THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

Appellate Case No. 2014-001412

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

v.

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

PETITION FOR WRIT OF CERTIORARI

July 13, 2017

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Certification of Counsel

The undersigned attorney hereby certifies that he filed a petition for rehearing with the Court of Appeals, and the Court of Appeals denied the petition on June 23, 2017.

Questions Presented For Review

1. **DOES THE DECISION OF THE COURT OF APPEALS CONFLICT WITH PRIOR DECISIONS OF THIS COURT?**
2. **DID THE PETITIONER SATISFY S.C. CODE ANN. § 15-77-300?**
3. **WERE PETITIONERS' ATTORNEYS' FEES REASONABLE?**

Statement of Facts

Appellant South Carolina Public Interest Foundation is a not for profit corporation organized and existing under the laws of the State of South Carolina and dedicated to the public interest, including the proper application and enforcement of the South Carolina Constitution (R. p. 4). Appellant William B. DePass, Jr. is a citizen, resident, taxpayer, and registered elector of Richland County (R. p. 4) He served as a member of the State Election Commission during the years 1988 through 1997, and he served as its Chairman during the years 1990 through 1997 (R. p. 4). He regularly serves as a volunteer poll worker on election days (R. p. 4). Mr. DePass claimed standing on all the foregoing bases (R. p. 4). He brought this action individually on his behalf and on behalf of all others similarly situated (R. p. 4).

Respondents John E. Courson, Darrell Jackson, Joel Lourie, and John L. Scott, Jr. are South Carolina Senators elected by Richland County voters; and they are named in their

official capacities (R. p. 4). These senators, all from Richland County, were instrumental in the passage of the Act at issue (R. p. 24, par. 10).

Prior to the enactment of Act 312 of 2008, the General Assembly had enacted various local acts combining the boards of voter registration and boards of election in individual counties (R. p. 5). In 2007, the Attorney General issued an opinion to Senator Glenn McConnell that the General Assembly's very similar action with regard to Charleston County in 2003 was unconstitutional. Op. S.C. Atty. Gen., August 14, 2007 (2007 WL 3244888). The Attorney General quoted an earlier opinion from 1977 arriving at that conclusion:

> In an opinion of this Office issued in 1977, we considered generally whether the General Assembly can introduce legislation merging county boards of voter registration and county election commissions on a county-by-county basis. Op. S.C. Atty. Gen., January 5, 1977. We concluded "such legislation would most probably be violative of that portion of Article VIII, section 7 of the South Carolina Constitution of 1985, as amended, which proscribes laws for a specific county." *Id.*

Id. at *4.

Accordingly, early in the next term of the General Assembly, on February 14, 2008, Senators McConnell and Campsen introduced the bill that became Act 312 of 2008. Act 312 addressed all forty-six counties in the state (R. p. 5). Act 312 did not change the substance of the previous local and special acts for individual counties, but amounted to the General Assembly's attempt to use one act to correct the Constitutional defects in all the special and single county acts related to county election commissions and county boards of voter registration (R. p. 5).

Act 312 of 2008 was codified at Title VII, Chapter 27 of the South Carolina Code. Section 7–27–110 stated: "Those counties that do not have combined boards of registration

and election commissions must have their members appointed and powers of their boards and commissions as provided by Sections 7–5–10 and 7–13–70." Likewise, as initially enacted, Section 7–27–405 stated: "The Richland County Election Commission and the Richland County Board of Registration must have their members appointed and powers of their board and commission as provided by Sections 7–5–10 and 7–13–70."

South Carolina Code Annotated § 7-5-10 authorized the Governor to appoint members of county boards of registration, with the advice and consent of the Senate. South Carolina Code Annotated § 7-13-70 authorized the Governor to appoint county commissioners of election, "upon the recommendation of the senatorial delegation and at least half of the members of the House of Representatives from the respective counties." *Id.*

Three years later, at the urging of the Richland County legislative delegation, including these Respondents, the General Assembly enacted and the Governor signed Act 17 of 2011, which merged the Richland County Election Commission and the Richland County Board of Voter Registration into one body known as the Board of Elections and Voter Registration for Richland County (*Id.*, p. 5). Act 17 changed the way the Chairman of the Board was appointed and reappointed, provided for a minimum budget for the newly formed Board, changed the way that persons were appointed to this body, and established various other criteria for the subsequent appointments and retention of the members of this Board (*Id.*). Act 17 of 2011 also abolished the Richland County Board of Voter Registration and the Richland County Election Commission (*Id.*).

