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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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, ... Petitioners-Respondents,

v.

Richland County, ... Petitioner,

and

Central Midlands Regional Transit Authority, ... Intervenor-Respondent.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for the Petitioner Richland County certifies that its Petition for Rehearing was made and finally ruled on by the South Carolina Court of Appeals on November 4, 2021.

QUESTIONS PRESENTED

I. Did the South Carolina Court of Appeals err in reversing the trial court's dismissal of this declaratory judgment action which is duplicative of litigation commenced by the South Carolina Department of Revenue against Richland County and the Department's formal audit as directed by the South Carolina Supreme Court in conjunction with that litigation?

II. Did the South Carolina Court of Appeals err in reversing the trial court's dismissal of this declaratory judgment action based on the Plaintiffs' failure to prosecute?

STATEMENT OF THE CASE

This is an appeal from an order by the Circuit Court to dismiss an action for declaratory relief based upon a failure to prosecute.

The Petitioners-Respondents South Carolina Public Interest Foundation, Edward D. Sloan, Jr., and William B. DePass (hereafter referred to collectively as "SCPIF") filed this action seeking declaratory relief on May 9, 2016. The action was originally brought against the Petitioner Richland County. Later, the Respondent Central Midlands Regional Transit Authority (CMRTA) was joined as an intervenor.

By way of background, in 1995, the South Carolina General Assembly enacted Chapter 37 of Title 4 of the South Carolina Code of Laws which is entitled "Optional Methods for Financing Transportation Facilities" (hereinafter referred to as the "Transportation Act"). *See*, 1995 Act No. 52. Section 1 of the Transportation Act sets forth a preamble to the Act with legislative findings that state as follows:

> In furtherance of the powers granted to the counties of this State pursuant to the provisions of Section 4–9–30, and Section 6–21–10 *et seq.*, of the 1976 Code, each of the counties of this State is authorized to establish transportation authorities and to finance, following the public hearing and referendum required in this act, the cost of acquiring, designing, constructing, equipping and operating highways, roads, streets, and bridges, and other transportation-related projects, either alone or in partnership with other governmental entities including, but not limited to, the South Carolina Department of Transportation.

See, 1995 Act No. 52, § 1.[1]

[1] The title to 1995 Act No. 52 states that the Transportation Act was intended "to authorize counties to establish optional methods for the financing of transportation facilities including the acquisition, construction, equipment, and operation of highways, roads, streets, bridges, and other transportation-related projects." *See*, 1995 Act No. 52. The list of

On July 18, 2012, the Richland County Council enacted Ordinance Number 039-12HR for the purpose of levying a one percent sales and use tax pursuant to S.C. Code Ann. § 4-37-30 of the Transportation Act (hereinafter referred to as the "Penny Tax").[2] The Penny Tax Ordinance provided for a referendum to be held on November 6, 2012. The Ordinance also provided for the County's implementation of the Penny Tax upon approval by the electorate. On November 6, 2012, the voters of Richland County approved the referendum.[3]

Following approval of the referendum, Richland County began establishing the framework for the implementation of the Transportation Penny Program to be paid for by the sales and use tax collected pursuant to the referendum. The Penny Tax was levied and collected for Richland County effective May 1, 2013.

SCPIF filed this action challenging the legality of Richland County Ordinance Number 039-12HR including categories of expenditures that have been made in accordance with that Ordinance.

In September 2016, the parties entered into a Consent Order for Complex Case Designation in which the parties agreed to the following:

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transportation-related projects was expanded in 2000. The title to 2000 Act No. 368 states that the amendment was "to provide that the proceeds of the tax may be used for mass transit systems and greenbelt projects." *See*, 2000 Act No. 368.

[2] Richland County chose not to adopt a transportation authority as permitted by the Transportation Act.

[3] The results of the referendum were challenged to the Richland County Board of Elections and Voter Registration, which denied the protest. An appeal was filed to the State Board of Canvassers, which affirmed the decision of the County Board. Thereafter, in *Letts v. Richland County*, Appellate Case No. 2012-213679, the petitioner sought a writ of certiorari to review the decision of the State Board. On March 21, 2013, the South Carolina Supreme Court unanimously denied the petition for writ of certiorari.

