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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

John C. Few and D. Garrison Hill, Circuit Court Judges

Opinion No. 2010-5016 (S.C. Ct. App. Filed August 1, 2012,
Withdrawn, Substituted, and Refiled January 23, 2013)

The South Carolina Public Interest Foundation, and Edward D. Sloan, Jr., individually, and on behalf of all others similarly situated, ... Petitioners,

v.

Greenville County, Herman G. Kirven, Jr., Judy Gilstrap, Eric Bedingfield, Jim Burns, Scott Case, Joseph Dill, Cort Flint, Lottie Gibson, Mark Kingsbury, Xanthene Norris, Robert Taylor, and Tony Trout, ... Respondents.

RESPONDENTS' RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUES ON APPEAL

I. When Sloan had previously sued Greenville County -- and lost -- in a case involving the same Council Reserves Policy that Sloan has challenged in the present case, arguing in both the prior case and the present case that County Council improperly delegated a portion of its authority to individual Council members, did the Court of Appeals properly find that the prior case was barred on the grounds of *res judicata*?

II. In light of the broad discretion that Home Rule provides to county government, did the Trial Court err in finding that Greenville County's Council Reserves Fund, a component of Greenville County's budget which Greenville County Council voted upon as part of its annual budget ordinance, constituted an improper delegation of legislative authority?

III. Given the Court of Appeals ruling on *res judicata,* did the Court of Appeals properly reverse the Trial Court's order awarding attorneys' fees to Sloan?

STATEMENT OF THE CASE

The Council Reserves

For fiscal year 1994-95, Greenville County Council, as a part of its annual budgeting process, established an account known as the County Council Reserves as an item in the County's annual operating budget. See Order from Sloan v. Greenville County, C.A. No. 96-CP-23-2918 at 2 (R. p. 4). In 1996, County Council amended the Council Reserves to limit the use of Council Reserves to infrastructure purposes such as flooding and drainage, roads, lights, sewer, and public buildings and grounds. See id.

On August 2, 2005 Greenville County Council adopted Ordinance 3940, the County's Fiscal Year 2006-2007 budget ("2007 Budget"). Exhibit A to Complaint (R. pp. 71-74). The 2007 Budget appropriated $109,422,318.00 for the General Fund to fund fiscal year 2007 County operations (R. p. 71). The General Fund Budget contains several departments, one of them being Department 1, Legislative and Administrative Services. See portions of Budget File (R. pp. 424-427). This department has three divisions: County Administrator, County Attorney and County Council. Id. Each of these Divisions is divided into three categories: salaries, operating expense and contractual. Operating expense for each Division includes copy expense, postage, printing, awards, advertising, membership and dues, publications, operational support, transportation, training and conferences, office supplies and photo supplies. Id.

For the County Council Division, however, additional line items are included in the operational expense: the Council Reserves. See Exhibit 2 of Defendants' Summary

Judgment Memo, at 3 ("Council Dist. Exp. Dis." line item)[1] (R. p. 426). It is from these line items where the individual expenses of County Council members are funded. In addition, Council members may use funds from Council Reserves in connection with costs "associated with special, non-recurring community requests for infrastructure purposes" and for "contributions to local governments in Greenville County for community projects." See R. p. 428. See also Sloan v. Greenville County, 401 S.C. 377, 382, 737 S.E.2d 502, 505 (2013) (Court of Appeals' Opinion in present case discussing eligible expense items from Council Reserves).

The amount of the Council Reserves for the Council members for the 2007 Budget varied: $26,946 for the Chairman; $24,251 for the Vice-Chairman; and $21,828 for all other Council members. R. pp. 424-426. For those Council members who are standing for re-election or those who are not running for re-election in an election year, they may only spend one-half of their Council Reserves during the first half of the year. R. p. 428. Finally, Council Members may not "carry over" Council Reserve funds. Id.

Sloan's Lawsuits Over the Council Reserves

The Prior Lawsuit

Following County Council's adoption of its budget for the 1997-98 fiscal year, Sloan sued the County, seeking an Order enjoining what Sloan alleged to be the "illegal practices" of the Council Reserves. See Third Amended Complaint in Sloan v. Greenville County, 96-CP-23-2918 (the "Prior Action" or "Prior Lawsuit"), at p. 13 (R. p. 61). In this Prior Action, Sloan plead eleven causes of action, six that he characterized as "procedural illegalities by Defendant," which he claimed violated various County and

[1] Several years after creation of the Council Reserves, the County began using the name "Council District Expense" for the account, as shown on the line item in Exhibit 2 referenced above. The term Council Reserves, however, is used throughout this Brief for the sake of clarity.

State Code sections. See Third Amended Complaint of Prior Lawsuit at pp. 8-12 (R. pp. 56-60). Regarding alleged violations of the Greenville County Code, Sloan alleged:

> "that Defendant has continued to draw upon Council Reserves without voting on each expenditure or appropriation," id. at ¶ 74 (R. p. 56);
>
> that the Council Reserves violated Greenville County Code § 7-81(a), which required that "appropriation of funds shall be made only by County Council to departments and agencies to provide public services to County citizens," id. at ¶ 80 (R. p. 57); and
>
> that Council Reserves violated Greenville County Code § 7-81(b), which required that "Requests for County funds will be submitted to Council for review during the regular County budget process, and appropriation will be made only for specific line item purposes." Id.