The Attorney General had repeatedly warned the Respondent Senators that this Act and others like it were plainly unconstitutional. In addition to the letter to Senator

McConnell in 2007, (Op. S.C. Atty. Gen., August 14, 2007 (2007 WL 3244888)) and the previous opinion cited therein, in 2012, the Attorney General issued a third opinion, this one to Senator John L. Scott, Jr. (one of the Respondents in this action) concerning Act 17 of 2011, the Act at issue in this case, and reiterated his opinion that Act 17 of 2011 was likewise unconstitutional (2012 WL 6061812).

> We do not address herein the constitutionality of Act 17 of 2011 under Art. VIII, § 7 of the South Carolina Constitution, which prohibits "laws for a specific county ...." However, we note that in an Opinion, dated August 14, 2007, we concluded that **a similar local law**, Act 127 of 2003, a statute which abolished the Charleston County Board of Voter Registration and the Charleston County Election Commission and created instead the Board of Elections and Voter Registration for Charleston County **was likely unconstitutional** as being in violation of Art. VIII, § 7. See *Op. S.C. Atty. Gen.*, August 14, 2007 (2007 WL 3244888).

(2012 WL 6061812, n. 2) (emphasis added).

Statement of the Case

Respondents accepted service of process in this action on November 21, 2012. The Attorney General opinion to Sen. John L. Scott, Jr., on this legal issue was dated four days later on November 25, 2012. Thus, three times the Attorney General has issued opinions, and once specifically to one of these Respondents, that such legislation was unconstitutional. Instead of heeding the Attorney General's warnings, the Respondent Senators chose to burden the Petitioners with the unnecessary expense of litigating the unconstitutionality of Act 17 of 2011.

In representing the State in this action, the Attorney General did not dispute that Act 17 was unconstitutional. (R. p. 32, par. 15 and 17).

The Circuit Court ruled that Act 17 of 2011 was unconstitutional, violating Article VIII, § 7 of the Constitution: "No laws for a specific county shall be enacted" (R. p. 10). The Circuit Court also found that Act 17 violated Article III, § 34's restriction on special legislation: "The General Assembly . . . shall not enact local or special laws. . . . IX. . . . Where a general law can be made applicable, no special law shall be enacted . . . ." S.C. Constitution, Article III, § 34" (R. p. 11).

Petitioners moved the Court pursuant to SCRCP 54, S.C. CODE ANN. § 15-37-10 and § 15-77-300 for costs and attorneys' fees. (R. pp. 79-104).

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

S.C. CODE ANN. § 15-77-300.

Respondent Senators opposed the motion (R. pp. 105-111). Respondents argued that § 15-77-300 does not apply to them. Respondents argued that they were legislatively immune from the payment of attorneys' fees. Respondents failed to plead the affirmative defense of legislative immunity in their Answer; nevertheless Petitioners will address legislative immunity.

Respondents did not object to the amount of the attorneys' fees claimed by the Petitioners, nor did they object to any particular entry or fact in the affidavits in support of the motion for attorneys' fees (R. pp. 105-111).

The Circuit Court denied Petitioners' Motion for Attorneys' Fees. The Circuit Court ruled that section 15-77-300 does not apply to members of the General Assembly, even in their official capacities. The Circuit Court also ruled that the members of the General Assembly were legislatively immune from a recovery for attorneys' fees and costs under sections 15-77-300 and 15 37-10. Petitioners moved the Court, pursuant to SCRCP 59, to alter or amend its Order, and the Court denied the Motion.

The Court of Appeals affirmed the denial of Petitioners' Motion for Attorneys' Fees, also ruling that § 15-77-300 applied **only to subdivisions of the Executive Department** of State government and did not apply to Respondents; and that Respondents were legislatively immune from an award of attorneys' fees and costs under § 15-77-300.

Petitioners respectfully petition this Court to rule that S.C. CODE ANN. § 15-77-300 is not limited to subdivisions of the Executive Department of State Government, but applies to the Respondent Senators, and that legislative immunity does not prevent an award of costs and attorneys' fees under § 15-77-300.

ARGUMENT IN SUPPORT OF PETITION

This Court should grant the Petition for Writ of Certiorari. SCACR 242(b) lists five "considerations governing review" to grant a Petition for Writ of Certiorari. The third consideration is: "Where the decision of the Court of Appeals is in conflict with the prior decision of the Supreme Court." Petitioners respectfully suggest that the decision of the Court of Appeals conflicts with several prior decisions of this Court.

I. THE COURT OF APPEALS DECISION CONFLICTS WITH MANY DECISIONS OF THIS COURT.

The decision of the Court of Appeals has essentially two holdings: § 15-77-300 applies only to subdivisions of the Executive Department; and legislative immunity bars an award under § 15-77-300. These holdings conflict with many prior rulings of this Court.

