

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Appellate Case No. 2017-001638

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, Sr., in his capacity as President Pro Tempore
of the South Carolina Senate, and The State of South Carolina. . . . Respondents.

INITIAL BRIEF OF RESPONDENT STATE OF SOUTH CAROLINA

ALAN WILSON
Attorney General

ROBERT D. COOK
Solicitor General
S.C. Bar No. 1373

J. EMORY SMITH, JR.
Deputy Solicitor General
S.C. Bar No. 5262

Post Office Box 11549
Columbia, SC 29211
(803) 734-3680
(803)734-3677 (Fax)
esmith@scag.gov
Counsel for Respondent State

RECEIVED

NOV 17 2017

SC Court of Appeals

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES 1

ARGUMENT 1

 I APPELLANTS LACK STANDING TO BRING THIS ACTION..... 1

 A Appellants Fail to Meet Constitutional Requirements for Standing..... 2

 B Appellants Have No Public Importance Standing 4

 II. ACT 275 DOES NOT VIOLATE THE ONE SUBJECT CLAUSE 5

CONCLUSION 10

TABLE OF AUTHORITIES

Cases

<i>Alley v. Daniel</i> , 153 S.C. 217, 150 S.E. 691 (1929)	5, 6
<i>Am. Petroleum Inst. v. South Carolina Dep't of Rev.</i> , 382 S.C. 572, 677 S.E.2d 16 (2009)	6
<i>ATC S., Inc. v. Charleston Cnty.</i> , 380 S.C. 191, 669 S.E.2d 337 (2008)	1, 2, 3, 4
<i>Bodman v. State</i> , 403 S.C. 60, 742 S.E.2d 363 (2013)	1, 3
<i>Commander Health Care Facilities, Inc. v. S. Carolina Dep't of Health & Envtl. Control</i> , 370 S.C. 296, 634 S.E.2d 664 (Ct. App. 2006).....	2
<i>Dantzler v. Callison</i> , 230 S.C. 75, 94 S.E.2d 177 (S.C. 1956)	6
<i>DeLoach v. Scheper</i> , [188 S.C. 21, 198 S.E. 2d (1938)].....	8
<i>Freemantle v. Preston</i> , 398 S.C. 186, 728 S.E. 2d 40 (2012)	2, 3
<i>Frothingham v. Mellon</i> , 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078.....	3
<i>Hercules, Inc. v. S.C. Tax Comm'n</i> , 274 S.C. 137, 262 S.E.2d 45 (1980)	6
<i>Joytime Distribs. & Amusement Co. v. State</i> , 338 S.C. 634, 528 S.E.2d 647 (1999)	1
<i>Keyserling v. Beasley</i> , 322 S.C. 83, 470 S.E.2d 100 (1996)	5, 6, 9
<i>Lennon v. South Carolina Coastal Council</i> , 330 S.C. 414, 498 S.E.2d 906 (Ct.App., 1998).....	1

<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992).....	2
<i>McCollum v. Snipes</i> , 213 S.C. 254, 49 S.E.2d 12 (1948)	5, 6
<i>Poulnot v. Cantwell</i> , 123 S.E. 651 (S.C. 1924)	6
<i>Retail Services & Systems, Inc. v. South Carolina Department of Revenue</i> , 2017 WL 1162466 (S.C., 2017).....	9
<i>S.C. Pub. Interest Found. v. Lucas</i> , 416 S.C. 269, 786 S.E.2d 124 (2016)	2, 6, 7
<i>S.C. Pub. Interest Found. v. S.C. Dep't of Transportation</i> , 804 S.E.2d 854 (S.C. 2017)	3
<i>Sloan v. Sanford</i> , 357 S.C., 593 S.E.2d.....	4
<i>Sloan v. Wilkins</i> , 362 S.C. 430, 608 S.E.2d 579 (2005)	5
<i>South Carolina Public Interest Foundation v. Harrell</i> , 378 S.C. 441, 663 S.E.2d 52 (2008)	5, 6, 7, 9
<i>South Carolina Public Service Authority v. Citizens and Southern Nat. Bank of South Carolina</i> , 386 S.E.2d 775, 300 S.C. 142 (1989)	8

Statutes

Act No. 275, 2016 S.C. Acts.....	5, 7, 8, 9
S.C. Const. art. III, §17	5 - 9

STATEMENT OF ISSUES

1. Do Appellants have taxpayer or public importance standing to bring this action?
2. Does this suit present a justiciable controversy?
3. Does Act 275, 2016 S.C. Acts, violate the “one subject” clause of the Constitution?

