THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2018-000794
Trial Court Case No. 2016-CP-40-02875

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

v.

Richland County,..... Respondent,

And

Central Midlands Regional Transit Authority.....Intervenor/Respondent

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FINAL BRIEF OF APPELLANTS

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STATEMENT OF THE CASE

Appellants South Carolina Public Interest Foundation ("SCPIF"), Edward D. Sloan, Jr., and William B. DePass, Jr., appeal two orders of the Circuit Court, and the denial of their Motions to Alter or Amend. (R. pp. 1-18). The Circuit Court granted Summary Judgment to the Central Midlands Regional Transportation Authority ("CMRTA"). (R. pp. 10-18). The Circuit Court also dismissed the Appellants' case against Richland County for failure to prosecute. (R. pp. 4-9).

STATEMENT OF FACTS

This case arises out of the same factual background as *Richland County v. South Carolina Department of Revenue*, 422 S.C. 292, 811 S.E.2d 758 (S.C. 2018). The Supreme Court opinion provides a well-developed statement of the background facts.

> Through the Optional Methods for Financing Transportation Facilities Act (Transportation Act), the General Assembly has authorized the governing body of a county to "impose by ordinance a sales and use tax in an amount not to exceed one percent within its jurisdiction for a single project or for multiple projects and for a specific period of time to collect a limited amount of money." S.C. Code Ann. § 4-37-30(A) (Supp. 2017). This is commonly referred to as the "penny tax." The types of projects permitted to be funded with such a tax are "highways, roads, streets, bridges, mass transit systems, greenbelts, and other *transportation-related projects*." *Id.* § 4-37-30(A)(1)(a)(i) (emphasis added). The revenues generated from such a tax must be used in accordance with **statutory restrictions** imposed by the General Assembly—namely, proceeds must be used for the **capital costs** of the types of transportation projects identified in the Transportation Act. *Id.* § 4-37-30(A)(15).
>
> To implement a transportation penny tax, "[t]he governing body of a county may vote to impose the tax authorized by this section, subject to a referendum, by enacting an ordinance." *Id.* § 4-37-30(A)(1). The local ordinance must specify the projects for which the proceeds of the tax are to be used; the length of time for which the tax is to be imposed; "the estimated *capital cost* of the project or projects to be funded in whole or in part from proceeds of the tax;" and the "anticipated year the tax will end." *Id.* § 4-37-30(A)(1) (emphasis added). At issue in this case is whether and to what extent certain costs qualify as "capital costs" and thus are considered proper

expenditures of penny tax revenues.

* * *

Under these enabling provisions of the Transportation Act, on July 18, 2012, the County enacted Ordinance No. 039-12HR (Ordinance) scheduling a referendum on November 6, 2012, for the purpose of seeking approval from voters for a penny sales and use tax (Penny Tax). The Ordinance referenced various provisions of the Transportation Act and proposed the imposition of a tax for twenty-two years for the following projects:

> (d) The Sales and Use Tax shall be expended for the costs of the following projects ... for the following purposes:
>
> (i) Improvements to highways, roads (paved and unpaved), streets, intersections, and bridges including related drainage system improvements. Amount: $656,020,644;
>
> (ii) **Continued operation of mass transit services** provided by Central Midlands Regional Transit Authority including implementation of near, mid and long-term service improvements. Amount $300,991,000; and
>
> (iii) Improvements to pedestrian sidewalks, bike paths, intersections and greenways. Amount: $80,888,356.

* * *

The referendum passed. The Penny Tax became effective beginning May 1, 2013, and is authorized to run for twenty-two years (through April 30, 2035) to raise over $1 billion for specified transportation projects throughout Richland County. Since taking effect, the Penny Tax has generated around $5 million in revenues per month for Richland County. Prior to this dispute, and in accordance with its statutory mandate, DOR allocated and remitted net revenues to the State Treasurer on a monthly basis. Those monies (with interest) were then distributed by the State Treasurer to the County on a quarterly basis as required by the Transportation Act. Specifically, section 4-37-30(A)(15) provides the State Treasurer is to hold these funds in a designated account separate from the general fund of the state, and once distributed, "these revenues and interest earnings must be used only for the purpose stated in the imposition ordinance."

At some point after the Penny Tax became effective, DOR received information concerning the County's possible misuse of Penny Tax funds. In April 2015, DOR initiated an audit to determine the County's compliance with state tax laws, specifically including the Transportation Act. *See* S.C. Code Ann. § 12-4-387 ("The Department of Revenue *shall* use available personnel to conduct audits involving *all taxes* to promote voluntary compliance and to collect revenues for the general fund of the State and

designated accounts" (emphasis added)); *id.* § 12-54-100 to -110 (authorizing DOR to conduct examinations and investigations and to issue a summons for any person or political subdivision of the State requiring that person or entity to appear, produce documents, and answer questions). The County did not object to the audit or to DOR's authority to conduct it.

Following the audit, DOR informed the County that it had uncovered (1) evidence of public corruption; (2) evidence of criminal violations of state tax laws and (3) unlawful expenditures of Penny Tax revenues by County Council.

DOR identified specific expenditures it believed were problematic . . . .

DOR also noted the County was paying *two* public relations firms monthly payments of $25,000 each for the provision of "public information services" in addition to reimbursing these firms for expenses such as brochures, mailings, business cards, website maintenance, catering, mileage, and computer and cell phone allowances. It was unclear exactly what work these firms performed since a fully operational public information office already existed within the County and because no documentation existed to detail what specific services were provided, the number of hours spent on these projects, or how much each service cost.

DOR further took issue with the more than $38,000 the County spent under a vague and duplicative "mentor-mentee" arrangement whereby the County contracted with certain inexperienced individuals to perform more than $400,000 in real-estate and legal services, then paid each of those individuals and an experienced contractor/vendor $200 per hour (for a combined cost of $400 per hour) to "mentor" and "be mentored" and learn how to perform the very services they were contracted to provide.

Faced with these dubious expenditures, the County put forward the position that all these expenditures were properly characterized as "administrative costs" under the Ordinance.

Nevertheless, the day following the audit, the County responded that it was "shocked and alarmed" and expressed a willingness to "immediately invoke measures to protect and preserve county money and assets" and reimburse any inappropriate expenditures of Penny Tax funds that may have occurred. Over the next several months, officials from DOR and the County continued written and in-person discussions regarding the results of DOR's audit.