A. The Court of Appeals Decision is in Conflict with *Lehman v State* as it Defines "State Agency."

The Court of Appeals ruled that § 15-77-300 applied only to a "state agency," and the Court of Appeals defined "agency" as a subdivision of the Executive Department of State government. In so ruling, the Court of Appeals ruled in conflict with *Layman v. State*, 376 S.C. 434, 446, 658 S.E.2d 320, 326 (2008). This Court in Layman awarded attorneys' fees under § 15-77-300 against the State itself and against the Retirement System.

In the case at bar, Petitioners brought this action against the State itself, by naming the Senators as Defendants in their official capacities. Petitioners did not bring this case against private parties, but against members of the South Carolina General Assembly in their official capacities (R. p. 22, par. 3), and the Senators admitted that they were sued in their official capacities (R. p. 34, par. 3). Suing a Senator in his official capacity is simply another way of naming the Senate or the State of South Carolina as a Defendant. "Official

capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent." *Monell v. New York City Department of Social Services*, 436 U.S. 658 n. 55, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Petitioners alleged nothing against the individual Respondents for any personal misconduct. Accordingly, the Senators were named only in their official capacities, for actions taken as Senators.

> In *Kentucky v. Graham,* 473 U.S. 159, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985), the Court sought to eliminate lingering confusion about the distinction between personal- and official-capacity suits. We emphasized that official-capacity suits "'generally represent only another way of pleading an action against an entity of which an officer is an agent.'" *Id.,* at 165, 105 S.Ct. at 3104 (*quoting Monell v. New York City Dept. of Social Services,* 436 U.S. 658, 690, n. 55, 98 S.Ct. 2018, 2035, n. 55, 56 L.Ed.2d 611 (1978)). **Suits against state officials in their official capacity therefore should be treated as suits against the State**. 473 U.S., at 166, 105 S.Ct., at 3105.

Hafer v. Melo, 502 U.S. 21, 25, 112 S.C. 358, 361, 116 L.Ed.2d 301 (2000) (emphasis added). "Personal-capacity suits, on the other hand, seek to impose individual liability upon a government officer for actions taken under color of state law." *Id.* Petitioners did not seek compensatory or punitive damages from the Respondent Senators. Petitioners sought merely a declaratory judgment that Act 17 of 2011 was unconstitutional, an official capacity lawsuit.

South Carolina courts have awarded fees against other public officials (**not** members of the Executive Department) acting in their official capacities under S.C. Code Ann. § 15-77-300. *Heath v. County of Aiken*, 302 S.C. 178, 394 S.E.2d 709 (1990) (Court awarded attorney's fees under § 15-77-300 against the County and County Council members); *Eargle v. Horry County*, 344 S.C. 449, 545 S.E.2d 276 (2001) (Court awarded attorney's fees under § 15-77-300 against the County and County Administrator); *Simpkins v. City of Gaffney*, 315 S.C. 26, 431 S.E.2d 592 (1993) (Court awarded attorney's fees

under § 15-77-300 against the City, City Council members, and City Administrator). Thus, an award of fees against the Senators in their official capacities would not be unprecedented or even unusual.

Because the case at bar was against Respondents in their official capacities, it was against the State. *Hafer v. Melo*, (*supra*). In *Layman v. State*, the Supreme Court upheld an award of attorneys' fees against the State itself under § 15-77-300, and reasoned as follows:

> The Retirement System is a named party in the caption of this case, and moreover, the Court specified that **both entities would be liable** when it directed the circuit judge to determine the issue of whether attorneys' fees were to be "taxed as court costs **against the State of South Carolina and the South Carolina Retirement System**" under the state action statute. *Layman v. State,* S.C. Sup.Ct. Order dated June 1, 2006 (368 S.C. at 648, 630 S.E.2d at 274).
>
> In our view, separating the **liability of the State** and the Retirement System is simply an attempt by these parties to bar any potential for a fee award, and this Court refuses to compartmentalize the **actions of the State** and the Retirement System in this manner. Instead, we believe the overriding principle of **the state action statute** is that as a state agency, the Retirement System is obligated to carry out the instructions **of the State**. Furthermore, as a governing body, **the State is ultimately responsible** for the actions of its agencies. That the statute plainly recognizes this principle is exhibited by the language purporting to apply to cases in which a party is "**contesting state action**." S.C. CODE ANN. § 15-77-300. For this reason, we find the attempt to parse the actions of the State and the Retirement System unpersuasive, and therefore hold that **either the State or the Retirement System may be liable for attorneys' fees under the statute**.

