THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

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SC Court of Appeals

Case No. 2012-CP-10-04969

Appellate Case No. 2013-001273

South Carolina Public Interest Foundation and Waring S. Howe, Jr., individually, and on behalf of all others similarly situated, ... Appellants,

v.

Robert W. Harrell, Jr., in his official capacity as Speaker of the South Carolina House of Representatives, Glenn McConnell, in his official capacity as President of the South Carolina Senate, Representative Harry B. "Chip" Limehouse III, Senator George E. "Chip" Campsen, and the State of South Carolina, ... Respondents.

FINAL RESPONDENT'S BRIEF

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Table of Contents

Table of Authorities

CASES

RULES

OTHER AUTHORITIES

Statement of Issues on Appeal

I. **The circuit court properly found collateral estoppel bars the Foundation from maintaining any challenge to the constitutionality of Act 130.**

II. **The circuit court properly granted summary judgment because Howe failed to establish any basis for standing.**

Introduction

This matter involves one issue—namely, whether the South Carolina Public Interest Foundation ("the Foundation") and Waring S. Howe, Jr. ("Howe") possessed the standing necessary to maintain a constitutional challenge to Act 130 of 2007. The circuit court granted Speaker Harrell's motion for summary judgment, finding the Foundation and Howe lacked standing. {Order granting Speaker Harrell's Motion for Summary Judgment; R.14}. Because the standing determination constituted a threshold issue, the circuit court correctly did not rule on the merits of Appellants' claims. {Id. at p. 17; R. 30}. Appellants must plead and prove **in this action** their basis for standing. Appellants cannot merely rely on past matters in which other parties have standing. Nor can Appellants have standing simply because they raised constitutional claims. Appellants failed to meet their burden.

Respondents presented a clear and concise position in this matter. Both Appellants lacked standing. First, the Supreme Court previously ruled that the Foundation lacks standing to bring constitutional challenges to Act 130 of 2007. Therefore, collateral estoppel barred the Foundation from establishing any type of standing in this action. Second, Howe failed to introduce any evidence of standing. Thus, no issue of fact existed as to Howe's lack of standing. The circuit court correctly found the Foundation and Howe failed to put forth any evidence of standing **in this action**. This Court should affirm the grant of summary judgment to Respondents.

Statement of the Case and Facts[1]

The issues in this case relate to the Foundation and Howe's challenge to the General Assembly's passage of Act 130 of 2007. {Complaint; R. 75}. This 2011 action was not the first time the Foundation initiated a constitutional challenge to Act 130 of 2007. {Speaker Harrell's Memorandum in Support of his Motion for Summary Judgment filed February 14, 2013, at p. 401; Transcript dated February 14, 2013, p. 3-4; R. 34-35}.[2]

In 2008, the Foundation[3] first challenged the constitutionality of Act 130 of 2007 in South Carolina Public Interest Foundation v. Harrell, et al., 378 S.C. 441, 445, 663 S.E.2d 52, 54 (2008) (overruled on other grounds, American Petroleum Inst. V. SC Dept. of Rev., 382 S.C. 572, 677 S.E.2d 16 (2009)).[4] Speaker Harrell defended

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[1] Respondents combine the Statement of Case and Statement of Facts to reduce repetition and for clarity. Moreover, the circuit court granted summary judgment on the threshold issue of standing. Thus, the only facts relevant to the appeal relate to the standing issue. A lengthy summation, as presented by Appellants, of the merits of the constitutional issues, which **were not ruled on** by the trial court, is unnecessary.

[2] This Court should note that in the transcript of the summary judgment hearing in this action, the court reporter inadvertently referred to Plaintiff Howe as Plaintiff Harrell throughout the transcription when, in fact, all counsel stated Plaintiff Howe. See Transcript p. 4, lines 9, 23; p. 5, lines 7, 9, 24; p. 6, line 4; p. 7, line 20; p. 8, line 4, 10, 18, 25; p. 9, line 8; p. 15, line 2; p 16, line 24; R. 34-40, 46-47. Each of these references is a typographical error. Counsel for Harrell and Limehouse each clearly stated, and were referring to, Plaintiff Howe at the hearing. This Court should substitute "Howe" for "Harrell" in each of those instances. Also, that error persists when counsel for Appellants argues. See Transcript p. 10, lines 8, 13; p. 11, line 19; p. 14, line 5; R. 41-42, 45. Again, this Court should substitute "Howe" for "Harrell" in each of those instances. Also, an additional error exists on page 26, lines 14, 16, 18, and 20; R. 57. Each time counsel said "abstentions" the reporter transcribed as "extensions." This is error and should read "abstentions."

[3] The Foundation was a petitioner in that action along with Edward D. Sloan, Jr. As petitioners, the Foundation challenged the constitutionality of Act 130 of 2007 along with other acts from that legislative year. Speaker Harrell also challenged the standing of Petitioner Sloan. The Supreme Court found Petitioner Sloan also lacked standing to challenge Act 130. Petitioner Sloan is not a party to the present action.

[4] The Supreme Court's holding in American Petroleum did not affect or even address the 2008 holding that the Foundation lacked standing to challenge the constitutionality of the Act.

the 2008 constitutional challenge to Act 130 of 2007 by dedicating seven pages of his return arguing, inter alia, that the Foundation lacked the standing to challenge Act 130. {Speaker Harrell's Memorandum in Support of his Motion for Summary Judgment at p. 4; Transcript p. 3; R. 404, 34; see also Harrell, 378 S.C. at 445 n.1, 663 S.E.2d at 54 n.1}. The Supreme Court fully weighed the standing defense, analyzed the Foundation's contrary position, and ultimately ruled the Foundation lacked standing to challenge Act 130 of 2007. {Speaker Harrell's Memorandum in Support of his Motion for Summary Judgment at p. 4; Transcript p. 3; R. 404, 34}. Specifically, the court held that:

> We decline to address Petitioners' contention that 2007 Act Nos. 130 . . . constitute special laws in violation of the South Carolina Constitution, Article III, § 7, and Article III, § 7. **Petitioners lack standing to challenge those acts**. Sloan v. Sanford, 357 S.C. 431, 593 S.E.2d 470 (2004) (as a general rule, a litigant must have a personal stake in the subject matter of the litigation to have standing); Blandon v. Coleman, 285 S.C. 472, 330 S.E.2d 298 (1985) (private person may not invoke the judicial power to determine the validity of executive or legislative action unless he has sustained, or is in immediate danger, of sustaining prejudice therefrom).

Harrell, 378 S.C. at 445 n.1, 663 S.E.2d at 54 n.1 (emphasis added)

Over three years later, the Foundation and Howe initiated the instant action by filing a petition for original jurisdiction in the Supreme Court again alleging that Act 130 of 2007 and the manner in which it was passed violated several constitutional provisions. {Petition for Original Jurisdiction dated November 1, 2011; R. 464}. Speaker Harrell opposed the petition for original jurisdiction and argued the Foundation and Howe lacked standing to maintain the challenge to Act 130 of 2007. {Speaker

Harrell's Return to Petition for Original Jurisdiction; R. 504}. The Supreme Court ultimately denied the petition for original jurisdiction. {Order denying Petition for Original Jurisdiction; R. 533}.

The Foundation and Howe then filed the action in the Court of Common Pleas for Richland County. {Complaint dated February 27, 2012; R. 68}. In the Complaint, Plaintiffs rely on Plaintiff Howe's status as a taxpayer of Charleston County as the basis for standing. {Complaint ¶___; R. 68}. Plaintiffs did not plead any proper basis for statutory standing or standing under the public importance exception. {Complaint; R. 68. All Respondents timely answered. {Answers of Speaker Harrell, Representative Limehouse, Answer of the State, and Answer of then Lieutenant Governor Ard and then Senator McConnell; R. 92, 75, 81, 87}.[5] Speaker Harrell and Representative Limehouse asserted the Foundation and Howe lacked standing to maintain the action. {Answer of Speaker Harrell ¶ 29; R. 97; Answer of Representative Limehouse ¶ 32; R. 79}.

