

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Feb 05 2021

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

SC Court of Appeals

Hon. Donald B. Hocker, Circuit Court Judge

C.A. No.: 2020-CP-36-00093
Appellate Case No. 2020-001348

Jefferson Davis, Jr.Appellant,

v.

Chad Connelly, Tom Persons & South Carolina Educational Credit for Exceptional Needs
Children FundRespondents.

INITIAL BRIEF OF APPELLANT

Jefferson Davis, Jr.
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Appellant

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE TRIAL COURT ERR IN DISMISSING APPELLANT’S SUMMONS AND COMPLAINT WITH PREJUDICE BASED ON STANDING?
- a. Should there be exceptions to the general rule that a donor to a traditional non-profit does not have standing to sue as it relates to use of donor’s donated funds?
 - b. Is a **CONSTRUCTIVE TRUST** formed such that donors have standing to file a declaratory judgment against a non-profit when the said entity VIOLATES (#1) a statutory legal requirement to cap its administrative expenses at 2% and (#2) the non-profit solicits donations by advertising the fact that no more than 2% of donations will be expended on administrative expenses?
 - c. Does a South Carolina taxpayer / donor have standing under a **PUBLIC IMPORTANCE** exception to file a declaratory judgment against (#1) a legislatively created non-profit, (#2) governed by a legislatively appointed board, (#3) administered (at taxpayer expense) by the South Carolina Department of Revenue, and (#4) awards South Carolina state income tax credits, when said entity violates its statutory legal requirements and children with “special needs” are the victims?
 - d. Does a South Carolina taxpayer / donor have **CONSTITUTIONAL STANDING** to file a declaratory judgment against governmental parties and appointees refused to act and taxpayer / donor has been injured?
- II. DID THE TRIAL COURT ERR IN DENYING APPELLANT’S MOTION FOR PERJURY, CONTEMPT AND SANCTIONS?
- a. Does the trial court have jurisdiction over perjured sworn documents filed with the court by a defendant when the court ultimately determines the plaintiff in the matter does not have standing?
 - b. Is a defendant excused from perjury and sanctions for a false sworn affidavit filed with the trial court when the court ultimately determines the plaintiff in the matter does not have standing?
 - c. Is a defendant excused from the crime of perjury when the trial court does not “use” the perjured documents in a finding of lack of plaintiff’s standing?
 - d. Must the trial court address a Motion for Perjury even when the court ultimately determines the plaintiff in the matter does not have standing?

STATEMENT OF THE CASE

This is an appeal from an order dismissing a Newberry County case solely based on standing related to a novel issue that has never been presented to the SC Courts. Appellant is a donor to a South Carolina legislatively enacted IRS 501(c)(3) non-profit governed by a five (5) person legislatively appointed board.¹ By South Carolina law, it is illegal for said non-profit to expend more than two percent (2%) of donations on administrative expenses. Appellant donated to said non-profit with the expectation that no more than 2% of the donation would be used for administrative expenses based on the required legal limitations as well as statements published by the non-profit on its website confirming that no more than 2% of donations would be spent on administrative expenses.

An independent third-party CPA audit of the non-profit, commissioned by the South Carolina Department of Revenue, provided incontrovertible evidence that for the fiscal year of the cash basis non-profit entity, substantially more than 2% of donations were spent on administrative expenses. Appellant filed his Declaratory Judgment seeking a temporary injunction to immediately halt further overspending in violation of statute, to issue a Declaratory Judgment that Respondents had violated the statutory legal 2% limit for administrative expenses, and for an Order that the individual Respondents reimburse the non-profit for all funds expended over the statutory 2% limit.²

¹ The subject non-profit is Respondent **South Carolina Educational Credit for Exceptional Needs Children Fund (ECENC Fund)**. Respondent **Chad Connelly** was (terminated July 2020) the Executive Director of the non-profit and Respondent **Tom Persons** (resigned July 2020) was the Board Chairman.

² **EMBEZZLEMENT**. Whereas said overspending was directed not to 3rd party expense, but to the personal compensation of the (since fired) Executive Director of the non-profit, Respondent Chad Connelly, with the approval of the (since resigned) Board Chairman of the non-profit, Respondent Tom Persons, it is the contention of Appellant that the individual respondents committed the crime of embezzlement.

