THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No. 2017-CP-40-01638

RECEIVED

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SC Court of Appeals

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

v.

The South Carolina House of Representatives, The South Carolina Senate, The Honorable James H. "Jay" Lucas, as Speaker of the South Carolina House of Representatives, The Honorable Hugh K. Leatherman, in his Capacity as President Pro Tempore of the South Carolina Senate, and The State of South Carolina, ... Respondents.

APPELLANTS' INITIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

I. DID APPELLANTS STATE A CLAIM THAT ACT 275 VIOLATES THE SOUTH CAROLINA CONSTITUTION?

II. DO APPELLANT POSSESS PUBLIC IMPORTANCE STANDING AND TAXPAYER STANDING?

III. WERE RESPONDENTS' MOTIONS TO DISMISS PREMATURE?

STATEMENT OF THE CASE

Appellants South Carolina Public Interest Foundation and Edward D. Sloan, Jr. filed suit against the South Carolina House of Representatives, the South Carolina Senate, their presiding officers, and the State of South Carolina, alleging that Act 275 of 2016 violates S.C. Constitution Article III § 17: "Every Act . . . shall relate to but **one subject**, and that shall be **expressed** in the title".

Part I of Act 275 restructures the governance of the Department of Transportation and the State Transportation Infrastructure Bank. Part II of Act 275 addresses the funding of the Department of Transportation and provides for the issuance of $2.2 billion in new bond funding for the DOT. Part III makes other structural changes including transferring the Chief Internal Auditor of the Department of Transportation, all his associated support staff, and all associated appropriations to the State Auditor's Office. Appellants prayed the Court to declare that Act 275 violates the S.C. Constitution, III § 17 and is therefore null and void.

None of the Respondents filed an Answer. The State of South Carolina filed a Motion to Dismiss under SCRCP 12(b)(1) and (6), asserting the Appellants lacked standing, that this civil action does not present a justiciable controversy, and that Act 275 does not violate the Constitution. President *Pro Tem* Leatherman filed a Motion to Dismiss, alleging Appellants lack standing.

The Circuit Court granted the Motions to Dismiss, ruling that Appellants lacked standing, and that Appellants had "failed to state a claim under the One Subject Rule." Order entered July 6, 2017, p. 4. The Circuit Court ruled that "each section relates directly

to or in conjunction with the other sections to the subject of improving the state's transportation infrastructure system."

Appellants contend that they stated a valid claim that the Act relates to more than one subject; and second, although the General Assembly asserted that "Improving the state's transportation infrastructure system" (Act 275 of 2016, § 89) was the "one subject" of the Act, that one subject was not "expressed" in the title. Accordingly, Appellants stated a valid claim that Act 275 of 2016 violates Article III, § 17 the South Carolina Constitution.

Appellants appeal, contending that both the ruling that the Appellants lacked standing and the ruling that the Appellants have failed to state a claim for constitutional violation were in error.

ARGUMENT

I. APPELLANTS STATED A VALID CLAIM THAT ACT 275 VIOLATES THE SOUTH CAROLINA CONSTITUTION.

On June 2, 2016, Respondents enacted Act 275 of 2016. Act 275 of 2016 violates S.C. Constitution Article III, § 17: "Every Act . . . shall **relate to** but **one subject**, and that shall be **expressed in the title**." Appellants stated a valid claim that Act 275 violates both parts of S.C. Constitution Article III, § 17.

A. The Title of Act 275 states that the Act Relates to Multiple Subjects.

Appellants stated a valid claim that the title of Act 275 "expresses" more than one subject. The Title to Act 275 of 2016 uses the phrase "relating to" ten different times, indicating that the Act "relates to" at least nine different subjects. They are:

1. Restructuring the Commission of the Department of Transportation;
2. The Commission appointing the Secretary of Transportation;
3. The Joint Transportation Review Committee;
4. Annual audits of the General Assembly;
5. Requiring the approval of the Department of Transportation Commission before the Transportation Infrastructure Bank may provide loans or other financial assistance;
6. Requiring that eligible costs of a project to be at least $25 million before the Transportation Infrastructure Bank can provide a loan or other financial assistance;
7. Requiring that a portion of the motor vehicle fees be credited to the State Highway Fund;

8. Requiring nearly all tax revenues from the sale or lease of a motor vehicle be credited to the State Highway Fund; and

9. The removal Department of Transportation Commissioners by the Governor.

Because the title to Act 275 states that it relates to nine different subjects, it does not relate to "but one subject;" it violates S.C. Constitution Article, III § 17.

