THE STATE OF SOUTH CAROLINA
In The Court of Appeals



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APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

The Honorable R. Scott Sprouse, Circuit Court Judge

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Appellate Case No. 2019-000330
Case No. 2018-CP-04-00955

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Joshua Hawkins and Floyd S. Mills, III,

Appellants,

v.

Secretary of State Mark Hammond; South Carolina Secretary of State's Office,

Respondents.

and

Harvey S. Peeler, Jr., in his capacity as President the South Carolina Senate; and James "Jay" Lucas, in his official capacity as the Speaker of the South Carolina House of Representatives,

Respondents.

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# Respondents' Initial Brief

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## Counterstatement of the Issues on Appeal

The South Carolina Constitution requires legislative acts comply with certain formalities to ensure their authenticity. The State of South Carolina is presumed to have complied with these formalities in passing legislation. Challenges to that presumption require the existence of a justiciable controversy. A controversy is capable of remedy by the judiciary.

The questions presented are:

I. Whether the two-issue rule mandates affirmance because Appellants failed to challenge the trial court's finding that their state law claim is moot?

II. Whether Appellants have standing because the challenged acts could hypothetically impact cases they may take for unknown, future clients?

III. Whether Appellants' claims are barred by res judicata because the claims were not raised in prior litigation that has finally ended?

IV. Whether Appellants' state law claim is mooted by the Secretary of State's affixation of the Great Seal to the two challenged acts?

V. Whether the statute of limitations bars Appellants' claims under federal law?

## Statement of the Case

### A. The Statutes at Issue

Appellants challenge the constitutionality of two separate statutes: (1) 2005 Senate Bill 83, enrolled as Act 32, 2005 S.C. Acts 133 (the "2005 Act"); and (2) 2011 House Bill 3375, known as the South Carolina Fairness in Civil Justice Act, enrolled as Act 52, 2011 S.C. Acts 238 (the "2011 Act"). The 2005 Act placed limits on non-economic damages claimed by plaintiffs in civil lawsuits, modified the state's application of joint and several liability, imposed penalties for frivolous civil proceedings, imposed standards to the use of expert witnesses in professional malpractice actions, and implemented a pre-suit mediation program for medical malpractice claims. (R. at __; Amend. Compl. ¶ 11.) The 2011 Act implemented limitations on punitive damages, placed requirements on insurance companies, and addressed construction defect suits. (R. at __; Amend. Compl. ¶ 12.) The State's Code Commissioner codified these acts into the State's general laws in February 2018. *See* Act 129, 2018 S.C. Acts 1301, § 3.

### B. Appellants' Claims

Appellants are licensed South Carolina attorneys. (R. at __; Amend. Compl. ¶¶ 1–2, 4, 17.) They seek a declaratory judgment that the two acts are invalid because the South Carolina Secretary of State failed to affix the State's Great Seal to the acts when the General Assembly passed them in 2005 and 2011, respectively. (R. at __; Amend. Compl. ¶ 13.) Appellants rely on Article III, Section 18 of the South Carolina Constitution. (R. at __; Amend. Compl. ¶ 8.)

Appellants also allege federal law requires the two acts be enjoined "because tort reform laws which arbitrarily cap damages and deprive injured individuals of a jury trial, among other arbitrary limitations on injured individuals' rights . . . ." (R. at __; Amend. Compl. ¶ 28.) Appellants allege both laws violate the Fourth, Fifth, Seventh, and Fourteenth Amendments to

the United States Constitution, thereby entitling him to injunctive relief under 42 U.S.C. § 1983. (R. at __; Amend. Compl. ¶ 26.) On appeal, however, they only argue the two acts violate the Seventh Amendment. (App.'s Br. at 3.)

Appellants seek relief on the basis the laws "reduced recovery in the past," and because they "have pending cases subject to the laws at issue, will have future cases subject to the laws at issue, and have and will be personally affected by the laws at issue as citizens of South Carolina." (R. at __; Amend. Compl. ¶ 4.)

### C. Procedural Posture and the Trial Court's Dismissal

In May 2018, Appellant Joshua Hawkins filed his complaint challenging the two acts, naming the Secretary of State Mark Hammond and his office as defendants. (R. at ___; Compl.) By consent, Senate President *Pro Tempore* Hugh K. Leatherman, Sr. and House of Representatives Speaker James "Jay" Lucas intervened. (R. at __; Mot. Intervene, July 2, 2018.)[1] In December 2018, Appellants filed an Amended Complaint, adding Floyd S. Mills, III, as a plaintiff. (R. at __.)

