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Jun 06 2024

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Alison Renee Lee, Circuit Court Judge

Appellate Case No. 2021- 000804

Johnnie Cordero Appellant
v.

Valerie Moore, in her official capacity as
Chair of The Richland County Democratic
Party; The Richland County Democratic Party;
Christale Spain, in her official capacity as
Chair of The South Carolina Democratic
Party; The South Carolina Democratic Party,

Respondents.

**APPELLANT’S PETITION FOR REHEARING
PURSUANT TO RULE 240, SCACR**

Comes Now, Johnnie Cordero Appellant in the above-entitled appeal, acting on his behalf, who petitions this Honorable Court for Rehearing pursuant to Rule 240 of the South Carolina Appellate Court Rules.

Procedural Background

Notice of Appeal was filed in this matter on July 28, 2021. Final briefs were filed by the Appellant and the Respondents on March 6, 2023, and February 27, 2023, respectively.

Appellant filed motions to supplement the record before decision on August 29, 2022, and April 24, 2024. Both motions were denied. The second motion was denied in part without the reason for the court's decision as in the following words:

"Appellant's request to amend the statement of issues on appeal and Appellant's request to supplement the record on appeal are denied." (Order, 5/8/24, para 2).

This part of the Order is in apparent violation of Rule 220(b) SCACR which provides, in pertinent part:

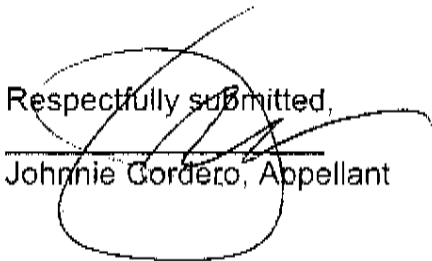
"(b) Decision of the Court. In every decision rendered by an appellate court, every point distinctly stated in the case which is necessary to the decision of the appeal and fairly arising upon the record of the court must be stated in writing and must, with the reason for the court's decision, be preserved in the record of the case.

(2) The Court of Appeals need not address a point which is manifestly without merit."

Because the court has not provided the reason for the denial of the referenced portion of the decision it appears to have violated the above-cited statute. The appellant respectfully requests that this matter also be considered in deciding the Petition for Rehearing.

Appellant now files this Petition for Rehearing pursuant to Rule 240, SCACR.

Dated: 6 June, 2024
Columbia, South Carolina

Respectfully submitted,

Johnnie Gordero, Appellant

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Respondents.

**APPELLANT’S MEMORANDUM IN SUPPORT
OF PETITION FOR REHEARING
PURSUANT TO RULE 240, SCACR**

INTRODUCTION

This matter began and remains a request for a declaration by the circuit court that Defendants Richland County Democratic Party and South Carolina Democratic Party violated various provisions of the South Carolina Elections law. The request was made under the Uniform Declaratory Judgments Act (hereinafter UDJA) S.C. Code §15-53-20. Which Act provides in pertinent part:

"Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief

is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect. Such declarations shall have the force and effect of a final judgment or decree.

It is now settled law that the circuit court had the “power to declare rights, status, and other legal relations” and could do so whether or not further relief is or could be claimed. And most importantly the declaration, either affirmative or negative would have the force and effect of a final judgment.

This Honorable Court now concludes in footnote 2 of its decision that:

“Cordero argues on appeal that he did not seek to challenge or enforce any statute; rather, he sued under the Uniform Declaratory Judgments Act and Rule 65(c), SCRCP, for a declaration that Respondents failed to comply with mandatory statutory provisions regarding state elections. However, Cordero failed to raise this argument to the circuit court either during the hearing, in the memorandum he filed after the hearing, or in a post-trial motion to alter or amend; therefore, we hold this issue was not preserved for appeal.” (Order, footnote 2)

The court has, in effect, concluded that despite the fact the action was brought under the UDJA and only requested declaratory relief and the fact that a hearing was never held regarding the gravamen of the action somehow the matter was not preserved for review. The appellant contends this conclusion is in error and is not supported by the facts.