B. The "One Subject" Articulated by the General Assembly Is Not Expressed in the Title.

The second provision of S.C. Constitution Article III, § 17 requires that the "one subject" be "expressed in the title" of the Act. The General Assembly states in Section 89 of Act 275 that the "subject" of the Act is "improving the state's transportation infrastructure system." However, "improving the state's transportation infrastructure system" is not "expressed" in the title. **It's simply not there**. As noted above, the title states the Act "relates to" nine other subjects, but not once does the title say that Act 275 relates to "improving the state's transportation infrastructure system." Accordingly, Act 275 does not "express" the "one subject" in the title of the Act. Accordingly, it violates S.C. Constitution Article III, § 17, and the Circuit Court's decision that Act 275 "relates to "but one subject" is in error.

C. Act 275 "Relates to" More Than "One Subject."

Some parts of Act 275 relate to the Transportation Commission, some parts relate to the Secretary of Transportation, some parts relate to the Transportation Infrastructure Bank. Those are three separate entities, appointed using three different methodologies, in

our diversified government. Those three sections "relate to" multiple subjects, in violation of Article III, § 17.

Part I of Act 275 restructures the governance of the Department of Transportation and the State Transportation Infrastructure Bank; Part II of Act 275 addresses the funding of the Department of Transportation and provides for the issuance of $2.2 billion in new bond funding for the DOT; and Part III makes other structural changes including transferring the Chief Internal Auditor of the Department of Transportation, all his associated support staff, and all associated appropriations to the State Auditor's Office. The three different sections indicate at least three different subjects that the Act "relates to."

The Supreme Court ruled that changing the Governor's appointment power over the Secretary of Transportation is not "reasonably and inherently related to the raising and spending of tax monies." *South Carolina Public Interest Foundation v. Lucas*, 416 S.C. 269, 277, 786 S.E.2d 124, 129 (2016). That holding would indicate that the structural changes in Part I (restructuring) do not "relate to" the same subject as Part II (the funding).

II. APPELLANTS POSSESS PUBLIC IMPORTANCE STANDING AND TAXPAYER STANDING.

Appellants asserted both taxpayer standing and public importance standing. The courts of South Carolina have addressed these matters many times, often in relation to these Appellants. Illustrative cases include the following: *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*, 357 S.C. 495, 640 S.E.2d 457 (2007); *Cornelius v Oconee County*, 369 S.C. 531, 633 S.E.2d 492 (2006); *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), *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999), *Newman v. Richland County Historic Preservation Commission,* 325 S.C. 79, 480 S.E.2d 72 (1997). These authorities confirm that the Appellants possess both taxpayer standing and public importance standing.

Furthermore, several of these cases have granted these Appellants standing to contest other Acts of the General Assembly on similar constitutional violations of Article III, § 17. *Sloan v. Wilkins,* 362 S.C. 430, 608 S.E.2d 579 (2005); *South Carolina Public Interest Foundation v. Harrell*, 378 S.C. 441, 663 S.E.2d 52 (2008); *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. Lucas*, 416 S.C. 269, 786 S.E.2d 124 (2016). Accordingly Appellants should have been granted standing to allege this Constitutional violation.

A. Public Importance Standing Has Enjoyed a Long History in South Carolina.

The issues in this case warrant a granting of public importance standing. The doctrine of public importance standing has a long history in South Carolina.

In 1873, the South Carolina Supreme Court addressed an indictment for practicing law without a license. The Court ruled that defects in the indictment disposed of the case, but then reasoned:

> This view is sufficient to dispose of the whole case, but as both the defendant and the Attorney General have pressed this Court for a decision on the question whether the Legislature had constitutional authority to enact a tax law imposing taxes of the character imposed by the license law, and **as the question is of public importance, we will consider and decide it**.

State v. Hayne, 4 S.C. 403, 411, 4 Rich. 403 (1873) (emphasis added). The Court addressed the question and found several aspects of the statute unconstitutional.