President Peeler and Speaker Lucas moved to dismiss the Amended Complaint arguing (1) Appellants lacked standing; (2) the claims are barred by *res judicata*; (3) the state law claim is moot; (4) the Secretary of State substantially complied with the Great Seal requirement; and (5) Appellants' federal claim under § 1983 was barred by the three-year statute of limitations. (R. at __.) Secretary of State Mark Hammond and his office joined the motion. (R. at __.)

The trial court heard arguments on Respondents' motion in January 2019. (R. at __.) On January 25, 2019, the trial court issued its order dismissing the action with prejudice. (R. at __.) The court concluded that Appellants' claims were barred by *res judicata*—Appellants could have

[1] In 2019, the Senate elected the Honorable Harvey S. Peeler, Jr. as President of the Senate. (R. at __.) The trial court subsequently substituted President Peeler for Senator Leatherman. (*Id.*)

raised their state and federal law challenges to the two acts in prior litigation, but failed to do so—and concluded that Appellants lacked standing for both of their claims. (R. at __.) The trial court also ruled that Appellants' state law claim was moot because the Secretary of State had affixed the Great Seal to the two challenged acts and because the State's Code Commissioner had codified those acts into the general law of the State. (R. at __.) With respect to Appellants' federal claim, the court concluded that it was barred by the three-year statute of limitations applicable to § 1983 claims. (R. at __.)

Appellants did not file a motion to reconsider. Appellants served their notice of appeal on February 25, 2019. (R. at __.)

**Standard of Review**

The Court reviews questions of standing and mootness *de novo*. *See Ex parte State ex rel. Wilson*, 391 S.C. 565, 570, 707 S.E.2d 402, 405 (2011) (reviewing justiciability *de novo*); *Freemantle v. Preston*, 398 S.C. 186, 192–96, 728 S.E.2d 40, 43–45 (2012) (reviewing dismissal for lack of standing *de novo*). It reviews a trial court's dismissal of an action under Rule 12(b)(6), SCRCP, by applying the same standard of review as the trial court, analyzing the pleadings to determine if "the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory . . . ." *Carolina Park Assocs., LLC v. Marino*, 400 S.C. 1, 6, 732 S.E.2d 876, 878 (2012) (quoting *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007)).

The Court "has a limited scope of review in cases involving a constitutional challenge to a statute because all statutes are presumed constitutional and, if possible, will be construed to render them valid." *State v. Neuman*, 384 S.C. 395, 402, 683 S.E.2d 268, 271 (2009). A statute will not be declared unconstitutional unless its invalidity appears so clearly as to leave no doubt

that it violates some provision of the constitution," and "its repugnance to the constitution is clear and beyond a reasonable doubt." *Segars-Andrews v. Judicial Merit Selection Comm'n*, 387 S.C. 109, 118, 691 S.E.2d 453, 458 (2010).

## Argument

The court correctly dismissed Appellants' Amended Complaint. This Court should affirm because (1) the two-issue rule requires upholding the trial court's dismissal of Appellants' moot state law claim; (2) Appellants lack standing to bring their claims; (3) Appellants' claims are barred by *res judicata*; (4) Appellants' state law claim is moot because the Great Seal is attached to the two acts they challenge; and (5) Appellants' federal claim is barred by the statute of limitations. The Court can affirm for one or any of these reasons.

### I. Appellants fail to challenge the trial court's ruling that their state law claim is moot and the two-issue rule requires the Court to uphold the dismissal of that claim.