Id., 422 S.C. 292, 297-302, 811 S.E.2d 758, 761-63 (footnotes omitted) (italics in original; bold and underlining added).

When discussions between the DOR and Richland County broke down, the DOR stopped remitting the tax proceeds to Richland County. Richland County filed suit against the DOR requesting mandamus relief ordering the DOR to make the monthly payments. The DOR counterclaimed for declaratory judgment that certain expenditures were unlawful.

Shortly thereafter, SCPIF, Sloan and DePass filed a Complaint and an Amended Complaint against Richland County (R. pp. 69-79, 106-115) alleging seven causes of action arising from the same Penny Tax program:

1. Ordinance Number 039-12HR exceeds the scope of S.C. Code Ann. § 4-37-30.
2. Violation of S.C. Code Ann. § 11-35-50.
3. Procurements Exceed the Scope of S.C. Code Ann. § 4-37-30.
4. No Annual, Independent, Public Audit.
5. No Annual Budget.
6. No Annual, Independent Audits of Agencies Receiving Appropriations.
7. Violation of S.C. Code Ann. § 4-37-25

CMRTA moved to intervene as a Defendant. (R. pp. 80-92). Then the County and CMRTA both moved to dismiss and for judgment on the pleadings. (R. pp. 103-105, 116-118). The Circuit Court ruled that Appellants possess taxpayer standing and public importance standing and also denied the Motions to Dismiss and for Judgment on the Pleadings. (R. pp. 21-38).

Later, CMRTA moved for Summary Judgment, and the County moved to dismiss for failure to prosecute and for Summary Judgment. (R. pp. 174-185). The Circuit Court granted CMRTA's Motion for Summary Judgment and dismissed the case against the County for failure to prosecute. (R. pp 4-18). Appellants moved to alter or amend both rulings. (R. pp. 285-296).

While the Motions to Alter or Amend were pending, the South Carolina Supreme Court issued *Richland County v. South Carolina Department of Revenue, et al.*, 422 S.C. 292, 811 S.E.2d 758 (S.C. 2018), which ruled that Penny Tax Revenues could not be used for expenditures not related to specific transportation capital projects. Appellants filed a Supplemental Memorandum in Support of Motions to Alter or Amend (R. pp. 301-307), based upon the Supreme Court opinion, but the Circuit Court denied both Motions to Alter or Amend. (R. pp. 1-3).

Appellants appeal the Order granting summary judgment to CMRTA, the Order dismissing the case against the County for failure to prosecute, and the denial of both Motions to Alter or Amend.

STANDARDS OF REVIEW

Summary Judgment

The Circuit Court granted Summary Judgment on the claims against CMRTA. This Court set out the standard for this Court's review of a grant of Summary Judgment in *Sloan v. Greenville Hospital System.*

> Under Rule 56(c) of the South Carolina Rules of Civil Procedure, a motion for summary judgment shall be granted "if 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. "An appellate court reviews the granting of summary judgment under the same standard applied by the trial court under Rule 56(c), SCRCP." *Hooper v. Ebenezer Senior Servs. & Rehab. Ctr.,* 386 S.C. 108, 114, 687 S.E.2d 29, 32 (2009) (citing *Brockbank v. Best Capital Corp.,* 341 S.C. 372, 379, 534 S.E.2d 688, 692 (2000)).
>
> A suit for declaratory judgment is neither legal nor equitable; rather, it is determined by the nature of the underlying issue. *Sloan v. Greenville County,* 380 S.C. 528, 534, 670 S.E.2d 663, 666 (Ct.App.2009). "The issue of statutory interpretation is a question of law for the court," and this Court may decide questions of law without deference to the trial court. *Id.* at 534, 670 S.E.2d at 667.

Id., 388 S.C. 152, 156-57, 694 S.E.2d 532, 534-35 (2010).

This Court also stated the standard this way:

> In reviewing the grant of summary judgment, this Court applies the same standard that governs the trial court under Rule 56, SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *South Carolina Elec. & Gas Co. v. Town of Awendaw,* 359 S.C. 29, 34, 596 S.E.2d 482, 485 (2004) (quoting *Osborne v. Adams,* 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001)). On appeal, all ambiguities, conclusions, and inferences arising in and from the evidence must be viewed in a light most favorable to the non-moving party. *Id.*

Vaughan v. Town of Lyman, 370 S.C. 436, 440, 635 S.E.2d 631, 633-34 (2006).

Failure to Prosecute

The Circuit Court dismissed the claims against Richland County for failure to prosecute.

> Whether an action should be dismissed for failure to prosecute is left to the discretion of the trial court judge, and his decision will not be disturbed, except upon a clear showing of an abuse of discretion. *Small v. Mungo,* 254 S.C. 438, 442, 175 S.E.2d 802, 804 (1970).

McComas v. Ross, 368 S.C. 59, 62, 626 S.E.2d 902, 904 (2006).

Generally, the dismissal of actions for failure to prosecute is appropriate in cases where: (1) the dismissals are imposed to maintain the orderly disposition of cases in the face of repeated warnings or multiple opportunities to proceed with trial; and (2) only then upon a finding of unreasonable neglect. *McComas v. Ross,* 368 S.C. 59, 62, 626 S.E.2d 902, 904 (Ct.App.2006). In addition, "there must be some showing of indifference to the rights of the defendant." *Id.* at 63, 626 S.E.2d at 904.

Appellants contend that the Circuit Court's dismissal for failure to prosecute was an abuse of discretion and based on an error of law.

ARGUMENT

I. THE CMRTA ORDER VIOLATES THE SUPREME COURT RULING.

The Circuit Court granted Summary Judgment to the Central Midlands Regional Transit Authority. (CMRTA Order) (R. pp. 10-18). The court ruled that the Transportation Act authorized the expenditure of Penny Tax revenues for "continued operation of mass transit services provided by Central Midlands Regional Transit Authority." Richland County Ordinance No. 039-12HR (Ordinance). (R. p. 17).

Appellants had argued that Penny Tax revenues must be used only for capital expenditures. The Circuit Court summarized Appellants' arguments.

