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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REPLY BRIEF OF APPELLANTS

James G. Carpenter, S.C. Bar No. 1136
THE CARPENTER LAW FIRM, PC
819 E. North Street
Greenville, South Carolina 29601
(864) 235-1269 (telephone)
(864) 331-3083 (facsimile)
Jim@CarpenterLawFirm.net
Attorney for Appellants

Other Counsel of Record:
Andrew Lindemann
Lindemann, Davis & Hughes, P.A.
Post Office Box 6923
Columbia, South Carolina 29260

Elizabeth Gray
Rob Tyson
Alexis K. Lindsay
PO Box 11449
Columbia, SC 29211

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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. One granted Summary Judgment to the Central Midlands Regional Transportation Authority ("CMRTA") (R. pp. 10-18), and the other dismissed the Appellants' case against Richland County for failure to prosecute. (R. pp.4-9).

The DOR Case

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 DOR found violations of South Carolina law and stopped remitting the Penny 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. After the initial rulings and prior to any discovery, both parties appealed, and then petitioned the South Carolina Supreme Court to take the case under SCACR 204. *Richland County v. South Carolina Department of Revenue, et al.*, 422 S.C. 292, 305, 811 S.E.2d 758, 765 (S.C. 2018).

The Supreme Court ruled that Penny Tax revenues could be used only for expenditures related to specific transportation capital projects, enjoined the County from violating the Transportation Act, and remanded the case to the Circuit Court. *Id.*, 422 S.C. 292, 312, 811 S.E.2d 758, 768-69 (S.C. 2018). The Supreme Court also directed the Circuit Court to "order the county to repay the improper expenditures from the County's general fund" if the County had expended Penny Tax funds contrary to the Transportation Act during the pendency of the appeal. 422 S.C. 292, 313, n. 9, 811 S.E.2d 758, 769, n. 9 (S.C.

2018). Finally, the Supreme Court directed the DOR to issue Guidelines governing expenditures from the Penny Tax. The DOR Guidelines allow the Penny Tax to be used for funding the continued operation of the CMRTA (R. p. 325). Upon remand of the DOR case, the Circuit Court adopted and approved the DOR Guidelines. (R. pp. 308-327).

The Case at Bar

Two weeks before Richland County filed suit against the DOR, Appellants had filed suit against Richland County alleging seven violations of State law arising from the Penny Tax program. (R. pp. 69-79). CMRTA intervened as a Defendant. (R. pp. 67-68). Shortly thereafter, this case was assigned to Judge Cooper along with the DOR case because: "It is expected there will be significant discovery sought in this case because of the issues in the case and there may be similar legal and administrative issues that would require duplication of, and potential inconsistent results." (R. pp. 64-66). But no discovery was conducted by any party in either case.

The Circuit Court granted summary judgment to CMRTA, ruling that the Transportation Act authorized the expenditure of Penny Tax revenues for continued operation of mass transit services. (R. pp. 10-18). The Circuit Court dismissed the Appellants' claims against Richland County for failure to prosecute. (R. pp. 4-9). After unsuccessful Motions under Rule 59(e) (R. pp. 1-3), Appellants appealed.

Respondent CMRTA's brief addresses issues unique to it, and Respondent Richland County's brief addresses issues unique to it. This Reply Brief will address the two Respondents' briefs separately.

REPLY TO CMRTA

CMRTA expects $300,000,000 of Penny Tax proceeds to fund its "continued operations." (R. p. 17). The CMRTA contends that this Court, like the Circuit Court in the DOR case, should defer to the DOR Guidelines allowing this funding; however, the DOR Guidelines violate the authorizing statute and the Supreme Court ruling, and they are not worthy of deference.

STANDARD 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).

I. THE DOR GUIDELINES VIOLATE THE STATUTE.

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.**" S.C. Code Ann. 4-37-30 (emphasis added). Richland County 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. (R. p. 206).

The DOR issued Guidelines, but they do not have the status of regulations. Even if they were regulations, they would not be entitled to deference because they are contrary to the controlling statute. "[T]he Court generally gives deference to an administrative agency's interpretation of an applicable statute or its own regulation. Nevertheless, where, as here, the plain language of the statute is contrary to the agency's interpretation, the Court will reject the agency's interpretation." *Brown v. Bi–Lo, Inc.,* 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003) (citations omitted). "Where the terms of the statute are clear, the court must apply those terms according to their literal meaning." *Brown v. S.C. Dep't of Health & Envtl. Control,* 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002).

