THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

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SC Court of Appeals

Lower Court Case No. 2002-CP-07-1377
Appellate Case No. 2013-001367

Ex parte: William Dixon Robertson III, William M. Bowen, W. Jefferson Leath, Jr., Michael S. Seekings, and Timothy W. Bouch,.....Appellants.

Timothy J. Treon and his wife, Jane Treon, and P. Jennings Scearce and Steven Christian individually, and on behalf of other similarly situated in the State of South Carolina,.....Respondents,

v.

Dryvit Systems, Inc.,..... Defendant.

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Appellants deny any wrongdoing and are eager to defend themselves in the proper forum. The allegations against them in the Rule to Show Cause are the same as the allegations for which they are presently being sued in the *Treon/Tucker* action. Unlike the Rule to Show Cause, the *Treon/Tucker* action protects Appellants' constitutional right to a trial by jury as well as their rights to due process, and that lawsuit, not this Rule to Show Cause, is the proper forum for Appellants to have their day in court

The vast majority of the Respondents' Brief focusses on the merits of whether Appellants abandoned the *Cardamone* class action through an alleged scheme where they were paid $600,000, with a promise of an additional $225,000 upon the dismissal of the *Cardamone* action. While that issue is at the center of both the *Treon/Tucker* lawsuit and the Rule to Show Cause hearing, it is of no moment to this appeal. The crux of this appeal is two-fold. First, as a threshold matter, this Court must decide whether Judge Hayes's Rule to Show Cause Order is immediately appealable. Second, this Court must decide whether the Rule to Show Cause should be dismissed either because Judge Hayes lacked the authority to issue it and/or because the Rule to Show Cause would deprive Appellants of due process. Respondents' attempt to try the merits of the case helps illustrate the aggressiveness with which they have attacked the Appellants over the years. However, the merits of this matter should be determined by a jury, not by Judge Hayes or by this appeal.

The South Carolina Appellate Court Rules restrict parties from designating matters that were not presented to the trial court below. *See* Rules 209(b) and 210(c), SCACR. According to Respondents' Brief and Designation of Matter, at various points

from 2006 until the issuance of the Rule to Show Cause, the Respondents have presented Judge Hayes with what they describe as "undisputed documentary evidence that Appellants secretly negotiated lucrative cash payments for themselves, their colleagues, and clients in exchange for abandoning the majority unnamed members of the *Cardamone* class." (Resp. Brief at 11) Judge Hayes described it as "mountains and volumes of evidence" he had heard over the years, such that it was "obvious" that Appellants "got what [they] wanted in Tennessee, and so [they're] not going to do anything in South Carolina" and "let the South Carolina fruit on that tree die." (March 31, 2010 hearing, p. 83, l. 10-19). This "undisputed documentary evidence" includes numerous e-mails and letters between class counsel in *Posey*, counsel for Dryvit, and the Appellants; the transcripts from both Fairness Hearings in *Posey*; copies of checks written by *Posey* counsel; and an affidavit from Allison DeLoache,[1] who claims she never retained any of the Appellants to opt her out of the *Posey* settlement.

That this evidence is undisputed goes without saying: it was, after all, presented to Judge Hayes when Appellants were neither parties to nor counsel in the *Cardamone* action. Its inclusion in this appeal (which has only to do with the forum in which the accusations lodged against Appellants will be litigated) reflects the unfair playing field Respondents have created with Judge Hayes. It also reflects Respondents' ongoing strategy of launching their offense before the whistle has blown. Judge Hayes has made it abundantly clear that he is counting these unopposed points despite the fact that

[1] Allison DeLoache and her husband had a separate lawsuit against Appellants, championed by Thomas Pendarvis, who represents the plaintiffs in the *Treon/Tucker* action. That lawsuit has been dismissed. (*See* Order Denying Plaintiffs' Motion for Class Certification [Designated by Respondents], p. 15; *See also* April 15, 2009 Affidavit of Dixon Robertson)

Respondents scored them long before the Appellants' team busses even arrived at the stadium. Such advantages are not allowed on our football fields, let alone in our courtrooms.

I. Appealability

To the extent Respondents address Appellants' argument that the order on appeal deprives them of a jury trial, Respondents contend simply that defendants in a Rule to Show Cause have no right to a jury. Respondents do not deny, however, that Appellants have a right to a jury trial in the *Treon/Tucker* matter. It is this right to a jury trial that the Rule to Show Cause threatens.

According to Respondents, the Rule to Show Cause will reveal that "Appellants secretly negotiated lucrative cash payments for themselves, their colleagues, and clients in exchange for abandoning the majority unnamed members of the *Cardamone* class" in violation of Rule 23, SCRCP; in Judge Hayes's Order issuing the Rule to Show Cause, he writes that he "is compelled to ascertain why fees of $825,000 were promised to [Appellants] which the e-mails and other documents in the record say are conditioned upon the dismissal of [the *Cardamone* class action]." (See Rule to Show Cause Order, p. 7) This language tracks the allegations in the *Treon/Tucker* Complaint, which asserts that the wrongful acts alleged "are the result of the [Appellants'] violation of a Court Order and Rule 23 of the SCRCP, and the violation of other laws of the State of South Carolina because the [Appellants] participated in and facilitated the abandonment of [the *Cardamone* class action] through a scheme wherein [the Appellants] were paid $600,000 with a promise of an additional $225,000 upon dismissal of [the *Cardamone* class action]." (Tucker First Amended Complaint, ¶2)

The same factual question is at stake in both actions; accordingly, the issue must first be determined by a jury in the *Treon/Tucker* case. *Cf. C&S Real Estate Servs., Inc. v. Massengale*, 290 S.C. 299, 301, 350 S.E.2d 191, 193 (1986) (explaining that when legal and equitable claims have common factual issues, the legal claims must be tried by a jury before the equitable claims can be resolved). Furthermore, because the Rule to Show Cause would preclude Appellants from re-litigating this question in a jury trial, Appellants are required to lodge this appeal in order to protect their constitutional right to a trial by jury. *See Fulmer v. Cain*, 380 S.C. 466, 670 S.E.2d 652 (2008); *Lester v. Dawson*, 327 S.C. 263, 266, 491 S.E.2d 240, 241 (1997). *See also Dimick v. Schiedt*, 293 U.S. 474, 486 (1935) ("Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.").