> [Appellants] allege CMRTA's use of penny tax revenues for operating expenses or administrative expenses is unlawful. They allege this use of funds exceeds the scope of § 4-37-30. Also, [Appellants] take exception to the language in Section 2 of Ordinance 039-12HR describing the mass transit systems project, "continued operation of mass transit services." **[Appellants] maintain these penny tax revenues must be used solely on capital costs** for transportation facilities and **not the continued operation of the system**.

(R. pp. 16-17) (emphasis added). The Circuit Court accurately stated Appellants' contentions.

The Circuit Court rejected Appellants' interpretation of the Transportation Act.

> But if one used the [Appellants'] interpretation of the statute, the penny tax revenues could be used for mass transit systems, but **only for expenditures on capital costs**. This interpretation goes beyond the plain language of the statute and would result in the expenditures being used **only to buy buses or construct facilities related to the mass transit system**.

(R. p. 17) (emphasis added). Again, the Circuit Court's description of Appellants' position was accurate.

Just prior to its Conclusion, the Circuit Court summarized its findings:

> The Court finds that the legislative intent is clear from the enabling Act itself. **There is no statutory language that states expenditures of penny tax revenues are limited to "capital costs".** Further, the legislature's preamble and findings lead to an opposite result -- penny tax revenues may be expended on the **operation** of transportation-related projects, which the statute specifically defines to include mass transit systems, such as the CMRTA.

(R. p. 18) (emphasis added).

As demonstrated below, the South Carolina Supreme Court's opinion in *Richland County v. South Carolina Department of Revenue* is directly contrary to the analysis of the Circuit Court. *Id.,* 422 S.C. 292, 811 S.E.2d 758 (S.C. 2018). The Supreme Court ruled that **only capital expenditures** qualify as lawful uses of the Penny Tax funds. Under the Supreme Court analysis, and the plain language of the Transportation Act, Penny Tax Revenues may not be used for the "continued operation" of the bus system. Appellants respectfully submit that the Circuit Court's ruling in the CMRTA Order must be reversed in light of the Supreme Court's ruling.

The Supreme Court ruled that the Transportation Act Limited Penny Tax expenditures to "'***transportation-related projects***.' [S.C. Code Ann.] § 4-37-30(A)(1)(a)(i) (emphasis added)." *Richland County v. South Carolina Department of Revenue,* 422 S.C. 292, 298, 811 S.E.2d 758, 761 (S.C. 2018). The Supreme Court continued:

> The revenues generated from such a tax **must be used** in accordance with **statutory restrictions** imposed by the General Assembly—namely, proceeds **must be used for the capital costs** of the types of **transportation projects** identified in the Transportation Act. *Id.* § 4-37-30(A)(15)."

Id., (emphasis added). The Court continued: "At issue in this case is whether and to what extent certain costs qualify as '**capital costs**' and thus are considered **proper expenditures of penny tax revenues**." *Id.,* (emphasis added). The Court ruled that although some

"administrative costs" were allowed under the Transportation Act, those "administrative costs" must be directly related to specific "capital costs." The Supreme Court ruled:

> Primarily, **DOR correctly asserted** the County's expenditure of Penny Tax funds on "**administrative costs" that were unrelated to any specific transportation project were improper as they exceeded the scope of the Transportation Act**. DOR informed the County that regardless of what "administrative costs" the County's Penny Tax Ordinance purported to allow, **only those costs allowable under the Transportation Act were proper expenditures of Penny Tax funds**. However, DOR also acknowledged this might include certain limited transportation-related administrative costs:
>
> > While some administrative costs may be appropriate expenditures under the [T]ransportation [Act], the use of the term "capital costs" in the statute gives some guidance on what administrative costs may be properly allowable under the law. The term "capital cost" is not defined in the law. However, "**capital costs" are generally considered one-time costs incurred for the creation or improvement of tangible property, either real or personal, such as buildings, infrastructure[,] and equipment . . . .** The concept of "capitalized costs" for tax purposes is described in detail in Internal Revenue Code (IRC) §§ 263, 263A, and the accompanying regulations . . . . Since the [Transportation Act] does not define "capital costs," these Internal Revenue Code principles can be used to provide guidance as to which costs are properly allowable under the [T]ransportation [Act].

Id., 422 S.C. 292, 302-03, 811 S.E.2d 758, 763-64 (S.C. 2018) (emphasis added). The "continued operation" of the CMRTA is not a "one-time cost," and therefore it is not a capital expenditure. *Id.* at 292, 302-03.

To provide clarity on what expenditures from the Penny Tax are permissible, the Supreme Court endorsed the Internal Revenue Code §§ 263 and 263A, which explains the meaning of capital expenditures.

> In light of the County's many suspect expenditures of Penny Tax funds, DOR requested an injunction against the County prohibiting the further expenditure of Penny Tax funds **until the County "adopts IRC 263/263A or some other acceptable alternative** as a standard to be used to determine

> when expenditures are proper within the [Transportation] Act." **Under these compelling circumstances, we find an injunction is appropriate**. To ensure objective criteria establishing compliance with the Transportation Act, **the County shall be subject to guidelines** for determining whether expenses are properly allocable to a specific transportation project, or the direct administration of a specific transportation project. Accordingly, the County is hereby enjoined from violating the Transportation Act. We direct the circuit court, no later than thirty days following remand, to enter the preliminary injunction in accordance with this opinion.

Id., 422 S.C. 292, 311, 811 S.E.2d 758, 768-69 (S.C. 2018) (emphasis added).

Ordinance Number 039-12HR purported to fund "continued operation of mass transit services provided by [CMRTA] including implementation of near, mid and long-term service improvements." *Id.*, Section 2. (c), Project 2. Using the proceeds of the Penny Tax for "continued operation of mass transit services" violates the stated statutory purpose of the Penny Tax: "financing transportation **facilities**" (emphasis added). CMRTA is being funded from the Penny Tax proceeds at a rate of about $3.5 million per quarter. (R. p. 212).[1]

"Continued operation of mass transit services" is not a "capital cost" under Internal Revenue Code (IRC) §§ 263, 263A. *Richland County v. South Carolina Department of Revenue*. The Circuit Court's ruling granting Summary Judgment to CMRTA was contrary to the Supreme Court ruling, and must be reversed.

[1] In addition to being unlawful, these provisions are unsustainable. The statute authorizes this Penny Tax only for twenty-two years. The source of the "continued funding" will expire with the statutory authorization for the Penny Tax.