The South Carolina General Assembly enacted Title IV, Chapter 37 of the South Carolina Code entitled "Optional Methods for Financing **Transportation Facilities**" (emphasis added), which authorizes counties to adopt an ordinance imposing a sales tax

for "financing **transportation facilities**" (emphasis added). 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).

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 (emphasis added). (R. p. 206). Using the proceeds of the 1% tax for "**continued operation** of mass transit services" (emphasis added) violates the stated statutory purpose of the 1% tax: "financing transportation **facilities**" (emphasis added).

The General Assembly authorized this tax for capital projects or "facilities." It was not authorized for "continued operation" of the mass transit system. The statute authorizes this Penny Tax only for a limited number of years. If these funds are used for the "continued operation" of the mass transit system, the source of the continued funding will expire when the statutory authorization for the Penny Tax expires. In addition to being unlawful, these provisions are unwise public policy because they do not create sustainable funding for CMRTA as the General Assembly sought to avoid.

The County argued in the DOR case that the word "operate," or derivations thereof, appear in the preamble of the statute, and from this observation, they argue that the statute authorizes the ongoing funding of the CMRTA. This argument is unfounded. First, the Act's preamble is not codified. Second, the preamble states that counties are "authorized

to establish transportation authorities and to finance . . . the cost of acquiring, designing, constructing, equipping and operating highways, roads, streets, and bridges, and other transportation-related projects . . . ." The term "operating" in the preamble modifies "transportation-related projects" including "roads, streets, and bridges."

The statute authorizing the Penny Tax authorizes two fundraising devices: the sales and use tax and tolls. Section (A) addresses the sales and use tax, and Section (B) deals with tolls.

> To accomplish the purposes of this chapter, counties are empowered to impose **one but not both** of the following sources of revenue: a **sales and use tax as provided in item (A) or** to authorize an authority established by the county governing body as provided in Section 4-37-10 to use and impose **tolls in accordance with the provisions of item (B)**:
> (A) Subject to the requirements of this section, the governing body of a county may 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) (emphasis added).

The ordinance authorizing the Penny Tax must list the "project or projects" and state "the estimated **capital cost** of the project or projects." *Id.* (emphasis added). The statute states:

> (1) The governing body of a county may vote to impose the tax authorized by this section, subject to a referendum, by enacting an ordinance. **The ordinance must specify**:
> (a) **the project or projects** and a description of the project or projects for which the proceeds of the tax are to be used, which may include projects located within or without, or both within and without, the boundaries of the county imposing the tax and which may include:
> (i) 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;
> (ii) **jointly-operated** projects, of the type specified in sub-subitem (i), of the county and South Carolina Department of Transportation; or

(iii) projects, of the type specified in sub-subitem (i), **operated** by the county or **jointly-operated** projects of the county and other governmental entities;
(b) the maximum time, stated in calendar years or calendar quarters, or a combination of them, not to exceed twenty-five years or the length of payment for each project whichever is shorter in length, for which the tax may be imposed;
(c) the **estimated capital cost of the project or projects** to be funded in whole or in part from proceeds of the tax and the principal amount of bonds to be supported by the tax; and
(d) the anticipated year the tax will end.

S.C. Code Ann. § 4-37-30 (A) (emphasis added).

"[C]ontinued operation of mass transit services provided by Central Midlands Regional Transit Authority" are not "capital costs."

The statute's use of the term "capital costs" indicates that only capital costs are allowable. "Capital costs" are one-time costs incurred for the creation or improvement of tangible property, either real property or personal property, such as buildings, infrastructure, and equipment. Other terms for such expenditures include "capital expenses" and "capital expenditures." 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 word "operate" appears in the text of the statute, and from that Respondents may argue that the Act authorized the funding of CMRTA "continued operations." This argument is unfounded. The statute does refer to certain projects "operated" or "jointly operated," but the use of the phrase "jointly-operated" is not a reference to "operational"

or "administrative" costs for purposes of revenue expenditures. It refers to which entity is already operating the project–the County alone or jointly with another government entity. Subpart (1)(a) requires the governing body to specify "the project or projects and a description of the project or projects for which the proceeds of the tax are to be used," including projects "within and without" the county's boundaries.

Respondents' reference to the specific uses of the word "operated" do not support their contention that the County may use the revenues to cover "operational expenses," of the CMRTA. The toll roads and toll bridges are addressed in Section (B) and an alternative to the 1% tax. This Section (B) is where the General Assembly addresses "operations."