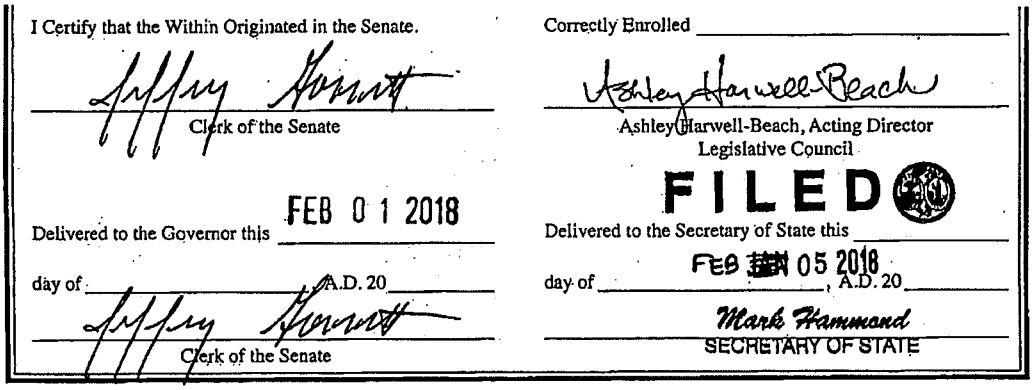
"Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become law of the case." *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 328, 730 S.E.2d 282, 284–85 (2012) (quoting *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010)). This rule means that "an unappealed ruling, right or wrong, is the law of the case," *Buckner v. Preferred Mut. Ins. Co.*, 255 S.C. 159, 160–61, 177 S.E.2d 544, 544 (1970), and the appellate court is precluded from reviewing the merits of the appeal on that issue, *Atl. Coast Builders*, 398 S.C. at 328, 730 S.E.2d at 284.

Here, the trial court concluded that Appellants' "claim under state law also fails because the claim is moot; courts do not decide moot cases." (R. at __; Order at 5.) The Court concluded that the claim was moot on two separate grounds: (1) the Secretary of State has already affixed the State's Great Seal to the two challenged acts and that sealing operated to cure any defect

retroactively, (R. at __; Order at 5–6); and (2) the State's Code Commissioner has codified the two challenged acts into the State's general law. (R. at __; Order at 6–7.)

The word moot does not appear in Appellants' brief a single time. In only one paragraph, they argue "the trial court's decision that 'substantial compliance' validated the 2011 Act retroactively was error[.]" (App.'s Br. at 6.) This does not address the Court's finding that Appellants' claim is moot because the Secretary of State has placed the Great Seal on the two challenged acts. Appellants also fail to address the court's separate ruling that their challenge is moot because of codification. (R. at __; Order at 6–7.) Thus, Appellants failed to appeal this issue and the Court should affirm the dismissal of their state law claim under the two-issue rule.

Affirmance is also required because the trial court correctly found Appellants' state law claim is moot. Here, the State's Code Commissioner has codified the two challenged acts into the State's general law. *See* Act 129, 2018 S.C. Acts 1301; *see S.C. Tax Comm'n v. York Elec. Coop., Inc.*, 275 S.C. 326, 331–33, 270 S.E. 2d 626, 629–30 (1980) (explaining codification's cure of potential defects in the legislative process). Moreover, the act codifying the laws had the State's Great Seal placed upon it after passage in accordance with Article III, § 18:


I Certify that the Within Originated in the Senate.

Clerk of the Senate

Delivered to the Governor this FEB 0 1 2018 day of ____, A.D. 20____

Clerk of the Senate

Correctly Enrolled

Ashley Harwell-Beach, Acting Director
Legislative Council

FILED

Delivered to the Secretary of State this FEB 05 2018 day of ____, A.D. 20____

Mark Hammond
SECRETARY OF STATE

*See* Act 129, 2018 S.C. Acts 1301.

Therefore, Appellants' claim was properly dismissed and the Constitution's requirement has been satisfied.

## II. Appellants lack traditional injury-in-fact standing and raised no other basis for standing to the trial court.

"Standing to sue is a fundamental requirement in instituting any action." *Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 639, 528 S.E.2d 647, 649 (1999). "Under our current jurisprudence, there are three ways in which a party can acquire this fundamental threshold of standing: (1) by statute; (2) through what is called 'constitutional standing'; and (3) under the public importance exception to standing." *Bodman v. State*, 403 S.C. 60, 66–67, 742 S.E.2d 363, 366 (2013). A party seeking to establish standing bears the burden of proving it for each claim raised. *S.C. Pub. Interest Found. v. S.C. Transp. Infrastructure Bank*, 403 S.C. 640, 645, 744 S.E.2d 521, 524 (2013); *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008).

Courts generally must not entertain a constitutional question where another issue—such as a lack of standing—is dispositive. *In re McCracken*, 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001) (reiterating "this Court's firm policy to decline to rule on constitutional issues unless such a ruling is required").

### A. Appellants have not been directly injured, and their claim of hypothetical future injury is too remote or abstract to establish standing.

Appellants do not claim any statute gives them standing, but instead rely on traditional injury-in-fact standing, known as "constitutional" standing. (R. at __; Amend. Compl. ¶¶ 4, 17, 19, 24.)[2] Because the injury of which Appellants complain does not directly affect them in a concrete, individual way and because the claimed injury cannot be redressed by this Court, Appellants lack traditional injury-in-fact standing.

