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

Case No. 2019-000330

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 of the South Carolina Senate, and James "Jay" Lucas, in his official capacity as the Speaker of the South Carolina House of Representatives,..... Respondents.

FINAL BRIEF OF APPELLANTS

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STATEMENT OF THE CASE

This is a case in which the Plaintiffs seek to invalidate two "tort reform" laws, on the basis that they are invalid under the plain language of the South Carolina Constitution and United States Constitution. These two laws affect the Plaintiffs personally and professionally, and, as such, the Plaintiffs have standing to challenge the validity and constitutionality of the laws. The Plaintiffs' argument is simple and follows the plain language of the South Carolina Constitution, the United States Constitution, and applicable case law. The trial court granted a Rule 12(b)(6) motion to dismiss the Plaintiffs' claim based on various reasons other than the plain language of applicable law, and based on reasons which the Plaintiffs contend are invalid, particularly at the 12(b)(6) stage. The Plaintiffs have stated a justiciable claim, the Plaintiffs do have standing, and the decision to grant the 12(b)(6) motion should be reversed.

STANDARD OF REVIEW

In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court. *Doe v. Marion*, 373 S.C. 390, 645 S.E.2d 245 (2007). Thus, the question for the Court is whether, in the light most favorable to the Plaintiff, and with every doubt resolved in their behalf, the allegations set forth on the face of the complaint state any valid claim for relief. *Sloan Constr. Co. v. Southco Grassing, Inc.*, 377 S.C. 108, 659 S.E.2d 158 (2008). In appeals involving stipulated or undisputed facts, an appellate court has the discretion to review whether the appellate court applied the law to those facts. *Nationwide Mut. Ins. Co. v. Rhoden*, 387 S.C. 194, 691 S.E. 2d 487 (Ct. App. 2010). A declaratory judgment action is considered neither legal nor equitable in nature, so the standard of review must be determined by the nature of the underlying issues. *Felts v. Richland Ctnty.*, 303 S.C. 354, 400 S.E.2d 781 (1991). In cases in which the constitutionality of a statute is challenged, the Court should evaluate whether the "invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the constitution." *Westvaco Corp. v. S.C. Dep't of Revenue*, 321 S.C. 59, 467 S.E.2d 739 (1995).

FACTS

The South Carolina Constitution and United States Constitution provide specific requirements on how laws become enforceable and which laws can be enforceable, and those requirements must be satisfied and are not allowed to be violated.

Article 3 Section 18 of the South Carolina Constitution provides that "[n]o 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: Provided, That either branch of the General Assembly may provide by rule for a first and third reading of any Bill or Joint Resolution by its title only." (emphasis added). It is undisputed that the Great Seal of the State was not applied to the 2011 South Carolina Fairness in Civil Justice Act (also cited as Act No. 52 of 2011 and Ratified Act No. 86 of 2011) (hereinafter "the 2011 Act") until November 7, 2017, at the earliest.

Also, the Seventh Amendment to the United States Constitution provides that "[i] Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." It is undisputed that the South Carolina Tort Reform Act of 2005 (hereinafter "the 2005 Act") and the 2011 Act limit the jury's ability to decide factual issues in suits at common law.

The Plaintiffs filed suit in Anderson County Court of Common pleas on May 16, 2018, against Secretary of State Mark Hammond and the South Carolina Secretary of State's Office, asking the Court to declare that the 2005 Act and the 2011 Act violated the South Carolina Constitution. (R. pp. 20-28). The Defendant served an answer to the complaint on June 27, 2018. (R. pp. 29-33). Hugh K. Leatherman, Sr., in his capacity as President Pro Tempore of the South Carolina Senate, and James "Jay" Lucas, in his official capacity as the Speaker of the South Carolina House of Representatives, subsequently intervened in the matter and filed a motion to dismiss on November 8, 2018. (R. pp. 57-76; 81-100). The Plaintiffs subsequently amended the complaint on December 7, 2018. (R. pp. 34-43). The Defendants filed a joint motion to dismiss the Plaintiffs' amended complaint on December 28, 2018. (R. pp. 104-168). The Honorable Judge

R. Scott Sprouse granted the Defendants' Rule 12(b)(6) motion to dismiss on January 25, 2019. (R. pp. 12-19). The Plaintiffs filed a timely notice of appeal.

ARGUMENT

I. Plaintiffs' are not barred by *res judicata*.

The doctrine of *res judicata* only bars subsequent litigation involving similar issues. *Res judicata* bars not only claims or issues that were asserted, and those that could have been asserted, whether by the same parties or their privies. *S.C. Pub. Interest Found. v. Greenville Cty.*, 401 S.C. 377, 385, 737 S.E.2d 502, 506 (Ct. App. 2013); *Equivest Fin., LLC v. Ravenel*, 422 S.C. 499, 507, 812 S.E.2d 438, 442 (Ct. App. 2018). The doctrine is intended to "end[] litigation, promote[] judicial economy and avoid[] the harassment of **relitigation of the same issues**." *Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 108-9 (1999) (emphasis added). Here, the Plaintiffs have challenged the validity and constitutionality of the 2005 Act and the 2011 Act because: 1) the undisputed failure to apply the Great Seal to the 2005 Act violated the plain language of the South Carolina constitution; and 2) the 2005 Act and the 2011 Act violate the plain language of the Seventh Amendment to the United States Constitution. Neither of these issues has been litigated by the Plaintiffs or anyone else in the past; therefore, *res judicata* does not apply here. The trial court's holding that *res judicata* barred the Plaintiffs' claims was error and should be reversed.