Regarding alleged violations of the State Code, Sloan claimed that Council Reserves violated S.C. Code Ann. § 4-9-130, "which required public hearings and reasonable notice whenever 'Council action' is taken to 'make appropriations, including supplemental appropriations.'" Id. at ¶ 88 (R. p. 58). Expenditures through the Council Reserves, Sloan claimed, were supplemental appropriations made "after budget ordinances had already been enacted" and without "public hearings or [giving] reasonable notice," which violated Code § 4-9-130. See id. at ¶ 89 (R. p. 58). For similar reasons Sloan claimed that Council Reserves violated S.C. Code Ann. § 4-9-140, which states that the "procedure for approval of supplemental appropriations shall be the same as proscribed for enactment of ordinances," id. at ¶¶ 84 and 85 (R. p. 58), and S.C. Code Ann. § 4-9-120, which provides that "all ordinances shall be read at three public meetings of Council on three separate days with an interval of not less than seven days between the second and third meetings." Id. at ¶ 92 (R. p. 59).

Both parties in the Prior Action moved for summary judgment. One set of arguments involved Sloan's allegations that the County did not vote on each

appropriation, or the "Procedural Irregularities" discussed above. See supra at 2-3. The County framed the issue as follows: "Sloan apparently contends that each disbursement from Council Reserves must be voted on and approved by Council as a whole following a public hearing regarding the proposed disbursement." See Defendants' Trial Brief from Prior Action (R. p. 154). Sloan countered that the Council Reserves violated § 7-81 of the Greenville County Code, arguing:

> [A]ll 'requests for County funds will be submitted to Council for review during the regular County budget process ....' But [r]ather than the entire Council reviewing 'requests for County funds' that are 'submitted for Council review during the regular County budget process,' individual Council members receive requests throughout the year and respond to them by submitting individual requisitions to the Clerk of County Council ..., for amounts not exceeding their individual fund limits (more than $18,000.00 per Council member this year).

Motion for Summary Judgment (R. pp. 176-177) (emphasis added). Sloan asked the Court for an Order "enjoining Defendants' appropriation, expenditures, disbursements, and donation of public funds **when they are not made by County Council as a whole, but rather they are made by individuals**, in violation of § 7-81(a)." (R. p. 179) (emphasis in the original).

The Trial Judge granted judgment to the County regarding the delegation of legislative authority issue. See, e.g., Order from Prior Action at 7-8 (R. pp. 9-10). Among other things, the Trial Judge expressly addressed Respondent Sloan's contention that the County had violated County Code § 7-81, concluding that "the County's actions have been consistent with the constitutional and statutory power granted county governments." See Order in Prior Action (R. p. 10). The Trial Judge held in part that based upon statutory and constitutional provisions and case law cited in the Order, "I find and conclude that Sloan has not sustained the burden of proving that the County has

engaged in any illegal act. As noted, Council Reserves are approved during the County's annual budgeting process and Council Reserves has been an item in the County's annual budget ordinance since 1994-1995." Id. (R. p. 12) (emphasis added). Sloan did not appeal this Order.

The Present Case

Sloan challenged the Council Reserves policy again with the Present Case, after County Council had adopted the 2007 Budget pursuant to Ordinance 3940. The Complaint alleged that the County had "authorized and operated their fund variously known as the Council District Expense Fund, Council Reserves, Discretionary Funds, or the Slush Fund." See Complaint in the Present Case at ¶ 8 (R. p. 69). Sloan took issue with those "[c]osts associated with special, nonrecurring community requests for infrastructure purposes such as . . . flooding, roads, lights, sewer and drainage, public buildings and grounds, and infrastructure related studies." Complaint, ¶ 10 (R. p. 69). Sloan based this challenge entirely on a 2003 Opinion of the South Carolina Attorney General (AG), which dealt with a budget ordinance of Florence County. See Complaint, ¶ 11 (R. p. 70) ("County Council's delegation of legislative power to an individual member, as described herein, is unconstitutional and illegal, as explained in a South Carolina Attorney General Opinion dated November 13, 2003 (Exhibit C)."). See also Exhibit C to Complaint (AG Opinion) (R. p. 76-85). The Honorable John C. Few granted summary judgment to Sloan, see Merits Order (R. pp. 27-33), and after that the Honorable D. Garrison Hill granted Sloan's Motion for attorneys' fees. See Fees Order (R. pp. 34-43). The County appealed these rulings. The Court of Appeals unanimously reversed both Orders on the grounds that *res judicata* barred the Present Action against

the County. See South Carolina Pub. Interest Found. and Edward D. Sloan, Jr. [Sloan] v. Greenville Cnty., 401 S.C. 377, 737 S.E.2d 502, Op. No. 5016 (2013).[2]

ARGUMENT

I. *Res Judicata* Bars Sloan's Claims.

A. Recent Opinions from this Court – which Sloan does not address – demonstrate that Sloan's claims are barred.

In Judy v. Judy, 393 S.C. 160, 712 S.E.2d 408 (2011) the Court reiterated the well-established principles that *res judicata* "bars subsequent actions for the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties," and that a litigant "is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit." 712 S.E.2d at 414 (quoting Plum Creek Development Co. v. City of Conway, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999)). The Court noted that the "fundamental purpose of res judicata ... is to ensure that 'no one should be twice sued for the same cause of action.'" 712 S.E.2d at 414 (quoting First Nat'l Bank of Greenville v. U.S. Fid. & Guar. Co., 207 S.C. 15, 24, 35 S.E.2d 47, 56 (1945)). The Court affirmed these principles in Yelsen Land Co., Inc. v. State of South Carolina, 397 S.C. 15, 723 S.E.2d 592 (2012).

