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. 2017-001556

---



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.

---

# REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

---

August 22, 2017

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

Other Counsel of Record:
Kenneth M. Moffitt
P.O. Box 142
Columbia, SC 29202
Attorney for Respondent Senators

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

Petitioners submit this Reply in Support of Petition for Writ of Certiorari pursuant to SCACR 242(g) to address points in the Respondent Senators' Return to the Petition for Writ of Certiorari ("Return").[1]

## I. THE SENATORS ASSERT THAT LEGISLATION DOES NOT CONSTITUTE STATE ACTION.

In what may be their most unusual argument, the Senators contend that an Act of the South Carolina General Assembly, is not "state action" under § 15-77-300 (Return, p. 12). The heading II.B. in the Return states, "LEGISLATIVE ACTION . . . DO NOT CONSTITUTE A STATE ACTION" [sic] (Return, p. 12).

The Senators contend, "The General Assembly does not engage in state action but instead empowers an official or agency to undertake state action" (Return, pp.12-13). Again, at the end of this argument, the Senators assert, "in exercising its legislative duties, the Senate does not act on behalf of the state." (Return, p.16). The Senators concede that no court has adopted such an unusual holding, but they contend that the issue of whether an Act of the General Assembly is "state action" is something that "must be part of the analysis by the Court."

Petitioners respectfully suggest that the reason that Respondents could not find in the authority on this point "addressed in . . . any other cases that Respondents reviewed" (Return, p. 12) is that the point is obvious beyond disputation: an Act of the South Carolina General Assembly is a South Carolina "state action." The South Carolina Constitution states, "The legislative power of this State shall be vested in two distinct branches, the

[1] Respondents state that they were served with the Petition for Writ of Certiorari on July 13, 2017 (Return, p. 3). Under SCACR 242(f), the Return was due August 12. The Court stamped the Return as Received August 15, 2017.

one to be styled the 'Senate' and the other the 'House of Representatives,' and both together the "General Assembly of the State of South Carolina." S.C. Const. Art. III, § 1. It is "the legislative power of the State" that enacted the unconstitutional Act addressed in this litigation.

## II. RESPONDENTS PRESENT NO SUBSTANTIAL JUSTIFICATION TO DEFEND THE CONSTITUTIONALITY OF ACT 217 OF 2011.

Respondents contend that costs and attorneys' fees under S.C. Code Ann. §15-77-300 are not authorized because they were "substantially justified" in defending Act 217 of 2011 (Return, pp.16-19). Respondents admit that the standard is whether they had a "reasonable basis in law and fact" for their defense (Return, p.17). The main component missing in the Senators' argument is any authority to validate or justify the constitutionality of Act 217 of 2011. It clearly violates two sections of the Constitution. First it violates Article VIII, § 7 of the Constitution: "No laws for a specific county shall be enacted" (R. p. 10). Second, it 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." In this litigation, the Attorney General, representing the State of South Carolina, agreed that Act 17 was unconstitutional. The Circuit Court found the Act unconstitutional, in violation of both Article VIII, § 7 and Article III, § 34 (R. p. 11).[2] The Senators did not appeal this ruling, and they have not presented any authority that would have justified their legal position in this litigation. Accordingly, an award of attorney's fees is entirely appropriate.

[2] It is undoubtedly a scrivener's error, but the Senators recount that the Circuit Court granted *Respondents'* motion to find Act 17 unconstitutional (Return, p. 2), when clearly it was *Petitioners'* motion.

Next, the Senators rely on the presumption of constitutionality for an Act of the General Assembly. However, this Court has often found Acts the General Assembly to be unconstitutional. Accordingly, the presumption of constitutionality is rebuttable. Respondents concede the existence and relevance of three Attorney General Opinions indicating that Act 17 was unconstitutional.

Finally the Senators assert that S.C. Code Ann. 15-77-300(A)(2) defines "substantial justification" as following "a statutory or constitutional mandate that has not been invalidated by a court of competent jurisdiction." However, they failed to identify any "statutory or constitutional mandate" requiring the Senators to enact an unconstitutional Act, or to defend an unconstitutional Act.