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[2] Appellants make a passing reference to a third ground for standing: taxpayer/resident standing. Since 2008, this type of generalized standing is no longer recognized in South Carolina. *See Bodman*, 403 S.C. at 66–67, 742 S.E.2d at 366 ("In *ATC*, we unanimously closed the door to a litigant asserting standing simply by virtue of his status as a taxpayer . . . ."); *accord Freemantle*, 398 S.C. at 193, 728 S.E.2d at 44.

To have constitutional standing, a plaintiff "must have a personal stake in the subject matter of the lawsuit. In other words, one must be a real party in interest." *Sea Pines Ass'n. for Prot. of Wildlife, Inc. v. S.C. Dep't of Nat. Res.*, 345 S.C. 594, 600, 550 S.E.2d 287, 291 (2001). This requires the party to have "a real, material, or substantial interest in the subject matter of the action, as opposed to one who has only a nominal or technical interest in the action." *Id.* These elements are "an indispensable part of the plaintiff's case; therefore, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stage of the litigation." *Town of Arcadia Lakes v. S.C. Dep't of Health & Envtl. Control*, 404 S.C. 515, 529, 745 S.E.2d 385, 392 (Ct. App. 2013) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

Under constitutional standing, South Carolina courts apply the same test that the federal courts apply under *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). *See Sea Pines Ass'n.*, 345 S.C. at 603, 550 S.E.2d at 292. The first element under *Lujan* is whether a plaintiff has an "injury-in-fact," which requires "an invasion of a legally protected interest" that is "concrete and particularized." *Lujan*, 504 U.S. at 560. For an injury to be particularized, it "must affect the plaintiff in a personal and individual way," *Sea Pines Ass'n.*, 345 S.C. at 603, 550 S.E.2d at 292; to be concrete, the injury "must actually exist." *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1548 (2016). Appellants fail to establish this element.

Appellants claim that they

> are in constant danger of being personally affected by the laws at issue in the event that they have an event that results in and [sic] insurance claim or litigation. Not only have one or both Plaintiffs experience [sic] reduced recovery in the past, but the Plaintiffs also have pending cases subject to the laws at issue, will have future cases subject to the laws at issue, and have and will be personally affected by the laws at issue as citizens of South Carolina.

(R. at __; Amend. Compl. ¶4.) Such "reduced recovery" relates to purported reduction of damage awards or settlements to their clients.[3] Hence, Appellants cannot allege to be the real party in interest. *Sea Pines Ass'n.*, 345 S.C. at 600, 550 S.E.2d at 291. The reduction of money received by Appellants' clients did not affect Appellants "in a personal and individual way." *Sea Pines Ass'n.*, 345 S.C. at 603, 550 S.E.2d at 292. Instead, the reduction could have affected only their clients. *Id.* Moreover, the amount of fees Appellants collected is a private matter between Appellants and their clients that would have been covered by their fee agreements. *See* Rule 1.5, RPC, Rule 407, SCACR (requiring communication of fee agreements to clients). Appellants must address those issues to their clients, not the Court in an unrelated matter. *Peppertree Resorts, Ltd. v. Cabana Ltd. P'ship*, 315 S.C. 36, 40, 431 S.E.2d 598, 601 (Ct. App. 1993) ("The general rule is an attorney must look to his client for compensation.").

There is also no concrete allegation that their clients' reduced recovery was caused by the challenged laws. Appellants contention that their clients would have recovered more but for the challenged acts in pure speculation. The same is true for Appellants' claim of potential future harm. Courts cannot protect against an abstract harm in "future cases subject to the laws" that Appellants challenge here without any specific allegation of real harm. (R. at __; Amend. Compl. ¶4.) As a result, Appellants' claimed injury is insufficiently concrete to give them standing. *Lujan*, 504 U.S. at 560.