Representative Limehouse thereafter moved to transfer venue to the Court of Common Pleas for Charleston County. {Representative Limehouse's Motion to Transfer Venue; R. 104}. Speaker Harrell joined in that request. {Transcript of Hearing dated July 10, 2012, citations omitted from Record on Appeal per agreement

[5] Appellants originally named former Lieutenant Governor Ken Ard and then Senator McConnell as defendants in their official capacities as president of the South Carolina Senate and as vice chairman of the Charleston County Legislative Delegation, respectively. {Complaint dated February 27, 2012; R. 68}. By consent order filed October 30, 2012, current Lieutenant Governor McConnell, as president of the South Carolina Senate, substituted for former Lieutenant Governor Ard. {Id.}. Senator George E. "Chip" Campsen, as current vice-chairman of the Charleston County Legislative Delegation, substituted for Lieutenant Governor McConnell. {Id.}.

with Appellants' counsel}. The court granted the motion to transfer venue on July 26, 2012. {Order granting Motion to Transfer dated July 26, 2012; R. 2}.

Thereafter, the Foundation and Howe moved for summary judgment on the merits of the constitutional claims.[6] {Appellants' Motion for Summary Judgment dated July 10, 2012; R. 113}. The circuit court continued the motion to allow the parties to engage in necessary discovery. {Transcript dated October 22, 2012; citations omitted from Record on Appeal per agreement with Appellants' counsel}. Discovery revealed that Howe did not suffer any individualized injury. {Exhibits A, B, and C to Speaker Harrell's Memorandum in Support filed February 14, 2013; Memorandum in Support p. 12; R. 412, 421, 423, 424}. Moreover, Howe testified he was added to this action solely to rectify the fact that the Supreme Court adjudicated in 2008 that the Foundation lacked the standing needed to bring this action. {Exhibits D and E to Speaker Harrell's Memorandum in Support filed February 14, 2013; Memorandum in Support p. 13-14; R. 425-426}. The Foundation admitted in discovery that it pays the legal fees incurred by Howe in this action. {Exhibit F to Speaker Harrell's Memorandum in Support filed February 14, 2013; Memorandum in Support p. 14; R. 414, 428}. Lastly, Howe admitted that (1) he was aware Act 130 of 2007 shortly after it passed, (2) he knew the members of the Charleston Legislative Delegation were placed on the Charleston Aviation Authority, and (3) he failed to take any action until 2011. {Exhibits G, H,

[6] Speaker Harrell and Representative Limehouse also each filed a memorandum in opposition to the Foundation and Howe's motion for summary judgment. {Speaker Harrell's Memorandum in Opposition dated February 14, 2012; Representative Limehouse's Memorandum in Opposition dated February 8, 2012; R. 322, 374}. Representative Limehouse filed an affidavit in opposition as well. {Affidavit of Representative Limehouse dated February 15, 2012; R. 393}.

and I to Speaker Harrell's Memorandum in Support filed February 14, 2013; Memorandum in Support p. 15-18; R. 415-418}.

Speaker Harrell filed a motion for summary judgment, arguing the Foundation and Howe lacked standing to maintain the constitutional challenges to Act 130 of 2007.[7] {Speaker Harrell's Amended Motion dated October 19, 2012; Memorandum in Support, with all Exhibits, filed February 14, 2013; R. 308, 401}. At the hearing on the motion, Representative Limehouse, Lieutenant Governor McConnell, and Senator Campsen, all agreed that the Foundation and Howe lacked standing. {Transcript dated February 14, 2014, p. 6, 7, 8; 18; R. 37, 38, 39; 49}. The State concurred as well. {Order granting Speaker Harrell's Motion for Summary Judgment p. 2; R. 15}.

The circuit court found the Foundation and Howe lacked standing to maintain the action and granted Speaker Harrell's motion for summary judgment. {Order Granting Motion for Summary Judgment; R. 14}. As to the Foundation, the circuit court found the Supreme Court ruled in the 2008 action that the Foundation lacked standing to raise a constitutional challenge to Act 130 of 2007. {Id. at p. 5-7; R. 18-20}. Thus, the circuit court found the Foundation was collaterally estopped from maintaining a challenge to Act 130 of 2007 in this matter. {Id.; R. 18-20}. As to Howe, the circuit court found he failed to establish standing for three reasons. {Id. at p. 8-17; R. 21-30}. First, Howe failed to plead any statutory basis for standing, and

[7] Initially, Speaker Harrell filed the motion as one for judgment on the pleadings. {Speaker Harrell's Amended Motion; Speaker Harrell's Memorandum in Support of Motion; R. 308, 401}. At the same hearing in which the circuit court continued Appellants' motion to allow discovery, the court denied Speaker Harrell's motion only as to the pleadings but with leave to re-file as a motion for summary judgment. {Order denying Motion for Judgment on the Pleadings dated October 24, 2012; R. 7}. The circuit court heard Speaker Harrell's motion after close of discovery and granted summary judgment because the Foundation and Howe lacked standing. That order is the order on appeal.

Act 130 of 2007 does not provide a basis for standing.[8] {Id. at p. 8-9; R. 21-22}. Second, the circuit court found that Howe failed to establish constitutional standing and that his status as a taxpayer does not alter that result. {Id. at p. 9-14; R. 22-27}. Third, Howe failed to plead or prove standing under the public importance exception. {Id. at p. 15-17; R. 28-30}. The circuit court declined "to rule on any other issues in this action[,]" including the merits of the Foundation and Howe's claims. {Id. at p. 17; R. 30}. The Foundation and Howe did not file any Rule 59(e), SCRCP, or other motion to reconsider. This appeal followed. {Notice of Appeal; R. 535}.

Standard of Review

In reviewing a grant of summary judgment, the appellate court applies the same standard as the trial court under Rule 56(c) of the South Carolina Rules of Civil Procedure. Quail Hill, LLC v. Cnty. of Richland, 387 S.C. 223, 234, 692 S.E.2d 499, 505 (2010). A motion for summary judgment should be granted where the Court is satisfied that "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP.

A party opposing a motion for summary judgment must "do more than simply show that there is some metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a **genuine issue for trial**." Hedgepath v. AT&T Co., 348 S.C. 340, 354, 559 S.E.2d 327, 335 (Ct. App. 2001) (quoting

[8] As discussed in section II, infra, Appellants do not raise any arguments that the circuit court erred in finding statutory standing does not exist. Appellants limit the appeal to taxpayer standing or public importance standing. {Appellants' Br. p. 6}.

Baughman v. AT&T Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991)) (internal quotes omitted and emphasis in original). "[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." Hedgepath, 348 S.C. at 355, 559 S.E.2d at 336. (citing Pye v. Aycock, 325 S.C. 426, 480 S.E.2d 455 (Ct. App. 1997)).

Moreover, reliance on the allegations in a pleading is insufficient to overcome a motion for summary judgment. Rule 56(e), SCRCP. "Instead [the] response to the motion must set forth specific facts, admissible in evidence . . ." in order to survive the motion for summary judgment. Moody v. McLellan, 295 S.C. 157, 367 S.E.2d 449 (Ct. App. 1988) (citing Rule 56(e), SCRCP).

A plaintiff's own self-serving statements, without more, are insufficient to create a genuine issue of material fact. See Brown v. Pearson, 326 S.C. 409, 420, 483 S.E.2d 477, 483 n.6 (Ct. App. 1997) (disregarding conclusory statements in a brief opposing summary judgment). Likewise, statements of counsel cannot be used in the determination of whether a genuine dispute of material fact exists. See, e.g., Higgins v. Med. Univ. of S. Carolina, 326 S.C. 592, 599, 486 S.E.2d 269, 272 (Ct. App. 1997) (holding that "factual statements of the attorneys, whether made during argument or in written briefs or memoranda, ordinarily may not be considered by the court in determining whether a genuine issue of material fact exists").