## III. THE ABUSE OF DISCRETION STANDARD DOES NOT APPLY TO AN ERROR OF LAW.

The Senators contend that "the Court of Appeals did not **abuse its discretion** in deciding that Section 15-77-300 does not apply to the Respondents" (Record, pp.22-23) (emphasis added). Nevertheless, the Senators concede that an error of law is an abuse of discretion. (Record, p.22). Both the Circuit Court and the Court of Appeals ruled that Section 15-77-300 does not apply to the Respondents. That is not a discretionary ruling; it's an interpretation of the law, an **erroneous** interpretation of the law, as demonstrated herein. Accordingly, the deference applicable to an abuse of discretion standard is not applicable here. This Court reviews lower court decisions for errors of law, such as the one in this case. Clearly, Section 15-77-300 does apply to the Respondents; and this Court has awarded attorneys' fees against members of the General Assembly, in their official capacities, on two previous occasions. *Sloan v. Wilkins*, 362 S.C. 430, 608 S.E.2d 579 (2005); *South Carolina Public Interest Foundation v. Lucas*, 416 S.C. 269, 786 S.E.2d 124

(2016). Such an award is legally authorized under appropriate circumstances. These awards demonstrate that Respondents are not immune from an award of costs and attorneys' fees.

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

The Senators subtly misstate the Petitioners contention regarding legislative immunity. They state, "According to Petitioners, Respondents' defense of the Act is what *obviates legislative immunity* and should lead to the award of attorney's fees." Return, p. 6 (emphasis added). Petitioners do not contend that Respondents' improper defense in this case "*obviates* legislative immunity." Petitioners contend that legislative immunity **has no application** to award of attorney's fees under S.C. Code Ann. § 15-77-300.

### A. Legislative Immunity applies to legislative actions not litigation actions.

Legislative immunity applies to **legislative** actions, not **litigation** actions. An award of attorneys' fees is based on unsupported litigation, not legislative actions. The attorneys' fees statute, § 15-77-300, does not authorize attorneys' fees to be paid for acts of legislative discretion, and the Petitioners are not seeking attorneys' fees for acts of legislative discretion.

The Respondents attempted to defend the indefensible. Such conduct is the explicit statutory reason for an award of attorneys' fees under § 15-77-300. Legislative immunity does not prevent an award of attorneys' fees under this section.

In the case at bar, the award of attorneys' fees would not be based on any legislative activity of the Respondents. Rather, the award of attorneys' fees is a part of an award of

costs, and derives not from legislative activity, but from the Respondents' **conduct in litigation**. Legislative immunity does not apply in this context.

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

Another reason why legislative immunity does not apply to the Respondent Senators is that legislative immunity is a privilege or exemption for a legislator sued in his **individual** capacity. Respondents were sued in their **official** capacities as representatives of the government of South Carolina. Second, legislative immunity prevents an award of compensatory or punitive damages. The Plaintiffs did not seek compensatory or punitive damages from these Senators. Plaintiffs sought only declaratory judgment to challenge the constitutionality of an Act of the General Assembly. Petitioners respectfully suggest that legislative immunity does not prevent an award of attorneys' fees, awarded as costs in this action.

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

The South Carolina Constitution does not contain a speech and debate clause, as does the U.S. Constitution, but it does grant a constitutional exemption from civil litigation to **individual** members of the General Assembly while that body is in session. South Carolina Constitution, Art. III, § 14. That section provides an affirmative defense that must be pled, and if it is not pled timely, it is waived. *Eaddy v. Eaddy*, 283 S.C. 582, 584, 324 S.E.2d 70 (1984). The Court ruled that the defendant had waived his privilege. Likewise, these Respondents failed to plead legislative immunity as an affirmative defense in their Answer, and therefore this affirmative defense is waived. After the Respondents litigated the merits of the case and lost, a tardy claim of legislative immunity does not bar an award of costs, including attorneys' fees under § 15-77-300.