Whereas donors in other states have been held to have standing in similar situations, the issue presented is novel in the SC courts, the trial court dismissed the action with a full expectation that Appellant would file this appeal so that the matter could be appropriately addressed by the higher court. As such Appellant filed this appeal.

STANDARD OF REVIEW

"A declaratory judgment action is neither legal nor equitable, and therefore, the standard of review is determined by the nature of the underlying issue." *Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 191, 684 S.E.2d 541, 543 (2009) (citing *Colleton County Taxpayers Ass'n v. Sch. Dist. of Colleton County*, 371 S.C. 224, 231, 638 S.E.2d 685, 688 (2006)).

In the case at hand, the Court of Appeals reviews the trial court's findings of fact and legal conclusions, *de nova*.

[CONTINUED ON NEXT PAGE.]

FACTS

Dismissal based on Standing

This declaratory judgment action was originally filed on February 12th, 2020. A hearing was held on March 5th, 2020. On Wednesday April 29th, 2020, the Honorable Judge Donald B. Hocker ruled (among other points) as follows:

“Grants Defendants’ Motion to Dismiss this case on the issue of Standing, only recognizing the current state of the law in South Carolina and that South Carolina has not addressed the issue of whether a Donor has standing. Consequently, the other issues raised in the Motion will not be addressed.”

A final order, as solely drafted by Defense Counsel, was filed on June 30, 2020 dismissing the case.

On July 13th, 2020, Appellant filed his Motion to Reconsider, which was denied on **September 28th, 2020**.

Motion for Perjury, Contempt & Sanctions

Following the initial hearing on March 5th, 2020, and following the April 29th, 2020 ruling by the Trial Court that Appellant did not have standing, subsequent data and evidence exposed that Respondents had filed with the Court false sworn affidavits.

As such, on **May 14th, 2020**, prior to the Court’s formal dismissal based on standing dated June 30th, 2020, Appellant filed his Motion for Perjury, Contempt & Sanctions for False Affidavit.

Respondent Connelly stated in a **March 4th, 2020** sworn affidavit filed with the Court the following:

“In the past 21 days Exceptional SC has raised approximately \$1,045,000 in donations. Donations are being received every day and as a result the number is constantly in flux. The current rate of donation receipts is approximately \$350,000 per week or \$50,000 per day.”

March 4, 2020, Affidavit of Chad Connelly³

Respondent Connelly’s sworn affidavit in support of Defendant’s Motion to Dismiss continued on to claim that **“the damages suffered will be between \$45,000 and \$50,000 per day over the next six weeks.”** *Id.*

On August 4th, 2020, a subsequent third party Sworn Affidavit was filed by Respondents in a failed effort to explain Respondent Connelly’s perjured Sworn Affidavit. An analysis of the data entered into evidence demonstrated the gross extent of Respondent Connelly’s perjured Sworn Affidavit, clearly demonstrating that only \$99,201.00 had been donated over the time period, not the \$1,045,000 sworn to by Respondent Connelly.

³ Respondent Chad Connelly is a former SCGOP statewide Republican Party Chairman, worked for the National Republican Party, was a candidate for the 5th Congressional District in 2017 (getting the “job” with the government run ECENC Fund (aka “Exceptional SC”) immediately after losing that election with a 4th place finish), and currently and previously have been involved with politically oriented 501(c)(3) & 501(c)(4) organizations. At the ECENC Fund, Mr. Connelly has used his position to contract with a host of related political consultants as opposed to hiring qualified parties to implement the program, leading to the program’s continued failures. Mr. Tom Persons is also a full-time political operative, his business partner is a registered SC lobbyist, and he is also a principle in a “public relations” firm that upon information and belief contracts with lobbyist principals. Although Mr. Persons has legal and fiduciary responsibilities to the ECENC Fund and its beneficiary children with special needs, their families and schools, he is financially conflicted based on his business interest and family members receiving scholarships from the organization and working for one of the beneficiary schools.

Given the gross extent of these perjured facts filed with the Court by Respondent Connelly, a finding of perjury and sever sanctions are appropriate.

On August 14th, 2020, the trial court denied Plaintiff’s Motion stating the following:

“Motion for Perjury: Denied. The Court is not going to get into whether or not false Affidavits were submitted. The Court did not rely on these in making a ruling on the standing issue.”

