROCESS?
3. DID THE COURT BELOW ERR IN DENYING APPELLANT'S MOTION TO DISMISS RESPONDENTS' COMPLAINT IN THAT IT FAILED TO ALLEGE THAT RESPONDENTS HAD A PERSONAL STAKE IN THE SUBJECT MATTER OF THE LITIGATION NOT COMMON TO ALL MEMBERS OF THE PUBLIC, AND FOR THAT REASON RESPONDENTS LACKED STANDING TO BRING THE ACTION?

## STATEMENT OF THE CASE

Respondents, Margaret Stroud and D5 Citizens Ensuring The Implementation of the Referendum, Inc., initiated an action against appellant Kim Murphy by the filing of a Summons, Complaint and Notice of Motion and Motion for Injunction on May 3, 2011. The Complaint contained separate causes denominated "Abuse of Process" and "Injunctive Relief" with the relief requested being an injunction to bar appellant from continuing appeals of permits issued by the South Carolina Department of Health and Environmental Control together with actual and punitive damages and costs. On June 2, 2011 appellant moved to dismiss the action pursuant to Rule 12(b)(1) and Rule 12(b)(6), SCRCF. Following a hearing the court below issued an order on September 1, 2011 denying appellant's motion to dismiss and granting injunctive relief to respondents to bar appellant from "further appeals or challenges" to permits needed for various construction projects in Lexington-Richland School District 5. Appellant timely moved for reconsideration, and in response the court below denied the motion, but issued on October 10, 2011 an order incorporating an exhibit referenced in the order of September 1, 2011, but omitted from that order. On October 31, 2011 appellant served and filed a Notice of Appeal of the order of September 1, 2011 as modified by order of October 10, 2011.

## ARGUMENT

- I. THE COURT BELOW ERRED IN BARRING APPELLANT FROM OBTAINING REVIEW OF PERMIT DECISIONS OF THE SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL ON GROUNDS THAT APPELLANT LACKED STANDING TO SEEK SUCH REVIEW WHEN THE JUDICIAL DETERMINATION THAT APPELLANT LACKED STANDING WAS IN CONTRAVENTION OF THE SEPARATION OF POWERS DELINEATED IN THE SOUTH CAROLINA CONSTITUTION.

The South Carolina Department of Health and Environmental Control (DHEC) implements and administers the state's water quality certification process established by Section 401 of the United States Clean Water Act, 33 U.S.C. Section 1341. 25A S.C. Code Ann. Regs. 61-101 (Supp. 2010). Acting under this regulation DHEC, an executive branch agency, issued permits to fill portions of two streams in connection with construction at Chapin High School in Lexington-Richland School District 5. (Compl. ¶ 10)

Utilizing the procedure established by Regulation 61-101 appellant initiated appeals of the permits as "contested cases" under the South Carolina Administrative Procedures Act. 25A S.C. Code Ann. Regs. 61-101 (Supp. 2010). Contested case appeals are heard by the South Carolina Administrative Law Court. S.C. Code Ann. §1-23-600 (Supp. 2010). Subsection G4 of Regulation 61-101 assigns the determination of standing to initiate an appeal of the grant of a DHEC permit to the contested case proceeding itself, stating:

Determination of whether a person has standing to contest a determination shall be made in the course of the contested case proceeding.

The statute which created the Administrative Law Court states in unambiguous language that this "court" is "within the executive branch of the government of this

State.” S.C. Code Ann. §1-13-500 (Supp. 2010). In other words, an appeal of an executive branch decision by DHEC is heard in the first instance by the Administrative Law Court which is itself a part of the executive branch. And as part of this appeal procedure, it is the Administrative Law Court that has the exclusive power to determine standing in a contested case. Notwithstanding the express assignment of the determination of standing in an administrative appeal to the executive branch, respondents seek to avoid the executive branch decision-making process by stating that their suit “...involves whether ...[appellant] has standing to file an appeal” of a DHEC permit decision. (Not. of Mot. for Inj. ¶ 1)

The court below concluded as the basis for issuing its injunction “that there is a likelihood of success [in the circuit court] on the merits that [respondents] will prevail on its [sic] challenge to [appellant’s] standing...” to maintain an appeal before the administrative law court. (Sep. 1 order p.2) Clearly this conclusion is in error because as a matter of law the circuit court has no role to play in the determination of a person’s standing to initiate a contested case appeal in the executive branch to obtain review of a DHEC water quality decision, the standing decision having been expressly assigned to the executive branch and not the judicial branch.