In Judy, the Court re-affirmed its three part test to determining whether *res judicata* operates to bar a subsequent lawsuit: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit. Judy, 712 S.E.2d at 412 (citing Riedman Corp. v. Greenville Steel Structures, Inc., 308 S.C. 467, 419

[2] Op. No. 5016 (S.C. Ct. App. January 23, 2013) (Davis Adv. Sh. No. 4 at 38).

S.E.2d 217 (1992)). The Court of Appeals relied on Judy extensively in its Order. See 401 S.C. at 385-89, 737 S.E.2d at 506-09.

Sloan does not and has not ever challenged the first element, and he cannot escape the fact that the second and third elements set forth in Judy also apply here. The thrust of the Plaintiffs' claim in the Present Case, as it was in the Prior Action, is a challenge to the Council Reserves Policy itself. In the Prior Lawsuit Sloan argued that establishment of the Council Reserves constituted an unlawful delegation of authority. Sloan based his non-delegation theory on the Greenville County Code and the State Code. Under the "Procedural Illegalities" section of the Third Amended Complaint in the Prior Lawsuit[3], Sloan alleged that, by allowing individual Council Members to distribute funds on a discretionary basis, "Defendant has continued to draw upon Council Reserves without voting on each expenditure or appropriation." Third Am. Compl., ¶ 74 (R. p. 56). The Prior Lawsuit's Sixth Cause of Action (the first cause of action in the "Procedural Illegalities" section of the Third Amended Complaint) asserted that the County violated the law by "disburs[ing] funds at the requests of individual members rather than collectively as the 'county council' for 'public services.'" Id., ¶ 81 (R. p. 57) (emphasis added). Sloan alleged that this fact violated Greenville County Code § 7-81, which provides that "[a]ppropriation of funds shall be made only by county council . . ." and that "[r]equests for county funds will be submitted to council for review . . . ." Id., ¶ 80 (R. p. 57). The Sixth Cause of Action expressly sought an injunction of "Defendant's expenditures, disbursements, appropriations at the request of individual member of County Council" on the grounds that the "Greenville County taxpayers will suffer

[3] The Third Amended Complaint in the Prior Lawsuit contained eleven causes of action, including several causes of action under the separate heading entitled "Procedural Illegalities by Defendant." See Third Am. Compl. from Prior Lawsuit, ¶¶ 73-103 (R. pp. 56-60).

irreparable harm and levying of taxes for illegal expenditures." Id., ¶ 82 (R. p. 57). Thus, it is unmistakably clear that Sloan did in fact raise a non-delegation argument in the Prior Action.

Moreover, the thrust of Sloan's Seventh, Eighth and Ninth Causes of Action in the Prior Action was that the County violated S.C. Code Ann. §§ 4-9-120 -- 140 by not holding public hearings or giving notice thereof of the appropriation to the County Reserves budget item as part of the County's annual budgeting process, making a non-delegation argument with the proposition that the appropriation to the County Reserves budget item must be an item of public hearing and notice thereof and cannot be a matter of "discretion." See R. pp. 58-59.

While Sloan ultimately abandoned several of the theories raised in the Prior Lawsuit, he continued to push the non-delegation argument, contending that it was unlawful to delegate discretion for budget allocations to individual members of County Council. Sloan's Summary Judgment Motion in the Prior Action bears this point out. For instance, paragraph 52 of the Motion contains the charge that "Defendant has continued to draw upon Council Reserves without voting on each expenditure or appropriation." (R. p. 171) (emphasis added). The Motion continues by noting that "Defendant's Council Reserve funds have in some measure taken on the characteristics of a private 'slush fund'" (R. p. 174), which is nearly identical to the language Sloan used in the Current Lawsuit. See Compl. ¶ 8 (R. p. 69) (referring to the Council Reserves fund as a "Slush Fund.").

Furthermore, in the Prior Action Sloan quoted the County Code Section he relied on and argued that the County Code required "all requests for county funds [to] be

submitted to council for review during the regular county budget process . . . ." (R. p. 176) (ellipsis in original). He then argued that,

> Rather than the entire council reviewing 'requests for county funds' that are 'submitted for council review during the regular county budget process,' individual council members receive requests throughout the year and respond to them by submitting individual requisitions to the clerk of county council, Mrs. Elizabeth Hanzey, for amounts not exceeding their individual fund limits (more than $18,000 per council member this year).

(R. pp. 176-177) (parenthetical in original). In the conclusion to the Motion, Sloan requested "[a]n order enjoining Defendant's appropriation, expenditure, disbursement, and donation of public funds when they are not made by County Council, as a whole, but rather they are made by individuals, in violation of [the County Code]." (Pl.'s Mot. and Supp. Mem. for Summ. J. in Prior Lawsuit, ¶ 4 (R. p. 179); cf. Compl. in the Current Lawsuit, ¶ 11 (R. p. 70) (complaining of "County Council's delegation of legislative power to an individual member")).