On September 28th, 2020, a final order, as solely drafted by Defense Counsel, was filed denying Appellant’s Motion for Perjury, Contempt & Sanctions for False Affidavit. On **October 5th, 2020**, in an abundance of caution, Appellant filed a Motion to Reconsider which was denied by the Court on **October 6th, 2020**.

ARGUMENTS

- I. **THE TRIAL ERRED IN DISMISSING APPELLANT’S SUMMONS AND COMPLAINT WITH PREJUDICE BASED ON STANDING.**
 - a. **There should be exceptions to the general rule that a donor to a traditional non-profit does not have standing to sue as it relates to use of donors donated funds.**

As stated, the trial court dismissed this case solely on the basis of standing in that this fact situation presents a novel issue for the State of South Carolina. Appellant agrees that the general rule states that “typical” donors to “typical” non-profits do not have standing to sue over the use of funds. However, situations always exist that are exceptions to the rule. Although this matter is

novel to the South Carolina courts, other states have found exceptions exist to this general rule, and that should be the case here in South Carolina as well.

The ECENC Fund is “different” from traditional non-profits given its statutory founding and governance. The ECENC Fund was formed and governed by statute. S.C. Code Ann. § 12-6-3790. That is a rare situation, made “one of a kind” due to the fact that same statute the South Carolina Department of Revenue is tasked with administration of the entity, the entity is governed by a 5 person legislatively appointed board, and the Director of the SC Department of Revenue is tasked with (in conjunction with the five board members) hiring an Executive Director of the entity. By that same statute, the entity can grant SC State Income Tax Credits.

Secondly, maximum administrative fees are strictly governed by statute. Primarily, the ECENC Fund is legally bound by the requirements of S.C. Code Ann. § 12-6-3790(B)(4) which requires that the entity adhere to a 2% maximum administrative fee requirement.

There is no other similar entity in existence in SC known to Appellant.

Other states have ruled similarly situated donors have standing to sue. Although this specific issue has not been litigated here in the South Carolina appellate courts, it has been analyzed in the appellate courts of other states in reversals of trial courts that only looked at the general rule that a donor cannot sue the donee. *L.B. Research & Educ. Found. v. UCLA Found.*, 29 Cal.Rptr.3d 710, 130 Cal.App.4th 171 (Cal. App. 2005) (in reversing the lower court, the appellate court held that the donor had standing to pursue the action against the donee under both the principal of #1 a contract subject to a condition subsequent, as well as #2 a charitable trust.) *Smithers v. St. Luke's-Roosevelt Hosp. Ctr.*, 723 N.Y.S.2d 426, 281 A.D.2d 127 (N.Y. App. Div.

2001) (in reversing the lower court, the appellate court held that the estate of the donor of a charitable gift has standing to sue the donee to enforce the terms of the gift.)

Appellant contends that at least three situations exist in the current fact situation that should be exceptions to the general rule: (1) **CONSTRUCTIVE TRUST**, (2) **PUBLIC IMPORTANCE**, & (3) **CONSTITUTIONAL STANDING**.

- b. A **CONSTRUCTIVE TRUST** is formed such that donors have standing to file a declaratory judgment against a non-profit when the said entity VIOLATES (#1) a statutory legal requirement to cap its administrative expenses at 2% and (#2) the non-profit solicits donations by advertising the fact that no more than 2% of donations will be expended on administrative expenses.

Respondent South Carolina Educational Credit for Exceptional Needs Children Fund (ECENC Fund, aka “Exceptional SC”) is strictly bound by law to not incur administrative fees in excess of 2% of donations. S.C. Code Ann. § 12-6-3790(B)(4). The ECENC fund solicits donations from individuals and their CPA / tax attorney representatives under the terms of S.C. Code Ann. § 12-6-3790(B)(4) and donors and those CPA / tax attorneys reasonably rely upon the plain language terms of the statute in forming a binding contract subject to a condition subsequent between the two parties. Standard contract law therefore gives all donors to the ECENC Fund standing.

The ECENC Fund also solicits donations on its website specifically stating that its administrative fees will not exceed 2%, and that 98% of all donations will go directly to scholarship grants for eligible children with special needs.

Furthermore, Exceptional SC accepts donations as a charitable trust pursuant to the terms of its donor solicitations (at least 98% will go to scholarships) and the express terms of S.C. Code Ann. § 12-6-3790(B)(4). Standard trust law gives all donors to the ECENC Fund standing.