ARGUMENT

I

APPELLANTS LACK STANDING TO BRING THIS ACTION

Standing to sue is a fundamental requirement in instituting an action.” *Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 639, 528 S.E.2d 647, 649 (1999). Under our current jurisprudence, there are three ways in which a party can acquire this fundamental threshold of standing: (1) by statute; (2) through what is called “constitutional standing”; and (3) under the public importance exception. *ATC S., Inc. v. Charleston Cnty.*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008).

Bodman v. State, 403 S.C. 60, 66-67, 742 S.E.2d 363, 366 (2013). Appellants do not claim statutory standing and have none. Although they claim that they have constitutional standing and public importance standing, Appellants have neither, as found by the the Circuit Court. They fail to address recent decisions of the Supreme Court that have narrowed taxpayer standing and public importance standing. Because Appellants lack standing, the Circuit Court lacked subject matter jurisdiction of this case. *Lennon v. South Carolina Coastal Council*, 330 S.C. 414, 417–18, 498 S.E.2d 906, 907–08 (Ct.App., 1998)(standing is an element of the constitutional requirement for a justiciable controversy).

Appellants Fail to Meet Constitutional Requirements for Standing

The principle of standing under the United States Constitution is “an essential and unchanging part of the case-or-controversy requirement of Article III.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The Supreme Court has provided a three-part test to establish standing: First, the plaintiff must have suffered an “injury in fact”—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical.’” Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be “fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court.” Third, it must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.” *Lujan*, 504 U.S. at 560–61 (internal citations omitted).

ATC, supra, 669 S.E.2d at 339. “Constitutional standing requires, at a minimum, that the party bringing the action sustain a direct injury or the immediate danger a direct injury will be sustained.” *Commander Health Care Facilities, Inc. v. S. Carolina Dep’t of Health & Envtl. Control*, 370 S.C. 296, 301, 634 S.E.2d 664, 666 (Ct. App. 2006). Appellants fail to meet these standards.

Appellants argue that they have standing as taxpayers. The Circuit Court found otherwise. R. p. * (Order at p. 3). Appellants look to earlier cases, but fail to address the more recent decisions narrowing taxpayer standing on which the Circuit Court relied, *Bodman* and *ATC, supra*, and *Freemantle v. Preston*, 398 S.C. 186, 193, 728 S.E. 2d 40, 44 (2012)¹. As stated in *Bodman*:

In *ATC*, we unanimously closed the door to a litigant asserting standing simply by virtue of his status as a taxpayer for this reason. There, we explained that “[t]he injury to ATC ... as a taxpayer is common to all property owners in Charleston County. This feature of

¹ Appellants cite *S.C. Pub. Interest Found. v. Lucas*, 416 S.C. 269, 271, 786 S.E.2d 124, 126 (2016) as a case that granted them standing, but the Opinion in that case does not address or even reference standing. Therefore, that case provides no guidance.

commonality defeats the constitutional requirement of a concrete and particularized injury.” *Id.* at 198, 669 S.E.2d at 340–41 (citing *Frothingham v. Mellon*, 262 U.S. 447, 488, 43 S.Ct. 597, 67 L.Ed. 1078 (holding that a taxpayer lacks standing when he “suffers in some indefinite way in common with people generally”)). We reaffirm this principle today and hold that Bodman’s status as a mere taxpayer is insufficient to confer standing upon him. (emphasis added).

Bodman, 742 S.E.2d at 366. The Supreme Court recently applied this case law to another case brought by Appellants and decided after they filed their initial brief in the initial appeal:

Here, Petitioners are unable to show they suffered a concrete and particularized injury distinct from that shared by other taxpayers; therefore, we find Petitioners do not have constitutional standing. *See Freemantle v. Preston*, [*supra*] (recognizing that a taxpayer’s injuries are “common to all citizens and taxpayers ... [which thereby] defeats the constitutional requirement of a concrete and particularized injury”).

S.C. Pub. Interest Found. v. S.C. Dep’t of Transportation, 804 S.E.2d 854, 858 (S.C. 2017).

Appellants fail to show how they have suffered an injury “distinct from that shared by other taxpayers.” *Id.* Instead they argue that any taxpayer can challenge any Act alleged to be *ultra vires*, but that position is not correct under current law. The above authority shows that allegations that a law is *ultra vires* are insufficient to establish standing without a finding of a “distinct injury.” In *S.C. Pub. Interest Found.* (2017), Appellants alleged that the matter at issue was *ultra vires*, but the Court still found no taxpayer standing.² The Supreme Court has “closed the door” to taxpayer standing unless a taxpayer can show a distinct injury. *Bodman*. Appellants have failed to make such a showing in the instant case just as they failed to do so in *S.C. Pub. Interest Found.* (2017). Accordingly, they lack standing as taxpayers.