Id., 376 S.C. 434, 446, 658 S.E.2d 320, 326 (2008) (emphasis added). Section 15-77-300 applies to civil actions "brought by **the State** . . . or a party who is contesting **state action**," *Id.* (emphasis added).

Like the Petitioners here, the plaintiffs in *Layman* challenged an unconstitutional Act of the General Assembly:

> [P]laintiffs filed an action in the circuit court against the State of South Carolina ("State") and the South Carolina Retirement System ("Retirement System") in response to the enactment of the State Retirement System Preservation and Investment Reform Act ("Act 153"). Act 153 amended the Teachers and Employee Retention Incentive (TERI) program and the Working Retiree program by requiring TERI participants and Working Retirees to make pay-period contributions of their salaries into the Retirement System when the statutes codifying these programs did not previously require them to do so.

Id., 376 S.C. 434, 441, 658 S.E.2d 320, 323-24 (2008) (footnotes omitted).

The Supreme Court awarded attorneys' fees as "court costs" under S.C. CODE ANN. § 15-77-300 to Petitioners who successfully challenged an unconstitutional Act of the General Assembly. *Layman v. State*, 376 S.C. 434, 658 S.E.2d 320 (2008). If the State *itself* can be held liable for attorneys' fees under § 15-77-300 for its litigation conduct, then surely the Senators in their official capacities, as the State, can be held liable.

B. The Court of Appeals Decision Conflicts with *Layman v State* as it Applies to Legislative Immunity.

The Court of Appeals ruled that the Respondent Senators were performing their legitimate legislative activity in **enacting** the unconstitutional act and were therefore immune to § 15-77-300. The requested award of attorneys' fees is **not** based on the conduct of the Senators acting as legislators and **enacting** an unconstitutional act; but rather it is based on the conduct of the Senators in **defending an indefensible lawsuit**. As in *Layman*, "the substantial justification inquiry in this case is based solely on the State's and the Retirement System's **maintenance of litigation** in which they defended a breach of their contract with the TERI participants." *Layman v. State*, 376 S.C. 434, 447, 658 S.E.2d 320, 327 (2008) (emphasis added). The Court in *Layman* reasoned further:

> [T]he factual circumstances surrounding the **enactment** of Act 153 are **irrelevant** in deciding whether substantial justification existed for the State's and the Retirement System's defense of Act 153's contractual

> validity in the underlying litigation. The circuit judge's finding that the State's enactment of Act 153 lacked substantial justification was not only **completely unrelated to the relevant inquiry** in this case, it also unnecessarily implicated separation of powers principles which recognize that the authority to carry out the legislative process rests exclusively with the legislature. Although a court may issue the final judgment with regard to the constitutionality or enforceability of a law currently in effect, there is no similar judicial authority for reviewing the basis for the legislature's enactment of a law in the first instance. *See Keyserling v. Beasley,* 322 S.C. 83, 86, 470 S.E.2d 100, 101 (1996) ("We do not sit as a super legislature to second guess the wisdom or folly of decisions of the General Assembly."). For these reasons, **the actions of the General Assembly in passing Act 153 into law was an incorrect basis on which to find a lack of substantial justification**.

Id. at 376 S.C. 434, 449-450, 658 S.E.2d 320, 328 (2008) (emphasis added). It is the action of the Respondent Senators in this litigation that justifies an award of attorneys' fees.

In *Layman*, the Supreme Court emphasized that it was the Defendants' **conduct in the litigation** that produced Defendants' liability under § 15-77-300. "[T]he substantial justification inquiry in this case is based solely on the State's and the Retirement System's **maintenance of litigation** in which they defended a breach of their contract with the TERI participants." *Layman v. State*, 376 S.C. 434, 447, 658 S.E.2d 320, 327 (2008) (emphasis added). The Court in *Layman* reasoned further:

> In deciding whether a state agency acted with substantial justification, **courts must only determine whether the agency's position in litigating the case has a reasonable basis in law and in fact**. *Id.* at 542, 405 S.E.2d at 832. For this reason, the factual circumstances surrounding the enactment of Act 153 are irrelevant in deciding whether substantial justification existed for the State's and the Retirement System's **defense** of Act 153's contractual validity **in the underlying litigation**.

Id. at 376 S.C. 434, 449, 658 S.E.2d 320, 328 (2008) (emphasis added).