> (B)(1)(a) This item (B) is intended to provide **an additional and alternative method**, subject to a referendum, for the provision of and financing for highways, roads, streets, and bridges, and other transportation-related projects, either alone or in partnership with other governmental entities to the end that these transportation-related projects may be undertaken in such manner as may best be calculated to expedite relief of hazardous and congested traffic conditions on the highways in the State, including the authorization for **turnpike projects** undertaken by the Department of Transportation in Article 9 of Chapter 5 of Title 57. . . .
>
> (b) Subject to the requirements of this item (B), the governing body of a county may by ordinance authorize, subject to a referendum, an authority to use **tolls** to finance projects authorized by this section.
>
> (c) The ordinance enacted by the governing body of the county to authorize an authority to use **tolls** must specify:
>
> > (i) the purpose for which the **toll revenues** are to be used which may include **jointly-operated** projects between the authority and the South Carolina Department of Transportation;
> >
> > (ii) the maximum time, stated in calendar years or calendar quarters, or a combination of them, not to exceed twenty-five years, for which the **tolls** may be imposed; and
> >
> > (iii) the maximum cost of the project or facilities to be funded in whole or in part from **toll revenues** and the principal amount of bonds to be supported by the **tolls**.

* * *

(2) If the voters have approved the **imposition of tolls** by referendum and if the authority enters into a partnership, consortium, or other contractual arrangement with the Department of Transportation relating to turnpike facilities, the authority may designate, establish, plan, improve, construct, maintain, **operate**, and regulate designated highways, roads, streets, and bridges as **"turnpike facilities"** as a part of the state highway system or any federal aid system whenever the authority determines the traffic conditions, present or future, justify these facilities. Under such partnership arrangement, the authority may utilize funds available for the maintenance of the state highway system for the maintenance of any **turnpike** facility financed pursuant to this chapter. If the authority determines it is feasible to make all or part of a construction project a **turnpike facility**, it may engage in the preliminary estimates and studies incident to the determination of the feasibility or practicability of constructing any **toll road** as it from time to time considers necessary and the cost of the preliminary estimates and studies may be paid from the general highway fund and must be reimbursed from funds provided under this chapter only if the studies and estimates lead to the construction of a **toll road**.

* * *

(6) In addition to the powers listed above, the authority may in connection with such **toll facilities**:

* * *

(g) enter into contracts with the Department of Transportation for sharing the cost of building and the **revenues derived from** the facilities authorized in this chapter and for the **operation** and maintenance of the facilities for transportation infrastructure debts only.

S.C. Code Ann. § 4-37-30 (B) (emphasis added). Although these provisions contain the words "jointly-operated," "operate," and "operation," all these provisions are limited to toll roads, turnpikes, and associated revenues. They are not related to the 1% sales tax, nor do they authorize using the Penny Tax for the continued operations of the CMRTA. The specific provisions demonstrate that the General Assembly did not intend for the County to use Transportation Act Revenues to pay those costs. Accordingly, using the Penny Tax

to fund "continued operations" of the CMRTA, and the DOR Guidelines that allow it (R. p. 325), and violate the enabling statute.

II. THE DOR GUIDELINES VIOLATE THE SUPREME COURT RULING.

The Circuit Court analysis and the Guidelines also contradict the South Carolina Supreme Court's opinion in *Richland County v. South Carolina Department of Revenue,* 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. 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). Under the Supreme Court analysis, Penny Tax revenues may not be used for the "continued operation" of the bus system.

The Court addressed the relationship between the enabling act, the Transportation Act, and the County Ordinance.

> 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.

422 S.C. 292, 311-312, 811 S.E.2d 758, 768 (S.C. 2018). (emphasis added).

The Supreme Court found that an appropriate analytical tool is United States Internal Revenue Code, §§ 263 and 263A, which specifically distinguishes between capitalized costs associated with a particular asset, and other expenditures, more properly considered supplemental expenses. The Internal Revenue Code requires that a taxpayer claiming a capital expenditure must capitalize all direct costs and an allocable portion of indirect costs and mixed costs associated with the purchase, creation, or improvements of property into what is called the "basis" of that property. Any costs that are traceable to the construction, purchase or improvement of property, such as a building or road, must be capitalized into the basis of that asset. These costs generally include the cost of labor to create the property, pensions for the employees working to create the property, accounting and legal services, and other items associated with the creation, construction or purchase of the property. Because the enabling Act for the Penny Tax does not define "capital costs," these Internal Revenue Code principles would serve as a useful guide for which "capital costs" are properly allowable under the Penny Tax Act.