Argument

The Foundation and Howe's arguments to this Court can be summarized in one sentence—standing exists merely because the action involves constitutional challenges to a statute. In fact, their brief dedicates seventeen (17) pages arguing the merits of the

constitutional claims.[9] {Appellants' Br. p. 6-23}. This is not the test for standing and misses the point on the basis on which the circuit court found the Foundation and Howe lacked standing. The Foundation lacked standing because the Supreme Court previously ruled the Foundation lacked standing to challenge Act 130 of 2007. Moreover, the argument ignores the fact that Howe introduced **no evidence** to establish any basis for standing or to allow application of the public importance exception to standing. The only evidence before the circuit court established that the Foundation and Howe both lacked standing to maintain the challenges to Act 130 of 2007. Finally, the fact that the Foundation and/or other plaintiffs have been granted standing under the public importance exception in other matters does not establish the standing exists **in this matter**.

I. The circuit court properly found collateral estoppel bars the Foundation from maintaining any challenge to the constitutionality of Act 130.

The Foundation alleges the circuit court erred in finding as a matter of law that collateral estoppel bars the Foundation from claiming it has standing to challenge Act 130 of 2007. {Appellants' Brief p. 30-36}. These arguments lack merit. The Supreme Court unequivocally adjudicated and ruled in 2008 that the Foundation lacked the standing necessary to challenge the constitutionality of Act 130 of 2007. Therefore, the circuit court correctly found that collateral estoppel bars the Foundation from maintaining, in this action, any challenge to the constitutionality of Act 130 of 2007. This Court should affirm.

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[9] In fact, the brief reads like a motion for summary judgment on the merits of the case. However, the circuit court expressly declined to rule on the merits of the constitutional claims. {Order Granting Motion for Summary Judgment p. 17; R. 30}. The sole issue before this Court is whether the Foundation and Howe lack standing to challenge Act 130 of 2007.

a. The circuit court properly found the Supreme Court's 2008 standing ruling satisfied all elements necessary for the application of collateral estoppel.

In 2008, the Foundation first challenged the constitutionality of Act 130. South Carolina Public Interest Foundation v. Harrell, 378 S.C. 441, 445, 663 S.E.2d 52, 54 (2008).[10] The Foundation petitioned the Supreme Court to accept original jurisdiction for its constitutional challenges to numerous legislative acts. Id. at 445, 663 S.E.2d at 54. The eight acts were Acts Numbered 49, 83, 110, 116, **130**, 136, 142, 143, and 151 of 2007. Id. at 445 n.1, 446-51, 663 S.E.2d at 54 n.1, 55-57. The Supreme Court "**accepted** this matter in our original jurisdiction to address Petitioners' claim that numerous acts passed by the General Assembly in 2007 violate . . ." the constitution. Id. at 445, 663 S.E.2d at 54 (emphasis added). All parties briefed the substance of the Foundation's challenge to Act 130 of 2007.

Speaker Harrell defended the constitutional challenge to Act 130 of 2007 on the ground that the Foundation lacked the standing to challenge Act 130. Harrell, 378 S.C. at 445, 663 S.E.2d at 54. The Supreme Court then fully weighed that defense, analyzed the Foundation's contrary position, and ultimately ruled on that exact issue. Id. Specifically, the Supreme Court held that:

> We decline to address Petitioners' contention that 2007 Act Nos. 130 . . . constitute special laws in violation of the South Carolina Constitution, Article III, § 7, and Article III, § 7. **Petitioners lack standing to challenge those acts**. Sloan v. Sanford, 357 S.C. 431, 593 S.E.2d 470 (2004) (as a general rule, a litigant must have a personal stake in the subject matter of the litigation to have standing); Blandon v. Coleman, 285 S.C. 472, 330

[10] As noted above, Harrell was overruled on grounds that did not alter the 2008 holding that the Foundation lacked standing to challenge the constitutionality of Act 130 of 2007.

> S.E.2d 298 (1985) (private person may not invoke the judicial power to determine the validity of executive or legislative action unless he has sustained, or is in immediate danger, of sustaining prejudice therefrom).

Harrell, 378 S.C. at 445 n.1, 663 S.E.2d at 54 n.1 (emphasis added). Therefore, the issue of the Foundation's standing to challenge Act 130 of 2007 was actually litigated to and decided by the Supreme Court in 2008.

Collateral estoppel prevents a party from relitigating an issue that was decided in a previous action. Aaron v. Mahl, 381 S.C. 585, 592, 674 S.E.2d 482, 486 (2009); S.C. Prop. & Cas. Ins. Guar. Assoc. v. Wal-Mart Stores, Inc., 304 S.C. 210, 213, 403 S.E.2d 625, 627 (1991). Collateral estoppel applies regardless of whether the claims in the first action and subsequent action are the same. Carolina Renewal, Inc. v. S.C. Dept. of Transp., 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009) (cert. denied January 6, 2011). "The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment." Id. All three elements are satisfied and preclude the Foundation from maintaining a challenge to Act 130 of 2007 in this action.

First, the circuit court found the issue of whether the Foundation had standing to challenge the constitutionality of Act 130 was actually litigated in the 2008 action. This was correct. The Foundation brought the action challenging the constitutionality of Act 130 of 2007. Speaker Harrell specifically defended on the grounds that the Foundation lacked standing. The Foundation refuted that position. The parties also briefed the substance of the constitutional challenge. Thus, the standing issue was litigated in 2008. Accordingly, the first element of collateral estoppel was satisfied.

Second, the circuit court correctly ruled that the Supreme Court directly and finally determined this standing issue in the prior action. After consideration of the merits of the Foundation's numerous other constitutional challenges, this Court specifically ruled that the Foundation lacked the standing to challenge Act 130, noting that "Petitioners lack standing to challenge those acts." Therefore, the Supreme Court definitively and unequivocally held in 2008 that the Foundation lacked standing to challenge Act 130 of 2007 on constitutional grounds.

In the brief to this Court, the Foundation now claims that the circuit court erred in applying collateral estoppel because Supreme Court did not determine this standing in the 2008 action. Rather, the Foundation claims the Supreme Court merely did not accept original jurisdiction over the challenge to Act 130 of 2007 in the 2008 action. {Appellants' Br. p. 30 ("The Supreme Court's discretionary denial of original jurisdiction does not collaterally estop another court from granting public importance standing")}. This argument is manifestly without merit. The opinion definitively states that the Supreme Court "accepted this matter in our original jurisdiction to address Petitioners' claim that numerous acts . . ." violated the constitution. Harrell, 378 S.C. at 445, 663 S.E.2d at 54. One of those claims was a challenge to Act 130 of 2007. Id. at 445 n.1, 663 S.E.2d at 54 n.1. All parties briefed the substance of the Foundation's challenge to Act 130 of 2007. The Supreme Court then ruled on each of the eight acts challenged by the Foundation. As to Act 130, 136, 142, 143, and 151, the Supreme Court held that the Foundation "lack[ed] the standing to challenge those acts." Id. The opinion then ruled on the challenges to Acts 49, 83, 110, and 116. Id. at 446-51, 663 S.E.2d at 55-57. As the opinion unquestionably established, the Supreme Court did not

deny original jurisdiction to the Foundation's challenge to Act 130 of 2007. Rather, the court exercised original jurisdiction as to that act and ruled the Foundation lacked standing to challenge that issue.