The Respondent Senators had abundant prior notice that the Act was unconstitutional. The Attorney General agreed with the Petitioners that Act 17 of 2011 was unconstitutional (R. p. 32, par. 15 and 17). The Attorney General had also issued three

prior opinions on essentially the same question, each time concluding that the act in question was unconstitutional. The Senators had access to the Attorney General opinions, just as did the Petitioners. The Circuit Court found the Act to violate two separate provisions of the South Carolina Constitution (R. pp. 2-11). As State officers, Respondents took a solemn oath to uphold the South Carolina Constitution, yet the Senators persisted in defending an unconstitutional Act.

Section § 15-77-300 targets "acting without substantial justification in **pressing [a] claim**," rather than legislating, *Id.* (emphasis added). If the Respondent Senators had admitted that the Act was unconstitutional, the fees would not have been incurred. This stonewalling is exactly what § 15-77-300 is designed to prevent and remedy. Defending a patently unconstitutional Act falls outside the "discharge of their legislative duty" and "legislative acts," but rather constitutes "acting without substantial justification in pressing its claim." *McCall,.* at 285 S.C. 243, 246, 329 S.E.2d 741, 743; S.C. CODE ANN. § 15-77-300.

In ruling that legislative immunity precludes an award of attorneys' fees as costs in this action, the Court of Appeals cited *Tenney v. Brandhove*, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951) and *Bogan v. Scott Harris*, 523 U.S. 44, 118 S.Ct. 966 (1998). *Tenney* and *Bogan* are distinguishable from the case at bar.

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

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

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

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

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

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

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

In *Tenney* and *Bogan*, the activities at issue were activities carried out as part of their legislative duties. The legislators in *Tenney* were "acting in the sphere of legitimate legislative activity." *Id.*, 341 U.S. 367, 376, 71 S.Ct. 783, 788. In *Bogan*, the Defendants were accused of proposing, voting on, and signing a piece of legislation to eliminate the plaintiff's governmental position, all inherently "legislative activities," and defendants were entitled to absolute legislative immunity.

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

There are other reasons why legislative immunity does not apply to the Respondent Senators. First, legislative immunity is a privilege or exemption for a legislator sued in his individual capacity. Respondents were sued in their official capacities as representatives of the government of South Carolina. *Hafer v. Melo*, 502 U.S. 21, 25, 112 S.C. 358, 361, 116 L.Ed.2d 301 (2000). Second, legislative immunity prevents an award of compensatory or punitive damages. The Plaintiffs did not seek compensatory or punitive damages from these Senators. Plaintiffs sought only declaratory judgment to challenge the constitutionality of an Act of the General Assembly. Third, legislative immunity is an affirmative defense which these Respondent Senators failed to plead, and it should be

deemed waived. Legislative immunity does not prevent an award of attorneys' fees, awarded as costs in this action.

Section 15-77-300 applies to civil actions "brought by **the State** . . . or a party who is contesting **state action**" *Id.* (emphasis added). The State includes the Senate. The South Carolina Constitution, Art. III, § 1 grants legislative power of this State to the General Assembly, consisting of the House of Representatives and the Senate. Thus, an Act of the General Assembly is a State action.

Petitioners possess a common law and constitutional right to challenge an unconstitutional Act of the General Assembly. The policy promoted by § 15-77-300 encourages South Carolinians to challenge unlawful governmental actions in court. Reimbursing citizens' litigation costs when they prevail encourages the citizens to pursue legitimate public interest actions and discourages governments from defending the indefensible in court. Accordingly, the policy behind § 15-77-300 supports a ruling that the legislative immunity defense does not apply.

C. The Court of Appeals Decision Conflicts with This Court's Award of Attorneys' Fees in *Sloan v. Wilkins.*

In 2005, Mr. Sloan successfully challenged an unconstitutional act of the General Assembly. The Defendants were the Speaker of the House in his official capacity and the President of the Senate in his official capacity. The President Pro Tempore intervened as a Defendant. Mr. Sloan prevailed, and the Court declared the Life Sciences Act unconstitutional in large part. *Sloan v. Wilkins*, 362 S.C. 430, 608 S.E.2d 579 (2005).

The full title of that case was:

Edward D. SLOAN, Jr., individually, and as a Citizen, Resident,
Taxpayer and Registered Elector of South Carolina,
and on behalf of all others similarly situated, Petitioners,
v.
David H. WILKINS, in his officially capacity as Speaker of the
S.C. House of Representatives, R. Andre Bauer in his official capacity as
Lt. Governor and President of the S.C. Senate,
and the State of South Carolina, Respondents.

Glenn F. McConnell, in his capacity as President Pro Tempore of the
South Carolina Senate, Intervenor.

Id.