In addition to identifying the alleged injury, a plaintiff must also establish under *Lujan* that it is "likely . . . that the injury will be 'redressed by a favorable decision.'" *Sea Pines Ass'n.*, 345 S.C. at 603, 550 S.E.2d at 292 (quoting *Lujan*, 504 U.S. at 560). A favorable decision here

[3] Furthermore, settlement is a voluntary act for which no court or party could hold the General Assembly liable for. *See Shelton v. Bressant*, 312 S.C. 183, 185, 439 S.E.2d 833, 834 (1993). The validity of the settlement is an issue between the parties, or between the settling party and its counsel. *Id.*

could offer no redress to Appellants' clients for the alleged reduction in their prior recovery. Even assuming those ended cases could be set aside, Appellants cannot establish that their clients would have recovered more had the two challenged acts not been applied in their cases. First, the issue of whether the two acts applied to the damages have since become law of the case. *See Bakala v. Bakala*, 352 S.C. 612, 632, 576 S.E.2d 156, 166 (2003) (holding that a family court judge could not overrule the prior unappealed order of another family court judge because it had become law of the case). More fundamentally, though, Appellants' clients (and those defendants they sued) are not parties, so the Court cannot bind the clients (or those defendants) here. *See Langford v. McLeod*, 269 S.C. 466, 474, 238 S.E.2d 161, 164 (1977) (explaining that Court cannot bind non-parties). Because their clients are not parties, the Court cannot retroactively increase the amounts Appellants claim to be owed. *See id.* at 474, 238 S.E.2d at 164.

Further, the two laws challenged here do not address or concern attorneys' fees. To the extent that Appellants suggest that their failure to collect as much as they would have liked is a cognizable injury, any such injury is not caused by the legislative acts they challenge because the acts do not regulate fees by and between clients and attorneys. Again, the issue of fees is between the lawyer and client. *See Peppertree Resorts*, 315 S.C. at 40, 431 S.E.2d at 601.

Because Appellants have failed to establish standing, the Court should affirm the trial court's dismissal of their state and federal claims.

### B. Appellants failed to raise the public importance exception to standing and it is not preserved.

In rare cases, South Carolina courts have lessened standing requirements by applying what has come to be known as the "public importance exception." *Sloan v. Dep't of Transp.*, 365 S.C. 299, 304, 618 S.E.2d 876, 878 (2005). Appellants suggest that the Court should apply this exception here. (App.'s Br. at 5.) Appellants, however, failed to even mention the public

importance exception to standing in their Amended Complaint. (R. at __.) They instead assert traditional injury-in-fact standing. (R. at __.) They likewise failed to make such an argument to the trial court, again relying only on traditional standing. (R. at ___.) Because they failed to raise the exception below, it is not preserved. *See Fisher ex rel. Shaw-Baker v. Huckabee*, 415 S.C. 171, 181, 781 S.E.2d 156, 161 (Ct. App. 2015) (holding plaintiff had waived alternative ground for standing by failing to raise the argument at trial).

The trial court recognized that Appellants only relied on traditional standing, stating in its order that Appellants "do not rely on any statute to provide them standing, nor do they plead an exception to standing." (R. at __; Order at 3.) Appellants failed to file a Rule 59(e) motion raising this issue. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (requiring appellant to file motion to reconsider where issue was raised, but not ruled upon by the trial court). They cannot raise it now for the first time on appeal. *See Buist v. Buist*, 410 S.C. 569, 574, 766 S.E.2d 381, 383 (2014) ("It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved.").[4] Because the exception is not preserved for review, the Court should affirm on this basis too.

## III. Appellants' claims are barred by the doctrine of res judicata.

Appellants urge the Court to reverse by arguing that the doctrine of res judicata is narrower than the trial court's application of it to their state and federal claims. (App.'s Br. at 4.) They argue that the issues they raise have not "been litigated by the Plaintiffs or anyone else in

[4] Even if Appellants had raised the exception, the Court should not apply it because doing so would cause the Court to impermissibly review a matter of policy rather than issue an opinion necessary for the type of future guidance required by *ATC South, Inc. v. Charleston Cty.*, 380 S.C. 191, 194–95, 669 S.E.2d 337, 339 (2008).

the past; therefore, res judicata does not apply here." (*Id.*)[5] In making this argument, Appellants ignore the very cases they cite in their brief.

Appellants properly recognize that res judicata bars not only claims or issues that were asserted, but also those "issues which *might* have been litigated in the first action." *S.C. Pub. Interest Found. v. Greenville Cty.*, 401 S.C. 377, 385, 737 S.E.2d 502, 506 (Ct. App. 2013) (emphasis added). Appellants allege that the two acts they challenge have unconstitutionally "reduced" recovery in prior civil actions. (R. at __; Amend. Compl. ¶¶ 4, 17, 19, 24.) Though they do not specify the cases in which the acts reduced the recovery, Appellants recognize those cases are over by using the past tense when referring to them. (*Id.*) Those actions are final. Appellants failed to raise this claim in those (unspecified) actions. Therefore, Appellants are barred from raising their state and federal claims here. *S.C. Pub. Interest Found.*, 401 S.C. at 385, 737 S.E.2d at 506; *see also Judy v. Judy*, 393 S.C. 160, 173–74, 712 S.E.2d 408, 415 (2011) (applying res judicata to bar plaintiff's subsequent action and request for punitive damages even though the forum for prior litigation lacked ability to award punitive damages).

