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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2018-000794
Case No. 2016-CP-40-2875

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.

PETITION FOR REHEARING

The Respondent Richland County petitions the South Carolina Court of Appeals for a rehearing of the Court's recent decision in *South Carolina Public Interest Foundation v. Richland County*, Op. No. 5865 (S.C. Ct. App. filed October 6, 2021).

The grounds for the Respondent Richland County's petition for rehearing are addressed in detail in the supporting memorandum filed herewith and incorporated herein.

The Respondent Richland County's petition for rehearing is based on the Court's decision in *South Carolina Public Interest Foundation v. Richland County*, Op. No. 5865 (S.C. Ct. App. filed October 6, 2021); the supporting memorandum filed herewith; the briefs and Record on Appeal; Rule 221(a), SCACR; Rule 224, SCACR; and other rules of court.

LINDEMANN & DAVIS P.A.

BY: *s/ Andrew F. Lindemann*

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MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

The Respondent Richland County has petitioned this Court for a rehearing of the recent decision in *South Carolina Public Interest Foundation v. Richland County*, Op. No. 5865 (S.C. Ct. App. filed October 6, 2021). The Respondent County respectfully submits that the following points were overlooked or misapprehended by this Court:

I.

The Respondent Richland County contends that this Court overlooked or misapprehended its application of the law on cases dismissed for failure to prosecute particularly in light of the

highly deferential standard of review.

"The question of whether an action should be dismissed ... for failure to [prosecute] is left to the discretion of the circuit [court] and [its] decision will not be disturbed except upon *a clear showing of an abuse of such discretion*." *Small v. Mungo*, 254 S.C. 438, 175 S.E.2d 802, 804 (1970). (Emphasis added). "An abuse of discretion occurs when the [circuit court's] ruling is based upon an error of law or, when based upon factual conclusions, is without evidentiary support." *Fontaine v. Peitz*, 291 S.C. 536, 354 S.E.2d 565, 566 (1987).

Thus, an appellate court should only reverse where there has been a "clear showing" of an abuse of discretion by the trial court. That showing was not made in this case. In fact, throughout its opinion, this Court acknowledges and "share[s] the circuit court's concern about the lack of action [by the Appellant] in prosecuting this case." Slip Op. at 7. This Court also recognizes that "a scheduling order is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril." Slip Op. at 7. This Court further agrees that discovery was first served after the discovery and dispositive deadlines in the scheduling order had already expired and that the scheduling order was ignored.

Moreover, this Court did not consider or at least mention that the trial judge was clearly swayed by the flawed means employed by the Appellants to contest the County's timely-filed motion for summary judgment, including the lack of any properly authenticated or admissible exhibits, the untimely filing of stale affidavits from another case – parts of which had even been stricken in the SCDOR litigation, reliance on a newspaper article which is obviously inadmissible hearsay, and the filing of a supplemental memorandum, without leave of court, two weeks after the hearing with an additional dump of documents without affidavits or deposition testimony to establish authenticity and more importantly relevance and context. The lack of due

diligence in how the case was prepared or presented was obvious and clearly supported the trial judge's decision to dismiss for failure to prosecute – even a dismissal with prejudice.

This Court, however, improperly substitutes its judgment for that of the trial court. In doing so, the Court incorrectly relies on the absence of existing appellate authority that was directly *and factually* on point. That is unfair. If every scenario must have been addressed by a prior existing appellate case that is directly on point factually, then our system of jurisprudence based on the *development* of precedent would not function. Logically speaking, under such a rationale, the appellate courts would never be able to take up and decide a novel issue of law or fact. Our body of precedent would be stagnant. In fact, our body of precedent would never have developed because the absence of legal and factual precedent to start with would have doomed any further extensions of the law – again both legally and factually. Clearly, that is not how our system of jurisprudence works. Thus, the *absence* of existing precedent based on the same factual scenario cannot and does not mandate a reversal.

The Court also addresses the fact that Judge Cooper entered the dismissal "with prejudice." A dismissal for failure to prosecute is generally not punitive; it is not entered as a sanction per se. Instead, it is used to control the docket and to ensure that cases are being prosecuted with due diligence. *See, Don Shevey & Spires, Inc. v. American Motors Realty Corp.*, 279 S.C. 58, 301 S.E.2d 757 (1983); *Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201, 493 S.E.2d 826 (1997). The courts apply a reasonableness standard, specifically what the Supreme Court terms "unreasonable neglect," not a punitive standard. *Don Shevey*, 301 S.E.2d at 758.

Ultimately, this Court concludes that "[w]e hold only that it was an abuse of discretion to dismiss Appellants' case with prejudice." Slip Op. at 8. Based on that language and the Court's overall analysis which agrees with the trial court's findings that the case was not being

prosecuted by the Appellants, it appears that the Court would affirm a dismissal without prejudice. Thus, given that this Court found that the trial judge erred only in making the dismissal "with prejudice," that does not merit a reversal and remand. On rehearing, this Court is urged to affirm the dismissal for failure to prosecute but to enter that dismissal "without prejudice" consistent with Rule 41(b).