In the instant case, the declaratory judgment request was in the complaint. To the extent that the matter was not addressed by the circuit court, it is not because it was not *before* the court. Nor were the defendants unaware of what this matter was about or the reasons for which the matter was commenced. The record reflects that:

1. This matter was brought under UDJA on July 28, 2021. The matter was designated "Complaint for Declaratory and Injunctive Relief Pursuant to SC Code §§ 15-53-10 and 15-53-90 and
2. The Prayer For Relief asks the court to DECLARE that five actions of the defendants violated the referenced statutes and to temporarily or permanently enjoin other actions;
3. The court did not hold a hearing on the request for declaratory judgment nor did it determine that a hearing was not necessary for determination of the matter. It simply ignored it.
4. Defendants transferred this matter to Federal District Court and the district court remanded the matter to the circuit court to address the remaining state law claim which was the request for declaratory judgment.
5. The circuit court acknowledged that the only matter before it was the state law claim, i.e., the request for declaratory judgment.
6. Defendants have never filed an answer in this matter having only ignored the basis of this matter as has the circuit court.
7. Appellant filed motions for Speedy Hearing and Calendar Advancement of Declaratory Judgment on May 20, 2020 pursuant to S.C. R. Civ. P. 57 which provides in part "[t]he court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar."
8. The court then entertained Defendants Motion to Dismiss under Rule 12(b)(6). In doing so the court was required to accept all of the allegations

of the complaint as true and to give the benefit of the doubt to the non-moving party.

9. In short, the court had to rule by implication on the declaratory judgment when it granted the defendants' Rule 12(b)(6) motion but failed to address it in its Order.

The appellant contends that if declaratory judgment can be avoided by the court simply by ignoring it the UDJA becomes a nullity. Be that as it may, it cannot be said that the matter was *not* raised below, nor can it be said that the matter was not properly before the court such that adjudication could not be had without a written decision by the court.

Moreover, failure to address this issue and thereby denying it without a written explanation is itself a violation of law and therefore an abuse of discretion¹.

The appellant also contends that it is time that the preservation rule be revisited to avoid manifest injustice that can arise when, as in this case, a court completely ignores the gravamen of the case before it without a hearing or decision.

In *Watson v City of New York* - 2018 NY Slip Op 00245, New York Appellate Division, First Department the court opined that:

"Although an argument not raised before the motion court ordinarily may not be asserted on appeal, where "a party does not allege new facts, but, rather, raises a legal argument which appeared upon the face of the record and which could not have been avoided...if brought

¹ S.C. App. Ct. R. 220(b)

Decision by the Court. In every decision rendered by an appellate court, every point distinctly stated in the case which is necessary to the decision of the appeal and fairly arising upon the record of the court must be stated in writing and must, with the reason for the court's decision, be preserved in the record of the case.

to [his or her] attention at the proper juncture," such argument may be raised for the first time on appeal (*Gerdowsky v Crain's N.Y. Bus.*, 188 AD2d 93, 97 [1st Dept 1993] [internal quotation marks omitted]). Where a party raises a legal argument for the first time on appeal, as long as the issue is determinative and the record on appeal is sufficient to permit review, this Court may consider the new argument (*Vanship Holdings Ltd. v Energy Infrastructure Acquisition Corp.*, 65 AD3d 405, 408 [1st Dept 2009];

The appellant recognizes that the decisions of the New York Appellate Division are not binding on this court but can be persuasive and for that reason alone should be considered.

The appellant contends, however, that at very least this court can remand this matter to the circuit court and direct it to address the declaratory judgment question that has been overlooked or ignored thus far. Moreover, since this matter has not been addressed this court has no basis for its decision in light of the fact that this is a request for declaratory judgment only, noting that declaratory judgment is not cause of action. The appellant also contends that at very least this court must remand this matter to the circuit court to address the declaratory judgment question before it can affirm.

Private Right of Action

The court in error holds, as did the circuit court below, that plaintiff/appellant lacks standing to sue as a private citizen because the statute in question does not confer a private right of action.

The circuit court decision is supported by a line of South Carolina Supreme Court cases that all apply to *public officials* and that arguably can not be applied to persons who are not public officials and to private organizations. The defendants are political parties and their leadership in their official capacities as chair of the defendant organizations.