II. THE RICHLAND COUNTY ORDER FAILS TO ADDRESS SUPREME COURT PRECEDENT.

The Circuit Court dismissed the Appellants' case against the County for failure to prosecute. Appellants respectfully submit that this dismissal was in error.

A. The Circuit Court Failed to Address the Legal Standard.

The appellate courts of this State have established standards for dismissal for failure to prosecute, and Appellants' case does not meet those standards. The Circuit Court Order cites one sentence from one case on this legal issue: 'The plaintiff has the burden of prosecuting his action, and the trial court may properly dismiss an action for plaintiff's unreasonable neglect in proceeding with his case," *quoting Don Shevey & Spires, Inc. v. Am. Motors Realty Corp.,* 279 S.C. 58, 60, 301 S.E.2d 757, 758 (1983). (R. p. 7). However, the Court's Order omitted any reference to the extensive analytical standards established by the appellate courts of this State. (R. pp. 5-9).

> In those cases where our supreme court has affirmed dismissal of actions based on a failure to prosecute, the dismissals were imposed to maintain the orderly disposition of cases in the face of **repeated warnings** to the offending party or **multiple opportunities to proceed with trial**, and only then upon a finding of **unreasonable neglect**. *See Small v. Mungo,* 254 S.C. 438, 443, 175 S.E.2d 802, 804 (1970) (finding no abuse of discretion where counsel was apparently in his office and plaintiff and witnesses were at work when case was called for trial, and counsel informed the court that he could not appear for hours); *Bond v. Corbin,* 68 S.C. 294, 294-95, 47 S.E. 374, 374 (1904). In granting dismissal for failure to prosecute, there must be some showing of **indifference to the rights of the defendant**. *E.g., Orlando v. Boyd,* 320 S.C. 509, 511, 466 S.E.2d 353, 355 (1996) (holding that precluding a witness from testifying was an abuse of discretion without a showing of **willful disobedience** when exclusion amounted to a judgment of default or dismissal).
>
> Our Fourth Circuit Court of Appeals has also addressed this issue. The court in *McCargo v. Hedrick,* 545 F.2d 393, 396 (4th Cir.1976) held that dismissal is a harsh sanction, which "should be resorted to only in **extreme cases**." Dismissal is generally permitted only in the face of a **clear record of delay or contumacious conduct** by the plaintiff. *Id.* The discretion

> should be exercised discreetly and only after **due consideration of the availability of sanctions less severe than dismissal**. *Id.; Bush v. U.S. Postal Serv.,* 496 F.2d 42, 44 (4th Cir.1974). The Fourth Circuit has said the trial court must consider four factors before dismissing a case for failure to prosecute: (1) the plaintiff's degree of **personal responsibility**; (2) the amount of **prejudice** caused the defendant; (3) the presence of a drawn out history of **deliberately proceeding in a dilatory fashion**; and (4) the effectiveness of **sanctions less drastic than dismissal**. *Hillig v. Comm'r of Internal Revenue,* 916 F.2d 171, 174 (4th Cir.1990). *See also Herbert v. Saffell,* 877 F.2d 267, 270 (4th Cir.1989); *McCargo,* 545 F.2d at 396; *Chandler Leasing Corp. v. Lopez,* 669 F.2d 919, 920 (4th Cir.1982).

McComas v. Ross, 368 S.C. 59, 62-63, 626 S.E.2d 902, 904-05 (2006) (emphasis added). Appellants respectfully note that the Circuit Court Order totally failed to address these factors and criteria.

Appellants further respectfully suggest that there has been no showing to meet the standards. Appellants are not accused of failing to answer Defendant's discovery requests, because neither Defendant issued any discovery requests to the Appellants. Appellants are not accused of violating or disobeying any Court Order. Appellants have not been charged with any misconduct. Appellants received no prior sanction or warning of any kind. Accordingly, the Circuit Court's dismissal for failure to prosecute was based on an error of law and an abuse of discretion.

B. Appellants Obtained Documentary Evidence Through FOIA.

Respondents contend that Appellants issued no discovery requests under the South Carolina Rules of Civil Procedure. This so-called "failure" must be addressed in context. Before filing this lawsuit, as is their practice, Appellants requested documents from Richland County under the S.C. Freedom of Information Act, S.C. Code Ann. 30-4-10 ff. ("FOIA"). Plaintiff issued the FOIA Request to the Respondents February 11, 2016 (R. pp. 240-243). After failing to receive a proper response, Plaintiffs filed suit on April 13,

2016, *South Carolina Public Interest Foundation v. Richland County and Torrey Rush, Chairman of County Council*, Civil Action Number 2016-CP-40-2404, ("the Penny Tax FOIA case"). (R. p. 244). Defendants filed an Answer on May 13, 2016. Defendants responded to the FOIA request with public records on June 8, 2016. (R. pp. 244-248). On or about September 19, 2016, Defendants provided 479 additional pages of responsive public records. Then, on or about November 17, 2016, Defendants provided an additional 303 pages of additional public records. (R. p. 236).

On or about January 19, 2017, the parties verbally agreed to settle the FOIA case, by payment of $3,000 in Plaintiffs' attorney's fees under FOIA. For nearly three months counsel wrote back and forth by letter and by email attempting to reach a written settlement agreement. Defendants eventually provided the settlement check for the attorneys' fees in the Penny Tax FOIA action. Attorneys' fees check in FOIA case. The Parties filed a Stipulation of Dismissal on or about April 11, 2017. Accordingly, Plaintiffs were pursuing the enforcement of their FOIA request and the production of relevant public records under FOIA related to this case from February 11, 2016, through April 11, 2017. (R. p. 236).

Furthermore, some of the documents that the Appellants presented in opposition to Richland County's Motion for Summary Judgment were documents that Appellants secured through FOIA. (R. pp 212, 222). In addition, Appellants used Richland County's written responses to Appellants' FOIA requests as evidence in opposition to Richland County's Motion for Summary Judgment. (R. pp. 202, 237, 245)

One difference between FOIA and the discovery rules is that the discovery rules require supplementation, but FOIA requires new or supplemental FOIA requests, which Plaintiffs also served. Plaintiffs served supplemental FOIA requests on CMRTA and on

counsel for CMRTA on October 27, 2017. (R. p. 237). CMRTA responded, producing the requested public records.