"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*, 422 S.C. 292, 298, 811 S.E.2d 758, 761 (S.C. 2018).

The Guidelines violate S.C. Code Ann. § 4-37-30 and the Supreme Court's ruling, by allowing the 1% sales tax to finance "continued operation of mass transit services provided by Central Midlands Regional Transit Authority including implementation of near, mid and long-term service improvements."

The Circuit Court's ruling granting Summary Judgment to CMRTA was contrary to the statute and contrary to the Supreme Court ruling. This Court should follow the wording of the statute and the Supreme Court's reasoning and analysis in the DOR case, rather than the DOR Guidelines, and reverse the judgment of the Circuit Court.

REPLY TO RICHLAND COUNTY

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

STANDARD OF REVIEW—FAILURE TO PROSECUTE

The Richland County Brief contends that the Circuit Court properly dismissed the case for failure to prosecute based upon Appellants' lack of formal discovery.

> 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.

I. THE CIRCUIT COURT ERRED IN DISMISSING FOR FAILURE TO PROSECUTE.

Richland County argues that the State court standard for dismissal for failure to prosecute is different from the federal court standard. Richland County attempts to drive an artificial wedge between the State court standard and the federal court standard.

A fair reading of *McComas v. Ross*, 368 S.C. 59, 62-63, 626 S.E.2d 902, 904-05 (2006), demonstrates no difference between the State standard and the Federal standard. In *McComas v. Ross*, the South Carolina Court of Appeals cited the authorities from both

the South Carolina courts, and the US Court of Appeals for the Fourth Circuit. The *McComas* Court did not draw any distinction between two standards but cited both sets of authority as though they were harmonious and complementary. And indeed, they are. Richland County favors the unreasonable neglect standard, but "unreasonable neglect" requires "repeated warnings to the offending party or multiple opportunities to proceed with trial, and only then upon a finding of unreasonable neglect." *McComas v. Ross*, 368 S.C. 59, 62, 626 S.E.2d 902, 904 (2006).

The Circuit Court below did not address or analyze the so-called State standard. The Circuit Court Order cited one sentence from one case: "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). Order filed November 30, 2017, p. 3.

Even if the Circuit Court were to ignore the cases from the Fourth Circuit, it should have used the following standard:

> 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).

McComas v. Ross, 368 S.C. 59, 62, 626 S.E.2d 902, 904 (2006) (emphasis added). The Circuit Court Order totally failed to address "repeated warnings," "multiple opportunities to proceed with trial," or "indifference to the rights of the defendant," or "showing of willful disobedience."

The record does not support a showing to meet the standard. The record discloses no "repeated warnings," or any warnings of any kind. The record discloses no "multiple opportunities to proceed with trial." Appellants actually had no opportunity to proceed with trial at all. The case was dismissed before it was called to trial. The record demonstrates no "indifference to the rights of the defendant." No party in either the SCDOR case or the present case had conducted any formal discovery. The record discloses no "showing of willful disobedience." Appellants did not disobey any Court Order. The record does not demonstrate a record of "unreasonable neglect." All parties in both cases were waiting for a ruling from the Supreme Court. Appellants did not fail to answer Respondent's discovery requests, because neither Respondent issued any discovery requests to the Appellants. Appellants did not commit 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.

Furthermore, prior to and during the litigation, Appellants requested documents from Richland County under the S.C. Freedom of Information Act, S.C. Code Ann. 30-4-10 ff. ("FOIA"). (R. pp. 240-243, 382-385). Because Richland County failed to properly respond to the FOIA request (R. pp. 244-248, 386-387), Appellants pursued 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, while the case

at bar was pending in the Circuit Court. Appellants obtained more than 2000 pages of documents from Richland County related to this litigation using the Freedom of Information Act.

Appellants participated extensively in the current litigation. They appeared at every hearing. They successfully opposed Motions to Dismiss. (R. pp. 21-60, 166-173). They opposed Motions for Summary Judgment and filed extensive memoranda. (R. pp. 186-222). Appellants presented documents secured through FOIA and written responses to Appellants' FOIA requests in opposition to Richland County's Motion for Summary Judgment. (R. pp. 212, 222, 244-248). Appellants served supplemental FOIA requests on CMRTA and on counsel for CMRTA on October 27, 2017. The County again refused to produce the public records or provide a written response, and Appellants 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). Appellants respectfully suggest that the foregoing demonstrates that Appellants diligently pursued this action, while waiting for a decision from the Supreme Court on *Richland County v. South Carolina Department of Revenue.*

Richland County relies solely on the fact that Appellants did not issue formal discovery requests under the Rules of Civil Procedure. 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). 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.