The Foundation also claims collateral estoppel does not apply because the 2008 action "did not address Petitioners' single county and special legislation claim on their merits" because the Supreme Court "declined to address them." {Appellants' Br. p. 36}. This argument misrepresents the 2008 opinion and misrepresents the test applicable to collateral estoppel. First, the Supreme Court did not decline to rule on the Foundation's constitutional challenge to Act 130 of 2007. The Court definitively ruled that the Foundation "lack[ed] standing to maintain challenges to those acts." Harrell, at 445 n.1, 663 S.E.2d at 54 n.1. Second, the Supreme Court did not have to rule on the merits of the constitutional claims in order for collateral estoppel to bar the Foundation from arguing the issue of standing in this action. Collateral estoppel prevents a party from relitigating an **issue** that was decided in a previous action. See Mahl, 381 S.C. at 592, 674 S.E.2d at 486; Wal-Mart Stores, 304 S.C. at 213, 403 S.E.2d at 627; Carolina Renewal, 385 S.C. at 554, 684 S.E.2d at 782. The issue fully litigated and ruled on in the 2008 action was the threshold issue of whether the Foundation had standing to challenge Act 130 of 2007. The Supreme Court ruled on the merits of that standing issue in the 2008 action. Thus, collateral estoppel applied to bar the Foundation from re-arguing that issue in this action. This Court should reject the Foundation's meritless claim to the contrary. Accordingly, this action satisfied the second element of collateral estoppel.

Third, the circuit court properly found that the Supreme Court's standing ruling was necessary to support the 2008 judgment and dispose of all the issues raised in that action. The Foundation raised challenges to several acts of 2007, including Act 130. The court ruled on all issues on various grounds. Id. at 446-51, 663 S.E.2d at 55-57. The ruling on Act 130 of 2007 was necessary to support the Supreme Court's ruling and disposed of all the issues raised by the Foundation. Without the standing ruling on Act 130 of 2007, the Supreme Court would not have disposed of all of the constitutional challenges brought in the 2008 action.

The Foundation also claims collateral estoppel does not apply because this action contains three issues not raised in the 2008 action. {Appellants' Br. p. 30}. This argument lacks merit. This Court has specifically and clearly rejected any argument that collateral estoppel does not apply when the claims in the second action are rooted in different claims than were advanced in the first action. See Carolina Renewal, 385 S.C. at 556, 684 S.E.2d at 783 (holding "[c]ollateral estoppel applies to specific **issues**, regardless of whether the claims in the first and subsequent suits are the same") (citations omitted, emphasis added). The Foundation presented the same issue in this action as was raised in the 2008 action—the constitutionality of Act 130 of 2007. The basis asserted by the Foundation to challenge the constitutionality of Act 130 of 2007 in this action is immaterial. Accordingly, the circuit court properly found that the third element of collateral estoppel was satisfied.

b. Collateral estoppel applies to bar a subsequent constitutional challenge previously raised in a prior action.

The Foundation also claims the United State Supreme Court created an exception to collateral estoppel when the cases raises constitutional claims. {Appellants' Br. p. 35-36}. This argument fails. First, this argument is not preserved for appellate review. The circuit court did not rule on this argument. {Order Granting Motion for Summary Judgment; R. 14}. The Foundation and Howe did not file any Rule 59(e), SCRCP, motion to request a ruling on that argument. Therefore, this argument is not preserved. See, e.g., Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (holding that an issue must be raised to and ruled upon by the trial judge in order to be preserved for appellate review); I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (holding that a party must file a motion to alter or amend if the trial court fails to rule on an issue in order to preserve it for appellate review). This Court should thus affirm.

Even if this argument were preserved, the argument still fails. The Foundation and Howe misrepresent the court's language in Montana v. United States, 440 U.S. 147 (1979). Montana states that "when issues of law arise in successive actions involving unrelated subject matter, preclusion may be inappropriate. This exception is of particular importance in constitutional application." Id. at 162. That language, even if it creates an exception, does not apply in this action because the 2008 action and this action involve related subject matter.

The Foundation focuses exclusively (as is evident from the emphasis placed in the quoted language in the brief) on the second sentence of that quote and argues that collateral estoppel does not apply here because of the constitutional challenge to Act 130 of 2007. However, such a position ignores the key phrase in the quote. The court

stated constitutional issues may be exempt when the issue arises "in successive actions **involving unrelated subject matter**." Montana, 440 U.S. at 162 (emphasis added). The subject matter in this action is **identical** to the subject matter in the 2008 action. This Court should thus reject this argument and affirm the application of collateral estoppel by the circuit court.

c. The Foundation and Howe's argument that Fairfield County or Charleston County changed the law lacks merit and does not afford relief from the application of collateral estoppel.

The Foundation and Howe further claim that collateral estoppel does not apply because the law has changed since the 2008 action with the issuance of Board of Trustees of the School District of Fairfield County v. State, 395 S.C. 276, 718 S.E.2d 210 (2011), and Charleston County School District v. Harrell, et al, 393 S.C. 552, 713 S.E.2d 604 (2011). {Appellants' Br. p. 33-35}. This claim lacks merit.

First, this argument is not preserved for appellate review. The circuit court did not rule on this argument now advanced by the Foundation and Howe. {Order Granting Motion for Summary Judgment; R. 14}. Moreover, the Foundation and Howe did not file any Rule 59(e), SCRCP, motion to request a ruling on that argument. Therefore, this issue is not preserved. This Court should thus affirm.

Second, the Foundation and Howe admitted to the circuit court that Fairfield did not change the law. They cannot change that position at this stage of the litigation. In response to the Foundation and Howe's motion for summary judgment on the merits, Speaker Harrell and Representative Limehouse contended Fairfield applied prospectively only. {Transcript dated February 14, 2013, at p. 25; Representative

Limehouse's Memorandum in Opposition to Appellants' Motion for Summary Judgment p. 5-6; R. 56, 378-379}. In response, the Foundation argued:

> Defendant Limehouse contends that the ruling in Fairfield County was a new ruling and should not be applied 'retrospectively' . . . . The Supreme Court foreclosed this argument in its holding in Fairfield County . . . . Accordingly, the holding in Fairfield County and the South Carolina precedents going back more than 100 years apply to the purported override in the case at bar. The South Carolina Supreme Court's proper application of the South Carolina constitution should not surprise the General Assembly.

{Appellants' Reply Memorandum of Law in Support of Appellants' Motion for Summary Judgment p. 8-9; R. 349-350}. The Foundation and Howe continued to argue Fairfield did not change the law in the hearing on the motion for summary judgment, arguing:

> Mr. Carpenter: Alright. To me the importance of the Fairfield County case is the Supreme Court said that for more than a hundred years it required a two-thirds vote . . . .

{Transcript dated February 14, 2013, at p. 21; R. 52}.

Now, for the first time, the Foundation and Howe claim Fairfield represents a change in the law in an attempt to avoid the application of collateral estoppel. This shift contradicts the position that the Foundation and Howe have taken throughout this litigation. This is improper. The Supreme Court recently held that such a change in position at this stage of the litigation is improper. In Clarendon County v. TYKAT, Inc., 394 S.C. 21, 714 S.E.2d 305 (2011), the court recognized that a party cannot argue one position on a summary judgment issue before the trial court and then subsequently take the opposite position on the same issue before the appellate court. In

that case, TYKAT moved for summary judgment in the trial court, arguing that no genuine issues of material fact existed. Id. The trial court denied TYKAT's motion. Id. On appeal, TYKAT presented an alternative argument that summary judgment was premature because discovery would have revealed a genuine issue of material fact. Id.

The Supreme Court rejected TYKAT's new argument, finding TYKAT "cannot now be heard to assert summary judgment was premature." Id. The court recognized that TYKAT was bound by its initial position on the issue. The same logic applies here to bar the Foundation and Howe's new argument that Fairfield changed the law. As a result, they are bound by their previous assertion that Fairfield did not change the law. Thus, the Foundation and Howe's claims lack merit. As a result, this Court should reject the Foundation and Howe's arguments on this issue.