Plaintiffs also served supplemental FOIA requests on the County. The County refused to produce the public records or provide a written response. Accordingly, Plaintiffs again filed suit under FOIA to enforce their FOIA requests for public records, *South Carolina Public Interest Foundation v. Richland County*, Civil Action Number 2017-CP-40-06286 on October 19, 2017. (R. pp. 380-387). The County did not file a timely Answer to the second FOIA case.

Neither the Appellants nor the Respondents issued any discovery requests under the Rules of Civil Procedure. However, Appellants used the Freedom of Information Act and obtained more than 2000 pages of documents from Richland County related to this litigation. Appellants spent more than a year litigating for the production of these documents and an award of attorney's fees under FOIA. (R. p. 288).

C. Appellants Actively Prosecuted this Case.

Plaintiffs participated extensively in the current litigation. Plaintiffs filed and served the Summons and Complaint. (R. pp. 70-79). Plaintiffs consented to the intervention of the Defendant CMRTA. (R. pp. 67-68). Plaintiffs filed a Memorandum of Law in Opposition to the Motions to Dismiss and Judgment on the Pleadings. (R. pp. 186-222). On February 14, 2017, Plaintiffs successfully argued against the Motions to Dismiss and Judgment on the Pleadings. Plaintiffs submitted proposed orders. On March 6, 2017, the Court denied both Defendants' Motions. (R. pp. 39-60). Defendants moved to Alter or Amend the Judgment. (R. pp. 136-157). Plaintiffs filed a responsive memorandum. (R.

pp. 166-173). On March 28, 2017, the Court filed an Amended Order Denying Motions to Dismiss and Motion for Judgment on the Pleadings. (R. pp.21-38).

Defendants moved for summary judgment. (R. pp.181-185). Plaintiffs filed a written response to Defendants' Motions for Summary Judgment. (R. pp. 186-222). Plaintiffs also submitted evidence (sworn testimony, documentary evidence, and legal admissions of the Defendants), with legal argument supporting Plaintiffs' claims. (R. 204-222). At the hearing of October 26, 2017, Plaintiffs argued against Motions for Summary Judgment (R. pp. 328-373) and submitted a Supplemental Memorandum of Law and proposed order. (R. pp. 235-265).

Appellants respectfully suggest that the foregoing demonstrates that Plaintiffs diligently pursued this action, while waiting for a decision from the Supreme Court on *Richland County v. South Carolina Department of Revenue*, 422 S.C. 292, 811 S.E.2d 758 (S.C. 2018).

D. Discovery Requests are Optional.

The only specific criticism Respondents made in support of the Motion to Dismiss for Failure to Prosecute was that Appellants did not issue formal discovery requests under the Rules of Civil Procedure. Appellants respectfully suggest that failure to issue formal discovery requests does not warrant a sanction of any kind, especially in light of Appellants' efforts in litigation and their success in securing the documents under FOIA.

Discovery requests under the South Carolina Rules of Civil Procedure are optional, not mandatory. "Parties **may** obtain discovery by one or more of the following methods." SCRCP 26(a)(emphasis added). "[A]ny party **may** take the testimony of any person, including a party, by deposition upon oral examination." SCRCP 30(a)(1)(emphasis

added). [A]ny party **may** serve upon any other party written interrogatories." SCRCP 33(a)(emphasis added). "In all cases the following standard interrogatories **may** be served by one party upon another." SCRCP 33(b)(emphasis added). "Any party **may** serve on any other party a request [for production of documents.]" SCRCP 34(a)(emphasis added). "A party **may** serve upon any other party a written request for . . . admission." SCRCP 36(a)(emphasis added).

Appellants respectfully suggest that Respondents did not sustain or articulate any prejudice from the Appellants' failure to use the formal discovery process. Respondents themselves failed to issue any discovery requests, subpoenas, or notices of depositions.

Accordingly, Appellants respectfully suggest that the Court's imposition of the harshest of all sanctions, dismissal, without any disobedience to any Order, without warning, without any prior sanction, and apparently without consideration of any lesser sanction, is not in keeping with the decisional law in this State and was therefore in error.

III. APPELLANTS PLED AND SUPPORTED VALID CLAIMS.

Richland County also moved for Summary Judgment (R. pp. 223-234), but the Circuit Court did not rule on the Motion for Summary Judgment (R. pp. 4-9). Appellants respectfully submit that the reason that the Circuit Court did not rule on Summary Judgment is that Appellants had pled and supported their claims with valid and admissible evidence. (R. pp.106-115). As noted above these claims are:

1. Ordinance Number 039-12HR exceeds the scope of S.C. Code Ann. § 4-37-30.
2. Violation of S.C. Code Ann. § 11-35-50.
3. Procurements Exceed the Scope of S.C. Code Ann. § 4-37-30.
4. No Annual, Independent, Public Audit.
5. No Annual Budget.
6. No Annual, Independent Audits of Agencies Receiving Appropriations.
7. Violation of S.C. Code Ann. § 4-37-25.

A. The Ordinance Exceeds the Limited Statutory Authority.

The South Carolina General Assembly enacted Title IV, Chapter 37 of the South Carolina Code Annotated entitled "Optional Methods for Financing **Transportation Facilities**" (emphasis added), which authorizes counties to adopt an ordinance imposing a sales and use tax for "financing transportation **facilities**" (emphasis added). Further, the authorizing statute establishes the kinds of "transportation facilities" for which such "optional methods of financing" may be used: "highways, roads, streets, bridges, mass transit systems, greenbelts, and other transportation-related projects **facilities** including, but not limited to, drainage **facilities** relating to the highways, roads, streets, bridges, and other transportation-related projects" S.C. Code Ann. 4-37-30(a)(1) (emphasis added).

The Supreme Court discussed the Act's purpose and limited grant of authority to counties in *Richland County v. South Carolina Department of Revenue.*

The types of projects permitted to be funded with [the Penny Tax] are

> "highways, roads, streets, bridges, mass transit systems, greenbelts, and other *transportation-related projects*." *Id.* § 4-37-30(A)(1)(a)(i) (emphasis added). The revenues generated from such a tax must be used in accordance with statutory restrictions imposed by the General Assembly—namely, proceeds must be used for the **capital costs** of the types of **transportation projects identified in the Transportation Act**. *Id.* § 4-37-30(A)(15).