These pleadings from the Prior Lawsuit make it unmistakably clear that Sloan pled and actively pursued a non-delegation argument in the Prior Action, just as he has done in the Present Case. The Trial Court in the Prior Action noted that "[a]lthough Sloan's complaint cite[d] a number of statutory and constitutional provisions that Sloan alleges County is violating, at trial and in his trial brief he argued only two bases in support of his claim." Prior Action Order at 3 (R. p. 5). One of the claims Sloan continued to press, the Trial Court noted, was the claim that "disbursements from Council Reserves violate Section 7-81 of the Greenville County Code." Id. It is this Code Section, in part, that formed the basis of Sloan's non-delegation argument in the Prior Action (see Third Am. Compl. in Prior Lawsuit, ¶¶ 53-56) (R. p. 53-54), and the

Trial Court expressly held "that Council's appropriation of funds to the Council Reserves budget item as an item in County's annual budget . . . is in compliance with Section 7-81." (Order from Prior Action) (R. p. 10). The Trial Court further held that "**County's actions have been consistent with the constitutional and statutory power granted county governments.**" Id. (emphasis added).

Given these proceedings from the Prior Lawsuit, it is clear that Sloan's only claim in the Present Action, which is premised on the non-delegation of legislative authority principle, is barred by the doctrine of *res judicata.* That claim is nothing more than a slightly different twist on a theory that was actually pled, pursued, litigated and ruled upon in the Prior Lawsuit. The primary right and duty and alleged wrong of the Present Case – whether the Council Reserves impermissibly delegates authority to Council Members – is identical to the primary right and duty and alleged wrong in the Prior Action.

These allegations alone show identity of subject matter with the Prior Action and that Sloan could have brought an unlawful delegation of legislative authority claim in the Prior Action. See Judy, 712 S.E.2d at 412 (setting forth three-part test). "South Carolina courts have used at least four tests to determine when a claim should have been raised in the first suit: (1) when there is identity of the subject matter in both cases; (2) when the first and second cases involve the same primary right held by the plaintiff and one primary wrong committed by the defendant; (3) when there is the same evidence in both cases; and recently, (4) when the claims arise out of the same transaction or occurrence that is the subject of the prior action." Judy, 712 S.E.2d at 414 (quoting James F. Flanagan, South Carolina Civil Procedure 649-50 (2d ed. 1996)). These four tests should

be considered "merely as factors rather than rigid, independent tests," and they cannot be reduced to a "formulated process." Id. at 414 Rather, the aim in using these four factors is to effectuate the "fundamental purpose of res judicata, which is to ensure that 'no one should be sued twice for the same cause of action.'" Id. (quoting First National Bank of Greenville v. U.S. Fidelity & Guaranty Co., 207 S.C. 15, 24, 35 S.E.2d 47, 56 (1945)).

At no point has Sloan ever addressed these four factors. Instead, he claims that the res at issue in the first litigation is inherently different than the res at issue in the second complaint because the budget years are different. Petition at 12, 14. Yet Sloan does not identify any circumstances creating a "difference" other than the discrete years involved in each budget.

Analyzing the four Judy factors in determining whether a claim should have been previously brought, it is clear that the issues raised by Sloan in this case could have been raised in the prior suit. First, there is a clear identity of subject matter in both cases. Both cases concern themselves with the Council Reserves, which Sloan has noted has been in effect "for several years." See Complaint at ¶ 8 (R. p. 69). In both the Prior Action and in this Present Case, the Plaintiffs alleged that this fund improperly delegated rights to individual Council members which should have been acted upon by the Council as a whole. See Third Amended Complaint in Prior Action at ¶ 74 (R. p. 56) and compare with Complaint in current action at ¶ 11 (R. p. 70) ("County Council's delegation of legislative power to an individual member, as described herein, is unconstitutional and illegal, as explained in a South Carolina Attorney General Opinion dated November 13, 2003."). See also supra pp. 8-11 (discussing different allegations from the prior and current cases and their similarities). Second, the evidence in both cases – the Council

Reserves Policy itself – is the same. It is noteworthy that while the Plaintiffs in the Prior Action did include certain expenditures from the fund in the record, those expenditures were meant to prove that other allegations of the Complaint (such as violation of the establishment clause and the public purpose doctrine) had been violated. See, e.g., Third Amended Complaint in Prior Action at ¶¶ 57-72 (R. p. 54-56). With respect to the issue of improper delegation of legislative authority, the Plaintiffs offered evidence of no specific expenditures in the Prior Action, and likewise in the Current Action created no record of any specific expenditures. Third, both the Prior Action and the Current Action arise out of the same Council Reserves Policy which Sloan alleges has been in existence "for several years." Present Action Complaint at ¶ 8. (R. p. 69). Fourth, and perhaps most important, Sloan's counsel admitted that nothing prevented Sloan from challenging Council Reserves in the Prior Action in the same manner as he did in the Present Case. See October 27, 2007 Transcript at p. 7, ll. 6-14 (R. p. 714) ("**THE COURT:** Well, let's -- I don't think there's any dispute that Mr. Sloan, taking it step by step, could have made the constitutional argument against the delegation of spending authority in the '96 case that he now makes in this case. No dispute about that, right, Mr. Carpenter? **MR. CARPENTER:** If I had been smarter, I could have done it, Judge.").

B. Sloan's attempts to change the law of *res judicata* and the equitable doctrine of collateral estoppel run counter not only to South Carolina law but also other well-established authorities.