South Carolina has a strong policy in favor of finality. *Raby Const., L.L.P. v. Orr*, 358 S.C. 10, 20, 594 S.E.2d 478, 483 (2004) (emphasizing Court's "longstanding policy towards final judgments and that important benefits are achieved by the preservation of final judgments."); *Price v. City of Georgetown*, 297 S.C. 185, 187, 375 S.E.2d 335, 337 (Ct. App. 1988) ("The res judicata doctrine originated in the principle that the public interest requires an end of litigation."). Had Appellants truly believed in the unconstitutionality of the two acts

[5] The doctrine bars those in privity from re-litigating issues as well. *See Equivest Fin., LLC v. Ravenel*, 422 S.C. 499, 507, 812 S.E.2d 438, 442 (Ct. App. 2018); *Weinberger v. Tucker*, 510 F.3d 486, 492–93 (4th Cir. 2007) (collecting cases holding attorney-client relationship establishes privity). Appellants do not challenge the trial court's determination that they are in privity with their clients. (R. at __; Order at 2.) Thus, it is law of the case. *See Bakala*, 352 S.C. at 632, 576 S.E.2d at 166 (2003) (applying law of the case doctrine).

(whether under state or federal law), then they should have raised those arguments in the prior cases. They failed to do so.[6] Appellants are barred from re-litigating these issues under the doctrine of res judicata.

## IV. Appellants' state law claim is moot because the Secretary of State has substantially complied with the Constitution's Great Seal requirement.

The South Carolina Constitution states that no

> Bill or Joint Resolution shall have the force of law until it shall have been read three times and on three several days in each house, has had the Great Seal of the State affixed to it, and has been signed by the President of the Senate and the Speaker of the House of Representatives . . . .

S.C. Const. art. III, § 18 (1895). The South Carolina Supreme Court has explained that the purpose of this provision is the self-authentication of laws passed by the General Assembly. *Wingfield v. S.C. Tax Comm'n*, 147 S.C. 116, 144 S.E. 846, 850 (1928).

When interpreting Article III, § 18, our Supreme Court has also recognized that "literal compliance with certain mandatory formulas is not exacted, but that a substantial compliance is sufficient." *Smith v. Jennings*, 67 S.C. 324, 332, 45 S.E. 821, 824 (1903). In *Jennings*, the plaintiff sued to enjoin enforcement of a 1903 bond act requiring the State Treasurer to write-off certain state bonds. *Id.* at 332, 45 S.E. at 824. The plaintiff claimed that the 1903 act was invalid in part because it did not state, "Be it enacted by the General Assembly of the state of South Carolina" as required by the Constitution. *Id.* at 325, 45 S.E. at 822. The Court rejected the plaintiff's argument that "absolutely literal compliance with the form prescribed is essential to valid legislation," holding that "while the constitutional provision as to form of enacting

[6] Appellant Joshua Hawkins knows how to challenge the constitutionality of the act(s). He has an appeal pending before the Court in which he argues on his client's behalf that the 2011 Act's punitive damages caps are unconstitutional. *See Garrison v. Target Corporation*, No. 2017-000267 (S.C. Ct. App.). The Court has not issued its opinion in *Garrison* as of this filing of Appellants' initial brief on November 6, 2019. *Id.*

clause is mandatory, that a substantial compliance with the mandate will be sufficient." *Id.*, 67 S.C. at 332, 45 S.E. at 824.

As the trial court correctly recognized, *Jennings*' substantial compliance principle applies here, mooting Appellants' challenge under the South Carolina Constitution. (R. at __; Order at 5.) Though Article III, § 18 requires the Great Seal to appear on the act, the Constitution does not require the Great Seal to create the law. Because the authority to pass law rests exclusively with the General Assembly, the Great Seal's omission from an act cannot invalidate it. *See* S.C. Const. art. III, § 18. A ruling to the contrary would bestow upon the Secretary of State a veto power over any acts passed by the General Assembly and signed by the Governor. The Court should not condone such an absurd result. *See State v. Long*, 406 S.C. 511, 515, 753 S.E.2d 425, 427 (2014) (rejecting interpretation of constitutional provision that would have led to an absurd result); *Lancaster Cty. Bar Ass'n v. S.C. Comm'n on Indigent Def.*, 380 S.C. 219, 222, 670 S.E.2d 371, 373 (2008) (explaining that Courts generally must avoid interpreting statutes to create absurd results).