The Supreme Court awarded Mr. Sloan costs and attorneys' fees, implicitly rejecting legislative immunity (R. pp. 138-39). Mr. Sloan received a check dated May 12, 2005, for $1,432.01 from the House of Representatives, and a check dated May12, 2005 for $1,432.02 from the Senate (R. p. 140). He also received a third check dated August 17, 2005, was for accumulated interest on the judgment for fees and costs (R. p. 140). Accordingly, legislative immunity did not prevent an award of costs and attorneys' fees when Sloan successfully challenged an unconstitutional act.

A court possesses statutory power to award court costs to or from any litigant under Section 15-37-10.

> In **every civil action** commenced or prosecuted in the courts of record in this State, except cases in chancery, the attorneys for the plaintiff or defendant shall be entitled to recover costs and disbursements of the adverse party . . . , **such costs to be allowed as of course** to the attorneys for the plaintiff or defendant and all officers of the court thereto entitled accordingly as the action may terminate and to be inserted in the judgment against the losing party. **In cases in chancery the same rule as to costs shall prevail** unless otherwise ordered by the court.

S.C. CODE ANN. § 15-37-10 (emphasis added).

Under S.C. CODE ANN. § 15-77-300 "the court may allow the prevailing party to recover reasonable attorney's fees to be taxed **as court costs**" against representatives of

the State who have pursued unjustified litigation, *Id.* (emphasis added). In the case at bar, the Senators are not legislatively immune from the payment of costs or attorneys' fees.

The Court of Appeals failed to address the Supreme Court's prior award of costs and attorneys' fees to Mr. Sloan when he challenged an unconstitutional act of the General Assembly, *Sloan v. Wilkins*, 362 S.C. 430, 608 S.E.2d 579 (2005).

D. The Court of Appeals Decision Conflicts with This Court's Award of Attorneys' Fees in *South Carolina Public Interest Foundation v. Lucas.*

The Court of Appeals decision also conflicts with this Court's recent ruling in *South Carolina Public Interest Foundation v. Lucas*, Appellate Case Number 2015-001443. This Court awarded costs and attorneys' fees under § 15-77-300. Petitioners submitted to the Court of Appeals a copy of that ruling and copies of the checks evidencing payment from the Speaker of the House, the President of the Senate, and the President pro tem of the Senate. The Court of Appeals failed to address that ruling, and its decision conflicts with this Court's award.

The Court of Appeals' rulings on both the definition of State action and on legislative immunity is in conflict with the Supreme Court orders that the House and the Senate officials pay costs and attorneys' fees to Mr. Sloan in 2005 and again on August 25, 2016 under § 15-77-300. Furthermore, in response to both awards, both the South Carolina House of Representatives and the South Carolina Senate and their officers **paid the award** of costs and attorneys' fees to Mr. Sloan and the South Carolina Public Interest Foundation without protest and without making a Motion to Alter or Amend the judgment of fees and costs. If § 15-77-300 had not applied to these Respondents, or if these Respondents had been legislatively immune from such an award, surely they would have raised an objection.

E. The Court of Appeals Decision Conflicts with Many Other Decisions of This Court in the Definition of "State Agency."

The Court of Appeals ruled that § 15-77-300 applied only to a "state agency," that the Court of Appeals defined as a subdivision of the Executive Department of State government. In so ruling, the Court of Appeals ruled in conflict with many decisions from this Court that have awarded attorneys' fees under this statute against **many entities** that are not part of the Executive Department of State government. *Heath v. County of Aiken*, 302 S.C. 178, 394 S.E.2d 709 (1990) (Court awarded attorney's fees under § 15-77-300 against the County and County Council members); *Eargle v. Horry County*, 344 S.C. 449, 545 S.E.2d 276 (2001) (Court awarded attorney's fees under § 15-77-300 against the County and County Administrator); *Simpkins v. City of Gaffney*, 315 S.C. 26, 431 S.E.2d 592 (1993) (Court awarded attorney's fees under § 15-77-300 against the City, City Council members, and City Administrator); *see also Cornelius v. Oconee County*, 369 S.C. 531, 633 S.E.2d 492, 497 (2006)(Court ordered attorneys' fees against the County under § 15-77-300).

The entire purpose of § 15-77-300 is to award attorneys' fees against a State actor who unjustifiably maintains litigation against a private party. The statute explicitly allows attorneys' fees to any party that is in litigation against "**the State or any political subdivision of the State**." *Id.* "The State" itself is subject to the statute. *Layman v State*. However, contrary to the holding of the Court of Appeals, "the State" is not a subdivision the Executive Department. Similarly, the statute specifically applies to a "political subdivision of the State," but a "political subdivision of the State" is not a subdivision of the Executive Department. Accordingly, the interpretation adopted by the Court of Appeals cannot be correct.