Instead of addressing relevant South Carolina case law Sloan attempts to change it. Without any citation to authority Sloan argues that the "Court of Appeals confuses the doctrine of *res judicata*, which requires a comparison of the factual claims in the two actions, with the doctrine of collateral estoppel, which requires a comparison of the legal

theories in the two actions." Cert. Petition at p. 9. Sloan then notes that the County provides no authority "to contravene this fundament[al] proposition." Id. The Court of Appeals' opinion, however, proves Sloan's position to be without merit. Citing relevant South Carolina authorities the Court of Appeals accurately summarizes the law in this area as follows:

> Res judicata bars relitigation of the same cause of action while collateral estoppel bars relitigation of the same facts or issues necessarily determined in the former proceeding." Pye v. Aycock, 325 S.C. 426, 436, 480 S.E.2d 455, 460 (Ct. App. 1997). In Beall v. Doe, this court distinguished the two concepts as follows:
>
> > The doctrines of res judicata and collateral estoppel are, of course, two different concepts. A final judgment on the merits in a prior action will conclude the parties and their privies under the doctrine of res judicata in a second action based on the same claim as to issues actually litigated and as to issues which might have been litigated in the first action. Under the doctrine of collateral estoppel, on the other hand, the second action is based upon a different claim and the judgment in the first action precludes relitigation of only those issues actually and necessarily litigated and determined in the first suit. 281 S.C. 363, 369 n.1, 315 S.E.2d 186, 190 n.1 (Ct. App. 1984)

401 S.C. at 385-86, 737 S.E.2d at 506-07. To counter this well-settled South Carolina precedent, Sloan relies on Commissioner v. Sunnen, 333 U.S. 591, 68 S.Ct. 715 (1948), a case that has been essentially limited to the facts of that case by the United States Supreme Court[4] and which has no controlling effect on the courts of South Carolina.

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[4] See Sloan v. Greenville County, 401 S.C. at 393, 737 S.E.2d at 510, explaining:

> Sunnen's explanation of *res judicata* in the context of differing tax years is not binding outside of the tax context. See United States v. Stauffer Chemical Co., 464 U.S. 165, 172 n.5, 104 S. Ct. 575, 78 L. Ed. 2d 388 (1984) (rejecting the general applicability of Sunnen's collateral estoppel analysis outside of the tax context); see also Peugeot Motors of Am., Inc. v. E. Auto Distribs., Inc., 892 F.2d 355, 359 (4th Cir. 1989) ("We do not believe that the mere fact that Peugeot's questioned policies continued after the 1981 litigation allows Eastern to make the same legal claim about the same policies that were litigated and on account of which relief was denied in prior litigation.").

In addition to Judy v. Judy, which as discussed above the Court of Appeals cited extensively, the Court of Appeals also quoted § 24 of the Restatement in highlighting that a valid and final judgment in an action extinguishes that claim with respect to "all or any part of the...series of connected transactions, out of which the action arose. [ ] What factual grouping constitutes a 'transaction', and what groupings constitutes a 'series', are to be determined pragmatically" Sloan, 737 S.E.2d at 508 (quoting Restatement (Second) of Judgments § 24(1),(2)(1982 & Supp. 2012)).

Comment d to § 24 of the Restatement (Second) makes clear the reasoning for barring the same plaintiff for making the same allegations against the same plaintiff regarding the same transaction or series of transactions:

> When a defendant is accused of...acts which though occurring over a period of time were substantially of the same sort and similarly motivated, fairness to the defendant as well as the public convenience may require that they be dealt with in the same action. The events constitute but one transaction or a connected series.

Restatement (Second) § 24 cmt. d (1982 & Supp. 2013). The Court of Appeals discussed the Restatement further, noting:

> In determining whether allegations arising from different fiscal years must be brought in the same action, the Restatement (Second) of Judgments is instructive:
>
> > (1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar, the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.
> >
> > (2) What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

Sloan, 401 S.C. at 388, 737 S.E,.2d at 508 (quoting Restatement (Second) of Judgments § 24 (emphasis in original).

Wright & Miller also supports this approach to reviewing a claim for purposes of *res judicata*:

> Defendants may reasonably demand that disposition of the first suit establish repose as to all matters that ordinary people would intuitively count part of a single basic dispute, and plaintiffs should be able to comply with this standard. The Restatement [(Second) of Judgments § 24 test for a transaction] is fully consistent with the desirable goal of achieving clear rules that control the vast run of ordinary litigation, and tolerably predictable application in most of the unusual sequences of actions that seem more or less closely related. Its advantages should outweigh the difficulties of application that inevitably will remain.

Wright, Miller, & Cooper's Federal Practice and Procedure § 4407.

The Court of Appeals properly cited, explained and applied binding precedent from this Court and other persuasive, learned authorities. Sloan cites no relevant authority of his own. In short, Sloan has no valid argument that the Court of Appeals erred.