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

## V. RESPONDENTS ARE "THE STATE" AND LIABLE FOR AN AWARD OF ATTORNEY'S FEES.

Pursuant to S.C. Code Ann. § 15-77-300, attorneys' fees can be awarded as costs against "the State or any political subdivision of the State." The Court of Appeals ruled that fees can be awarded only against an agency of the Executive Department. By focusing on "agency" or "appropriate agency" instead of "the State or any political subdivision of the State," under the Court of Appeals' analysis, the tail is wagging the dog. This statute gives a right to fees to anyone litigating with "the State or a political subdivision of the State."

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

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

Under the plain language of the statute, the **State itself** can be liable for attorneys' fees under S.C. Code Ann. § 15-77-300. Furthermore, the statute explicitly contemplates that a **political subdivision** can be liable for attorneys' fees under this section. Accordingly, the term "agency" or "appropriate agency" must mean something other than a subdivision in the Executive Department, as the Court of Appeals ruled.

This Court awarded attorneys' fees against **the State itself** in *Layman v State*, 376 S.C. 434, 658 S.E.2d 320 (2008). The State itself is not a subset of the Executive Department. Accordingly, the terms "agency" and "appropriate agency" are generic terms must refer back to the statutory language in the previous section: "the State or any political subdivision of the State." That construction is the only one that makes sense in the context of the statute.

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

If the State itself can be liable for attorneys' fees under § 15-77-300, then certainly the Senate and the Respondent Senators in their official capacities can be liable for attorneys' fees under § 15-77-300. *See Layman v State*, 376 S.C. 434, 658 S.E.2d 320 (2008).

## CONCLUSION

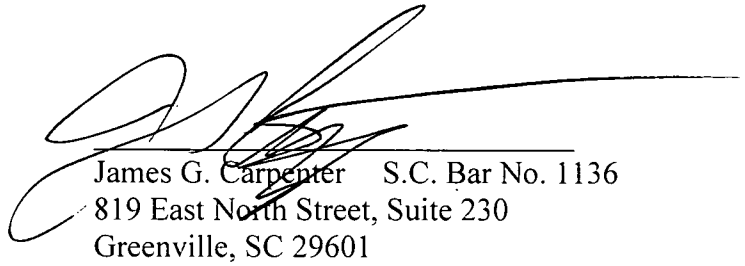
Act 17 of 2011 is "state action." Act 17 of 2011 violated two provisions of the South Carolina Constitution, and the Respondent Senators presented no authority justifying the constitutionality of Act 17. Accordingly, they did not have a good faith basis in fact and law for defending this lawsuit. The presumption of constitutionality is a rebuttable presumption, Petitioners fully rebutted that presumption, and Respondents presented no argument against it.

The lower courts' rulings refusing to apply Section 15-77-300 to the Respondent Senators was not an exercise of discretion; it was an error of law. Section 15-77-300 authorizes an award of attorneys' fees against the State itself and political subdivisions, not merely subdivisions of the Executive Department. If fees can be awarded against the State, they can certainly be awarded against the Respondent Senators in their official capacities.

Legislative immunity does not bar declaratory judgment; nor does it bar an award of costs and attorneys' fees against Respondents in their official capacities, for their conduct in litigation.

Finally, the Supreme Court has twice awarded Petitioners attorneys' fees and costs against members of the General Assembly. Accordingly, Petitioners pray the Court to reverse the judgments of the lower courts, and award Petitioners their attorneys' fees and costs.

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



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

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

---

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

---

Appellate Case No. 2017-001556

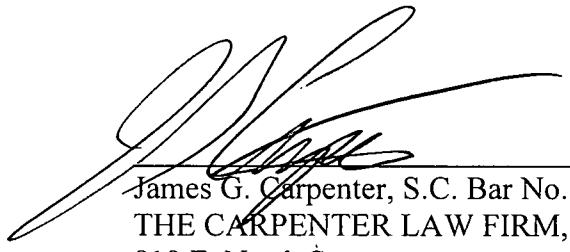
---

**Certificate of Service**

The undersigned attorney hereby certifies that he has served a copy of the foregoing Reply in Support of Petition for Writ of Certiorari on counsel for Respondents by US Mail, postage prepaid on this August 22, 2017, to the following persons:

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

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



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