Similarly, in *Ashmore v Greater Greenville Sewer District*, the South Carolina Supreme Court ruled that the board established to govern the Greenville Memorial Auditorium District was unconstitutionally composed. That ruling was sufficient to dispose of the case, but the Court continued:

> If this were an ordinary case, our opinion might well stop here. The Board of Trustees of the projected Auditorium District has been held invalid in toto. The district is a headless body and cannot function under the present legislation. But the case is not an ordinary one; it is not a private controversy between individuals, as such. On the contrary, it is defended by an intended governmental agency which the legislature undertook to create by their enactments; and raised on the record are earnestly argued **public questions of importance**. The last stated factor brings into play the principle, **now generally established, that questions of public interest originally encompassed in an action should be decided for future guidance**, however abstract or moot they may have become in the immediate contest. 3 Am.Jur. 310, Annotation, 132 A.L.R. 1185.

Id. 211 S. C. 77, 95, 44 S.E.2d 88, 96-97 (1947) (emphasis added).

The South Carolina Supreme Court rendered a holding similar to *Ashmore* in *City of Columbia v. Sanders*, 231 S.C. 61, 97 S.E.2d 210 (1957). *Sanders* was a declaratory judgment action addressing the municipal merger of Columbia and Eau Claire and their water systems. The case raised questions about Columbia's revenue bonds issued to fund further expansion of the water system. At the conclusion of the opinion, the Supreme Court stated:

> We have been in considerable doubt as to whether the pleadings present a

> proper case for any kind of declaratory relief. But since **the rule requiring the existence of a justiciable controversy is somewhat relaxed where the public interest is involved**, Anderson, Declaratory Judgments, Second Edition, Volume I, Section 63, and Volume II, Sections 686, 707, 709 and 714, we have decided to make the foregoing limited declaration with respect to the issuance of further revenue bonds.

97 S.E.2d 213 (emphasis added). The Supreme Court repeated this holding in *State ex rel McLeod v. McGinnis*, 278 S.C. 307, 311, 295 S.E.2d 633, 635 (1982): "We held that where the public interest is involved, the rule requiring the existence of a justiciable controversy is somewhat relaxed." See also, *Palmer v. Dunn,* 216 S.C. 558, 559, 59 S.E.2d 158, 159 (1950) ("This Court took original jurisdiction of the controversy because of its urgency and public importance"); *Thompson v. South Carolina Commission on Alcohol and Drug Abuse*, 267 S.C. 463, 467, 229 S.E.2d 718, 719, 85 A.L.R.3d 692 (1976) ("the rule [of standing] is not an inflexible one, and we are of the opinion that the questions involved are of such wide concern, both to law enforcement personnel and to the public, that the court should determine the issues in this declaratory judgment action"); *Gilstrap v. South Carolina Budget & Control Bd.,* 310 S.C. 210, 213, 423 S.E.2d 101, 103 (1992) ("[T]he questions involved here are of such wide concern that the rules on standing will not be inflexibly applied").

The doctrine that the Court should decide questions of public importance has been recognized at least as far back as 1873. By 1947 the principal was "generally established," and since 1947, South Carolina Courts have repeatedly applied the doctrine particularly when a civil action alleges the **unconstitutionality** of an Act or governmental action. *South Carolina Public Interest Foundation v. Lucas*, 416 S.C. 269, 786 S.E.2d 124 (2016) (an Act of the General Assembly violated the Constitution by relating to more than one

subject); *South Carolina Public Interest Foundation v. South Carolina Transportation Infrastructure Bank*, 403 S.C. 640, 744 S.E.2d 521 (2013) (unconstitutionality of the governance of the State Transportation Infrastructure Bank); *American Petroleum Institute v. S.C. Dep't of Revenue*, 382 S.C. 572, 677 S.E.2d 16 (2009) (an Act of the General Assembly violated the Constitution by relating to more than one subject); *South Carolina Public Interest Foundation v. Harrell*, 378 S.C. 441, 663 S.E.2d 52 (2008) (an Act of the General Assembly violated the Constitution by relating to more than one subject); *Sloan v. Wilkins*, 362 S.C. 430, 608 S.E.2d 579 (2005) (an Act of the General Assembly violated the Constitution with by relating to than one subject); *Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004) (allegation that the Governor violated the Constitution by possession of a commission from another power).