In order for respondents to prevail in this litigation the circuit court would be required to intrude on the administrative procedure established by the General Assembly in order to make a decision on a matter exclusively within the jurisdiction of the executive branch. Respect by the judicial branch for decisions of the executive branch is a hallmark of separation of powers, and is codified in Section 1-23-610(B) which precludes a court from substituting its judgment for that of the administrative law judge

on questions of fact. See also, *Bailey v. S.C. Dept. of Health and Environmental Control*, 388 S.C. 1, 693 S.E.2d 426 (Ct. App. 2010). If any part of the judicial branch were to have the authority to determine if appellant had standing to initiate a contested case review of a DHEC permit decision, it would not be the circuit court as appeals from the administrative law court are heard by this court and not by the circuit courts. S.C. Code Ann. §1-23-610(A)(1) (Supp. 2010). Rather than seek to intervene in the contested case proceeding to challenge appellant's standing there, respondents initiated a judicial proceeding in which they asked the court below to predict that they would likely be successful in demonstrating that the circuit court had the authority to determine appellant's standing in an executive branch appeal. Respondents' suit ignores the statutes and regulation applicable to administrative appeals and disregards completely the constraints of Article I, Section 8 of the South Carolina Constitution which provides:

In the government of this State, the legislative, executive and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the function of one of said departments shall assume or discharge the duties of any other.

Respondents invited the court below to make a determination assigned by law to the executive branch, and in acting on this invitation the court below impermissibly displaced the administrative process in contravention of the constitution. *S.C. Dept. of Health and Environmental Control v. Armstrong*, 293 S.C. 209, 359 S.E.2d 302 (Ct. App. 1987). The court below indicated that its forecast of the likely outcome of its judicial determination of appellant's standing in the contested case process was an appropriate basis for the grant of injunctive relief, but such a forecast ignores both the constitution and the long-established rule that judicial discretion cannot be substituted for that of an

executive branch body. *Rose v. Beasley*, 327 S.C. 197, 489 S.E.2d 625 (1997); *Guerard v. Whitner*, 276 S.C. 521, 280 S.E.2d 539 (1981). The forum in which appellant's standing to obtain review of the DHEC permitting decisions is to be determined is the administrative law court, not the circuit court.

*Newman v. Richland County Historical Preservation Commission*, 325 S.C. 79, 480 S.E.2d 72 (1977) relied on by the court below is distinguishable in that the plaintiff there initiated a civil action directly against the body of which she was a member. Appellant here has not initiated an action against the school board of which she is now a member, but has challenged on appeal actions taken by a separate, independent political body, DHEC. The *Newman* court's focus on the question of whether a member of a body was "aggrieved for the purpose of appealing" a decision of the body outlines an argument that respondents might have made before the administrative law court had they chosen to intervene in the appeal process. *Newman* does not supply a rationale applicable to the facts of this case or enable the circuit court to disregard the constitutionally mandated separation of powers.

The court below should have dismissed the Complaint pursuant to Rule 12(b)(1), SCRPC on grounds that the court lacked subject matter jurisdiction to interfere with an executive branch decision by usurping the authority of the administrative law court to determine appellant's standing as part of its contested case review of the grant of permits by DHEC.