² Although *S.C. Pub. Interest Found.*, (2017) did find public importance standing, that case is distinguishable as discussed *infra*.

B

Appellants Have No Public Importance Standing

The key to the public importance analysis is whether a resolution is needed for future guidance. It is this concept of “future guidance” that gives meaning to an issue which transcends a purely private matter and rises to the level of public importance. *Baird*, 333 S.C. at 531, 511 S.E.2d at 75 (“[A] court may confer standing upon a party when an issue is of such public importance as to require its resolution for future guidance.”) (citations omitted); *Sloan v. Sanford*, 357 S.C. at 434, 593 S.E.2d at 472 (“[U]nder certain circumstances, standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance.”) (citations omitted).

ATC supra, 669 S.E.2d at 341. *Bodman* recognized that the Supreme Court “tempered the application of the public importance exception somewhat in *ATC*,” yet Appellants failed to plead or reference in their briefs this “needed for future guidance” standard or even mention *ATC* or *Bodman* despite the Circuit Court’s discussion of these cases. The Circuit Court rejected public importance standing for Appellants because of their failure to plead the necessary elements of public importance standing.

In a 3-2 “close call” decision, *S.C. Pub. Interest Found.* (2017), concluded that Appellants had public importance standing to challenge the Department of Transportation’s inspection of bridges in private, gated communities. The Court found that “future guidance is needed since there is no judicial guidance addressing the issue and there is evidence SCDOT will inspect this type of property in the future.” *Id.* No such issues of ongoing agency actions are present in the instant case nor are the safety concerns that the Court found.

“For a court to relax general standing rules, the matter of importance must, in the context of the case, be inextricably connected to the public need for court resolution for future guidance.” *ATC*, 669 S.E.2d at 341. No such “inextricably connected” need exists here. Appellants’

challenge to the Act at issue under the “one subject” clause of the Constitution is patently lacking in merit, and they allege no basis upon which they or the public are harmed by the Act. *See infra*. Simply because Appellants believe that they have spotted a constitutional issue does not mean that the public needs future guidance. Others perusing the South Carolina Code of Laws might spot other statutes about which they believe issues of constitutionality exist, but simple invocation of an issue does not mean that the public needs guidance as to it. If invocation of a constitutional question were all that were necessary, then virtually every constitutional challenge would be subject to review and a showing of a need for “future guidance” would be unnecessary. Instead, the Courts have said that the need for future guidance must be shown. Appellants fail to show such a need. Therefore, they lack public importance standing.

II

ACT 275 DOES NOT VIOLATE THE ONE SUBJECT CLAUSE

S.C. Const. art. III, §17 provides that “[e]very Act or resolution having the force of law shall relate to but one subject, and that shall be expressed in the title.” As discussed in *South Carolina Public Interest Foundation v. Harrell*, 378 S.C. 441, 445–46, 663 S.E.2d 52, 54–55 (2008):

The purpose of Article III, § 17 is (1) to apprise the members of the General Assembly of the contents of an act by reading the title, (2) prevent legislative log-rolling and (3) inform the people of the state of the matters with which the General Assembly concerns itself. *Sloan v. Wilkins*, 362 S.C. 430, 608 S.E.2d 579 (2005). *See also Keyserling v. Beasley*, 322 S.C. 83, 470 S.E.2d 100 (1996). Article III, § 17 is to be liberally construed so as to uphold an Act if practicable. *Id.*; *McCollum v. Snipes*, 213 S.C. 254, 49 S.E.2d 12 (1948). Doubtful or close cases are to be resolved in favor of upholding an Act's validity. *Alley v. Daniel*, 153 S.C. 217, 150 S.E. 691 (1929). Article III, § 17 does not preclude the legislature from dealing with several branches of one general subject in a single act. It is complied with if the title of an act expresses a general subject and the body provides the

means to facilitate accomplishment of the general purpose. *Keyserling*. However, Article III, section 17 requires that “the topics in the body of the act [be] kindred in nature and hav[e] a legitimate and natural association with the subject of the title,” and that the title conveys “reasonable notice of the subject matter to the legislature and the public.” *Hercules, Inc. v. S.C. Tax Comm'n*, 274 S.C. 137, 141, 262 S.E.2d 45, 47 (1980).