II.

The Court also respectfully overlooked or misapprehended the County's additional sustaining ground based on the fact that the Appellants' action, or at the very least a substantial portion thereof, is duplicative of litigation commenced by the South Carolina Department of Revenue ("SCDOR") and the formal audit completed by SCDOR.

The County submits that the Appellants should not be permitted to proceed with this action because, as is evident from the Appellants' opening brief, this action is duplicative to the legal proceedings pursued by SCDOR against Richland County. The record fully supports that position. For starters, in the Consent Order for Complex Case Designation, the parties agreed that the SCDOR litigation is "a case with similar facts and legal issues" and that "there may be similar legal and administrative issues that would require duplication of, and potential inconsistent results were the cases not assigned to the same trial judge." (R. 65-66). In addition, during the October 26, 2017 motion hearing, the Appellants' counsel discusses the SCDOR appellate brief which was filed with the South Carolina Supreme Court in the SCDOR litigation and admits "we have borrowed a lot of their ideas. Imitation is the sincerest form of flattery. I think they make a good argument." (R. 360). He then suggests to the trial court that "a good use of judicial resources [would be] to wait and see what the Supreme Court says before duplication or conflicting. … I think a lot of these issues are in the Supreme Court." (R. 361). The Appellants'

counsel also concedes that "[t]he issues are heavily overlapped. The parties are largely the same." (R. 362). Thus, he argued that it would "make sense" to consolidate the cases and try them together "for purposes of judicial efficiency." (R. 362).

This Court acknowledges that "[d]ismissing this litigation as duplicative of the DOR case has some appeal." Slip Op. at 8. However, this Court then focuses solely on Rule 12(b)(8), SCRCP, and concludes that "we cannot square dismissal on this ground with precedent that reads the procedural rule on duplicate cases narrowly." Slip Op. at 8. However, this Court has overlooked that the Respondent County is not relying on Rule 12(b)(8) *per se*. In its brief, the County argued that "the rationale of Rule 12(b)(8), SCRCP, is applicable," and then focused on the fact that duplicative litigation is legally disfavored as the Supreme Court made clear in *State ex rel. Wilson v. Condon*, 410 S.C. 331, 764 S.E.2d 247 (2014). In that case, the Supreme Court likewise did not rely on Rule 12(b)(8) *per se* either, but rather on "*the principle underlying Rule 12(b)(8)*." 764 S.E.2d at 248. (Emphasis added). To be clear, the Supreme Court recognized that "although the parties in this matter and the federal case are not identical, the principle underlying Rule 12(b)(8) of the South Carolina Rules of Civil Procedure that duplicative litigation should be avoided *applies to this case*." 764 S.E.2d at 248. (Emphasis added). Thus, the Supreme Court fully acknowledged that Rule 12(b)(8) did not strictly apply in *Condon*, but nonetheless, its "principle" or rationale does apply so that duplicative litigation addressing the legality of same-sex marriage was to be avoided.

Consistent with *Condon*, the Respondent Richland County in the case at bar acknowledges that SCDOR and the Appellants are not technically the same party, but there is no question that they serve the *identical roles* in the two lawsuits brought against the County over the same issues and concerns. In fact, the trial court granted the Appellants taxpayer and public

importance standing on the premise that "[a] decision is necessary for future guidance." (R. 49). That same "future guidance" may be obtained through proceedings initiated by SCDOR, and hence, there is no need for the duplicative litigation which the Supreme Court has cautioned is to be "avoided," particularly in inherently complex and novel cases such as the legality of same-sex marriage in *Condon* and the construction and application of the Transportation Act at issue here and in the SCDOR litigation. In short, this Court's narrow application of Rule 12(b)(8) and its precedent are clearly at odds with the Supreme Court's decision in *Condon* where the Court stresses the "the principle underlying Rule 12(b)(8)" to avoid duplicative litigation.

This is particularly true in the context of this litigation because our Supreme Court has recognized that SCDOR – and no one else – possesses the "oversight and enforcement" authority over penny tax transportation programs and the expenditure of funds thereunder. In its decision in *Richland County v. South Carolina Department of Revenue*, 422 S.C. 492, 811 S.E.2d 758 (2018), the Supreme Court explained that SCDOR has "extensive administrative, oversight, and enforcement responsibilities in the Transportation Act and … Title 12 of the South Carolina Code confer[s] upon DOR a duty in ensuring the County's expenditures of Penny Tax revenues comply with the revenue laws DOR is charged with enforcing." 811 S.E.2d at 765. The Supreme Court also described SCDOR as "the agency statutorily tasked with administering the Penny Tax program" and further noted that "the expenditure of millions of dollars of Penny Tax revenues is an issue of wide concern … to DOR." *Id.*