The non-profit is bound by law, and has voluntarily bound itself, to not exceed 2% in administrative expenses. In so doing, the ECENC Fund has entered into a CONSTRUCTIVE TRUST⁴ with its donors. Appellant was a donor to the ECENC Fund during the applicable period with the expectation that 98% of his donation would go directly to scholarships for eligible children with “special needs” based on statute and solicitation materials provided to Appellant creating a constructive trust. That legally enforceable promise did not occur and as such all donors, including Appellant, have the legal standing to sue.

- c. A South Carolina taxpayer / donor does have standing under a **PUBLIC IMPORTANCE** exception to file a declaratory judgment against (#1) a legislatively created non-profit, (#2) governed by a legislatively appointed board, (#3) administered (at taxpayer expense) by the South Carolina Department of Revenue, and (#4) awards South Carolina state income tax credits, when said entity violates its statutory legal requirements and children with “special needs” are the victims.

The second condition under which Appellant bases his standing is that of a matter which so involves taxpayer related issues of PUBLIC IMPORTANCE. When a state government administered organization, with a legislatively appointed governing board, such as the ECENC fund, is tasked with supporting “special needs” children and is opening in undeniably violating the law, it is a matter of public importance that standing should be conferred. Statute provides that

⁴ For purposes herein, Appellant has wrapped up all similar contentions under the term CONSTRUCTIVE TRUST. Be that an actual constructive trust, a contract subject to a condition subsequent, a charitable trust, or any other similar legal or equitable basis.

the non-profit's board members and the SC Attorney General have standing. But in matters such as this with a substantial public importance for children, whereby those parties fail to act, it is incumbent upon the public to act.

Furthermore, the State of South Carolina allocates \$12 MILLION per year to the ECENC Fund program. S.C. Code Ann. § 12-6-3790. That \$12 MILLION is a substantial sum further necessitating PUBLIC IMPORTANCE standing.

Transparency required. Although Appellant's declaratory judgment filing may have led to the firing of Respondent Chad Connelly, and the resignation of Respondent Tom Persons, the remaining parties (SC Dept. of Revenue, the Director of the SC Dept. of Revenue & four legislatively appointed board members) remain and upon information and belief, the violation of the maximum administrative spending limit continues. It is a matter of extreme PUBLIC INTEREST that transparency in government corruption be exposed, particularly when the government parties opposing this transparency including Respondent ECENC Fund, are the wrongdoers and children with "special needs" are the victims.

- d. A South Carolina taxpayer / donor does have **CONSTITUTIONAL STANDING** to file a declaratory judgment against governmental parties and appointees refused to act and taxpayer / donor has been injured.

The principle of standing under the United States Constitution is "an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). The Supreme Court has provided a three-part test to establish standing:

“First, the plaintiff must have suffered an ‘injury in fact’—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) ‘actual or imminent, not ‘conjectural’ or ‘hypothetical.’” Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be ‘fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court.’ Third, it must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’” *Lujan*, 504 U.S. at 560-61, 112 S.Ct. 2130. See also *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342, 126 S.Ct. 1854, 164 L.Ed.2d 589 (2006). As cited in *ATC South, Inc. v. Charleston County*, 669 S.E.2d 337, 380 S.C. 191 (S.C. 2008).

To establish constitutional standing, a plaintiff must also show a causal connection between the injury and the conduct complained of and it must be likely, as opposed to speculative, that the injury will be redressed by a favorable decision. *ATC South*, 380 S.C. at 195, 669 S.E.2d at 339. As cited in *Freemantle v. Preston*, 398 S.C. 186, 728 S.E.2d 40 (S.C. 2012)

The case at hand meets all these requirements. Appellant was injured in fact in that he personally donated to the ECENC Fund with the full expectation that 98% of the donation would go to scholarships for children with “special needs”. Had the Respondents not violate the law by exceeding the 2% administrative fee maximum, Appellant’s expectations would have been fulfilled. Appellant had options and could have donated directly to a school for children with “special needs”. However, Appellant was enticed by Respondents to donate to the ECENC Fund with the promise that no more than 2% would go to administrative fees. A favorable ruling as requested by Appellant requiring Respondents to comply with the 2% maximum, and to refund the excess administrative fees, would have certainly provided the redress sought. As such, Appellant has CONSTITUTIONAL STANDING in this matter.

II. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR PERJURY, CONTEMPT AND SANCTIONS.