The term "the appropriate agency" cannot be limited to a subdivision of the Executive Department, but rather must include those entities specifically listed earlier in the statute: "the State [or] any political subdivision of the State." § 15-77-300 (A). Accordingly, this statute applies to these Respondents, and the Court of Appeals' decision holding that the statute applies only to subdivisions of the Executive Department of State government conflicts with many prior decisions of this Court.

II. PETITIONERS SATISFY THE STATUTORY CRITERIA.

A citizen must prove three elements to claim attorneys' fees under § 15-77-300: (1) the citizen must be the prevailing party; (2) the "state or political subdivision" must have acted without substantial justification; and (3) no special circumstances would have made the award of attorney's fees unjust. *Heath v. County of Aiken,* 302 S.C. 178, 394 S.E.2d 709 (1990); *Richland County v. Kaiser*, 351 S.C. 89, 567 S.E.2d 260 (Ct. App. 2002). Petitioners satisfied these three criteria.

A. Petitioners Are Prevailing Parties.

The Circuit Court found that Act 17 of 2011 violates Article VIII, § 7 of the Constitution: "No laws for a specific county shall be enacted" (R. p. 9). The Circuit Court also found that Act 17 violates Article III, § 34's restriction on special legislation: "The General Assembly . . . shall not enact local or special laws. . . . IX. . . . Where a general law can be made applicable, no special law shall be enacted . . . ." S.C. Constitution, Article III, § 34. Act 17 fails to state or relate to any reason why a general law could not address those matters. (R. pp. 10-11). With these two rulings, the Petitioners are prevailing parties.

B. Respondents Acted Without Substantial Justification.

Respondent Senators acted without substantial justification in pressing their claims in this lawsuit, with the knowledge of three opinions of the Attorney General that Act 17 was unconstitutional. In analyzing this element, courts look to whether the "state or political subdivision" had a reasonable basis in law and fact. *Video Gaming Consultants, Inc. v. South Carolina Dept. of Revenue*, 358 S.C. 647, 595 S.E.2d 890 (Ct. App. 2004).

Respondents did not have a reasonable basis in law and fact. Act 17 applied only to Richland County. The Senators are under no constitutional or statutory mandate to defend an Act that is so clearly unconstitutional. Like the defendants in *Cornelius v. Oconee County*, these Respondents "cited **no viable authority** supporting [their] position" that the Act was constitutional, and therefore in this litigation, they "acted **without substantial justification.**" *Id.*, 369 S.C. 531, 633 S.E.2d 492, 497 (2006) (emphasis added). Respondents had no mandate to defend the indefensible. Respondents were not "substantially justified" in pressing their claims in this lawsuit, and an award of attorneys' fees is warranted.

C. No Special Circumstances Make an Award of Fees Unjust.

No special circumstances make an award of fees unjust. Petitioners brought this action to uphold the Constitution. The State benefits when civic-minded citizens bring such actions. "It is very commendable that public-spirited citizens should endeavor to protect the taxpayers of a county from the efforts of an accommodating fiscal court to make unauthorized and unlawful appropriations of public funds." *Shillito v. City of Spartanburg*, 214 S.C. 11, 26, 51 S.E.2d 95 (1948), *quoting Fox v. Lantrip*, 169 Ky. 759, 185 S.W. 136, 139. The Court continued, "Citizens should be encouraged to bring suits like these." Petitioners' action benefitted the citizens of South Carolina by upholding the Constitution.

Accordingly, Petitioners meet the qualifications for an award of attorneys' fees under S.C. CODE ANN. § 15-77-300.

III. PETITIONERS' ACTUAL ATTORNEYS' FEES AND COSTS WERE REASONABLE.

Petitioners incurred total attorneys' fees and costs of $33,824.57 in pursuing this matter in the Circuit Court. Petitioners' counsel attached an affidavit, a supplemental affidavit, and statements documenting attorneys' fees and costs (R. pp. 86-104). The Respondent Senators did not object to any specific entry claimed as Petitioners' attorneys' fees, nor did they argue that the total fee claimed was unreasonable in any way (R. pp. 105-111). Petitioners' actual attorneys' fees and costs were reasonable, and Petitioners are entitled to an award of attorneys' fees and costs.

The statute sets out the criteria for a finding of reasonableness of the attorneys' fees.

> (B) Attorney's fees allowed pursuant to subsection (A) must be limited to a reasonable time expended at a reasonable rate. Factors to be applied in determining a reasonable rate include:
>
> (1) the nature, extent, and difficulty of the case;
> (2) the time devoted;
> (3) the professional standing of counsel;
> (4) the beneficial results obtained; and
> (5) the customary legal fees for similar services.
>
> The judge must make specific written findings regarding each factor listed above in making the award of attorney's fees. However, in no event shall a prevailing party be allowed to shift attorney's fees pursuant to this section that exceed the fees the party has contracted to pay counsel personally for work on the litigation.