II. THE COURT BELOW ERRED IN DENYING APPELLANT'S MOTION TO DISMISS RESPONDENTS' CLAIM FOR ABUSE OF PROCESS WHERE THE COMPLAINT FAILED TO ALLEGE FACTS SUFFICIENT TO STATE A CAUSE OF ACTION FOR ABUSE OF PROCESS

Respondents have designated in their Complaint causes of action for "Abuse of Process" (Compl. p. 4) and "Injunctive Relief." (Compl. p. 5) Since an injunction is a remedy, *Richland County v. Kaiser*, 351 S.C. 89, 567 S.E.2d 260 (Ct. App. 2002), and not a cause of action, the sufficiency of respondents' allegations must be considered in the context of the requirements of a claim for abuse of process. The Supreme Court of South Carolina has identified clearly and succinctly the elements of the claim:

It is well-settled that two essential elements are required for an abuse of process action: (1) an ulterior purpose; and (2) a willful act in the use of the process not proper in the regular conduct of the proceedings. *Johnson v. Painter*, 279 S.C. 390, 307 S.E.2d 860 (1983); *Huggins v. Winn-Dixie of Greenville, Inc.*, 249 S.C. 2016, 153 S.E.2d 693 (1967).

*LaMotte v. Punch Line of Columbia, Inc.*, 296 S.C. 66, 370 S.E.2d 711, 713 (1988).

Respondents alleged that appellant initiated her appeal of the DHEC permit "for an ulterior purpose" (Compl. ¶ 18), but respondents failed to allege that the request for review of the DHEC permit was accompanied by a willful act not proper in the regular conduct of the contested case proceedings. Where, as here, a party has failed to allege the manner in which the initiation of the appeal was improper, the failure is a fatal flaw. *Food Lion v. United Food & Commercial Workers International Union*, 351 S.C. 65, 567 S.E.2d 251 (2002). As the Supreme Court explained in *United Food* the process at issue must be perverted or misused as there is no abuse of process claim where the process is used to accomplish the result for which it was created. Respondents have not alleged

either a perversion of the administrative appeal or that any process was misused in any way. Even though “an ulterior purpose may be inferred from an improper willful act,” the inference cannot be reversed to infer improper acts from an improper motive. *Id.*, 567 S.E.2d at 255.

Additionally, respondents failed to allege that the administrative appeal, the contested case review of the DHEC permit, was a process directed against them. It seems obvious that the administrative contested case was conducted independently of respondents, directed at DHEC and not directed against respondents. No cause of action for abuse of process exists where a defendant has not caused a process to issue against a plaintiff. *Rycroft v. Gaddy*, 281 S.C. 119, 314 S.E.2d 39 (Ct. App. 1984).

The court below should have dismissed the Complaint pursuant to Rule 12(b)(6), SCRPC as respondents failed to allege facts that would constitute a cause of action for abuse of process.

III. THE COURT BELOW ERRED IN DENYING APPELLANT’S MOTION TO DISMISS RESPONDENTS’ COMPLAINT IN THAT IT FAILED TO ALLEGE THAT RESPONDENTS HAD A PERSONAL STAKE IN THE SUBJECT MATTER OF THE LITIGATION NOT COMMON TO ALL MEMBERS OF THE PUBLIC, AND FOR THAT REASON RESPONDENTS LACKED STANDING TO BRING THE ACTION

Respondents’ suit alleges that appellant has no standing to maintain a contested case review of a DHEC permitting decision. Yet, ironically, it is respondents who lack standing to bring this action asking the circuit court to inject itself into the executive branch decision-making process. As this court explained in *Commander Health Care Facilities, Inc. v. S.C. Dept. of Health and Environmental Control*, 370 S.C. 296, 634 S.E.2d 664, 666 (Ct. App. 2006), “to have standing, a litigant must have a personal stake