C. Sloan's arguments concerning the Court of Appeals' supposed reliance upon collateral estoppel are simply wrong.

Contrary to Sloan's claims, the Court of Appeals did not apply collateral estoppel nor any of the collateral estoppel rulings in the Sunnen decision. See Petition, p. 15 (claiming "the Court of Appeals misapplied Sunnen, by using Sunnen's collateral estoppel analysis instead of Sunnen's res judicata analysis"). Rather the Court of Appeals noted that subsequent cases interpreting Sunnen have limited that case. Sloan v. Greenville County, 401 S.C. at 393, 737 S.E.2d at 510. On that point Sloan argues that United States v. Stauffer Chem. Co., 464 U.S. 165, 168, 104 S.Ct. 575, n. 5 (1984),

which the Court of Appeals quoted as limiting Sunnen, 401 S.C. at 393, 737 S.E.2d at 510, only applies to Sunnen's collateral estoppel language, and not to *res judicata*, because the footnote at issue in Stauffer uses the term "estopped." Petition, p. 16. A plain reading of Stauffer's footnote 5 makes clear, however, that it rejects Sunnen's application generally to matters outside of federal tax law – the footnote uses the term estopped generally, not as it relates to collateral estoppel specifically. Thus, the only limitation to Stauffer's general and wide-ranging rejection of the Sunnen holding is the one arbitrarily imposed by Sloan in the Petition before this Court.[5]

II. The County's Council Reserve Policy was a Lawful Exercise of Home Rule.

The Trial Court found that Council Reserves violated the general law non-delegation of legislative authority principle. See Merits Order at 5-6 (R. p. 32-33).[6] Both Sloan's arguments in the Present Case and the Trial Court's Merits Order give far too restrictive a view of the County's ability to govern itself under Home Rule. With regard to budgets and appropriations, State law requires that the County Council pass a budget, which it did. Nothing in the Constitution or general statutes expressly prohibit the Council Reserves. Given these points, and given the liberal construction that Home Rule provides to County ordinances, Sloan's claims fail.

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[5] Similarly, Petitioners' claim that the Fourth Circuit's rejection of the Sunnen doctrine in Peugeot Motors of Am., Inc. v. E. Auto Distribs, Inc., 892 F.2d 355, 359 (4th Cir. 1989) does not apply because the defendant in that case had not waived a collateral estoppel defense (Petition, p. 16), is without merit. That opinion's persuasive authority rests on its agreement with the authorities that *res judicata* is an available defense where the policies in question continued after the conclusion of the first litigation, id., a scenario exactly like that in the instant matter.

[6] Sloan contended that Council Reserves are unconstitutional delegation of legislative power, basing that contention entirely on an opinion issued by the South Carolina Attorney General's office issued on November 13, 2003, found at 2003 S.C. AG LEXIS 179 (hereinafter "AG Opinion"). See Complaint, ¶¶ 8 and 11 (R. p. 69-70). The Trial Court found that this issue did not present a constitutional question, Merits Order at 3 (R. p. 30). Sloan has not disputed this ruling.

Under Home Rule the powers of county government are broad and sweeping. See S.C. Constitution, Art. VIII, § 17 (providing that "all laws concerning local government shall be liberally construed" in the local government's favor.). See also S.C. Code Ann. § 4-9-25 ("The powers of a county must be liberally construed in favor of the county and the specific mention of particular powers may not be construed as limiting in any manner the general powers of counties."). Pursuant to the constitutional directive to provide for the powers and duties of local government under the Home Rule regime, the legislature has expressly recognized that the local governments have the power, authority, and discretion to determine what laws are appropriate for advancement of "order and good government" at the local level and to enact ordinances accordingly. S.C. Code Ann. § 4-9-25 (granting counties the authority "to enact . . . ordinances . . . for preserving . . . order, and good government" in their respective localities).

S.C. Code Ann. § 4-9-140 requires that County Council "adopt annually and prior to the beginning of the fiscal year operating and capital budgets for the operation of county government and shall in such budgets identify the sources of anticipated revenue including taxes necessary to meet the financial requirements of the budgets adopted." There is no further directive respecting a county's budget: how much should be spent in one budget versus another, how the county should administer the budget, and so on. It simply requires operating and capital budgets be adopted prior to the fiscal year and that the revenues to fund these budgets be identified. A county is left to fill in the blanks. The broad wording of the directive in this section reflects the legislature's awareness that local governments are to have a broad degree of discretion in administering their own budgets. Rather than imposing strict and detailed guidelines, the legislature simply

elected to generally require that counties adopt budgets. This is exactly the type of flexibility and shift of autonomy to the local level that Home Rule was designed to effect. See, e.g., D.W. Flowe & Sons, Inc. v. Christopher Constr. Co., 326 S.C. 17, 23, 482 S.E.2d 558, 561 (1997) (quoting constitutional Home Rule provisions and concluding its analysis of the ordinance at issue by saying "[t]herefore, construing § 11-35-50 liberally in District's favor, we hold District had legislative authority to enact Ordinance").

Furthermore, to the extent there is any ambiguity or question about the County's autonomy in this regard, the Constitution, statutes, and case law of this State unequivocally mandate that the ambiguity be resolved in favor of the County's autonomy to make its own policy decisions regarding "order and good government." S.C. Code Ann. § 4-9-25 (granting counties the authority "to enact . . . ordinances . . . for preserving . . . order, and good government"); Glasscock Co., Inc. v. Sumter County, 361 S.C. 483, 491, 604 S.E.2d 718, 722 (Ct. App. 2004) ("Article VIII mandates that 'all laws concerning local government shall be liberally construed in their favor.'"); McSherry v. Spartanburg County Council, 371 S.C. 586, 590-91, 641 S.E.2d 431, 433-34 (S.C. 2007)(" [I]n reviewing the discretionary decision of a legislative body, our courts have been loath to substitute their judgment for that of elected representatives.").