Richland County admits that these Appellants raised issues very similar to those in the DOR Case. Richland County admits that in the DOR case, neither Richland County nor the DOR conducted any discovery. "The SCDOR litigation was still at the pleading stage when the appeal was taken; no discovery had been conducted" (County Brief, p. 16). Richland County conducted no discovery in the case at bar. (R. p. 287). Nevertheless, the County argues that the Circuit Court properly dismissed the Complaint based on the Appellants' failure to issue formal discovery requests, while all parties in both cases were waiting for a ruling from the Supreme Court.

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.

II. RULE 12(B)(8) DOES NOT PROHIBIT THIS ACTION.

On appeal, Richland County raises a new and different reason to uphold the dismissal: the SCDOR is pursuing a similar action against the County, and this litigation is either prohibited or unnecessary.

Respondent's new argument was not presented to or ruled upon by the Circuit Court. Respondents call it an additional sustaining ground. They argue that "the principle underlying Rule 12(b)(8) of the South Carolina Rules of Civil Procedure . . . applies to this case." Respondents Brief, p. 13. Neither the Rule nor the principle applies.

Rule 12(b)(8) allows a pleader to file a motion to dismiss prior to filing an Answer because "another action is pending **between the same parties** for the same claim." *Id,*

(emphasis added). Failure to make such a motion or raise such a defense waives the argument. Rule 12(h)(1) states:

> A defense . . . that another action is pending between the same parties for the same claim is **waived** (A) if **omitted from a motion** in the circumstances described in subdivision (g) or (B) if it is neither made by motion under this rule **nor included in a responsive pleading** or an amendment thereto permitted by Rule 15(a) to be made as a matter of course.

Id. (emphasis added). Respondents did not raise such defense in the Circuit Court, either by motion or by pleading. To have done so would have been ludicrous; there has never been another action "pending between the same parties for the same claim." Their argument based upon Rule 12(b)(8) borders on the spurious.

III. *WILSON V. CONDON* DOES NOT PRECLUDE THIS ACTION.

Richland County also argues that the rationale or principle of *State ex rel. Wilson v. Condon*, 410 S.C. 331, 764 S.E.2d 247 (2014), indicates that this matter should be dismissed because it is "duplicative litigation." *Wilson v. Condon* addressed the validity of a State Constitutional definition of marriage as a union between one man and one woman. Persons had challenged the Constitutional definition as violating the U.S. Constitution. The issue was pending in a U.S. District Court in South Carolina. The South Carolina Attorney General petitioned for original jurisdiction, for a ruling to prevent multiple cases addressing the same issue in Probate Courts all over the State. Original Jurisdiction is discretionary under SCACR 204, and this case addressed the orderly administration of cases in multiple Probate Courts. The Supreme Court ruled that because the claim was based upon the United States Constitution, the issue would be more appropriately handled in U.S. District Court. Accordingly, the Supreme Court ruled that no South Carolina courts would address the merits of the argument until the federal court

had resolved the case. The case at bar is far different. It does not involve any question of federalism, any action in federal court, or the United States Constitution. *Wilson v. Condon* has no application to the case at bar.

Contrary to the argument suggested by the County, in the DOR case, the Supreme Court found, "the expenditure of millions of dollars of Penny Tax revenues is **an issue of wide concern** both to DOR and **to the residents and taxpayers of Richland County**." *Richland County v. South Carolina Department of Revenue*, 422 S.C. 292, 306, 811 S.E.2d 758, 765 (S.C. 2018). Accordingly, these Appellants should be allowed and encouraged to pursue these issues "of wide concern."

Furthermore, this argument seems to be inconsistent with the reason this case was assigned to Judge Cooper along with the DOR case: "It is expected there will be significant discovery sought in this case because of the issues in the case and there may be similar legal and administrative issues that would require duplication of, and potential inconsistent results, where the case is not assigned to the same trial judge." (R. pp. 65-66). Appellants again suggested to the Circuit Court that upon remand of the DOR case, the two cases should be joined together for discovery and trial purposes, for judicial economy and so that there would not be a danger of inconsistent decisions (email dated September 28, 2017; R. pp. 361-362). Nevertheless, the Circuit Court did not join the two cases together, but rather granted summary judgment to CMRTA, and dismissed the claims against Richland County for failure to prosecute.