The South Carolina Supreme Court has ruled many times that public interest standing should be granted to address issues of great public importance. *South Carolina Public Interest Foundation v. South Carolina Transportation Infrastructure Bank*, 403 S.C. 640, 744 S.E.2d 521 (2013). Appellants' allegations that Act 275 is unconstitutional make this an issue of great public importance. Accordingly, the Circuit Court erred in failing to follow this body of case law; the Circuit Court erred in refusing to grant public importance standing to Appellants to enable them to raise these issues of great public importance.

B. Taxpayer Standing Has Enjoyed a Long History in South Carolina.

All Appellants have paid County and State taxes. Accordingly, each Appellant possesses standing as a taxpayer to contest the unconstitutional Act.

Taxpayer standing has a long history in South Carolina, and an even longer history in other states and in federal courts. The Circuit Court, though presented with these authorities, simply chose to ignore them.

More than 125 years ago, in *Mauldin v City Council of Greenville*, the South Carolina Supreme Court recognized taxpayers' standing to contest allegedly illegal or *ultra vires* actions of a city. 33 S.C. 1, 11 S.E. 434 (1890). The City argued against taxpayer standing: "The individual tax-payer, as such merely, can obtain a standing in court only by alleging and proving that the illegal act complained of will inflict damage special and peculiar to himself, etc." The South Carolina Supreme Court rejected that presumption and reasoned,

> Can it be that, in such case, a number of citizens, tax-payers of a city, cannot be heard against the corporate authorities in a court of equity asking for an injunction against the consummation of the contemplated wrongs, without alleging special damages to themselves individually? There is a certain relation in the nature of agency between the municipal authorities and all taxpayers of the corporation.
>
> * * *
>
> Here **the tax-paying citizens** of Greenville are not the whole public, but comparatively a small part of it. They are not strangers to the municipality. **They, and they alone, are affected by their acts**. As to them this is more in the nature of "a private" than "public" matter.

Id. 33 S.C. 1, 11 S.E. 434, 435 (emphasis added). The South Carolina Supreme Court ruled, "We think the plaintiffs had a standing in court, and were entitled to have their case heard on its merits." Id. 11 S.E. at 436.

In Mauldin, the South Carolina Supreme Court cited older South Carolina cases, and cases from Maryland, Connecticut, New Hampshire, Iowa, and Missouri, all acknowledging taxpayer standing. Finally, the Court cited Dillon on Municipal Corporations in

support of taxpayer standing. The South Carolina Supreme Court, quoting a case from Maryland, stated,

> [T]he plaintiffs "as **tax-payers** of the city, and others similarly situated, *** **constitute a class especially damaged** by the alleged unlawful act of the corporation, in the alleged increase of the burden of taxation upon their property situated within the city. The complainants have therefore a special interest in the subject-matter of the suit, **distinct from that of the general public**;"

Id., *quoting Mayor, etc., v. Gill*, 31 Md. 375-394 (emphasis added).

The United States Supreme Court has also recognized taxpayer standing.

> [R]esident taxpayers may sue to enjoin an illegal use of the moneys of a municipal corporation. *Roberts v. Bradfield*, 12 App. D. C. 453, 459, 460. **The interest of a taxpayer of a municipality in the application of its moneys is direct and immediate** and the remedy by injunction to prevent their misuse is not inappropriate. It is upheld by a large number of state cases and is the rule of this court. *Crampton v. Zabriskie*, 101 U. S. 601, 609, 25 L. Ed. 1070. Nevertheless, there are decisions to the contrary. See, for example, *Miller v. Grandy*, 13 Mich. 540, 550. The reasons which support the extension of the equitable remedy to a single taxpayer in such cases are based upon the peculiar relation of the corporate taxpayer to the corporation, which is not without some resemblance to that subsisting between stockholder and private corporation. 4 Dillon, Municipal Corporations (5th Ed.) § 1580 et seq.

Commonwealth of Massachusetts v. Mellon, 262 U.S. 447, 486-87, 43 S.Ct. 597, 601, 67 L.Ed. 1078 (1923) (emphasis added).