Id., 422 S.C. 292, 298, 811 S.E.2d 758, 761 (S.C. 2018) (emphasis added).

Richland County adopted Ordinance Number 039-12HR ("Ordinance") to levy and impose a 1% sales and use tax, pursuant to S.C. Code Ann. § 4-37-30 (R. p. 204). The County Ordinance exceeded the Transportation Act's purpose, scope, and grant of limited authority.

> It is axiomatic that **the County's Ordinance may not expand the scope** of expenditures authorized in the enabling provisions **of the Transportation Act**, which requires a nexus between expenditures and a transportation-related **capital project**. *See, e.g.*, S.C. Code Ann. § 4-37-30(A)(1)(a)–(c); *Sinkler v. County of Charleston*, 387 S.C. 67, 76–78, 690 S.E.2d 777, 781–82 (2010) (invalidating a county ordinance that failed to establish a development scheme **as contemplated by the relevant enabling legislation** and rejecting the county's argument that the flexibility and authority conferred by the enabling legislation authorized the county to employ measures beyond the scope of the enabling legislation); *Holler v. Ellisor*, 259 S.C. 283, 287, 191 S.E.2d 509, 510 (1972) (observing that local government enactments and regulations "must be **authorized by the enabling act**, at least, where they are enacted pursuant to the authority conferred by such act, and they can be **no broader than the statutory grant of power**"). A proper expenditure of Penny Tax funds must be tethered to a specific transportation-related **capital project** or the administration of a specific transportation project.

Richland County v. South Carolina Department of Revenue, 422 S.C. 292, 311-12, 811 S.E.2d 758, 768 (S.C. 2018) (emphasis added).

As demonstrated above, the Transportation Act does not authorize Penny Tax revenues for the "continued operations" of the CMRTA.

The County argued that the County alone was empowered to determine which expenditures were permitted under the Transportation Act. The Supreme Court disagreed.

> [W]e also find the County has woefully failed to demonstrate a likelihood of success on the merits with regard to its interpretation of the Transportation Act. *See, e.g., Sinkler v. County of Charleston*, 387 S.C. 67, 76–78, 690 S.E.2d 777, 781–82 (2010) . . . . To the contrary, DOR has presented a compelling prima facie case that **some of the County's expenditures of Penny Tax revenues are in violation of the Transportation Act**.

Id., 422 S.C. 292, 311, n. 7, 811 S.E.2d 758, 768 (S.C. 2018) (emphasis added). The County may not expand the scope of the Transportation Act by ordinance.

B. Respondents Violated S.C. Code Ann. § 11-35-50.

Respondents have violated S.C. Code Ann. § 11-35-50 which requires all political subdivisions to "adopt ordinances or procedures embodying sound principles of appropriately competitive procurement." One of the "sound principles of appropriately competitive procurement" is having procurement decisions made by "the appropriate chief procurement officer." S.C. Code Ann. § 11-35-510.

On May 6, 2014, Richland County Council amended the Richland County procurement law to grant itself the authority to exempt Penny Tax expenditures, and only Penny Tax expenditures, from the standard procurement rules. Richland County Code, § 2-591 (R. pp. 199, 215). Procurements from the proceeds of the Penny Sales Tax are not made by the Chief Procurement Officer, or even by the Procurement Department consisting of procurement professionals, but rather they are made by the members of the County Council, in contrast to and isolated from, all other procurements of Richland County.

Furthermore, Richland County passed the ordinance allowing Penny Tax fund contracts to be approved, subject to Richland County Code § 2-591, which does not contain any protest or appeal rights. (R. p. 215). Finally, because Richland County did

not use the ordinance method to approve a contract, the protest procedures contained in Richland County Code § 2-621.1 did not apply. Nor was the possible referral of the protest to the County's independent procurement review panel available, as ordinarily provided by Richland County Code § 2-621.4. (R. p. 216).

Tim Donovan is the Audit Manager for Foreign Audit, Nexis and Discovery for the South Carolina Department of Revenue. He provided an affidavit in the case of *Richland County v. the South Carolina Department of Revenue*, Civil Action No. 16-CP-40-3102. ("Donovan Affidavit") (R. pp. 213-217). Appellants filed Donovan's affidavit in opposition to the Motion for Summary Judgment in this case. Donovan testified that he had "audited Richland County to determine compliance with the provisions of the state's tax statutes and in particular section 4-37-30 (A) (the sales and use tax provision)." (Donovan Affidavit, paragraph 5) (R. p. 214).

Donovan also testified that Richland County amended the RFP process:

> While the amended RFP process does require an evaluation committee to determine and submit a short list of qualified firms to the Council for consideration, the process appears to be **substantially abbreviated and does not include the rigorous scoring** of the original procurement procedure. Further, the law specifically **exempts contracts** granted (or not granted) using this procedure **from the protest provisions** of the Richland County law. *See* Richland County code, section 2-591, section (f).

Donovan Affidavit, par. 8 (emphasis added) (R. p. 215). Donovan further addressed the Program Development Team ("PDT") contract granted by counsel.

> Under this second procedure, counsel, on the first round of voting, awarded Team ICA/Brownstone/MB Kahn the PDT contract. The effect of the May 6, 2014 amendment and the subsequent contract award is that Council awarded a $31 million contract for project management **without independent scoring by an impartial scoring committee**. . . . Without independent scoring, there is **little oversight** regarding conflicts of interest, efficiency of costs, or experience, and qualification of service providers cannot properly exist.

Donovan Affidavit, par. 9 (emphasis added) (R. p. 215).

These politically infused decisions violate "sound principles of appropriately competitive procurement." S.C. Code Ann. § 11-35-50. Accordingly, these measures violate state law.

C. Procurements Exceed the Scope of S.C. Code Ann. § 4-37-30.

As shown above, Ordinance Number 039-12HR exceeds the statutory authority of S.C. Code Ann. § 4-37-30, by authorizing the Penny Tax to finance "continued operation of mass transit services provided by Central Midlands Regional Transit Authority." In addition, there were other expenditures that violates S.C. Code Ann. § 4-37-30.

1) The Transportation Act Does Not Authorize Penny Tax Revenues for Pedestrian Sidewalks, Bike Paths, and Lanes.