It is undeniable that Respondent Chad Connelly's May 4th, 2020 Sworn Affidavit was false and as such perjury. It is also clear that intent existed in that the false document was filed with the trial court as evidence (#1) in support of Respondent's Motion to Dismiss, and (#2) in an effort to saddle Appellant with substantial bond requirements by claiming "the damages suffered will be between \$45,000 and \$50,000 per day over the next six weeks."

Respondent's intent to deceive the trial court, as well as thousands of parents, school leaders, legislators and others interested in and closely monitoring this matter is clear. The boldness demonstrated by the extreme gross overstatement of donations by Respondent Connelly (**\$1,045,000 sworn donations, while only \$99,201 in fact**) was not a mere minor error, it was to such a gross level that requires addressing.

Corruption in government cannot be swept under the rug by simply refusing to get into the facts. Our courts are here to address issues, not avoid them for convenience. More importantly our courts are not here to help "important" people avoid the substantial embarrassment and criminal implications of them lying in Sworn Affidavits filed with the court.

This gross perjury was an affront to our judicial system. Regardless of whether any plaintiff has standing or not, or if a court has jurisdiction over the underlying subject matter of the litigation or not ... our courts have jurisdiction over ALL procedural and related technical matters presented to the court in the determination of jurisdiction. The court has jurisdiction over ALL conduct of the parties, regardless of standing. A crime cannot be wiped away by simply finding a plaintiff

does not have standing for a lawsuit. A crime cannot be wiped away whether or not the court relied upon the perjured documents or not.

Intent, criminal intent, to provide a false sworn affidavit to the court existed and should not be ignored simply because the offending party might be “important” or the matter as a whole might be embarrassing to government officials.

We live in trying times where large numbers of the public do not trust or government officials or even our courts. This is such a matter. If our courts cannot be trusted to address wrongs, equally, where do we as citizens go for redress?

As such, Appellant submits the following statements for the SC Court of Appeals concurrence:

- a. **The trial court has jurisdiction over perjured sworn documents filed with the court by a defendant even when the court ultimately determines the plaintiff in the matter does not have standing.**
- b. **A defendant is not excused from perjury and sanctions for a false sworn affidavit filed with the trial court even when the court ultimately determines the plaintiff in the matter does not have standing.**
- c. **A defendant is NOT excused from the crime of perjury when the trial court does not “use” the perjured documents in a finding of lack of plaintiff’s standing.**
- d. **The trial court must address a Motion for Perjury even when the court ultimately determines the plaintiff in the matter does not have standing.**

[CONTINUED ON NEXT PAGE.]

CONCLUSION

For the foregoing reasons, Appellant asks this Honorable Court to reverse the judgment of the trial court order dismissing this case for lack of standing and direct the court to address Plaintiff's Motion for Perjury, Contempt & Sanctions for False Affidavit with a finding commensurate of the incontrovertible guilt of Respondents.

Respectfully submitted,



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Date: February 5th, 2021

Appellant

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Appellate Case No. 2020-001348

Jefferson Davis, Jr.Appellant,

v.

Chad Connelly, Tom Persons & South Carolina Educational Credit for Exceptional Needs
Children FundRespondents.

PROOF OF SERVICE

I certify that I have served **INITIAL BRIEF OF APPELLANT** and **APPELLANT'S DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL** on the below named parties at the email addresses noted on the date below. Due to the current coronavirus crisis, no hard copy is being mailed.

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February 5th, 2021

Via Email Only (ctappfilings@sccourts.org)

The Honorable Jenny Abbott Kitchings
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Feb 05 2021

SC Court of Appeals

RE: Jefferson Davis Jr, Appellant vs. Chad Connelly, Et al. Respondents

Appellate Case No.: 2020-001348

C.A. NO.: 2020-CP-36-00093

Dear Ms. Kitchings:

Please find attached the original of the following for the above referenced matter.

- 1. Initial Brief of Appellant**
- 2. Appellants' Designation of Matter to be Included in the Record on Appeal**
- 3. Proof of Service**

I have also served this filing on Respondent via email only for safety reasons. Pursuant to recent Orders from the Supreme Court of South Carolina, it appears service by email is preferred due to the current Coronavirus Emergency.

Thank you for your assistance. If you have any questions, please feel free to email me at jeff@apogeetax.com or give me a call at 843-901-8036 (cell).

Sincerely,



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