The Merits Order and the AG Opinion that Sloan relies on ignore Section 4-9-25 and run counter to the liberal construction that Home Rule affords County ordinances. Indeed, the problem with the AG's Opinion is that it looks to find express authority to allow County Council to take action, instead of finding constitutional or statutory provisions that prohibit it. The AG Opinion states:

> Just as the latter opinion suggests, there appears to be no statute which authorizes a county council to delegate spending authority to its individual

> members. While § 4-9-100 authorizes additional administrative duties to be delegated to the chairman and to receive additional compensation therefor, no state law appears to authorize subdelegation to individual Council members such broad discretion as is present here to determine how the funds in question are to be spent. **The fact that the General Assembly authorized subdelegation to a specific council member (chairman) in the limited circumstances defined by § 4-9-100 (administrative duties) strongly suggests that the subdelegation of authority to individual council members to expend funds from the so-called "discretionary fund" is not present.** Absent such statutory authority being expressly provided by the General Assembly, it is our opinion that a court would conclude ... that this authority is lacking.

AG Opinion at **23-24 (R. p. 83). This is the wrong analysis. As long as an ordinance does not conflict with the Constitution or general law, the County Council can do whatever it feels necessary to preserve, among other things, order and good government. The AG Opinion, however, states there must be some state law that expressly authorizes a county action. Moreover, according to the AG in the bolded language above, by providing for subdelegation in one "limited instance" in one statute, the General Assembly must have intended that this power not be present elsewhere. This is the exact opposite of what Section 4-9-25 says: "specific mention of particular powers may not be construed as limiting in any manner the general powers."

The AG Opinion provides that "generally, it is recognized that unless a statute specifically provides otherwise, legislative powers vested in the governing body of a municipality cannot be delegated to administrative officials of the municipality." AG Opinion at *2 (R. p. 77). However, "purely administrative, ministerial, or executive powers may be delegated by a municipal governing body to the appropriate officer." Id. County Councils, unlike State Government, typically exercise the powers of all three branches of government. See AG Opinion at *10 (R. p. 85) (citing Op. S.C. Atty. Gen., September 10, 1973). Thus, "[t]he constitutional principle of separation of powers

applicable to state government by Article I, § 8 of the Constitution has been held inapplicable to local political subdivisions of the State." Id. (R. p. 85). (citing Gaud v. Walker, 214 S.C. 451, 53 S.E.2d 316 (1949)).

The allocation of money to the Council Reserves is a legislative act performed by Council as a body in a duly enacted ordinance. The spending of those funds, however, is a ministerial/administrative function. The role an individual council member has in deciding how to spend the money allocated to him or her, within the guidelines of the Council Reserves as voted upon by County Council, is administrative in nature, and such spending decisions made within these guidelines implement the greater Council's policy to spend the Council Reserves on those items explicitly enumerated in the budget ordinance and Council Reserves Policy. This limited decision making authority, if any, of each member is no different than any other County administrative personnel's ability to make decisions within the scope the Council has prescribed. County Council has not delegated its right and responsibility to adopt a budget.

This position is consistent with South Carolina law. In South Carolina State Highway Department v. Harbin, the court noted that "[a] statute which in effect reposes an absolute, unregulated, and undefined discretion in an administrative body bestows arbitrary powers and is an unlawful delegation of legislative powers." 226 S.C. 585, 595, 86 S.E.2d 466, 471 (1955). Unlike Harbin, where the court found that no standards or limitations were placed on the administrative body, the Council has placed limitations on the ability of its members to spend the Council Reserves by specifically enumerating those items to which the Council Reserves may be spent. Harbin further noted that "while the legislature may not delegate its power to make laws, in enacting a law

complete in itself, it may authorize an administrative agency or board 'to fill up the details' by prescribing rules and regulations for the complete operation and enforcement of the law within its expressed general purpose." Id. (citing Davis v. Query, 209 S.C. 41, 39 S.E.2d 117 (1946) and State v. Taylor, 223 S.C. 526, 77 S.E.2d 195 (1953)). Each Council member is "filling in the details" when he or she chooses how to use the monies from the Council Reserves.

The Council Reserves Policy at issue "clearly establish[es] primary standards for carrying it out . .. [and] . . . lay[s] down an intelligible principle to which" each Council member must conform. Id. Recognizing the difficulty in the application of these principles, the South Carolina Supreme Court noted in Harbin:

> that there is no fixed formula for determining the powers which must be exercised by the legislature itself and those which may be delegated to an administrative agency. The degree to which a legislative body must specify its policies and standards in order that the administrative authority granted may not be an unconstitutional delegation of its own legislative power is not capable of precise definition. 'There are many instances where it is impossible or impracticable to lay down criteria or standards without destroying the flexibility necessary to enable the administrative officers to carry out the legislative will; especially may such a contingency arise when the discretion conferred relates to police regulations.'