> In a case with similar facts and legal issues, the case was designated complex and assigned to Judge G. Thomas Cooper. See *Richland County,* SC, *and CMRTA v. SCDOR and Rick Reames, Ill, in his Official capacity as its Director* v. *Richland PDT, a joint venture* consisting of M.B. Kahn Construction Company, Inc., ICA Engineering, Inc., and Brownstone Construction Group, LLC, as a unit and individually, *CA# 16-CP-40-310.*
>
> Both cases challenge the validity of Richland County's Ordinance authorizing a penny tax and the use of penny tax funds by Richland County. It is expected there will be significant discovery sought in *this* case because of the issues in the case and there may be similar legal and administrative issues that would require duplication of, and potential inconsistent results, were the cases not assigned to the same trial judge.

(R. 65-66). (Emphasis in original). That consent order thus explained that there was another action pending whereby the South Carolina Department of Revenue ("SCDOR") has asserted claims with "similar facts and legal issues" as the present case. That litigation (referred to as "SCDOR litigation") resulted in an appeal being filed to the South Carolina Supreme Court after the Circuit Court granted the County's petition for mandamus and denied motions for temporary injunction filed by both parties.

In the present case, the Circuit Court issued a Consent Scheduling Order on November 18, 2016, as agreed to by the parties, which set a discovery deadline of July 17, 2017, a dispositive motions deadline of September 18, 2017, and a trial date after October 18, 2017. (R. 63). The parties never sought any extensions of those deadlines.

Ultimately, SCPIF initiated and engaged in absolutely no discovery. No written discovery was served, and no depositions were scheduled or taken. This was despite their

recognition that "there will be significant discovery sought in *this* case" as well as an order by the Circuit Court denying an early motion to dismiss the First Cause of Action.[4]

On September 18, 2017, the County served its Motion to Dismiss and/or Motion for Summary Judgment. (R. 174-179).[5] The County raised a number of grounds including a request for dismissal given SCPIF's failure to prosecute. A hearing was held on October 26, 2017, before Circuit Court Judge G. Thomas Cooper, Jr., to whom this action was assigned as well as the SCDOR litigation. (R. 328-373). On November 30, 2017, the Circuit Court issued an Order Granting Motion to Dismiss wherein the court found that "the Plaintiffs have taken no action to prosecute their claims in the eighteen or so months since the Complaint was filed on May 9, 2016." (R. 8). The Circuit Court concluded that that "the dismissal of this action under Rule 41(b) and the inherent authority of the Court is warranted." (R. 8). The Circuit Court did not address any of the other grounds for summary judgment that had been raised by the County.

SCPIF filed a motion for reconsideration that was denied by Order filed April 17, 2018. SCPIF then filed this appeal to this Court. In the interim, while SCPIF's motion for reconsideration was pending, the Supreme Court issued its decision in the SCDOR litigation, which resulted in a temporary injunction being issued against the County. The Supreme Court also remanded the SCDOR litigation for further proceedings, including discovery and an

[4] In the Amended Order Denying Motions to Dismiss and Motion for Judgment on the Pleadings filed March 27, 2017, the Circuit Court wrote as follows: "The Court finds that the issue in the First Cause of Action is not one that should be decided on judgment on the pleadings, but rather should be developed factually and legally through the course of the litigation. There has been no discovery in this case." (R. 37).

[5] SCPIF did not file a motion for summary judgment seeking an adjudication of the merits of their seven causes of action. Instead, after receiving the County's motion, SCPIF served its first sets of written discovery on September 22, 2017, which was more than two months after the discovery deadline as contained in the Consent Scheduling Order.

adjudication on the merits. *See*, *Richland County v. South Carolina Department of Revenue*, 422 S.C. 492, 811 S.E.2d 758 (2018).

SCPIF filed an appeal to the Court of Appeals. On October 6, 2021, the Court of Appeals issued a published opinion reversing the decision of the Circuit Court to dismiss the claims against Richland County. The Court of Appeals did affirm the entry of summary judgment in favor of the Respondent CMRTA. The Petitioner Richland County filed a petition for rehearing which was summarily denied by order filed November 4, 2021.

ARGUMENTS

I. The South Carolina Court of Appeals erred in reversing the trial court's dismissal of this declaratory judgment action which is duplicative of litigation commenced by the South Carolina Department of Revenue against Richland County and the Department's formal audit as directed by the South Carolina Supreme Court in conjunction with that litigation.