Thus, the case at bar, which is a taxpayer-commenced lawsuit, is not only duplicative to the SCDOR-initiated litigation, it also interferes with SCDOR's exercise of is oversight and enforcement authority and creates an untenable situation for counties. If SCDOR is bestowed with oversight and enforcement authority over the County, as the Supreme Court has already

found, then taxpayers, as a group or separately, cannot be bestowed with the same oversight and enforcement power through the judicial process to make different demands on counties in their implementation and operation of penny tax transportation programs. If that were permissible, the counties will have to respond to multiple (perhaps countless) different taxpayers with oversight and enforcement power, when the Supreme Court has found that the statutory scheme places that oversight and enforcement authority exclusively with SCDOR. It is certainly conceivable that the demands of taxpayers through their "enforcement lawsuits" would be inconsistent with the requirements imposed by SCDOR. It will also make it impossible for the counties and SCDOR to resolve disputes without judicial intervention because taxpayers may want to resolve an issue differently than SCDOR and will commence a taxpayer "enforcement lawsuit" to seek a different resolution than SCDOR. In short, taxpayer lawsuits were not intended to create a mechanism to compete with governmental oversight and enforcement authorities; yet if the case at bar is allowed to proceed as this Court is allowing with its current opinion, that is precisely what will occur. Counties will be subject to the regulatory demands of SCDOR ***and*** all of the taxpayers who have paid any sales tax in Richland County. That creates an untenable situation.[1]

In sum, this Court is respectfully asked to rehear this case and to give effect to South Carolina jurisprudence which explicitly disfavors duplicative litigation. This case is no different than *State ex rel. Wilson v. Condon*, 410 S.C. 331, 764 S.E.2d 247 (2014), where our Supreme

[1] The Court does find that "[t]here is no denying some of Appellants' claims are different from the claims in the DOR litigation." Slip Op. at 8. The Court does not state what those different claims are. However, even if that is true, the Appellants, by using a taxpayer lawsuit, should not be in a position to usurp the oversight and enforcement authority of the regulatory agency bestowed with such power. Nonetheless, even if the Appellants can assert claims that SCDOR chose not to pursue, certainly the claims that are duplicative should be barred. The Court should, at the very least, rule that the duplicative claims are barred.

Court cautioned that "duplicative litigation should be avoided," particularly in inherently complex and novel cases. 764 S.E.2d at 248. This is also most appropriate in the present context, where there is a recognized governmental oversight and enforcement authority with respect to the claims and subject matter at issue. In order words, where oversight and enforcement authority is bestowed on a government agency such as SCDOR and that authority is clearly being exercised, there is no need, and in fact it is contraindicated, for a taxpayer to utilize a taxpayer lawsuit to seek the same oversight and enforcement through litigation. To be clear, counties, such as Richland County here, should not have to defend enforcement proceedings initiated by SCDOR as well as taxpayer lawsuits asserting the same authority.

CONCLUSION

Based on the foregoing discussion, the Respondent Richland County respectfully requests that the Court rehear its decision in this case.

Respectfully submitted,

LINDEMANN & DAVIS P.A.

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CERTIFICATE OF SERVICE

Pursuant to Section (d)(1) of the Supreme Court's Order RE: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (August 25, 2021), the undersigned employee of Lindemann & Davis, P.A., counsel for the Respondent Richland County, does hereby certify that service of the **Petition for Rehearing** and the **Memorandum in Support of Petition for Rehearing** in the above-captioned matter was made upon all counsel of record by email only at the below listed email addresses this the 21st day of October 2021:

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October 21, 2021

Via Email Only
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Email: ctappfilings@sccourts.org

RE: South Carolina Public Interest Foundation, Edward D. Sloan, Jr., and William B. DePass, Jr., individually, and on behalf of all others similarly situated v. Richland County
Appellate Case Number: 2018-000794
Civil Action Number: 2016-CP-40-2875
Claim Number: Legal
Our File Number: 314.9965

Dear Ms. Kitchings:

In accordance with Section (b)(2) of the Supreme Court's Order RE: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (August 25, 2021), please find enclosed for filing by email only the **Petition for Rehearing** and the **Memorandum in Support of Petition for Rehearing** in the above referenced matter. Copies are being served upon all counsel of record pursuant to Section (d)(1) of the same order.

The $50.00 filing fee will be sent to the Court via U.S. Mail on today's date. If you have any questions, please advise.

Sincerely,

LINDEMANN & DAVIS, P.A.

Andrew F. Lindemann

AFL/jmb
Enclosures

cc: James G. Carpenter, Esquire *(w/ Enclosures, Via Email Only)*
Ray E. Jones, Esquire *(w/ Enclosures, Via Email Only)*
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Robert E. Tyson, Jr., Esquire *(w/ Enclosures, Via Email Only)*
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