Third, the Foundation and Howe claim Charleston County changed the law since the 2008 action. {Appellants' Br. p. 35}. This argument misrepresents that case. There, the plaintiff brought an action challenging the constitutionality of Act 189 of 2005. Charleston Cnty., 393 S.C. at 555, 713 S.E.2d at 606. The circuit court granted defendants' motion to dismiss. Id. The issue on appeal was whether the circuit court improperly considered documents outside of the pleadings to dismiss the action. Id. at 555, 713 S.E.2d at 606. The Charleston County court did not address any other issue or make any substantive rulings on the merits of the underlying constitutional claims. Id. at 560, 713 S.E.2d at 609. In fact, the Supreme Court specifically noted that "we express no opinion regarding the ultimate constitutionality of Act 189." Id. The court further held that "at this **procedural juncture**, we are only concerned with whether School District's complaint states a viable cause of action sufficient to

withstand a Rule 12(b)(6) motion to dismiss." Id. at 561, 713 S.E.2d at 609. The court emphasized that in reversing "we reiterate that we express no opinion as to the validity or proper interpretation of any of the statutes cited herein." Id. Thus, this case cannot be construed to change the law as asserted by the Foundation and Howe. Thus, the Foundation and Howe's claims lack merit, and this Court should reject them.

d. This Court should not extend standing to the Foundation or Howe because our traditional rules of standing operate to ensure Act 130 of 2007 could be challenged by a proper party.

The Foundation and Howe next allege that Act 130 of 2007 will be "immune from review" unless they can challenge the act in this action. {Appellants' Br. p. 32-33}. They further contend no one would ever be able to challenge Act 130 of 2007. {Id.}. This argument fails. Act 130 of 2007 can be challenged by a proper party within the applicable limitations period.

While the Foundation and Howe lack standing to challenge Act 130 of 2007, that does not preclude a challenge from a proper plaintiff. First, an individual that suffered a concrete or particularized injury in fact resulting from Act 130 of 2007 could maintain a challenge to the act. ATC South, Inc. v. Charleston Cnty., 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008) (setting forth the test to establish constitutional standing). Second, the State could challenge Act 130 of 2007, when appropriate. See, e.g, State ex rel. Condon v. Hodges, 349 S.C. 232, 241, 562 S.E.2d 623, 628 (2002) (holding the State can bring an action when it is necessary for the enforcement of the laws of the State, the preservation of order, and the protection of public rights). Moreover, the State has standing to bring constitutional actions. Id. Therefore, the

Foundation and Howe's argument lacks merit. Act 130 of 2007 is not immune from review. This Court should reject this argument.

e. Conclusion

Based on the foregoing, the well-settled rules of collateral estoppel preclude the Foundation from asserting in this action that it has the standing necessary to maintain a challenge to the constitutionality of Act 130 of 2007. Therefore, the circuit court correctly found that the Foundation was collaterally estopped from asserting that it possesses the standing necessary to maintain this action. Because the Foundation lacked standing to maintain a constitutional challenge to Act 130 of 2007, the circuit court properly granted summary judgment on this issue to Respondents. This Court should affirm.[11]

II. The circuit court properly granted summary judgment because Howe failed to establish any basis for standing.

The Foundation and Howe claim the circuit court erred in ruling the Foundation and Howe "possessed neither taxpayer standing nor public importance standing in this case."[12] {Appellants' Br. p. 6}. This claim should be rejected. It is well-established that Howe's status as a taxpayer is insufficient to vest him with constitutional standing to challenge Act 130 of 2007. Howe also failed to plead or present any evidence to establish application of the public importance exception. Therefore, the circuit

[11] The Foundation also claims collateral estoppel does not bar it from asserting standing because Howe may have standing as a taxpayer. {Appellants' Br. p. 31 ("Howe's involvement . . . distinguishes this case from Harrell"). This argument has no merit. Whether Howe has standing has no impact on whether collateral estoppel bars the Foundation from establishing standing. The issues are mutually exclusive. Howe's lack of standing is addressed in section II, infra.

[12] The circuit court also ruled that the Foundation and Howe failed to establish statutory standing as well. {Order Granting Summary Judgment p. 4-5; R. 17-18}. Appellants fail to raise any arguments as to this standing ruling. Therefore, that unappealed ruling is now law of the case.

correctly found no issue of fact existed and ruled that Howe lacked standing to challenge Act 130 of 2007. This Court should affirm.

a. The circuit court properly granted summary judgment because how the Foundation and Howe perceive the merits of their constitutional claims may not impact the standing determination.

The Foundation and Howe allege that their five constitutional claims "deserve public importance standing" and use the merits of those claims, argued over seventeen (17) pages of the brief, to support this allegation. {Appellants' Br. p. 6-23}. This argument is manifestly without merit. Our Supreme Court has definitively rejected using the merits of the underlying claims as a basis to prove standing. This is because standing constitutes a threshold determination made prior to the court addressing the merits of the claims. Moreover, consideration of the merits would subvert the very reason standing is a threshold determination. Thus, the circuit court properly rejected this argument and granted summary judgment to Respondents. This Court should affirm.[13]

In Ex Parte State ex rel. Wilson, 391 S.C. 565, 707 S.E.2d 402 (2011), the Supreme Court considered the exact argument advanced by the Foundation and Howe to this Court. In that case, plaintiffs challenged annexation of property pursuant to state statute. Wilson, 391 S.C. at 568, 707 S.E.2d at 404. The individual plaintiffs argued they possessed standing because the state did not properly annex the property under the applicable annexation statutes. Id. at 572-73, 707 S.E.2d at 406. The individual

[13] Speaker Harrell and Representative Limehouse each filed a memorandum in opposition to the Foundation and Howe's motion for summary judgment. {Speaker Harrell's Memorandum in Opposition dated February 14, 2012; Representative Limehouse's Memorandum in Opposition dated February 8, 2012; R. 322, 374}. Representative Limehouse filed an affidavit in opposition as well. {Affidavit of Representative Limehouse dated February 15, 2012; R. 393}. Speaker Harrell and Representative Limehouse incorporate the arguments contained therein to refute Appellants' merits arguments to this Court.

plaintiffs argued that the state did not annex under the 100% landowner consent annexation statute. Id. Rather, the individual plaintiffs claimed standing under the 75% consent annexation standing. Id. at 573, 707 S.E.2d at 406. The circuit court reviewed the annexation ordinance, determined fewer than 100% of property owners consented, and granted standing to the individual plaintiffs under the other statute. Id.

The Supreme Court reversed the circuit court. Id. at 573, 707 S.E.2d at 407. The Supreme Court reasoned that to determine standing in that manner improperly required a standing determination based on the merits of the case. Id. at 573-74, 707 S.E.2d at 407. The court recognized it could only reach the merits of the issue if presented by a party with standing. As the court stated:

> While we disagree with the circuit court's interpretation of the statute, we can **only reach that question if presented by a party with standing** . . . We reject the suggestion that the perceived merits of the underlying claim may influence the standing determination. This basic principle defeats the [individual plaintiffs'] claim.

Id. at 573, 707 S.E.2d at 406-07 (emphasis added). The Supreme Court reasoned that:

> The ordinance recites that the annexation was achieved using the 100% method. If we went behind that assertion without a proper plaintiff, we would be inviting a sliding scale for standing: the more meritorious a claim appears, the more relaxed the standing requirement would be.

Id. at 573, 707 S.E.2d at 407. The court noted it previously rejected such a position and concluded that "[a]dhering to our precedent, **we must determine standing without regard to the merits of the underlying claim**." Id. at 574, 707 S.E.2d at 407 (emphasis added).