The Court of Appeals erred in reversing the dismissal of SCPIF's declaratory judgment action which is duplicative of litigation commenced by SCDOR against Richland County and the formal audit completed by SCDOR, which was based on this Court's rulings and direction in *Richland County v. South Carolina Department of Revenue*, 422 S.C. 492, 811 S.E.2d 758 (2018). It its opinion, this Court recognized that SCDOR – and no one else – possesses the "oversight and enforcement" authority over penny tax transportation programs and the expenditure of funds thereunder. This 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. This 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.*

The record demonstrates that the SCPIF action is duplicative to the SCDOR-initiated litigation and the audit that was conducted by SCDOR in conjunction with that litigation. That fact was recognized and acknowledged by SCPIF. 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, SCPIF's counsel discussed the SCDOR appellate brief which was filed with this 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). SCPIF's 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).

The Court of Appeals acknowledged that "[d]ismissing this litigation as duplicative of the DOR case has some appeal." Slip Op. at 8. However, the Court of Appeals then focused solely on Rule 12(b)(8), SCRCP, and concluded that "we cannot square dismissal on this ground with precedent that reads the procedural rule on duplicate cases narrowly." Slip Op. at 8. However, the Court of Appeals overlooked that the 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 this Court made clear in *State ex rel. Wilson v. Condon*, 410 S.C. 331, 764 S.E.2d 247 (2014). In that case, this 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, this 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, this 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 County acknowledges that SCDOR and SCPIF 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 SCPIF taxpayer and public importance standing on the premise that "[a] decision is necessary for future guidance." (R. 49). That same "future guidance" has been obtained through the proceedings initiated by SCDOR as well as its court-sanctioned audit authority which SCDOR has exercised with respect to the Richland County Penny Tax Transportation Program. Hence, there is no need for the duplicative litigation which this 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, the Court of Appeals' narrow application of Rule 12(b)(8) and its precedent are clearly at odds with this Court's decision in *Condon* which stresses "the principle underlying Rule 12(b)(8)" to avoid duplicative litigation.

Moreover, this case 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 subject to that oversight. If SCDOR is bestowed with oversight and enforcement authority over the County, as this Court has already ruled, then taxpayers, as a group or separately, cannot and should not 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 claiming oversight and enforcement power, when this Court has already ruled 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 the Court of Appeals has allowed, 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.[6]

In sum, this Court is respectfully asked to grant a writ of certiorari 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 this 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

[6] The Court of Appeals did 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 did not state what those different claims are. However, even if that is true, SCPIF, 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 SCPIF can assert claims that SCDOR chose not to pursue, certainly the claims that are duplicative should be barred.

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 oversight and enforcement proceedings initiated by SCDOR as well as taxpayer lawsuits asserting the same authority.

Accordingly, this Court is respectfully requested to issue a writ of certiorari to prevent duplicative litigation from proceeding which impedes the exercise of public policy and also interferes with the exclusive oversight and enforcement authority to which SCDOR has previously been empowered according to this Court's prior precedent.

II. The South Carolina Court of Appeals erred in reversing the trial court's dismissal of this declaratory judgment action based on the Plaintiffs' failure to prosecute.

Instead of ruling on the merits of Richland County's motion for summary judgment, the Circuit Court dismissed SCPIF's Amended Complaint for Declaratory Judgment for failure to prosecute. The Circuit Court acted well within its discretion and authority.

Rule 41(b), SCRCP, authorizes a court to dismiss an action based upon a plaintiff's failure to prosecute. In *Small v. Mungo*, 254 S.C. 438, 442, 175 S.E.2d 802 (1970), this Court held that "it is within the inherent power of the court to dismiss an action for failure to prosecute." 175 S.E.2d at 803. This Court further held that "[t]he plaintiff has the burden of prosecuting his action, and the trial court may properly dismiss an action for plaintiff's unreasonable neglect in proceeding with his cause. This authority is necessary if the courts are to control and efficiently manage an ever-expanding docket." *Don Shevey & Spires, Inc. v. American Motors Realty Corp.*, 279 S.C. 58, 301 S.E.2d 757, 758 (1983). In *Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201, 493 S.E.2d 826 (1997), this Court also explained that "[p]rovision is made in federal and state statutes or rules of

practice for dismissal of civil actions for failure of prosecution by the plaintiff. However, the power of trial courts to dismiss a case for failure to prosecute with due diligence is generally considered inherent and independent of any statute or rule of court. Such power is deemed to be necessarily vested in trial courts to manage their own affairs so as to achieve orderly and expeditious disposition of cases." 493 S.E.2d at 832.