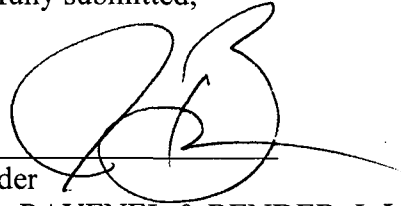
in the subject matter of the litigation.” The injury claimed to have been suffered by a plaintiff must be “personal” and “not merely of a general nature that is common to all members of the public.” *Id.* To establish standing a party must demonstrate an injury in fact that is causally connected to defendant’s actions, and that the injury will be redressed by a favorable decision. *Sea Pines Ass’n for the Prot. Of Wildlife v. South Carolina Dep’t of Natural Res. & Cmty. Servs. Assocs., Inc.*, 345 S.C. 594, 550 S.E.2d 287 (2001). Respondents allege generally that they have and will suffer “actual damages” as a result of appellant’s maintenance of contested case reviews of DHEC permits. (Compl. ¶¶ 1 & 2) Respondents do not allege how they are individually harmed, but telegraph that their damages are those they envision for the public at large when they allege that “The appeals have caused a delay in District 5’s issuance of bonds for the funding the approved Referendum projects and will costs [sic] millions of dollars in additional costs over the term of the bonds.” (Compl. ¶ 36) The absurdity of respondents’ injury allegation is exposed in their assertion that they “have and will suffer damages in the millions of dollars should the delay continue....” (Compl. ¶ 41) It seems beyond belief that an eighteen-year-old student and a nonprofit corporation would suffer individual injury in any amount should there be a delay in the issuance of bonds by an entity not a party to this litigation.

Respondents have alleged no concrete, particularized, individualized injury to either of them; therefore, they cannot meet their burden of establishing their standing to maintain this litigation. *Commander Health Care, supra*. For this reason the court below should have dismissed the Complaint.

## CONCLUSION

Respondents, who have not alleged facts sufficient to support their own standing to maintain this litigation, on the basis of insufficient allegations of abuse of process invited the court below to disregard our state's constitutionally mandated separation of powers to make a decision vested exclusively in the executive branch. Unfortunately, as discussed above, the court accepted that invitation and impermissibly intruded upon executive branch authority. For the reasons stated herein, the order of September 1, 2011 as modified by the order of October 10, 2011 should be reversed, and respondents' complaint dismissed.

Respectfully submitted,



Columbia, South Carolina

November 30, 2011

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ATTORNEYS FOR APPELLANT



# The South Carolina Court of Appeals

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V. CLAIRE ALLEN  
DEPUTY CLERK

POST OFFICE BOX 11629  
COLUMBIA, SOUTH CAROLINA 29211  
1015 SUMTER STREET  
COLUMBIA, SOUTH CAROLINA 29201  
TELEPHONE: (803) 734-1890  
FAX: (803) 734-1839  
[www.sccourts.org](http://www.sccourts.org)

November 15, 2011

Jay Bender, Esquire  
Baker Ravenel & Bender, LLP  
P.O. Box 8057  
Columbia, SC 29202

Re: Stroud, Margaret v. Murphy, Kim  
Case #2011202407

Dear Mr. Bender:

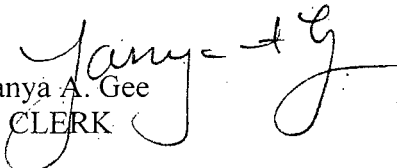
We have received your Notice of Appeal in the case noted above. This case will be docketed in the Court of Appeals and all communications concerning this case, including motions and petitions, initial and final briefs, and the Record on Appeal, should be directed to and filed in this Court. Failure to file in the proper court may result in the dismissal of your appeal. For all filings, please note the requirements of Rule 267(a) of the South Carolina Appellate Court Rules, and be further advised that Court of Appeals policy requires the bar number and firm name of any counsel shown must be included in his or her address.

PLEASE BE ADVISED that, pursuant to Rule 207 of the South Carolina Appellate Court Rules, the transcript must be ordered within ten (10) days of the proof of service of the Notice of Appeal and you must provide this Court, opposing counsel, and the Office of Court Administration with all correspondence regarding the transcript. It is also Appellant's responsibility to make satisfactory arrangements (including agreement regarding payment for the transcript) with the Court Reporter for furnishing the transcript. You are reminded of the notification requirements of Rule 207(a)(5), SCACR, also, please advise the Court in writing upon receipt of the transcript.