Ordinance Number 039-12HR purported to adopt a 1% tax not only for "highways, roads, streets, [and] bridges" but also "pedestrian sidewalks [and] bike paths and lanes." *Id.* Section 1(b). (R. p. 390). The Ordinance states, "The imposition of the sales and use tax and the use of sales and use tax revenue, if approved in the referendum, shall be subject to the conditions precedent and conditions or restrictions on the use and expenditure of sales and use tax revenues established by the Act, the provisions of this Ordinance, and other applicable law." *Id.*, Section 1 (c). (R. p. 389).

Ordinance Number 039-12HR exceeds the statutory authority of S.C. Code Ann. § 4-37-30. "Pedestrian sidewalks [and] bike paths and lanes" are not "transportation facilities," and funding them with the Penny Tax funds is not authorized by S.C. Code Ann. § 4-37-30. Accordingly, those provisions are unlawful.

2) The Supreme Court Ruled That Many County Expenditures Are Not "Transportation-related Capital Projects."

The Supreme Court addressed numerous "dubious" Richland County expenditures that the ordinance allowed, but the statute did not.

> DOR identified specific expenditures it believed were **problematic**, including the use of more than $554,000 in Penny Tax funds to organize and staff the County's Small Local Business Enterprise (SLBE) Program, ...
>
> DOR also noted the County was paying *two* public relations firms monthly payments of $25,000 each for the provision of "public information services" . . . . It was unclear exactly what work these firms performed since a fully operational public information office already existed within the County and because no documentation existed to detail what specific services were provided, the number of hours spent on these projects, or how much each service cost.
>
> **DOR further took issue** with the more than $38,000 the County spent under a vague and duplicative "mentor-mentee" arrangement . . . .
>
> Faced with these **dubious expenditures**, the County put forward the position that all these expenditures were properly characterized as "administrative costs" under the Ordinance.

Richland County v. South Carolina Department of Revenue, 422 S.C. 292, 301-02, 811 S.E.2d 758, 763 (S.C. 2018) (emphasis added).

The Supreme Court ruled that these expenditures exceeded the scope of the statute and should be enjoined:

> A proper expenditure of Penny Tax funds must be tethered to a **specific transportation-related capital project** or the administration of a specific transportation project.
>
> In light of the County's **many suspect expenditures** of Penny Tax funds, DOR requested an injunction against the County prohibiting the further expenditure of Penny Tax funds until the County "adopts IRC 262/263A or some other acceptable alternative as a standard to be used to determine when expenditures are proper within the [Transportation] Act." Under these compelling circumstances, we find **an injunction is appropriate**. To ensure objective criteria establishing compliance with the Transportation Act, the County shall be subject to guidelines for determining whether

> expenses are properly allocable to a specific transportation project, or the direct administration of a specific transportation project. Accordingly, **the County is hereby enjoined from violating the Transportation Act**.

Id., 422 S.C. 292, 312, 811 S.E.2d 758, 768 (S.C. 2018) (emphasis added).

The Court ruled that the Transportation Act does not authorize Penny Tax revenues for expenditures other than capital costs of transportation projects.

Richland County's Penny Tax Ordinance, Ordinance Number 039-12HR, exceeds the scope of the state enabling statute, because the ordinance seeks to allow broad payment of expenses that the enabling Act does not permit. The Act is very asset-specific and requires the County's enabling ordinance to specifically list "the estimated **capital costs** of the project or projects to be funded in whole or in part from the proceeds of the tax." S.C. Code Ann. § 4-37-30(A)(1)(c) (emphasis added). Under the statute, the expenditures must be used for facilities (tangible assets) and not general County operating expenses, and the expenses incurred must be related to the facilities themselves.

Black's Law Dictionary defines "capital expenditure" as "an outlay of funds to acquire or improve a fixed asset." Black's Law Dictionary, Seventh Edition, West Group, St. Paul, Minnesota, 1999. Black's Law Dictionary defines "capital expense" as "an expense made by a business to provide a long-term benefit; a capital expenditure. A capital expense is not deductible, but can be used for depreciation or amortization." *Id.*

The Supreme Court ruled that IRC §§ 263 and 263A, or a similar definition, should guide the County's expenditures from the Penny Tax Fund. *Richland County v. South Carolina Department of Revenue*, 422 S.C. 292, 312, 811 S.E.2d 758, 768 (S.C. 2018).

The County had been employing virtually no limit on unrelated and unauthorized expenditures. The Department of Revenue and the Court noted that Richland County had been using Penny Tax funds to establish and staff the County-wide Small Local Business

Enterprise ("SLBE") Program, in violation of the state statute's specification that Penny Tax revenue be spent on transportation-related projects. These expenditures were an unlawful use of Penny tax proceeds, contrary to the enabling Act and the Supreme Court's decision in *Richland County v. South Carolina Department of Revenue*, 422 S.C. 292, 811 S.E.2d 758 (S.C. 2018).

Richland County used Penny tax revenues to pay for public relations services and "mentoring." *Richland County v. South Carolina Department of Revenue*, 422 S.C. 292, 302, 811 S.E.2d 758, 763 (S.C. 2018). This expenditure is unlawful under the enabling Act which requires that funds be used specifically for transportation facilities. Furthermore, the public relations from Penny Tax funds was excessive in relation to similar services offered by substantially similar firms. Certain County practices and expenditures from the Penny Tax funds revenues are not authorized by the enabling statute or the Ordinance.

3) Respondents Have Authorized Unlawful Expenditures.

Respondents' Penny Tax expenditures have publicly embarrassed the County. They have generated indictments and resignations of public officials. They resulted in grand jury investigations of improper expenditures (R. pp. 220-221). Donovan's Affidavit addressed some of these unlawful expenditures, including multiple overlapping payments going to insiders or members of the Project Development Team ("PDT").

> Concerns also exist about some of the relationships between the PDT (Team ICA/Brownstone/MB Kahn), the COMET bus system, and the parties who have been granted contracts with Penny Tax funds. For example, the Comet Board is scheduled to receive at least $300 million of Penny Tax dollars over the life of the Penny Tax program to run the Midlands' bus system. The company which received the contract to operate the bus system is represented by Darryl Campbell. Mr. Campbell owns a one-third equity interest in Brownstone which is one of the three

> firms that comprise the PDT. Campbell Consulting Group, solely owned by Mr. Campbell, also received a contract to perform public relations services for its client who operates the Comet bus system. Finally, the PDT awarded a $1.5 million contract to Campbell Consulting Group for public relations work potentially associated with the Penny Tax program. **Thus, Mr. Campbell, through his ownership interest in Brownstone and Campbell Consulting Group, are potentially being paid three times from Penny Tax funds**: (1) through his one third ownership in one of the three firms that were awarded the PDT contract, (2), through the contract involving the COMET bus system, and (3) through the $1.5 million public relations contract awarded through the PDT.