Thus, the controlling standard, according to this Court, is "unreasonable neglect." That is the very standard that the Circuit Court applied in this case. The Circuit Court found, as fully supported by the record, a "lack of activity in prosecuting this action by the Plaintiffs," which warranted a dismissal "under Rule 41(b) and the inherent authority of the Court." (R. 8). The Circuit Court provided a specific explanation for its conclusion:

> [T]he record reflects that the Plaintiffs have taken no action to prosecute their claims in the eighteen or so months since the Complaint was filed on May 9, 2016. The Plaintiffs pursued no discovery as part of this lawsuit. No written discovery was timely served by the Plaintiffs, and no depositions have been taken. In the Amended Order Denying Motions to Dismiss and Motion for Judgment on the Pleadings filed March 27, 2017, the Court wrote as follows: "The Court finds that the issue in the First Cause of Action is not one that should be decided on judgment on the pleadings, but rather should be developed factually and legally through the course of the litigation. There has been no discovery in this case." Since that time, the Court is advised that discovery has still not been conducted. In short, this Court finds that no timely discovery has been initiated or completed, and based on the Scheduling Order filed November 18, 2016, the discovery deadline has now expired.

(R. 8). (Footnotes omitted).

The South Carolina Court of Appeals reversed. However, in doing so, the Court of Appeals erred in its application of the law governing the dismissal of cases for failure to prosecute particularly in light of the standard of review which is highly deferential to the trial court. It is well settled that "[t]he 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 Circuit Court. That showing was not made in this case. In fact, throughout its opinion, the Court of Appeals acknowledged and "share[d] the circuit court's concern about the lack of action [by the Appellant] in prosecuting this case." Slip Op. at 7. The Court of Appeals also recognized 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. The Court of Appeals also agreed that discovery was first served by SCPIF after the discovery and dispositive deadlines in the scheduling order had already expired and that the scheduling order was ignored.

Moreover, the Court of Appeals did not consider that the trial judge was clearly swayed by the flawed means employed by SCPIF 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.

In short, the Court of Appeals improperly substituted its judgment for that of the Circuit Court. In doing so, the Court of Appeals was in error in placing dispositive weight on the absence of existing appellate authority that was directly *and factually* on point. That is unreasonable, unfair, and actually unprecedented. A novel question – whether legal or factual in nature – should not be rejected solely because there is no precedent on point. In other words, a novel question should not be rejected solely because it is novel. Realistically, if every scenario must have been addressed by a prior existing appellate case that is directly on point legally *and* factually, then our system of jurisprudence based on the *development* of precedent would not function. Under such a rationale, the appellate courts would never be able to take up and decide a novel issue of law or a novel set of facts. 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, and the Court of Appeals erred in rejecting the decision of the Circuit Court under the facts presented solely because there was no existing precedent presenting the same factual scenario.

The Court of Appeals also focused on the fact that the trial judge 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 this Court terms "unreasonable neglect," not a punitive standard. *Don Shevey*, 301 S.E.2d at 758.

Ultimately, the Court of Appeals concluded 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 of Appeals' overall analysis which agrees with the Circuit Court's findings that the case was not being prosecuted by SCPIF, it appears that the Court of Appeals would have affirmed a dismissal without prejudice. Thus, given that the Court of Appeals found that the trial judge erred only in making the dismissal "with prejudice," that did not merit a reversal and remand. Instead, the appropriate ruling would be an affirmance as modified of the dismissal for failure to prosecute with the dismissal to be entered "without prejudice" consistent with Rule 41(b).

This Court is respectfully requested to issue a writ of certiorari to re-affirm and apply the highly deferential standard of review for a trial court's decision to dismiss an action for failure to prosecute under Rule 41(b) and inherent authority. Moreover, the Court is respectfully asked to hold that the absence of precedent involving the same or virtually the same factual pattern is no basis for reversal. The development of our jurisprudence depends on courts to address novel legal issues and novel factual scenarios. The Court of Appeals erred in reversing only because there was no such existing precedent.

CONCLUSION

For these reasons, the Petitioner Richland County respectfully requests that this Court grant its petition for a writ of certiorari.

Respectfully submitted,

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