Nearly 50 years before *Mellon*, the Supreme Court recognized taxpayer standing as a question so settled that there was "no serious question."

> Of the **right of resident tax-payers** to invoke the interposition of a court of equity **to prevent an illegal disposition of the moneys** of the county or the illegal creation of a debt which they in common with other property-holders of the county may otherwise be compelled to pay, **there is at this day no serious question**. The right has been **recognized by the State courts in numerous cases**; and from the nature of the powers exercised by municipal corporations, the **great danger of their abuse** and the **necessity of prompt action to prevent irremediable injuries**, it would seem **eminently proper for courts of equity to interfere** upon the application of the tax-payers of

a county to prevent the consummation of a wrong, when the officers of those corporations assume, in **excess of their powers**, to create burdens upon property-holders. Certainly, in the absence of legislation restricting the right to interfere in such cases to public officers of the State or county, there would seem to be no substantial reason why a bill by or **on behalf of individual tax-payers** should not be entertained to prevent the misuse of corporate powers. The courts may be safely trusted to prevent the abuse of their process in such cases. Those who desire to consult the leading authorities on this subject will find them stated or referred to in Mr. Dillon's excellent treatise on the Law of Municipal Corporations.

Crampton v. Zabriskie, 101 S.Ct. 601, 609, 11 Otto 601, 25 L.Ed. 1070 (1879) (emphasis added). For more than 135 years, there has been "no serious question" concerning a taxpayer's standing to bring a civil action to prevent unlawful use of taxpayer funds.

Likewise, in South Carolina, Appellants possess standing to seek an injunction against illegal and private appropriations of public assets.

The principle is firmly settled in this State that a taxpayer may maintain an action in equity, on behalf of himself and all other taxpayers, to restrain public officers from paying out public money for purposes unauthorized by law. *Sligh v. Bowers*, 62 S.C. 409, 40 S.E. 885; *Mauldin v. City Council of Greenville*, 33 S.C. 1, 11 S.E. 434, 8 L.R.A. 291; *McCullough v. Brown*, 41 S.C. 220, 19 S.E. 458, 23 L.R.A. 410; Pom.Eq.Jur., Page 277, Sec. 260; 2 Dill.Mun.Corp., Sec. 736.

Kirk v. Clark, 191 S.C. 205, 4 S.E.2d 13, 15 (1939).

The court in *Kirk v. Clark* also noted:

"Perhaps the most frequent ground of application for relief by injunction against municipal corporations is for the prevention of an illegal or unlawful diversion of public funds. . . . [Courts] will . . . relieve in behalf of citizens and taxpayers against such official acts on the part of such bodies, when they move without authority or warrant of law and in excess of the corporate powers. High on Injunctions, Vol. 2, Sec. 1237."

Id.

The South Carolina Supreme Court has repeatedly acknowledged that a private citizen has standing to contest an illegal action by a governmental body. *Shillito v. City of*

Spartanburg, 214 S.C. 11, 51 S.E.2d 95 (1948). In *Shillito*, the plaintiff sued for declaratory and injunctive relief when a tax was illegally collected. Shillito's action was aimed "(a) against the illegality of the tax; (b) against the levying of subsequent assessments under the alleged unlawful tax; and (c) against the disbursement of funds collected from such tax." The Court found that the plaintiff had standing for all three purposes.

> As a rule, private citizens may not restrain official acts when they fail to allege and prove damage to themselves different in character from that sustained by the public generally. An apparent exception to this rule exists when the Act sought to be enjoined is an unlawful diversion of public funds. 52 Am. Jur., Sec. 3, Page 3. **In such cases, a taxpayer who may be compelled to pay the assessment, or who has contributed to the sum jeopardized, is considered to have sufficient interest to enjoin the illegal Act**. The decided preponderance of authority holds that **a taxpayer** singly or in a class suit, may maintain a suit in equity to **restrain unlawful municipal action** which leads, directly or indirectly, to taxation, and that **a taxpayer**, as specially damaged by the increase of the burden of taxation on his property, **has a special interest**, distinct from the general public, in the subject matter of such a suit **which entitles him to relief**. 52 Am. Jur., Sec. 3, Page 3.
>
> **A citizen and taxpayer has standing as such to contest the expenditure of public funds** under an alleged unconstitutional statute. 52 Am. Jur., Sec. 15, Page 11. Under the foregoing authorities, we are satisfied that the action as brought can be maintained to challenge the validity of this special law **and the alleged unlawful diversion of public funds** to the designated beneficiary.