I further wish to call the attention of the parties to the attached order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests

with counsel and the parties. This office will not review filings for redaction or to determine if materials should be sealed.

Very truly yours,

  
Tanya A. Gee  
CLERK

TAG/jt

cc: Katie Renee Parham, Esquire  
Robert Guild, Esquire  
Todd R. Ellis, Esquire  
The Honorable Jeanette W. McBride

# The Supreme Court of South Carolina

RE: Interim Guidance Regarding Personal Data Identifiers and  
Other Sensitive Information in Appellate Court Filings

## ORDER

Under the Federal Constitution, our State Constitution, and our common law, court records are presumptively open to the public, and these records may only be sealed by a court based on specific findings that the need for secrecy outweighs the presumption of openness. Ex parte Capital U-Drive, Inc., 369 S.C. 1, 630 S.E.2d 464 (2006); Davis v. Jennings, 304 S.C. 502, 405 S.E.2d 601 (1991). Therefore, with some few exceptions, 1 documents filed with this Court or the South Carolina Court of Appeals (appellate court) are available to the public unless sealed by order of the appellate court in which the matter is pending.

Several commercial vendors have recently requested copies of briefs filed with the appellate courts. It is anticipated that these and other appellate filings will be available electronically from both private and public sources in the future. The ready availability of these documents raises significant privacy concerns. While this problem is currently under review by the Chief Justice's Task Force on Public Access to Court Records, we adopt the following interim guidance regarding personal data identifiers and other sensitive information in documents filed in the appellate courts.

Documents shall not include, or will partially redact where inclusion is necessary, the following personal data identifiers from documents filed with an appellate court: 2

**Social Security Numbers.** If a social security number must be included, only the last four digits of the number should be used.

**Names of Minor Children.** If a minor is the victim of a sexual assault or is involved in an abuse or neglect case, the minor's name will be completely redacted and a term such as "victim" or "child" will be used. In all other cases, only the minor's first name and first initial of the last name (i.e., J.S.) should be used.

**Financial Account Numbers.** If financial account numbers are relevant, only the last four digits of the numbers should be used.

**Home Addresses.** If a home address must be included, only the city and state should be used.

Parties wishing to file documents containing the personal data identifiers listed above may file redacted documents under seal, together with redacted versions for the public file. The sealed and redacted documents shall be filed in a separate Appendix and the bottom of each page of the Appendix shall be marked "Sealed." No order of the appellate court will be required to file this sealed Appendix. The number of copies of the Appendix to be served and filed shall be the same as that required for the brief, record on appeal, motion or other filing that includes the redacted documents.

If the caption of the case contains any of the following, file a motion to amend the caption to redact the identifier. This should be done contemporaneously with the filing of the notice of appeal or the commencement of the case with the appellate court. Without a motion to the appellate court, the caption of a juvenile delinquency matter from the family court shall be redacted to only use the juvenile's first name and first letter of the juvenile's last name (i.e., In the Interest of John S., a Juvenile.)

A party seeking to seal material beyond those personal identifiers listed above, must file a motion to seal with the appellate court in which the matter is pending. This is true even if the lower court or administrative tribunal may have issued an order sealing the record. Until the motion is ruled on, the clerk of the appellate court shall treat the material as if it is sealed. Parties and counsel are reminded that the standard established in Ex parte Capital U-Drive-It, Inc. and Davis v. Jennings, supra, must be met before any request to seal all or a portion of a record will be granted. Once sealed by order of an appellate court, the materials will remain sealed before the appellate courts unless otherwise ordered by the appellate court in which the matter is pending.

Parties should exercise caution in including other sensitive personal data in their filings, such as personal identifying numbers, medical records, employment history, individual financial information, proprietary or trade secret information, information regarding an individual's cooperation with the government, information regarding the victim of any criminal activity, or national security information.

Attorneys are expected to discuss this matter with their clients so that an informed decision can be made about the inclusion of sensitive information. The appellate courts and their staff will not review filings for redaction or to determine if materials should be sealed; the responsibility for insuring that information is redacted or sealed rests with counsel and the parties.