II. Plaintiffs have standing because the laws directly affect them and are publicly important.

"Standing to sue is a fundamental requirement in instituting any action." *Joytime Distribs. & Amus. Co. v. State*, 338 S.C. 634, 639, 528 S.E.2d 647, 649 (1999). A plaintiff possesses

standing if he or she can demonstrate "a real, material, or substantial interest in the subject matter of the action" *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) (standing where plaintiffs affected in "personal and individual way[s]").

A plaintiff may also have standing via the "public importance" rule in the event that the issue is "of such public importance as to require its resolution for future guidance." *See Sloan v. Dep't of Transp.*, 379 S.C. 160, 170-71, 666 S.E.2d 236, 241 (2008); *Sloan v. Hardee*, 371 S.C. 495, 497 n.1, 640 S.E.2d 457, 458 n.1 (2007); *Sloan v. Dep't of Transp.*, 365 S.C. 299, 304, 618 S.E.2d 876, 878-79 (2005); *Sloan v. Wilkins*, 362 S.C. 430, 436-37, 608 S.E.2d 579, 582-83 (2005), *abrogated on other grounds, Am. Petroleum Inst. v. S.C. Dep't of Revenue*, 382 S.C. 572, 677 S.E.2d 16 (2009); *Sloan v. Sanford*, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004); *Baird v. Charleston Cnty.*, 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999). Here, the Plaintiffs possess standing because: 1) as citizens of South Carolina they are directly impacted by the 2005 Act and 2011 Act; 2) as attorneys whose income is derived from handling civil lawsuits they are directly impacted by the 2005 Act and 2011 Act; and 3) the validity of the 2005 Act and the validity of the 2011 Act are of great public importance to require resolution for future guidance. The trial court's decision that the Plaintiffs lack standing was error and should be reversed.

III. Secretary of State failed to comply with a clear Constitutional prerequisite to validity.

The South Carolina Constitution clearly sets forth what must happen before a law is valid and enforceable. Article 3 Section 18 of the South Carolina Constitution provides that "[n]o 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: Provided, That

either branch of the General Assembly may provide by rule for a first and third reading of any Bill or Joint Resolution by its title only." (emphasis added).

The Plaintiffs have alleged, and it is undisputed, that the Great Seal of the State was not applied to the 2011 South Carolina Fairness in Civil Justice Act (also cited as Act No. 52 of 2011 and Ratified Act No. 86 of 2011) (hereinafter "the 2011 Act") until November 7, 2017, at the earliest. Accordingly, the earliest date that the 2011 Act could have been enforceable was November 7, 2017. As the 2011 Act eliminated remedies for existing rights and diminished the rights of persons under disability, the 2011 Act applies only prospectively from the date the Great Seal was applied, and not retroactively. *Wiesart v. Stewart*, 665 S.E.2d 187, 379 S.C. 300 (S.C. App., 2008). Accordingly, the 2011 Act was only operative from November 7, 2017, forward, assuming it is otherwise constitutional (which it wasn't as set forth below). Accordingly, the trial court's decision that "substantial compliance" validated the 2011 Act retroactively was error and this decision should be reversed.

IV. Plaintiffs' lawsuit was timely.

Plaintiffs have filed suit to challenge the validity and constitutionality of a law that is still being applied in Courts around the state to this day, meaning that the Plaintiffs' suit was timely filed under any conceivable statute of limitations period. In South Carolina, the statute of limitations for a claim brought under the South Carolina Tort Claims Act is two years. S.C. Code Section 15-78-110. Claims brought pursuant to 42 U.S.C. § 1983 may be brought within three (3) years in South Carolina. *See* 42 U.S.C. § 1988; *Wilson v. Garcia*, 471 U.S. 261, 271 (1985); *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), *cert. denied* (Aug. 3, 2018).

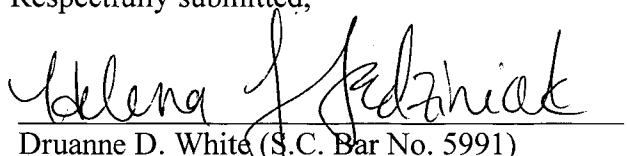
Further, the continuous tort rule provides that "a new statute of limitations begins to run after each separate invasion of the property." *Silvester v. Spring Valley Country Club*, 344 S.C. 280, 287, 543 S.E.2d 563, 567 (Ct. App. 2001); *Stoneburner v. Thompson*, No. 3:12-cv-3551-JFA, 2014 U.S. Dist. LEXIS 68975, at *13 (D.S.C. May 20, 2014) (applying continuous tort rule, but concluding that statute of limitations still barred under the facts of case); *Abdullah v. Reynolds*, No. 2:12-cv-3499-RMG, 2014 U.S. Dist. LEXIS 27104, at *10 (D.S.C. Mar. 3, 2014) ("where a tort 'involves a continuing or repeated injury, the cause of action accrues at and the statute of limitations begins to run from the date of the last injury or when the tortious acts or omissions cease.'"). *Ins. Prods. Mktg. v. Conseco Life Ins. Co.*, Civil Action No. 9:11-cv-01269-PMD, 2012 U.S. Dist. LEXIS 113111, at *32-33 (D.S.C. Aug. 13, 2012) ("Therefore, the Court finds that Defendants' allegedly wrongful conduct has occurred within the statutory limitations period; in fact, the conduct is still occurring to this very day and each day creates a separate cause of action.").

Here, the Plaintiffs challenge a law that still affects them and other South Carolina citizens on a daily basis, and thus the action was filed within any conceivably applicable limitations period. The trial court's decision that the lawsuit was filed after the expiration of the statute of limitations was error and should be reversed.

CONCLUSION

The Plaintiffs respectfully request the Court reverse the Circuit Court's ruling for the reasons set forth herein.

Respectfully submitted,



February 18, 2020

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CERTIFICATE OF COUNSEL

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

February 18, 2020

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