Id. at 22. (Emphasis added.) Thus, under *Shillito*, the Appellants, as taxpayers, have standing to seek declaratory and injunctive relief against an illegal expenditure.

In *Brown v. Wingard*, 285 S.C. 478, 330 S.E.2d 301 (1985), two taxpayers sued the Mayor and City Council of Greenwood because they had spent public money for expenses incurred by spouses of the Council members on a trip to the National League of Cities Convention. The taxpayers sought declaratory relief. Council members argued that the taxpayers lacked standing. The court found that the taxpayers had standing to contest the

unlawful expenditure. "As in *Lee* [*v. Clark*, 224 S.C. 138, 77 S.E.2d 485 (1953)], respondents, as taxpayers, have an interest in seeing that city officials disburse funds in a lawful manner. They have presented a justiciable controversy under the [Declaratory Judgment] Act, and the demurrer was properly overruled." 285 S.C. at 480.

Myers v. Patterson, 315 S.C. 248, 433 S.E.2d 841 (1993) is a similar holding. A plaintiff had standing as a taxpayer to contest the allegedly unlawful transfer of money collected for one purpose to a fund set up to address another purpose. The South Carolina Supreme Court ruled, "A taxpayer who . . . has contributed to the sum jeopardized, is considered to have sufficient interest to enjoin the illegal act." The Court ruled against the plaintiffs on the merits, but nevertheless found that they had standing as taxpayers to contest the illegal diversion of funds.

These cases finding taxpayer standing were not limited to acts and disbursements which violate some specific provision of the state or federal constitution. These rulings dealt in broad terms with the illegality of the actions, or the unlawful manner in which the funds were spent.

Not only does such a taxpayer have standing; such civil actions are commended by the South Carolina Supreme Court: "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.

"A taxpayer's standing to challenge unauthorized or illegal governmental acts has been repeatedly recognized in South Carolina." *Sloan v. School District of Greenville*

County, 342 S.C. 515, 520, 537 S.E.2d 299, 301 (Ct. App. 2000). Appellants have standing, under the common law, as taxpayers and citizens to seek declaratory and injunctive relief against an illegal act of the Respondents.

Appellants do not need a statutory right of action to challenge an *ultra vires* act. Appellants' standing does not originate in a statute; it arises from the equitable principles of the common law. *Shillito v. City of Spartanburg* ruled that the action was equitable, and analogous to a shareholders' derivative action. *Id.* at 214 S.C. 11, 51 S.E.2d 95 (1948),

> Suits by **tax-payers** against towns and their officers to prevent or remedy misapplication of town funds, are not only allowed by statute, but it is the prevailing doctrine in America that **tax-payers** may maintain them in the absence of a statute. Their relations to the municipality are analogous to those of stockholders to a private corporation.

Id. at 28, quoting *Russell v. Tate,* 52 Ark. 541, 13 S.W. 130, 132, 7 R.L.A. 180, 20 Am. St. Rep. 193 (emphasis added). Thus, the Respondents could not require a statutory right of action. Appellants, instead rely on the common law under which they should be granted standing.

Appellants possess standing as citizens and taxpayers to seek declaratory and injunctive relief for an *ultra vires* act. One clear statement of this rule of standing is Justice Toal's dissenting opinion in *Newman v. Richland County Historic Preservation Comm'n.*, 325 S.C. 79, 480 S.E.2d 72 (1997). The majority ruled that because the plaintiff was a member of the Commission whose actions she was attacking in court, she had no standing. If she had not been a member of the Commission whose decision she was attacking, the Supreme Court would likely have found that she had standing. The majority reasoned that other citizens' right to sue would protect the public and denied standing to Ms. Newman. The court quoted from *Control Data Corporation v. Controlling Board,* 16 Ohio App. 3d

30, 16 Ohio B. Rep. 32, 474 N.E.2d 336 (Oh. App. 1983). "Sufficient representation of the public's interest could be provided by a citizen affected by the decision of the Controlling Board and not by allowing a member of the Board to take a partisan position and challenge the outcome." *Newman,* at 83. The dissent would have granted plaintiff standing even though she was a member of the Commission.