I note at the outset that the circuit court cited cases for its holding that this court seemingly ignored. The circuit court cited *Georgetown Cty. League of Women Voters v. Smith Land Co.*, 393 S.C. 350, 353, 713 S.E.2d 287, 289 (2011) and *Doe v. Marion*, 373 S.C. 390, 397, 645 S.E.2d 245, 248 (2007) as the basis for its holding that the plaintiff did not have a private right of action. This court did not cite or comment on any of the cases upon which the circuit court relied in its decision. Does this mean that the circuit court's reliance on those cases was misplaced and if so should this court send the case back down to the circuit court?

This court cites two cases *Carnival Corp v Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 80-81, 753 S.E. 2d 846 (2014) and *Doe v. Marion*, 373 S.C. 390, 401, S.E. 2d 245, 251(2007) for the propositions (1) that the public importance exception could not be applied to remedy plaintiff's lack of standing, (2) that the statute on which the action was based did not create a right of action for negligence per se. Both cases have been misapplied and therefore cannot be controlling.

In *Carnival Corp.*, the defendants were the South Carolina State Ports Authority and the City of Charleston, South Carolina. *A city government and a public authority.*

The court noted:

"Citizens must be afforded access to the judicial process to address alleged injustices. On the other hand, standing cannot be granted to every individual who has a grievance against a *public official*. Otherwise, *public officials* would be subject to numerous lawsuits at the expense of both judicial economy and the freedom from frivolous lawsuits. *Sloan v. Sanford*, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004)." (Emphasis added).

The court was referring to *grievances against public officials* who would be subject to numerous frivolous lawsuits and who therefore needed to be protected.

In *Sloan*, a case cited by the court in *Carnival Corp* the defendant was the Governor of South Carolina. There the court found that the petitioner who sued as “a citizen, resident, taxpayer, and registered elector of the State of South Carolina[,]” had standing to sue. *id.*

The whole line of cases that have addressed this issue have been cases brought against public officials or government agencies. See, *Culbertson v. Blatt*, 194 S.C. 105, 9 S.E.2d 218 (1940); *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69; *Thompson v. South Carolina Comm'n on Alcohol & Drug Abuse*, 267 S.C. 463, 229 S.E.2d 718 (1976)); *Evins v. Richland County Historic Preservation Comm'n*, 341 S.C. 15, 532 S.E.2d 876 (2000).

According to the S.C.Code 16-3-1040 a “Public official” is defined as “. . . an elected or appointed official of the United States or of this State or of a county, municipality, or other political subdivision of this State.” Neither the plaintiff nor defendants in this case are public officials. The Defendants are political parties and their leadership in their official capacity.

The appellant contends therefore that the line of cases relied on by the court do not apply to the facts in the case at bar. This court has concluded as did the circuit court that there is no private right of action in the South Carolina Election laws referenced in the underlying complaint.

The appellant contends that this is only and exclusively a declaratory judgment under the UDJA. The circuit court in error did not even address the very basis of the complaint. The court cannot simply ignore the matter that is before it.

The matter before it was whether the defendants' violated the South Carolina Election Law. There is no question that the defendants held their convention in clear violation of the statute. The reasons for the violation are irrelevant as *the statute provides no exceptions*. The only remedy would be legislative, i.e., change the law. The question becomes must a statute provide a private cause of action for declaratory judgment to be appropriate?

The court relied on *Denson v. Nat'l Cas. Co.*, 439 S.C. 142, 151-52, 886 S.E. 2d 228, 233 (2023) for the proposition that “[g]enerally, when a statute does not expressly create civil liability, a duty will not be implied unless the statute was enacted for the special benefit of a private party.”

The *Denson* decision however, was a split decision in which Acting Justice Kaye G. Hearn dissented in a separate opinion in which Chief Justice Beatty concurred. The dissenting opinion was a lengthy, well-reasoned opinion that should be considered here.

In *Denson*, the dissent noted, “Today, I dissent because the majority conflates two independent, well-recognized legal concepts—the doctrine of negligence *per se* and implied private rights of action.” *Denson v. Nat'l Cas. Co.*, 439 S.C. 142, 156 (S.C. 2023):

The dissent noted that “a court can also find private rights of action if it determines the statute implies that result.” *id.* at 156. Emphasis added.