S.C. Code Ann. § 15-787-300(B). *See also, Burton v. York County Sheriff's Dept.*, 358 S.C. 339, 357, 594 S.E.2d 888, 898 (Ct. App. 2004) *citing Jackson v. Speed*, 326 S.C. 289, 486 S.E.2d 750 (1997), and *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 494 (1993). Petitioners satisfied these criteria.

First, as to the nature, extent and difficulty of the case, Petitioners brought this action and spent significant time, effort and money challenging these Senators to uphold the Constitution.

Second, as to the time necessarily devoted to the case, as shown by the affidavit of Petitioners' counsel, Petitioners spent significant time in proving the unconstitutional nature of the Act.

Third, Petitioners' counsel are experienced attorneys of high professional standing and well known to the courts of this State. *See, inter alia, South Carolina Public Interest Foundation v. Lucas*, 416 S.C. 269, 786 S.E.2d 124 (2016); *South Carolina Public Interest Foundation v. South Carolina Transportation Infrastructure Bank*, 403 S.C. 640, 744 S.E.2d 521 (2013); *American Petroleum Institute v. S.C. Dep't of Revenue*, 382 S.C. 572, 677 S.E.2d 16 (2009); *South Carolina Public Interest Foundation v. Harrell*, 378 S.C. 441, 663 S.E.2d 52 (2008); *Sloan v. Department of Transportation*, 379 S.C. 160, 666 S.E.2d 236 (2008); *Sloan v. Hardee,* 371 S.C. 495, 640 S.E.2d 457 (2007); *Sloan v. Department of Transportation*, 365 S.C. 299, 618 S.E.2d 876 (2005); *Sloan v. Wilkins,* 362 S.C. 430, 608 S.E.2d 579 (2005); *Sloan v. Sanford,* 357 S.C. 431, 593 S.E.2d 470 (2004); *Sloan v. Greenville County,* 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003); *Sloan v. School District of Greenville County*, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000).

Fourth, Petitioners obtained beneficial results. Upholding the Constitution was the Petitioners' objective. Furthermore, Petitioners' litigation benefits every citizen by requiring the General Assembly to comply with the Constitution.

Fifth, as to the customary legal fees for similar services, Petitioners have presented Counsel's affidavit supported by detailed time records showing that Plaintiff incurred

attorneys' fees and costs. Petitioners respectfully suggest that based upon counsel's affidavit and the Court's familiarity with attorney fees customarily charged in this legal community, the time spent and the hourly rates requested by Counsel are reasonable. In fact, Plaintiff's Counsel have discounted their normal rates due to the public interest nature of this litigation. The Court should find that Petitioners' actual attorneys' fees and costs were reasonable, and that Petitioners are entitled to a full award of attorneys' fees and costs.

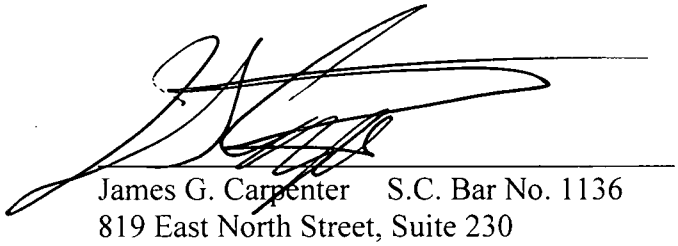
CONCLUSION

The decision of the Court of Appeals conflicts with *Layman v. State*, 376 S.C. 434, 446, 658 S.E.2d 320, 326 (2008), two decisions awarding fees from members of the General Assembly in their official capacities, and many more decisions awarding of attorneys' fees and costs under § 15-77-300 to litigants against cities, counties, and their officers. The statute applies to these Respondents, as they were acting for the State.

Petitioners have met the statutory criteria for an award of fees. Respondents made no objection to any particular entry, nor to the amount of the fees claimed. Petitioners' attorneys' fees are reasonable.

Wherefore, Petitioners pray the Court to issue a writ of certiorari, reverse the rulings of the Court of Appeals, and award Petitioners their actual attorneys' fees and costs from the Respondent Senators in their official capacities.

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



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July 13, 2017

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

Appellate Case No. 2014-001412

Certificate of Service

The undersigned attorney hereby certifies that he has served a copy of the foregoing Petition for Writ of Certiorari on counsel for Respondents by US Mail, postage prepaid on this 17 day of July, 2017, to the following persons:

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