Apart from this issue of Commission membership, Justice Toal's dissent provides a clarifying discussion of the history of citizen standing to seek declaratory and injunctive relief for *ultra vires* acts.

> Generally, a private person may not invoke the judicial power to determine the validity of executive or legislative action unless he has sustained, or is in danger of sustaining, prejudice therefrom. *Florence Morning News, Inc. v. Building Comm'n,* 265 S.C. 389, 218 S.E.2d 881 (1975). . . . **However, an exception to this rule exists for *ultra vires* acts by government officials**. For example, we have said that a court will not . . . interfere, by means of a taxpayer suit, to restrain the authorities of a county board from the exercise of their discretionary power . . . in the absence of illegality, fraud, or clear abuse of authority. *Owens v. Magill,* 308 S.C. 556, 419 S.E.2d 786 (1992) (emphasis added); *see also Ex Parte Hart,* 190 S.C. 473, 477, 2 S.E.2d 52, 53-54.
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> * * *
>
> As with most things, moderation is required. A moderate balance is achieved by granting citizens standing when they bring actions **alleging *ultra vires* acts by a governmental agency**, while denying citizens standing to challenge discretionary actions. Thus, I would find that an individual has standing to contest a governmental action if he alleges particularized *ultra vires* acts by the governmental entity. The complaint cannot be a general assertion of *ultra vires* action on the part of the governmental actor, but must identify (1) the specific act or acts that have exceeded the actor's authority, and (2) the specific constitutional, statutory, or other law that has been exceeded.

Newman v. Richland County Historic Preservation Comm'n., 325 S.C. 79, 84-85, 480 S.E.2d 72, 75-76 (1997) (emphasis added).

An authoritative case on this kind of standing is *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999). Several doctors sued Charleston County alleging that the manner in which Charleston County had voted to fund the acquisition and renovation of a hospital for the Medical University of South Carolina was *ultra vires*. The doctors alleged that to use tax exempt bonds for this purpose would violate the authorizing statutes. Charleston County moved to dismiss, arguing among other things, that the doctors lacked standing to bring the action. The trial court granted the County's motion, and the doctors appealed. The Supreme Court, in a unanimous decision, reversed the ruling on standing. Justice Toal, writing for the court, ruled that when an issue was "of such public importance as to require its resolution for future guidance," then "a court may confer standing upon a party."

> In this case, Doctors have specifically alleged that **County committed an *ultra vires* act** by exceeding its statutory authority to issue the hospital bonds. Moreover, the issuance of the hospital bonds clearly impacts a profound public interest--the public health and welfare. In fact, the express purpose of the Act is to promote the public health and welfare. *See* S.C. Code Ann. § 44-7-1420 (1985). It is hard to conceive of any greater societal interest [*16] than this one. Thus, **as citizens of Charleston County, Doctors have a significant interest in ensuring that their county acts within the legal parameters established by the legislature** for funding hospital development. Thus, by virtue of the immense public interest at stake here, Doctors have standing to bring the present action, and any further determination of imminent prejudice is unnecessary.

333 S.C. 519, 531 (emphasis added). The issues Appellants raise in this case, allegations of an unconstitutional act is also an important public issue, which calls for judicial intervention.

In *Baird v. Charleston County*, the doctors were granted standing, not because they were physicians in competition with the clinic, but rather because they were citizens of

Charleston County, they challenged an *ultra vires* act, and the matter was of profound public interest. "Thus, as citizens of Charleston County, Doctors have a significant interest in ensuring that their county acts within the legal parameters established by the legislature for funding hospital development." *Id.*

In the language cited by the Court's opinion in *Newman*, each Appellant is "a citizen affected by the decision of the [Respondent]." Lawsuits by such "citizens" provide "sufficient representation of the public's interest." *Newman, quoting Control Data Corporation v. Controlling Board,* 16 Ohio App. 3d 30, 16 Ohio B. Rep. 32, 474 N.E.2d 336 (Oh. App. 1983). Hence, each Appellant has standing as a citizen to represent the public's interest and to contest the *ultra vires* acts alleged in the Complaint.