IT IS SO ORDERED

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E.C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

August 13, 2007

<sup>1</sup> See, e.g., Rule 12 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR; Rule 12 of the Rules for Judicial Disciplinary Enforcement contained in Rule 502, SCACR; Rule 402(n), SCACR; and Rule 403(l), SCACR.

<sup>2</sup> This restriction shall not apply when this information is required or requested by the appellate court. For example, the application for admission to practice law under Rule 402, SCACR, requires many of these personal identifiers to be disclosed.

PM - 10/31/11  
POS - 10/31/11

**THE STATE OF SOUTH CAROLINA**  
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY  
L. Casey Manning, Circuit Court Judge

Case No. 2011-CP-40-2926

Margaret Stroud and D5 Citizens Ensuring the Implementation of  
the Referendum, Inc.,.....Respondents

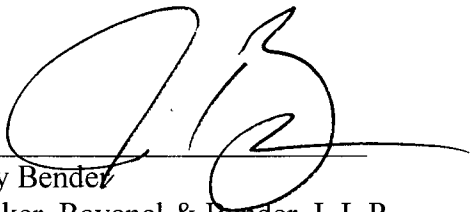
v.

Kim Murphy,.....Appellant

**NOTICE OF APPEAL**

Kim Murphy appeals the order of the Honorable L. Casey Manning dated  
September 1, 2011 as modified upon reconsideration by the order of October 10, 2011  
received by appellant on October 12, 2011.

October 31, 2011



Jay Bender  
Baker, Ravenel & Bender, L.L.P.  
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803.799.9091

**RECEIVED**  
OCT 31 2011  
**SC Court of Appeals**

(Additional counsel for Appellant  
and other counsel of record identified on  
following page)

Katie R. Parham  
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ATTORNEYS FOR APPELLANT

Other Counsel of Record:

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Law Office of Todd Ellis, P.A.  
7911 Broad River Rd., Suite 100  
Irmo, South Carolina  
803.732.0123  
Attorney for Respondents

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY  
L. Casey Manning, Circuit Court Judge

**RECEIVED**

OCT 31 2011

**SC Court of Appeals**

Case No. 2011-CP-40-2926

Margaret Stroud and D5 Citizens Ensuring the Implementation of  
the Referendum, Inc.,.....Respondents.

v.

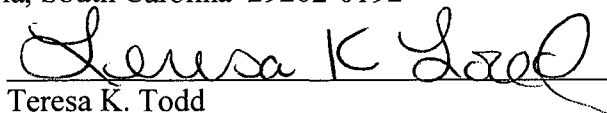
Kim Murphy,.....Appellant.

**PROOF OF SERVICE**

I, Teresa K. Todd, Legal Assistant to Jay Bender, an employee of Baker, Ravenel & Bender, L.L.P., hereby certify that I have, on the date indicated below, served counsel below with a Notice of Appeal by having a copy of same hand delivered to counsel at the following address:

Todd R. Ellis  
7825 Broad River Road, Suite 300  
Irmo, SC 29063

The Honorable Jeanette McBride  
Richland County Clerk of Court  
Post Office Box 192  
Columbia, South Carolina 29202-0192

  
Teresa K. Todd

October 31, 2011

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF RICHLAND )  
  
Margaret Stroud and D5 Citizens Ensuring )  
The Implementation of the Referendum, Inc.)  
 )  
Plaintiffs, )  
 )  
Kim Murphy )  
 )  
Defendant. )

IN THE COURT OF COMMON PLEAS  
FOR THE FIFTH JUDICIAL CIRCUIT

CASE NUMBER: 2011-CP-40-2926

**ORDER DENYING DEFENDANT'S  
MOTION FOR RECONSIDERATION  
AND INCORPORATING EXHIBIT  
TO THE COURT'S ORDER OF  
SEPTEMBER 1, 2011**

FILED  
2011 OCT 10 PM 2:45  
JANETIE W. MCBRIDE  
C.C.P. 59 G.S.