Id. (citing Matz v. J. L. Curtis Cartage Co., 132 Ohio St. 271, 7 N.E.2d 220, 225 (1937). The Trial Court, and to a lesser degree Sloan, agreed below that there was some level at which the County could delegate spending authority. See generally October 7, 2008 Transcript at pp. 31-35 (R. pp. 787-791). See also id. at p. 31, l. 23 – p. 32, l. 7 (R. p. 787-788) ("THE COURT: Well, some of these things are clearly okay, right? I mean, it's fine for Council to give some money to a Council member to buy pens and pencils. MR. CARPENTER: We are not challenging that. Maybe we should have. Maybe

County Council should have some administrative person go out and buy 100 pencils and pass out pens to each Council member. But we are not challenging that.") and p. 34, l. 7 – p. 35, l. 3 (R. pp. 790-791 ("THE COURT: One Council member might ... want to fulfill their responsibility to the County by driving around and looking to see what the issues are in the County whereas another Council member might want to use the internet and use the telephone to call constituents to see what their concerns are. So is it okay for the Council member to be reimbursed for mileage if the member chooses to go out and see some project in the community, see some area of the community? MR. CARPENTER: Yeah, that ... THE COURT: Of course it is. So there is some level of ... MR. CARPENTER: There is a de minimis ... THE COURT: Okay. Maybe it is de minimis but there is some stuff in there in here that's okay. Clearly what you are saying though is, you are saying mixing in this big stuff is improper. It's improper delegation. It's okay to delegate some things. But what they are really doing is they are giving away this legislative authority away. MR. CARPENTER: Yes."). The Court then stated "Mr. Sloan agrees that there is some level of what's in here that's valid. And you [the County] agree that there is some level of delegation that could take place that's invalid. The question is where is the line." Id. at ll. 7-11 (R. p. 791). While the County submits that the Trial Court properly framed the issue in this regard, the County respectfully submits that the Trial Court did not give the County proper deference under Home Rule in determining where this line may lie.

Under the present facts, the Greenville County Council delegated the authority to execute the law; it did not delegate the authority to make the law. Thus, the Council

Reserves was a permissible delegation of the Council's authority.[7] Of course, all reasonable doubt must resolved in favor of the ordinance, S.C. Constitution, Article VIII, § 17, and if a constitutional construction is possible, it should be followed. Davis v. County of Greenville, 322 S.C. 73, 470 S.E.2d 94 (1996). See also Westvaco Corp. v. South Carolina Department of Revenue, 321 S.C. 59, 476 S.E.2d 739 (1995) ("A legislative act will not be declared unconstitutional unless its repugnance to the Constitution is clear and beyond a reasonable doubt. ... A legislative act will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates a provision of the Constitution."). In light of this presumption of constitutional validity and the fact the ordinance does not delegate legislative powers, the ordinance is legal and does not violate the South Carolina Constitution, statutory or common law.

III. The Court of Appeals Did Not Err in Reversing the Award of Attorneys' Fees Where Petitioners Did Not File a Successful Claim Against the County.

Sloan no longer is the prevailing party, and thus has no right to recover attorneys' fees. The Court of Appeals correctly held that by reversing the Trial Court's order in favor of Sloan, so to is the Trial Court's award of attorneys' fees reversed. 401 S.C. at 394, 737 S.E.2d at 511. However, even if Sloan were to ultimately prevail on this matter, an award would still be unjust because the County was substantially justified in pressing its claim. McDowell v. SCDSS, 304 S.C. 539, 405 S.E.2d 830 (1991). When Sloan filed the Present Case the County relied upon existing authority dealing with the same issue

[7] The County amended the Council Reserves policy after entry of the Merits Order to comply with Judge Few's order. The amendment required "that the following types of projects must be approved by the entire County Council before a disbursement will be made out of the Council District Expense account: (i) costs associated with special, non recurring community requests for infrastructure purposes such as flooding, roads, lights, sewer and drainage, public buildings and grounds, and infrastructure related studies, and (ii) contributions to local taxing entities in Greenville County for community projects." R. p. 38 (Attorneys' Fees Order). See also R. pp. 855-56 (discussing amendment).

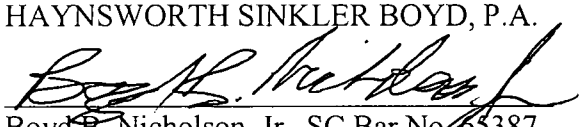
presented in the Present Case, within the same county, and between the same parties. In its Order in the Prior Action, the Trial Court determined "that Council's appropriation of funds to the Council Reserves budget item as an item in County's annual budget" was in compliance with the County's Code and State Law. Prior Action Order at p. 8 (R. p. 10). By relying upon a holding issued in the same county, dealing with the same issue, and between the same parties, the County was substantially justified in pressing its claim.

CONCLUSION

For the foregoing reasons the County respectfully submits that the Court should deny Sloan's Petition.

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.



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May 13, 2013
Greenville, South Carolina

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

John C. Few and D. Garrison Hill, Circuit Court Judges

Opinion No. 2010-5016 (S.C. Ct. App. Filed August 1, 2012,
Withdrawn, Substituted, and Refiled January 23, 2013)

The South Carolina Public Interest Foundation, and Edward D. Sloan, Jr., individually, and on behalf of all others similarly situated, ... Petitioners,

v.

Greenville County, Herman G. Kirven, Jr., Judy Gilstrap, Eric Bedingfield, Jim Burns, Scott Case, Joseph Dill, Cort Flint, Lottie Gibson, Mark Kingsbury, Xanthene Norris, Robert Taylor, and Tony Trout, ... Respondents.

PROOF OF SERVICE

This is to certify that the foregoing RESPONDENTS' RETURN TO PETITION FOR WRIT OF CERTIORARI was served in the above-referenced case by placing a copy of said document in the United States Mail on this the 13th day of May, 2013, addressed as follows:

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Respectfully submitted,

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