The two acts bear all the other indicia of authenticity: the signatures of the Speaker of the South Carolina House of Representatives and the President of the South Carolina Senate on the date the acts were ratified, and the Governor's signature days later. (R. at __.) The legislative journals also confirm that the two challenged acts went through three readings, received a majority of votes in both chambers, and were enrolled. *See* Journal of the House of Representatives at 25, 116th Session (March 29, 2005) (noting enrollment of 2005 Act); Journal of the House of Representatives at 54, 119th Session (June 2, 2011) (noting enrollment of 2011 Act). Thus, the two acts were properly authenticated regardless of the affixation of the Great

Seal, so the trial court was correct to presume the acts are valid. *See Segars-Andrews*, 387 S.C. at 118, 691 S.E.2d at 458.

The Court should also affirm because the question of the two acts' authenticity is purely academic now. Appellants concede that the acts have the Great Seal affixed to them currently. (App.'s Br. at 3, 6; *see also* R. at __.) This is not just substantial compliance, but actual compliance with Article III, § 18. When the Secretary of State fulfilled the constitutional requirement by affixing the Great Seal is immaterial—the two acts remain valid even retrospectively. *See State v. Toomer*, 41 S.C.L. (7 Rich.) 216, 229–30 (1854) (upholding appointment of court officer retroactively despite his commission lacking appropriate seal); *see also* S.C. Att'y. Gen Op., 2017 WL 6189878, at *8 (Dec. 1, 2017) (concluding that the sealing of the two acts relates back to the original date of enactment). Act 129, which codifies the laws challenged by Appellants also has the Great Seal affixed to it. (*See* Resp. Br. at 6.)

As a result of this substantial and actual compliance with the Constitution's Great Seal Requirement, the trial court was correct to conclude that Appellants' declaratory judgment claim is moot. *See S.C. Ret. Sys. Inv. Comm'n v. Loftis*, 402 S.C. 382, 384, 741 S.E.2d 757, 758–59 (2013) ("A case is moot where a judgment rendered by the Court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the Court."). Therefore, the Court should affirm.

## V. Appellants' federal claim is barred by the statute of limitations.

In addition to dismissing Appellants' federal claim under the doctrine of res judicata and for lack of standing, the trial court also dismissed Appellants' federal claim as untimely. (R. at __; Order at 7.) The Court should affirm the trial court's dismissal on this ground notwithstanding Appellants' new argument for application of the "continuous tort rule."

"Section 1983 permits a plaintiff to recover damages when an individual, acting under the color of state law, transgresses a federally created right of the plaintiff." *Williams v. Condon*, 347 S.C. 227, 248, 553 S.E.2d 496, 507 (Ct. App. 2001) (citations omitted). Like any claim, it is subject to being barred by failing to bring the claim within the applicable statute of limitations. Because § 1983 does not have its own statute of limitations, though, courts apply the analogous state law personal injury statute of limitations in § 1983 actions. *See* 42 U.S.C. § 1988; *Wilson v. Garcia*, 471 U.S. 261, 271 (1985) (holding that courts must adopt a "personal injury" statute of limitations period for § 1983 actions). Under South Carolina law, § 1983 claims are subject to a three-year statute of limitations. S.C. Code Ann. § 15-3-530(5) (providing a three-year limitations period for personal injury actions); *Estate of Mims v. S.C. Dep't of Disabilities & Special Needs*, 422 S.C. 388, 399, 811 S.E.2d 807, 813 (Ct. App. 2018) (applying statute of limitations in § 1983 action).

The acts Appellants challenge were passed thirteen and seven years before they filed their lawsuit. Yet they did not bring this § 1983 challenge to the substance of the acts until 2018. Appellants' own Amended Complaint shows they have slept on their rights by waiting seven years—more than twice the applicable limitations period—to bring this § 1983 action. *See Moates v. Bobb*, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App. 1996) ("One purpose of a statute of limitations is to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his rights.") (quotation omitted). Instead of rewarding Appellants for failing to bring their claim sooner, the trial court properly dismissed their § 1983 challenge as untimely.