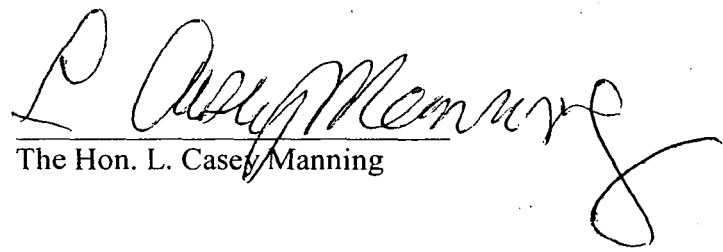
This matter comes before me on Defendant's motion pursuant to Rule 59 of the South Carolina Rules of Civil Procedure for Reconsideration of the Court's Order of September 1, 2011 Denying Defendant's Motion to Dismiss and Ordering a Temporary Restraining Order Against Defendant Murphy.

The Court considered the arguments set forth in Defendant's Motion and denies her Motion to Reconsider.

For the purpose of clarification, the Court does however incorporate into its September 1, 2011 Order, Exhibit A attached hereto setting forth the Appeal/Filings of Kim Murphy as of September 1, 2011.

THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that the above stated Agreement is hereby entered into as an Order of this Court.

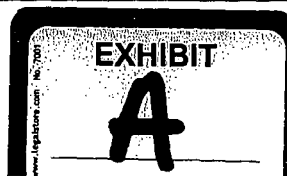
IT IS SO ORDERED.

  
The Hon. L. Casey Manning

Oct. 10, 2011

**AS OF SEPTEMBER 1, 2011,  
APPEALS/FILINGS in DISTRICT 5 OF KIM MURPHY**

| DATE   | SUBJECT OF APPEAL  | CURRENT STATUS OF APPEAL  |
|--|--|---|
| <p style="text-align: center;">June 15, 2010<br/>Administrative Law Court</p>  | <p style="text-align: center;">401 Water Quality<br/>Certification</p>     | <p style="text-align: center;">Appeal Denied, 401<br/>Certification affirmed</p>  |
| <p style="text-align: center;">August 16, 2010<br/>KIM MURPHY<br/>Files Notice of Candidacy To Run<br/>District 5 School Board</p>   |  |   |
| <p style="text-align: center;">November 2, 2010<br/>Kim Murphy Elected to District<br/>School Board</p>  |  |   |
| <p style="text-align: center;">June 24, 2011<br/>SC Court of Appeals<br/>(Appeal of Court Ruling)</p>  | <p style="text-align: center;">401 Water<br/>Quality<br/>Certification</p> | <p style="text-align: center;">Pending to SC Court<br/>of Appeals</p>   |
| <p style="text-align: center;">March 10, 2011<br/>Administrative Law Court</p>   | <p style="text-align: center;">Wastewater<br/>Construction<br/>Permit</p>  | <p style="text-align: center;">Declined by DHEC<br/>review Board Appeal<br/>Pending before<br/>Administrative Law<br/>Court –<br/>no hearing date set</p> |
| <p style="text-align: center;">July 7, 2011<br/>DHEC Request for Review</p> <p style="text-align: center;">William Grant</p> <p style="text-align: center;">Kim Murphy</p> <p style="text-align: center;">Cheryl Vaeth<br/>Leisha Huffstetlar<br/>Wayne Duncan</p> | <p style="text-align: center;">Storm Water<br/>Permit</p>                  | <p style="text-align: center;">Declined By DHEC<br/>review Board<br/>Murphy Has 30 days<br/>to appeal to the<br/>Administrative Law<br/>Court</p>         |



STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF RICHLAND )  
 )  
 Margaret Stroud and D5 Citizens Ensuring )  
 The Implementation of the Referendum, Inc.)  
 )  
 Plaintiffs, )  
 )  
 Kim Murphy )  
 )  
 Defendant. )  
 \_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