Appellants allege standing as citizens and taxpayers. They allege that the Respondents engaged in an *ultra vires* acts, in violation of the Constitution. Just as the doctors in Charleston possessed standing to argue that the funding of the hospital acquisition was *ultra vires*, because of the profound public interest involved, these Appellants should be granted standing to contest the unconstitutional Act in this case; there is a profound public interest involved. A decision is necessary for future guidance, "and any further determination of imminent prejudice is unnecessary." *Id.*

In the case at bar, Appellants have met the burden set out in the *Newman* dissent and in *Baird.* They have identified the specific Act that is unconstitutional and the nature of the constitutional violation. They have stated a valid case, and it was error to dismiss for lack of standing.

The Circuit Court simply refused to consider all these authorities articulating the doctrines of taxpayer standing, and the cases of great public importance that have been

established in the jurisprudence of the South Carolina Supreme Court and repeatedly recognized for more than 100 years. The Circuit Court's refusal to follow these authorities was error.

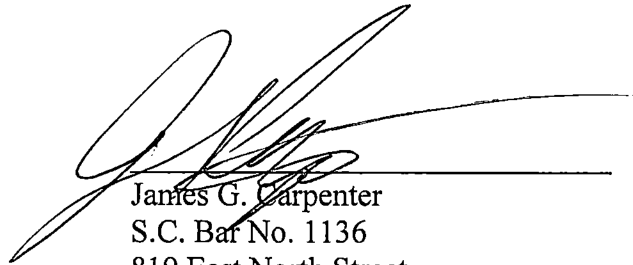
III. RESPONDENTS' MOTIONS TO DISMISS WERE PREMATURE.

Finally, the constitutionality of Act 275 is a matter that should be addressed, not on a Motion to Dismiss, but after full and fair opportunity for development of the case. Respondents did not even file Answers to the Complaint. For this reason, Respondents' Motions to Dismiss should have been denied.

CONCLUSION

Appellants pray the Court to reverse the judgment of the Circuit Court, and to grant Appellants such other and further relief as the Court deems just and proper.

Respectfully submitted,
THE CARPENTER LAW FIRM, PC



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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he served a copy of the foregoing Appellants' Initial Brief on opposing counsel by first class mail, postage prepaid, this August 25, 2017, addressed as follows:

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Respectfully submitted,
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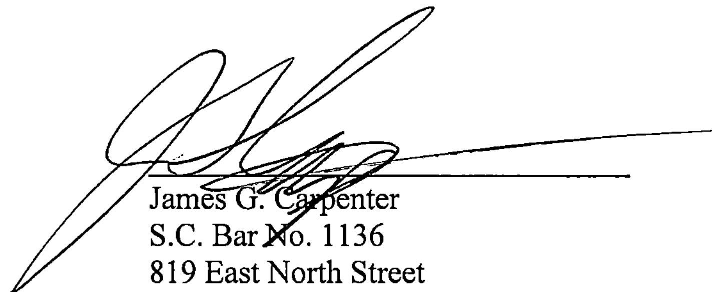

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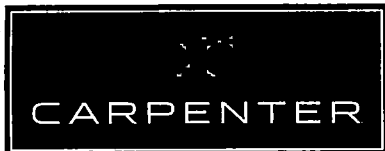

WHEN IT'S WORTH FIGHTING FOR

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August 25, 2017

RECEIVED
AUG 28 2017
SC Court of Appeals

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

Re: *South Carolina Public Interest Foundation et al. vs. S.C. House of Representatives, et al*
Case No. 2017-CP-40-00484

Dear Ms. Kitchings:

I enclose an original and one copy of the Appellants' Initial Brief and Certificate of Service in this matter. Please file-stamp the extra copy and return it to me in the enclosed postage paid envelope.

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

Sincerely yours,
THE CARPENTER LAW FIRM, PC

James G. Carpenter

Enclosures
CC w/ enclosures: J. Emory Smith, Jr.
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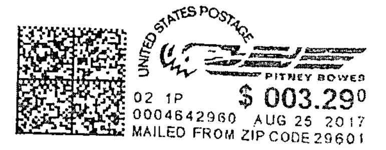

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