The Supreme Court's logic and holding applies to the Foundation and Howe's argument to this Court. The merits of the Foundation and Howe's constitutional challenges to Act 130 of 2007 are insufficient to vest the Foundation and Howe with standing as set forth by Wilson. In addition, consideration of the merits by the circuit court or this Court would subvert the well-established principle that standing constitutes a threshold determination made prior to the court addressing the merits of the underlying claims. See, e.g, ATC, 380 S.C. at 194–95, 669 S.E.2d at 339 ("We are obligated **before reaching the merits** of the rezoning question **to determine whether ATC has standing to press its complaint**.") (emphasis added); Joytime Distribs. & Amusement Co. v. State, 338 S.C. 634, 639, 528 S.E.2d 647, 649 (1999) ("Standing to sue is a fundamental requirement in instituting an action."). Therefore, the circuit court properly determined the standing issue without consideration of the merits of the Foundation and Howe's constitutional claims. This Court should do likewise and affirm the grant of summary judgment.

b. Howe's status as a taxpayer of Charleston County cannot vest him with standing to challenge Act 130 of 2007.

Howe contends the circuit court erred because he possessed taxpayer standing. {Appellants' Br. p. 24-26 ("In the case at bar, Howe has contributed to the general tax funds of the County. Accordingly, Howe possesses standing as a taxpayer . . .")}. This argument has no merit. The Supreme Court has unequivocally foreclosed a plaintiff's ability to obtain constitutional standing via his status as a taxpayer. Thus, this argument fails. The circuit court properly granted summary judgment to Respondents on this issue. This Court should affirm.

"[S]tanding cannot be granted to every individual who is disgruntled by a governmental decision or policy; otherwise, the government would be forced to defend a constant barrage of lawsuits questioning its every move." Newman v. Richland Cnty. Historic Preservation Com'n, 325 S.C. 79, 480 S.E.2d 72 (1997). "Standing to sue is a fundamental requirement in instituting any action." Joytime, 338 S.C. at 639, 528 S.E.2d at 649. "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 to standing." Bodman v. State, 403 S.C. 60, 66-67, 742 S.E.2d 363, 366 (2013); see also Freemantle v. Preston, 398 S.C. 186, 192, 728 S.E.2d 40, 43 (2012). The Foundation and Howe's claim of taxpayer standing falls within the test for constitutional standing. Bodman, 403 S.C. at 67, 742 S.E.2d at 366; Freemantle, 398 S.C. at 192-93, 728 S.E.2d at 43-44. Plaintiff Howe cannot establish constitutional standing as a taxpayer because he has not suffered an individualized injury in fact.

To establish constitutional standing, the plaintiff must prove he 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." ATC, 380 S.C. at 195, 669 S.E.2d at 339; see also Bodman, 403 S.C. at 67, 742 S.E.2d at 366; Freemantle, 398 S.C. at 192-93, 728 S.E.2d at 43-44.

The Supreme Court's recent decisions have rejected the argument advanced by Howe and hold that a plaintiff's status as a taxpayer does not create an individualized injury in fact sufficient to confer constitutional standing. In Bodman, the plaintiff, a taxpayer, brought an action challenging the constitutionality of two sections of the

South Carolina Code. 403 S.C. at 66, 742 S.E.2d at 366. The respondents argued plaintiff lacked standing because he had not suffered an individualized injury. Id. Plaintiff countered that he possessed standing as a taxpayer. Id. The court rejected this contention and held:

> As to constitutional standing, one of the core requirements is that the plaintiff suffered a concrete and particularized injury. Here, to the extent Bodman has suffered or will suffer any harm as a result of this tax scheme, this harm is shared by all taxpayers in the State. 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 commonality defeats the constitutional requirement of a concrete and particularized injury.' We reaffirm this principle today and hold that Bodman's status as a mere taxpayer is insufficient to confer standing upon him.

Id. at 67, 742 S.E.2d at 366 (internal quotations and citations omitted) (emphasis added).

The Bodman decision confirmed the same holding espoused in Freemantle. There, the Supreme Court again addressed whether status as a taxpayer could satisfy the elements of constitutional standing. 398 S.C. at 192, 728 S.E.2d at 43. In that matter, the plaintiff argued, just as Howe does here, that his status as a taxpayer was sufficient to confer standing to maintain the action. Id. The Supreme Court rejected this contention. Id. The Court held:

> In our judgment, the injury, if any, to Appellant as a taxpayer is common to all citizens and taxpayers of Anderson County. Thus, this feature of commonality defeats the constitutional requirement of a concrete and particularized injury. We therefore affirm the trial court

> in rejecting [plaintiff's] claim of taxpayer standing under constitutional standing principles.

Id. at 193, 728 S.E.2d at 44.

Bodman and Freemantle merely reaffirmed the Supreme Court's previous holding in ATC on this issue. In that matter, the court rejected a plaintiff's contention that status as a taxpayer establishes constitutional standing. The court held:

> [Plaintiff] further relies on its status as a taxpayer to acquire standing. The injury to [plaintiff], however, as a taxpayer is common to all property owners in Charleston County. This feature of commonality defeats the constitutional requirement of a concrete and particularized injury. As the United States Supreme Court observed, a taxpayer lacks standing when he 'suffers in some indefinite way in common with people generally.'

ATC, 380 S.C. at 198, 669 S.E.2d at 340-41. Thus, it is well-established that Howe's status as a taxpayer is insufficient to provide a basis for constitutional standing.[14]

Additionally, Howe is named solely to remedy the fact that the Supreme Court previously held that the Foundation lacked standing to bring a challenge to Act 130 of 2007. Howe was aware the Supreme Court held in 2008 that the Foundation lacked standing to challenge the Act, testifying that:

> Q: [D]id you also understand that the court reached a decision, denying – as part of their decision in that case, they denied standing to the Public Interest Foundation, that decision was in June – rendered in June of 2008?

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[14] Before the trial court, Howe claimed his subjective beliefs sufficiently established an injury in fact. {Speaker Harrell's Memorandum in Support of the Motion for Summary Judgment p. 11-13; R. 411-413}. However, he does not advance that argument to this court. As such, it is abandoned. Even if not abandoned, this argument does not confer an injury in fact sufficient to establish constitutional standing. Beaufort Cnty. v. Trask, 349 S.C. 522, 529 n.20, 563 S.E.2d 660, 664 (Ct. App. 2002) ("It is not sufficient that they maintain the proceeding merely as a citizen to protect abstract rights."). Moreover, Plaintiff Howe's subjective heightened injury cannot form the basis for standing. Id. ("Nor does mere difference in degree of interest of one taxpayer from that of another in itself entitle the former to maintain a suit to test the validity of the ordinance"). The Supreme Court's precedent establishes that Howe cannot show constitutional standing on this basis.

A: I believe that was brought to my attention.

{Exhibit D to Speaker Harrell's Memorandum in Support of Motion for Summary Judgment; R. 425}. Notably, the Foundation needed an individual to rectify the "legal reasons" that the Foundation could not bring the action on its own. Howe admitted that he was brought into this action to alleviate this standing issue of the Foundation:

> Q: How did you become involved in the lawsuit? How did you and Mr. Sloan get together on the same page, is what I am trying to ask.
> A: It became known to me that his foundation was intending to bring this lawsuit, and it was desired that in addition to them as a plaintiff, **that for certain legal reasons** it perhaps would be helpful for a citizen of Charleston County also be a plaintiff in this lawsuit to **possibly satisfy certain legal considerations**.

{Exhibit E to Speaker Harrell's Memorandum in Support of Motion for Summary Judgment; R. 426}. Moreover, Plaintiffs have admitted that the Foundation alone paid the legal fees incurred by Howe in this action. {Exhibit F to Speaker Harrell's Memorandum in Support of Motion for Summary Judgment; R. 428}.

Based on the above, Howe has not suffered an individual injury in fact. Therefore, Howe's status as a taxpayer is insufficient to establish constitutional standing. The circuit court correctly rejected this argument and granted summary judgment to Respondents on this issue. This Court should affirm.

c. The Foundation and Howe failed to plead the public importance exception to standing.