CASE NUMBER: 2011-CP-40-2926

**ORDER DENYING DEFENDANTS  
 MOTION TO DISMISS and ORDERING  
 A TEMPORARY RESTRAINING  
 AGAINST DEFENDANT MURPHY**

2011 SEP - 1 PM 4: 33  
 JEANETTE W. BRIDGE  
 CLERK OF COURT  
 RICHLAND COUNTY  
 FILED

This matter comes before me on the Plaintiffs motion pursuant to Rule 65 of the South Carolina Rules of Civil Procedure for the issuance of a restraining order requiring Defendant Kim Murphy to withdraw the appeals set forth on Exhibit A related to permits necessary for the construction of Chapin High School in School District 5 of Lexington and Richland Counties (“District 5”) and prohibiting Defendant from filing further appeals in District 5 and for further filing **appeals or actions that would result in the delay or obstruct construction approved by District 5 and the voters who passed the 2008 bond referendum to fund the expansion and renovation project.** The Court also considered Defendant’s Motion to Dismiss the Plaintiffs’ claims in accordance with Rule 12(b)(1) and (6). A hearing was held on the motions on August 3, 2011 and the Court heard arguments from counsel representing the parties.

After considering the materials provided by counsel and hearing the arguments at the hearing on these motions, the Court denies Defendant’s Motion to Dismiss and enjoins Defendant Murphy from filing any further appeals in District 5.

The Court finds, in the light most favorable to Plaintiffs, that Plaintiffs have standing and

have sufficiently plead facts to constitute a cause of action against Defendant Murphy for abuse of process. *Spence v. Spence*, 368 S.C. 106, 116-17, 628 S.E.2d 869, 874 (2006).

As for the Plaintiffs Motion to enjoin Defendant Murphy, the Court finds that there is a likelihood of success on the merits that Plaintiffs will prevail on its challenge to Mrs. Murphy's standing to file appeals or declaratory actions of District 5 decisions in her own name so long as she is a sitting member of the District 5 school board. In *Newman v. Richland County Historic Preservation Com'n* 480 S.E.2d 72 (S.C.,1997), the Supreme Court stated that it had found no precedent "which permits a disappointed legislator to attack a decision of her own body, either through a declaratory judgment or through a direct "appeal." *Id* at 74.

The Court is not requiring Mrs. Murphy to withdraw the appeals which she has already filed and which are set forth on Exhibit A, but finds that the Plaintiffs are likely to succeed on the merits, that the issue of a public official filing appeals of the directives and decisions of the board on which she sits in her own name is a significant public interest, and, in balancing the harm to the parties by the issuance of an injunction, the Court finds that the Plaintiffs would suffer irreputable harm if future appeals were filed. There is little or no harm to Mrs. Murphy in preventing her from individually filing such appeals while she is a sitting board member.

Therefore, the Court is ordering the following:

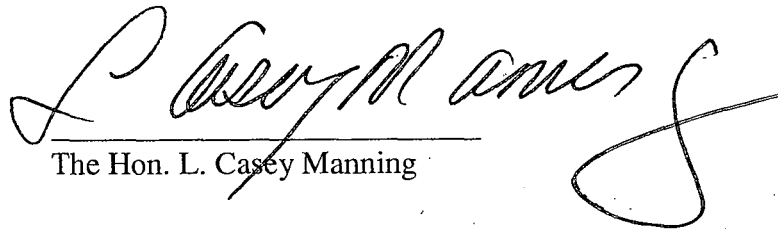
1. That Defendant answer fully the discovery responses served upon her on or before September 22, 2011;
2. That discovery proceed and this matter be heard on the merits as soon as practicable;
- 3. That Defendant Murphy, so long as she is a member of the District**

**5 school board, is prohibited from filing in her own name any further appeals, actions or challenges at the** South Carolina Department of Health and Environmental Control ("DHEC") or any other agency necessary to approve permitting for various construction projects authorized by the District 5 school board and funded by the 2008 referendum passed by the citizens of District 5.

THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that the above stated Agreement is hereby entered into as an Order of this Court.

IT IS SO ORDERED.

Sept 1, 2011

  
The Hon. L. Casey Manning