Abrogated as to severability, *Am. Petroleum Inst. v. South Carolina Dep't of Rev.*, 382 S.C. 572, 677 S.E.2d 16 (2009), modified as to severability by *South Carolina Public Interest Foundation v. Lucas*, 416 S.C. 269, 271, 786 S.E.2d 124, 126, (2016); *see also*, *South Carolina Public Interest Foundation v. Lucas*, *supra*.

“As used in this section of the Constitution, ‘subject’ is the thing legislated about, or the matter or matters upon which the legislation operates, to accomplish a definite object, or objects reasonably related one to the other.” *Poulnot v. Cantwell*, 123 S.E. 651 (S.C. 1924). “The purpose of this section is to prevent deception of the public and to prevent insertion of matters not germane to the general subject.” *Dantzler v. Callison*, 230 S.C. 75, 94 S.E.2d 177, 185 (S.C. 1956).

The Supreme Court has set forth guides for the application of the one subject clause. That clause “is to be liberally construed so as to uphold the Act if practicable. *Harrell, supra*, citing *McCollum v. Snipes*, 213 S.C. 254, 49 S.E.2d 12 (1948). Doubtful or close cases are to be resolved in favor of upholding an Act's validity. *Alley v. Daniel*, 153 S.C. 217, 150 S.E. 691 (1929)” *Keyserling, supra*. As stated in *Dantzler, supra*, “[t]he requirement should not be enforced in any narrow or technical spirit. It was adopted to prevent certain abuses and it should be reasonably and liberally construed on the one hand so as to guard against these abuses, and on the other hand so as not to embarrass or obstruct needed legislation.” (Emphasis added).

The Act at issue is entirely consistent with the one subject clause because it relates solely to transportation as demonstrated by its encompassing the following parts:

- Part I “Governing The Improvement of the State’s Transportation Infrastructure System” including appointment and duties of the DOT Commission and a Joint Transportation Review Committee, the appointment of the Secretary of Transportation, audits of DOT, and approval of Transportation Infrastructure Bank loans
- Part II. Funding the Improvement of the Transportation Infrastructure System including allocation of fees and fines
- Part III Transition provisions including provisions for transferring DOT auditing staff to the State Auditor, and a statement that the Act “relates directly to or in conjunction with other sections to the subject of improving the state’s transportation infrastructure system as clearly enumerated in the title

The above “topics in the body of the act” are “kindred in nature,” *Harrell, supra*, quoting *Hercules*. In fact, the Act, itself, states that “[t]he General Assembly finds that the sections presented in this act constitute one subject as required by Section 17, Article III of the South Carolina Constitution, 1895, in particular finding that each change and each topic relates directly to or in conjunction with other sections to the subject of improving the state's transportation infrastructure system as clearly enumerated in the title.” Act 275, § 89. Therefore, the “thing legislated about” (*McCollum*), the subject of the Act, is improvement of the State’s transportation infrastructure system. That subject distinguishes this case from *Lucas, supra*, which found that an Appropriations Act proviso was not germane to that Act in its suspension of a termination /

devolution provision regarding the Governor's authority to appoint the Secretary of Transportation. Act 275 is not an Appropriations Act as was the statute in *Lucas*. Its transportation subject is defined and clear. All parts of Act 275 are pertinent to that subject.

The "one subject" clause does not require the Court to "second guess" the legislature regarding an Act that clearly pertains to the subject of transportation. Going beyond the requirements of the Constitution and the authority of this Court, the effect of Plaintiffs' argument would be to require that the different parts of this Act be fragmented and passed separately. Fortunately, the Constitution does not require such action. As stated in *South Carolina Public Service Authority v. Citizens and Southern Nat. Bank of South Carolina*, 386 S.E.2d 775, 787, 300 S.C. 142, 162 (1989):

In *DeLoach v. Scheper* [188 S.C. 21, 198 S.E. 2d 409 (1938)], the Court recognized the breadth of this constitutional provision:

[T]here is a marked distinction between the object of a law and the subject of a law.

Very few enactments have but one object or purpose in mind....

DeLoach, 188 S.C. at 28, 198 S.E. at 412.

* * * * *

[T]he constitutional provision here invoked does not preclude the Legislature from dealing with several branches of one general subject in a single Act..

DeLoach, 188 S.C. at 29, 198 S.E. at 412. It would be impractical and time-consuming to require the legislature to pass a separate act on every separate branch of a subject."