Now, though, Appellants raise a new argument to avoid the application of the three-year statute of limitations. They ask the Court to apply the "continuous tort rule" theory. (App.'s Br. at 6–7.) They did not raise this argument in their Amended Complaint, at the hearing on

Respondents' Motion to Dismiss, or in a motion to reconsider. Thus, this new argument is not preserved for review. *See Buist*, 410 S.C. at 574, 766 S.E.2d at 383 ("It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved.").

Regardless, the continuous tort theory or continuing harm theory does not apply here. Though Appellants cite several federal cases applying the theory, they fail to cite any state cases applying it. This is because numerous state cases have declined to apply the theory and those that have applied it, have done so narrowly. *See, e.g., Harrison v. Bevilacqua*, 354 S.C. 129, 141, 580 S.E.2d 109, 155 (2003) (declining to apply theory in medical malpractice case); *Dillon Cty. Sch. Dist. No. Two v. Lewis Sheet Metal Works, Inc.*, 286 S.C. 207, 216–17, 332 S.E.2d 555, 560 (Ct. App. 1985) (declining to apply the theory in case for negligence, breach of warranty, and strict liability), *overruled on other grounds by Atlas Food Sys. & Servs., Inc. v. Crane Nat. Vendors Div. of Unidynamics Corp.*, 319 S.C. 556, 462 S.E.2d 858 (1995); *Anonymous Taxpayer v. S.C. Dep't of Revenue*, 377 S.C. 425, 440–41, 661 S.E.2d 73, 81 (2008) (declining to apply theory in case alleging impairment of state retirement benefits). Therefore, the Court should reject Appellants' attempt to raise a new argument and should instead affirm the trial court's dismissal of their § 1983 claim as untimely.

**Conclusion**

The trial court considered Appellants' state and federal law challenges to the 2005 Act and the 2011 Act. It correctly determined that both claims were barred by res judicata and that Appellants lacked standing. It also correctly determined that Appellants' state law claim was moot, and their federal law claim was barred by the statute of limitations. Thus, it correctly

dismissed Appellants' complaint, with prejudice. The Court should affirm the trial court's dismissal.

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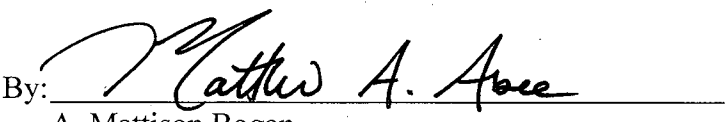
By: 

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Columbia, South Carolina
November 6, 2019

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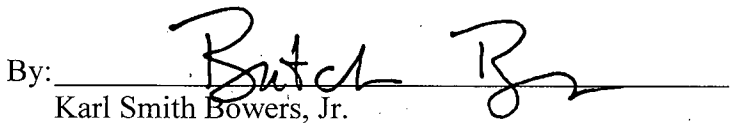
By: 

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Columbia, South Carolina
November 6, 2019

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

---

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas



The Honorable R. Scott Sprouse, Circuit Court Judge

---

Appellate Case No. 2019-000330
Case No. 2018-CP-04-00955

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Joshua Hawkins and Floyd S. Mills, III,

Appellants,

v.

Secretary of State Mark Hammond; South Carolina Secretary of State's Office,

Respondents.

and

Harvey S. Peeler, Jr., in his capacity as President the South Carolina Senate; and James "Jay" Lucas, in his official capacity as the Speaker of the South Carolina House of Representatives,

Respondents.

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**Proof of Service**

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I certify that on the date below I served counsel for Appellants with **Respondents' Initial Brief** by mailing a copy by regular mail to the following addresses:

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November 6, 2019

THE STATE OF SOUTH CAROLINA
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Respondents.

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**Proof of Service**

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I certify that on the date below I served counsel for Appellants with **Respondents' Designation of Matter** by mailing a copy by regular mail to the following addresses:

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**Hand Delivered**



The Honorable Jenny Abbott Kitchings
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SC Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: Hawkins, et al. v. Secretary of State Mark Hammond, et al.
Appellate Case No. 2019-000330
Civil Action No. 2018-CP-04-00955
Our File No. 045547.01504

Dear Ms. Kitchings:

Enclosed for filing please find an original and two copies of Respondents' Initial Brief and original and two copies of Respondents' Designation of Matter in the above-referenced matter. Please return a file-stamped copy to our courier.

Respectfully,

Matthew A. Abee

MAA:krs
Enclosures
cc: Karl Smith Bowers, Jr., Esquire
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