IV. APPELLANTS SEEK A REMAND FOR A RULING ON THE MERITS.

Finally, Richland County raises what seems to be a "straw man" argument, suggesting that Appellants were requesting a ruling on the merits of their claims against

Richland County. Appellants are not doing so. They listed and summarized their claims against Richland County to attempt to prevent another argument based on an "additional sustaining ground:" that Respondents were entitled to summary judgment on the merits, when the Circuit Court had declined to make such a ruling.

Appellants agree with Respondent Richland County's statement: "in the event that that dismissal is reversed, the merits of the Appellants' claims and the County's defenses must be remanded for a decision on the merits." Richland County brief, pp. 15-16.

Richland County adopted Ordinance Number 039-12HR ("Ordinance") that 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). Appellants allege that "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. Amended Complaint. Accordingly, those provisions are unlawful.

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 statute does not permit. Neither S.C. Code Ann. § 4-37-30 (the enabling statute), nor any other part of Chapter 37, Title IV (Penny Tax Act) refers to administrative expenses as allowable for transportation projects. Other statutes, in other contexts, specifically authorize costs of administration, but this Act does not. The statute controls what expenses can be paid out of Penny Tax monies, and 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. The County seemed to be employing no limit on unrelated and unauthorized expenditures, instead of allowing only "capital costs."

Richland County used Penny Tax funds to establish and staff the County's Small Local Business Enterprise ("SLBE") Program, in violation of the State statute's specification that Penny Tax revenue be spent on transportation-related projects. The SLBE Program was established as a county-wide program intended to support all facets of County operations, not just Penny Tax projects. The County stated, "It is Richland County's plan to expand the use of the SLBE program to all procurements within the county, following its initial use on transportation projects." Letter dated December 31, 2015, to Rick Reames from Tony McDonald, County Administrator, p. 2. Expenditures, including more than $200,000 for legal services related to "SLBE Program Administration" to a Maryland law firm, approximately $219,000 in estimated personnel costs, $122,000 for a software management system, and $13,000 for website development, are all made to support the entire SLBE Program, and not specifically related to Penny Tax projects. Accordingly, these expenditures are an unlawful use of Penny tax proceeds, contrary to the enabling Act.

Richland County used Penny tax revenues to pay for excessive public relations services and "mentoring." This expenditure is inappropriate and unlawful under the enabling Act's requirement that funds be used specifically for transportation facilities.

Furthermore, the public relations contract paid for from Penny Tax funds is excessive in relation to similar services offered by substantially similar firms. Respondents

have not revealed substantial documentation that would verify or validate what services were performed and the number of hours spent on those projects. Richland County has not presented documentation as to what services were actually performed for these $3 million in fees or how much these services cost on a per service basis.

The scope of the Ordinance exceeds the scope of the enabling statute. Furthermore, certain practices and expenditures from the Penny Tax funds revenues are not authorized by the enabling statute or the Ordinance. Appellants have pled and supported their claims that 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. Amended Complaint. The foregoing claims are only some of the claims these Appellants asserted against the County. All claims should be remanded for hearing in the Circuit Court.

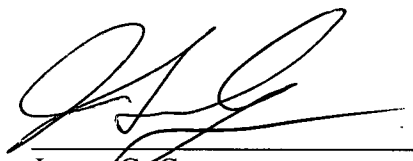
CONCLUSION

The Court should reverse the Summary Judgment ruling in favor of CMRTA which allowed the funding of the "continued operations" of the CMRTA, because it conflicts with the authorizing statute and the Supreme Court ruling in *Richland County v. South Carolina Department of Revenue*, 422 S.C. 292, 811 S.E.2d 758 (S.C. 2018).

The Court should 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.

The Court should 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



James G. Carpenter
S.C. Bar No. 1136
819 East North Street
Greenville, SC 29601
(864) 235-1269
Attorney for the Appellants

CERTIFICATE OF COMPLIANCE

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

Respectfully submitted,
THE CARPENTER LAW FIRM, PC

James G. Carpenter
S.C. Bar No. 1136
819 East North Street
Greenville, SC 29601
(864) 235-1269
Attorney for the Appellants