Donovan Affidavit, par 11. (R. p. 216).

The Donovan Affidavit also addresses the questionable payments to insiders for unnecessary or inappropriate training.

> Additionally, the chair of the COMET board was hired as a member of the PDT and received a nearly $400,000 contract to perform "right-of-way" closings. At the same time, chair received $200 an hour to be "mentored" on how to perform right of way closings. In total, he received over $38,000 as a "mentee". Similarly, a local real estate broker was hired to provide immediate service regarding "right-of-way" matters for one of the firms hired by the PDT to work on Penny Tax projects. This broker also received "mentee" payments to be trained in the various activities of "right of way acquisition" process.

Donovan Affidavit, par. 12. (R. p. 216). Persons already well acquainted with this fairly simple process could have been hired, without spending tens of thousands of dollars to mentor them.

Finally, Respondents' records indicate they plan to spend $25 million on sidewalks, $21 million on bikeways, and $2.8 million on pedestrian intersection improvements (R. p. 222). These projects are not "transportation facilities" as that term is commonly understood. Accordingly, such projects are beyond the scope of the authorizing statutes and unlawful.

D. Respondents Failed to Require Annual Audits of the Penny Tax Program and from Agencies Receiving Appropriations from the Penny Tax.

Respondents have failed to require annual independent audits of the Penny Tax program itself, and from agencies receiving appropriations from the Penny Tax. The Ordinance states, "Except as specifically authorized by County Council, any outside agency organization receiving an appropriation of the Sales and Use Tax must provide to County Council an independent annual audit of such agency organization financial records and transactions and such other and more frequent financial information as required by County Council, all in a form satisfactory to County Council." *Id.*, Section 3. (b). (R. p. 208).

Donovan also testified to the lack of auditing required by the Richland County ordinance.

> My audit review of the Penny Tax Program gave **no indication that an annual independent audit of Penny Tax funds was conducted as required by the statute**. *See* Richland County Ordinance No. 039-12HR, Section 1, paragraph 2 and Section 3, subsection (b), paragraph 3. . . . Since [April, 2015], the County has not produced to the Department a copy of any audits. Furthermore, the audit review that I conducted did not indicate that any independent audits of the financial records and transactions of the agencies organizations receiving an appropriation of the Penny Tax were audited as required by the ordinance. **Council admitted** in correspondence to the Department **that no audits**, as required by the statute, **were conducted**.

Donovan Affidavit, par 9. (R. p. 215).

Similarly, in response to Appellants' FOIA request, **Richland County admitted** that it does not have any independent audits of agencies receiving appropriations from the Penny Tax funds. *See* Appellants' initial FOIA request number 7: "All reports of audits of any outside agency receiving an appropriation of the sales and use tax." (R. p. 241). Respondents responded: "Richland County does not have in its possession audit reports for

outside agencies receiving an appropriation of the sales and use tax." (R. p. 245). These audits are required by the Ordinance. Without such independent audits of agencies receiving appropriations from the Penny Tax funds, all such spending pursuant to this Ordinance is unlawful.

Furthermore, on September 20, 2017, County Administrator Gerald Seals issued Council Memorandum 9-3 to County Council, reporting that outside auditors had found **overdrafts amounting to nearly $35 million** of funds to pay for capital projects, many of which directly involved the Penny Tax funds. (R. pp. 249-264).

CONCLUSION

Appellants pray the Court to reverse the summary judgment ruling in favor of CMRTA allowing the funding of the "continued operations" of the CMRTA, because it conflicts with the ruling of the Supreme Court in *Richland County v. South Carolina Department of Revenue*, 422 S.C. 292, 811 S.E.2d 758 (S.C. 2018).

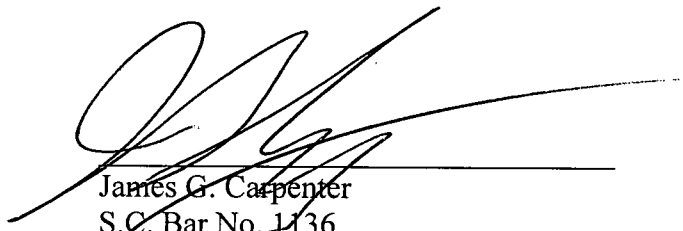
Appellants pray the Court to reverse the order of dismissal for failure to prosecute, because it disregards the controlling standards of the appellate courts of the state governing dismissal for failure to prosecute.

Appellants have pled and supported their claims that Respondents are exceeding the scope of the statutes that authorize the Penny Tax. These claims include both the continued operation of the bus system, improper expenditures, and the failure to adopt "sound principles of appropriately competitive procurement." Respondents have violated the auditing requirements for the Penny tax program and the agencies that receive Penny tax funds.

Finally, Respondents have issued nearly $35 million in overdrafts related to capital projects.

Accordingly, Appellants pray the Court to reverse the judgments of the Circuit Court, remand this case for further proceedings, and grant Appellants such other and further relief as the Court deems just and proper.

Respectfully submitted,
THE CARPENTER LAW FIRM, PC



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CERTIFICATE OF COMPLIANCE

The undersigned attorney certifies that the Appellants' Final Brief complies with SCACR 211(b).

Respectfully submitted,
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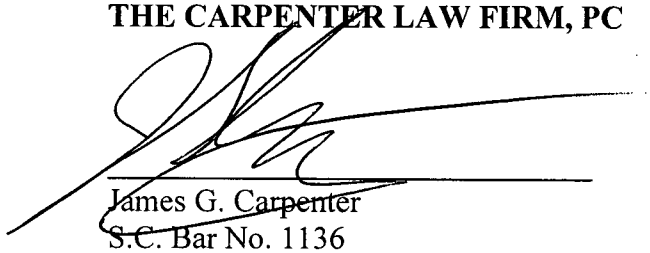

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