The Foundation and Howe claim they sufficiently pled the public importance exception to standing because they "cited a long list of cases recognizing public importance standing . . . ." {Appellants' Br. p. 23-24}. This claim should be rejected.

The complaint failed to properly plead **facts** to support a claim for the application of the public importance exception to standing in this action.

As an initial matter, the Foundation and Howe have abandoned this argument on appeal. They fail to cite any authority to support their argument. See, e.g., First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (noting an issue is deemed abandoned where appellant fails to provide arguments or supporting authority for his assertion); Eaddy v. Smurfit-Stone Container Corp., 355 S.C. 154, 164, 584 S.E.2d 390, 396 (Ct. App. 2003) (holding "short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not preserved for our review").

Even if this issue were not abandoned, this Court should still reject the argument. It is well-settled that a plaintiff must plead in the complaint and prove one of the grounds for standing in order to maintain his action. Beaufort Cnty. v. Trask, 349 S.C. 522, 529 n.1, 563 S.E.2d 660, 663 (Ct. App. 2002) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992)). The Foundation and Howe failed to properly plead facts to support a claim for the application of the public importance exception to standing in this action.

The cases cited in the complaint stand for more than application of the public importance exception to standing. The opinions are not limited to that issue. The courts in those cases addressed and ruled on many more issues and arguments. Respondents could not guess as to the basis, holding, or tenant of those cases that the Foundation and Howe intended to reply upon in the complaint. Moreover, Respondents

should not be required to guess or assume as to what the Foundation and Howe intended in any allegation of the complaint.

Our rules require the Foundation and Howe to give Respondents fair notice of what was pled. Rule 8, SCRCP; Shirley's Iron Works, Inc. v. City of Union, 403 S.C. 560, 574, 743 S.E.2d 778, 785 (2013) ("It is elementary that the principal purpose of pleadings is to inform the pleader's adversary of legal and factual positions which he will be required to meet on trial."). Our rules require this to be done with **facts**. Rule 8(a), SCRCP (requiring a pleading to contain "a short and plain statement of the grounds **including facts** and statutes upon which the court's jurisdiction depends") (emphasis added). The complaint failed to include any facts as to the public importance exception to standing or any facts as to how those cases were applicable to that issue.

Moreover, the cases cited in the Complaint failed to show how **this case** warranted application of the public importance exception. Again, the complaint was factually silent as to how the public importance exception applied to this case. The fact that past cases could establish application of the exception has no bearing on the facts of this case. Our case law and rule definitively require a plaintiff to plead facts sufficient to establish the basis for relief. The Foundation and Howe failed to do so.

d. The Foundation and Howe failed to present any evidence to allow application of the public importance exception.

In addition to the failure to plead the public importance exception to standing, Howe failed to present any evidence that would establish application of the public importance exception to standing.[15] In fact, Respondents presented the only evidence at

[15] Because of this failure to present evidence to establish application of the public importance exception, the Foundation and Howe rely solely on the fact that this matter contains constitutional claims to establish

the hearing on this issue. Respondents' position throughout this litigation is that the Foundation and Howe failed to present **any evidence** to allow application of the public importance exception. The circuit court granted summary judgment on that basis. The Foundation and Howe ignore this argument, and instead, they rely on the merits of their constitutional claims or Howe's status as a taxpayer as a basis for standing. The merits of the constitutional claims do not obviate the need for the Foundation and Howe to present evidence that this matter is of sufficient public importance. They failed to do so. The Foundation and Howe offered no evidence to the circuit court to support application of the public importance exception. That is why summary judgment was proper. This Court should affirm the grant of summary judgment on this basis.

Moreover, the circuit court's grant of summary judgment on the public importance exception dovetails with the underpinnings of the public importance exception. Our standing rules have long recognized that the mere fact that the issue is one of public importance does not confer upon any citizen or taxpayer the right to invoke a judicial determination of the issue. Crews v. Beattie, 197 S.C. 32, 14 S.E.2d 351 (1941). Rather, the party must demonstrate some **overriding** public purpose or concern to confer standing to sue on behalf of his fellow taxpayers. Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999). Our Supreme Court mandates that public importance exception to these standing rules should apply "only where a resolution is needed for future guidance." Freemantle, 398 S.C. at 193, 728 S.E.2d at 44. "Thus, for a court to relax general standing rules, the matter of importance must, **in the context of the case**, be extricably connected to the public need

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the public importance exception. {Appellants' Br. p. 6-23}. Respondents addressed that argument in section II.a, supra.

for court resolution for future guidance." Id. (emphasis added); ATC, 380 S.C. at 199, 669 S.E.2d at 341 (internal quotations omitted).

The Respondents introduced testimony from Howe that established no overriding public importance. Howe was aware of the passage of Act 130, as well as the fact that the members of the Charleston Legislative Delegation were placed on the Charleston Aviation Authority, very shortly after Act 130 became effective. He testified that:

> Q. ...When did you first learn that Representative Limehouse, in his capacity as chairman of the Charleston delegation, had been placed on the Aviation Commission?
> A. You know, that's really hard. Probably very soon after the, what was it, '08 legislation was passed. And then, of course, he would have to get on there as being chairman of the Charleston County legislative delegation. So it would have been –I pay attention, and it would have been not that long after he actually took that position that I would have been aware of it. Because again, I pay attention.
> Q. So were you aware, given the fact that you pay attention that Act 130 of 2007, when it was passed?
> A. When it was passed?
> Q. Not specifically the date it was passed, but did you have awareness that they had passed Act 130 of 2007?
> A. Yeah.

{Exhibit G to Speaker Harrell's Memorandum in Support of Motion for Summary Judgment; R. 430}. He continued:

> Q: I think you answered that you became aware of the act . . . sometime after it was passed . . . ."
> A: I don't know exactly.
> Q: But soon thereafter?
> A: I'm thinking it was probably soon thereafter just because my usual way of keeping abreast.

{Exhibit H to Speaker Harrell's Memorandum in Support of Motion for Summary Judgment; R. 432}. Moreover, the Foundation first challenged the constitutionality of

Act 130 in 2008. Despite this knowledge, the Foundation and Howe chose to not initiate this action for nearly five years after the first challenge. Howe testified that:

> Q: So did you take any action from when the act was passed in 2007 before you became a good citizen of Charleston County and signed up in 2012?
> A: Did I take any action?
> Q: That's right.
> A: No.
> Q: Okay. Why not, if this issue bothered you?
> A: As I understood it these same issues were already being or just had been brought to the judicial system of South Carolina.

{Exhibit I to Speaker Harrell's Memorandum in Support of Motion for Summary Judgment; R. 433}. Howe further added that:

> Q. Okay. Is there any reason why you haven't challenged or brought a suit to challenge Act 130 of 2007 since that decision?
> A. The opportunity didn't really present itself. I didn't receive the - you know, the personal motivation until it was brought earlier this year. I'm a pretty busy guy, Mr. Hitchcock, and undertakings like this can only be done at certain times.
> Q. Okay. But, I mean -- and that would be -- you were -- you were too busy to bring -- you're saying that you were too busy to bring the lawsuit for the past four years since that decision was rendered?
> A. Among, I'm sure, other reasons.

{Exhibit J to Speaker Harrell's Memorandum in Support of Motion for Summary Judgment; R. 434}. This evidence illustrated how the Foundation and How could not assert that this matter presented a matter of overriding public importance or some immediate need for future guidance.[16] They delayed in taking action for nearly five

[16] Appellants' claim the circuit court improperly ruled that the doctrine of laches prevents the application of the public importance exception. {Appellants' Br. p. 36-39}. This is categorically inaccurate. The circuit court did not make any ruling based on laches. {Order Granting Summary Judgment; R. 14}. Instead, what the circuit court did was use the above evidence to show how Appellants' actions in this

years after the Supreme Court barred the Foundation's 2008 challenge to Act 130 of 2007. The Foundation and Howe failed to introduce any factual evidence to refute this evidence.[17] Therefore, no genuine issue of fact existed on that issue. The circuit court was correct to grant summary judgment.