This court has concluded that “the statutes Cordero claimed were violated did not provide for a private right of action. Its reasoning is necessarily flawed because the standard relied upon is not dispositive of the question before the court.

In order to use a statute for this purpose, plaintiffs must establish a duty owed through proving two recognized criteria: "(1) that the essential purpose of the statute is to protect from the kind of harm the plaintiff has suffered; and (2) that he is a member of the class of persons the statute intended to protect." *Rayfield v. S.C. Dep't of Corr.*, 297 S.C. 95, 103, 374 S.E.2d 910, 914 (Ct. App. 1988). Those two elements ensure that the statute proposed as a basis of duty and breach is being used properly. Both elements are designed to limit negligence *per se*'s use to actions where the plaintiff is owed a duty arising from the statute. See S.C. Jur. Negligence § 12 ("To show that the defendant *owes him a duty of care arising from a statute*, the plaintiff must show two things: (1) that the essential purpose of the statute is to protect from the kind of harm the plaintiff has suffered; and (2) that he is a member of the class of persons the statute is intended to protect." (emphasis added)). *Denson v. Nat'l Cas. Co.*, 439 S.C. 142, 157 (S.C. 2023)

In the case at bar the essential purpose of the statutes in question is, given the history of the political parties in South Carolina (particularly the Democratic Party) to protect South Carolinians from arbitrary and capricious policies that undermine the purpose for the recognition and certification of political parties and their influence on voting.

That the statutes govern certified political parties generally and political party conventions particularly. These rules are for the benefit of South Carolina Electors who are members of certified political parties. It follows that the statutes in question are for the benefit of *electors* who are members of certified political parties of whom the appellant is not only one but also at the time a party operative. Clearly, the appellant is

a member of the class the statute was created to protect. And who has suffered injury as a result of the actions of the defendants. However, only seeks a declaration stating that the defendants have violated the statute.

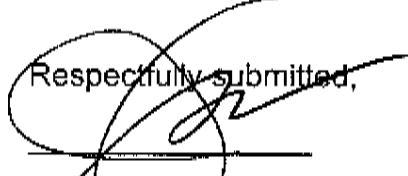
Issues of Public Importance

This court concludes that the matters raised by appellant do not rise to the level of public importance such that resolution is needed for future guidance. There are approximately 3.25 million registered voters in South Carolina. When certified political parties choose to violate the election laws the effect is widespread and can for that reason be devastating. To say that the potential repetition of such violations does not demonstrate the need for future guidance is in a word baffling. To say that party decertification is the only remedy that can be obtained is even more baffling. Assume that a certified political party chose to not hold conventions as are mandatory under the statute decertification is drastic and more important takes literally years to accomplish. Case in point: The Democratic party brought suit requesting declaratory and injunctive relief when the labor violated the same statutes and held convention out of time. The court granted the relief - same judge. See, *South Carolina Democratic Party v. South Carolina Labor Party, et al*, Docket No. 2022-CP-40-04077 8/18/22.

For the foregoing reasons appellant respectfully requests that he be granted rehearing or in the alternative this court remand this matter to the circuit court for hearing on the matter set forth above and for such other and further relief as to this court may seem just and proper.

(Signature on next page)

Dated: 6 June 2024
Columbia, SC

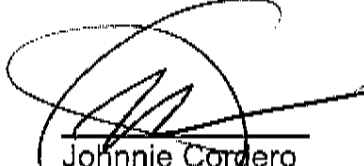
Respectfully submitted,

Johnnie Cordero, Appellant

CERTIFICATE OF SERVICE

I, JOHNNIE CORDERO, hereby certify that I have served an exact copy of the **APPELLANT'S PETITION FOR REHEARING and MEMORANDUM IN SUPPORT** on the attorneys for the Respondents by hand delivery on June 6, 2024 at their offices at:

**Burnett Shutt & McDaniel, PA
912 Lady Street
Columbia, SC 29202
Attn: Nekki Shutt, Esq.
Attn: Grant Burnett Lefever, Esq.**

Dated 6 June 24
Columbia, SC


Johnnie Cordero

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