Therefore, the General Assembly has properly dealt with the subject of transportation in the several parts of Act 275.

In another “one subject” case twenty years ago, the Supreme Court stated that it “did not sit as a superlegislature to second guess the wisdom or folly of decisions of the General Assembly.” *Keyserling v. Beasley, supra*, quoted in *Retail Services & Systems, Inc. v. South Carolina Department of Revenue*, 2017 WL 1162466, at *7 (S.C., 2017). The Court stated that it “must . . . follow the law and decisions heretofore set forth in this state. Doing so, [it reached] the inevitable conclusion that the “One-Subject” provision of Article III, § 17 was not violated in [that] case.” *Keyserling*.

Appellants contend that the subject is not expressed in the title. They did not clearly raise that issue in the Complaint, and it has no substantive merit. The Act states that “each topic [therein] relates directly to or in conjunction with other sections to the subject of improving the state's transportation infrastructure system as clearly enumerated in the title.” Act 275, § 89. Appellants complain that this transportation subject is not set forth in the title, but section 89 says that this subject describes the various topics enumerated in the title. As found by the Circuit Court:

The title to Act 275 clearly apprises the General Assembly of the contents of the Act and informs the people of South Carolina of the matter with which the General Assembly was concerning itself in passing Act 275. The title to Act 275 is replete with references to "Transportation" and matters directly relating to transportation, i.e., "highway fund," "resurfacing program," "road and bridge projects," etc. The title to Act 275 also specifically apprises the General Assembly and informs the people of the state of each statute that will be affected or amended by Act 275.

R. p. * (Order at p. 9). Therefore, the title meets constitutional standards. *Harrell, supra*.

The Circuit Court Judge correctly found that Act 275 is constitutional. Therefore, he properly granted the motions to dismiss on that basis as well as due to the lack of standing of the Plaintiffs to challenge that law.

CONCLUSION

For all of the foregoing reasons, the State of South Carolina respectfully requests that this Court affirm the Order of the Circuit Court.

Respectfully submitted,

ALAN WILSON
Attorney General

ROBERT D. COOK
Solicitor General
S.C. Bar No. 1373

J. EMORY SMITH, JR.
Deputy Solicitor General
S.C. Bar No. 5262

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3680
(803)734-3677 (Fax)
esmith@scag.gov

BY: 

ATTORNEYS FOR RESPONDENT STATE
OF SOUTH CAROLINA

November 17, 2017

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Appellate Case No. 2017-001638

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

RECEIVED

v.

NOV 17 2017

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, Sr., in his capacity as President Pro Tempore of the South Carolina Senate, and The State of South Carolina. . . . Respondents.

SC Court of Appeals

CERTIFICATE OF SERVICE

I hereby certify that I have served the State's Initial Brief and Designation of Matter for the Record on the other parties by mailing copies to their counsel at the addresses below via the United States Mail this November 17, 2017.

James G. Carpenter, Esquire
The Carpenter Law Firm, PC
819 East North Street
Greenville, SC 29601

Kenneth M. Moffitt, Esquire
Assistant Clerk, South Carolina Senate
P.O. Box 142
Columbia, SC 29202

Michael J. Anzelmo, Esquire
Matthew A. Abee, Esquire
Nelson Mullins Riley & Scarborough LLP
P.O. Box 11070
Columbia, SC 29211-1070

Paul D. Harrill, Esquire
Bradley S. Wright, Esquire
McNair Law Firm, P.A.
P.O. Box 11390
Columbia, SC 29211



J. EMORY SMITH, JR.,
Deputy Solicitor General



ALAN WILSON
ATTORNEY GENERAL

November 17, 2017

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
HAND DELIVERED

Re: S. C. Public Interest Foundation v. The S. C. House of Representatives, et al
Appellate Case No. 2017-001638

Dear Ms. Kitchings:

Enclosed for filing with your Office are the original Initial Brief and Designation of Matter for the Record of the Respondent State of South Carolina together with a Certificate of Service. Please confirm filing by stamping the enclosed copies of the Brief and Designation. Thank you for your assistance.

Respectfully submitted,

J. Emory Smith, Jr.
Deputy Solicitor General

cc : James G. Carpenter, Esquire
Michael J. Anzelmo, Esquire
Matthew A. Abee, Esquire
Kenneth M. Moffitt, Esquire
Paul D. Harrill, Esquire
Bradley S. Wright, Esquire

RECEIVED

NOV 17 2017

SC Court of Appeals