Lastly, the circuit court's ruling aligns with the fact that the Supreme Court has recently "tempered the application of the public importance exception." Bodman, 403 S.C. at 68, 742 S.E.2d at 367 (citing ATC, 380 S.C. at 198, 669 S.E.2d at 341. The Supreme Court:

> [T]empered the application of the public importance exception somewhat in ATC. In doing so, we reminded the bench and bar that "[w]hether an issue of public importance exists necessitates a cautious balancing of the competing interests presented." To avoid an overzealous use of this exception, we said that "[t]he 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."

Bodman, 403 S.C. at 68, 742 S.E.2d at 367. The court continued by stressing that more limited rules of standing actually benefit the judicial process:

> Few exercises of the judicial power are more likely to undermine public confidence in the neutrality and integrity of the Judiciary than one which casts the Court in the role of a Council of Revision, conferring on itself the power to invalidate laws at the behest of anyone who disagrees with them. In an era of frequent litigation, class actions, sweeping injunctions with prospective effect, and

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case show how a matter of overriding public importance or some immediate need for future guidance did not exist in this action.

[17] The Foundation and Howe cannot rely on statements or argument of counsel to create a genuine dispute of material fact on this issue. See Higgins v. Med. Univ. of S. Carolina, 326 S.C. 592, 599, 486 S.E.2d 269, 272 (Ct. App. 1997) ("[F]actual statements of the attorneys, whether made during argument or in written briefs or memoranda, ordinarily may not be considered by the court in determining whether a genuine issue of material fact exists.").

> continuing jurisdiction to enforce judicial remedies, **courts must be more careful to insist on the formal rules of standing, not less so.** Making the . . . standing inquiry all the more necessary are the significant implications of constitutional litigation, which can result in rules of wide applicability that are beyond Congress' power to change.

Id. (emphasis added).

The Supreme Court's rationale indicates that the public importance exception will be utilized less frequently moving forward. Further, no longer should the exception be invoked to reach a constitutional challenge to legislation. This is true especially when, as here, the plaintiffs failed to plead or provide evidence as to why and how an overriding public interest exists in the matter or requires resolution for future guidance. To hold otherwise would nullify the tempering of the exception set forth by our Supreme Court in an improper manner.

e. Howe's status as a former member of the Charleston County Aviation Authority does not create standing where none exists.

The Foundation and Howe allege that Howe has standing as a former member of the Charleston County Aviation Authority. {Appellants' Br. p. 26-28}. They rely on Davis v. Richland County Council, 372 S.C. 497, 642 S.E.2d 740 (2007), and Evins v. Richland County School District, 341 S.C. 15, 532 S.E.2d 876 (2000), to support this claim. This argument fails for two reasons. First, the argument is not preserved for review. Second, the Foundation and Howe misapprehend the holdings of Davis and Evins. Neither case supports a grant of standing to Howe.

This argument is not preserved for appellate review. While the issue was raised, the circuit court did not rule on this argument. {Order Granting Motion for Summary Judgment; R. 14}. The Foundation and Howe did not file any Rule 59(e),

SCRCP, motion to request a ruling on that issue. Therefore, this issue is not preserved. See, e.g., Wilder Corp., 330 S.C. at 76, 497 S.E.2d at 733 (holding that an issue must be raised to and ruled upon by the trial judge in order to be preserved for appellate review); I'On, 338 S.C. at 422, 526 S.E.2d at 724 (holding that a party must file a motion to alter or amend if the trial court fails to rule on an issue in order to preserve it for appellate review). This Court should affirm.

Second, even if properly before this Court, neither case affords any relief. In Davis, plaintiffs were members of the Richland County Recreation Commission. 372 S.C. at 498, 642 S.E.2d at 741. The General Assembly passed Act 207 of 2005, which altered the method for appointment of members to the commission. Id. at 499, 642 S.E.2d at 741. Plaintiffs were members at the time of the passage of Act 207. Id. Act 207 caused plaintiffs to lose their seats on the commission at the expiration of their respective term. Id. at 500, 642 S.E.2d at 741 (noting that plaintiffs "filed suit after their terms expired (pursuant to Act No. 207)"). The Supreme Court held that plaintiffs had "standing to challenge the constitutionality of an Act **which authorizes their removal from office**." Id. at 500, 642 S.E.2d at 742.

That is not the case here. Act 130 of 2007 did not authorize the removal of Howe from his membership on the Charleston County Aviation Authority. Act 130 of 2007 left Howe's membership intact. {Act 130 of 2007; R.488}. As a result, Davis does not apply and cannot support the Foundation and Howe's claim for standing.

In Evins, the plaintiff challenged transfer of property made by the Richland County Preservation Commission. 341 S.C. at 17-18, 532 S.E.2d at 877. The General Assembly created the commission and vested it with certain powers via an enabling

statute. Id. at 18-19, 532 S.E.2d at 877-78. The specific power to convey property was not enumerated in the enabling statute. Id. at 19, 532 S.E.2d 878. Plaintiff challenged the conveyance, alleging it was ultra vires because the commission had no statutory authority to transfer the property. Id. The circuit court dismissed, finding plaintiff lacked standing. Id. at 18, 532 S.E.2d at 877. The Supreme Court reversed and held that plaintiff had standing because the commission's action was ultra vires because the power to convey property was not granted to the commission by the General Assembly. Id. at 21, 532 S.E.2d at 879. The key factor was the commission acting outside the scope of a grant of legislative power.

We have no such concerns in this matter. This case does not involve the actions of the Charleston County Aviation Authority vis-à-vis the enabling grant of power from the General Assembly. Rather, this matter involves the General Assembly acting in the first instance. Here, the action of the General Assembly cannot be considered ultra vires. The General Assembly possesses plenary power to pass any statute, including those related to an aviation authority, per our state Constitution. See, e.g., City of Rock Hill v. Harris, 391 S.C. 149, 154, 705 S.E.2d 53, 55 (2011) ("The power of our state legislature is plenary, and therefore, the authority given to the General Assembly by our Constitution is a limitation of legislative power, not a grant."). The exercise of plenary power cannot be considered ultra vires.[18] Thus, Evins is distinguishable from this matter and does not support Howe's argument.

[18] Whether the exercise of plenary power is later found unconstitutional is a separate matter, but in no event would the exercise be considered ultra vires.

f. Conclusion

Based on the foregoing, no genuine issue of material fact exists as to Howe's lack of constitutional standing. Howe also failed to plead any facts or put forth evidence to allow application of the public importance exception to the rules of standing. Therefore, Howe lacks the standing necessary to maintain a challenge to the constitutionality of Act 130 of 2007. The circuit court properly granted summary judgment on this issue to Respondents. This Court should affirm.

Conclusion

Based on the foregoing, this Court should affirm the circuit court's order granting summary judgment to Respondents.

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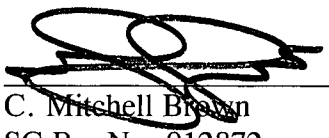
By: 

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{Rule 208(b)(6), SCACR, signature pages follow}

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2012-CP-10-04969

Appellate Case No. 2013-001273

South Carolina Public Interest Foundation and Waring S. Howe, Jr., individually, and on behalf of all others similarly situated, ... Appellants,

v.

Robert W. Harrell, Jr., in his official capacity as Speaker of the South Carolina House of Representatives, Glenn McConnell, in his official capacity as President of the South Carolina Senate, Representative Harry B. "Chip" Limehouse III, Senator George E. "Chip" Campsen, and the State of South Carolina, ... Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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