Here, the issues to be decided are imperative to the causes of action alleged in the *Treon/Tucker* case, yet they have no bearing on any cause of action in the *Cardamone* case, the settlement of which has already been pronounced fair. (*See* June 10, 2010 Order and Judgment Granting final Approval of Settlement Agreement) Additionally, the issue of whether a trial court has the authority pursuant to Rule 23, SCRCP, to issue a Rule to Show Cause against a non-party to the case presents a novel question of law which should be addressed in the interest of judicial economy. *See, e.g., Salmonsen v. CGD, Inc.*, 377 S.C. 442, 453, 661 S.E.2d 81, 87 (2008) (finding an order establishing an "opt-in" notification procedure was immediately appealable because it affects a mode of trial and explaining, moreover, that "this issue presents a novel question of law which should

be addressed at this time in the interest of judicial economy"); *S. Bell Tel. & Tel. Co. v. Hamm*, 306 S.C. 70, 75, 409 S.E.2d 775, 778 (1991) ("In any event, since this issue would be raised to the Court at some future time and since both parties have fully briefed the issue, we find that it is in the interest of judicial economy to decide the matter now.").

II. Lack of Power to Issue a Rule to Show Cause

Appellants further argue that the Rule to Show Cause Order should be dismissed because Judge Hayes lacked the power to issue it. As explained in Appellant's opening brief, the authorities relied on by Judge Hayes do not support the issuance of a Rule to Show Cause, and the Rules of Civil Procedure prohibit the use of a Rule to Show Cause to commence this action against Appellants. *See, e.g., Jasper Cnty. Bd. of Educ. v. Jasper Cnty. Grand Jury*, 303 S.C. 49, 51, 398 S.E.2d 498, 499 (1990) (involving a factual scenario where a Rule to Show Cause was issued against a non-party to an action, and later dismissed by the trial judge because no summons and complaint had been served, and therefore no action had been commenced under Rule 3(a), SCRCP).

In responding to these arguments in their brief, Respondents' argument heading is: "The Trial Judge Has the Power to Compel Appellants to Be Questioned under Oath Regarding Lawyer Misconduct in this Matter." (Resp. Br. at 17) Later in their brief, Respondents cite to the Preamble of the South Carolina Rules of Professional Conduct several times, arguing that "the entire procedural scheme set forth in Rule 23 is designed to be conducted by a presiding judge to guard against and rectify just the sort of misconduct engaged in by Appellants." (Id. at 30) In other words, Respondents argue Judge Hayes has the authority to issue a Rule to Show Cause against Appellants in order to discipline them for allegedly violating the Rules of Professional Conduct. This

argument has no merit.

The South Carolina Supreme Court, not the circuit court, "has the sole authority to discipline attorneys and to decide the appropriate sanction." *In re Cromartie*, 401 S.C. 265, 275, 736 S.E.2d 856, 861 (2012). *See also* S.C. Const. art. V § 4 ("The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted."). While Respondents agree that Rule 23 confers certain responsibilities onto a trial judge, it does not (and cannot) expand the jurisdictional limits of the circuit court. Yet at this juncture, where the settlement in the *Cardamone* class action has already been approved, the purpose of the Rule to Show Cause is not to protect absent class members, but rather to administer discipline to the Appellants. Respondents' arguments highlight this jurisdictional problem.

Respondents also heavily rely on *Premium Investment Corp. v. Green*, 283 S.C. 464, 324 S.E.2d 72 (Ct. App. 1984), to support their argument that Judge Hayes has the authority to issue a Rule to Show Cause against Appellants. That reliance is misplaced.

In *Premium Investment*, a subdivision property owner commenced a class action to recover the proceeds from the settlement of a prior class action. The procedural posture of *Premium Investment* is much like the posture of the *Treon/Tucker* action, not this one. *Premium Investment* does not address in any way a circuit court judge's authority to issue a Rule to Show Cause against former class counsel and former class representatives, as Judge Hayes has done in this case. Furthermore, in *Premium Investment*, the class representatives settled and dismissed **the class action itself**, to the detriment of the absent class members. Here, the class action was never dismissed, only the individual claims of the former class representatives. The settlement of the former

class representatives' individual lawsuits did not prejudice the absent class members because the *Cardamone* class action has now settled, and the agreement reached was better than the terms agreed to in the *Posey* class action.

Respondents also cite *Ex parte TLC Laser Eye Centers, LLC*, 404 S.C. 385, 746 S.E.2d 105 (2013), as an example of the so-called "nationwide body of Rule 23 jurisprudence and South Carolina law" that supports Judge Hayes's issuance of a Rule to Show Cause against Appellants. (Respondents' Brief at 31). *TLC Laser Eye Centers* lends absolutely no support for Respondents' argument. In that case, TLC Laser Eye Centers and TLC The Laser Center (collectively "TLC") moved for a Rule to Show Cause against plaintiffs in a circuit court action despite the fact that TLC was no longer a party to that action. *Id.* at 389, 745 S.E.2d at 107. Initially, TLC had been named as a defendant in the action, and during the course of litigation, the circuit court issued a protective order in an effort to protect the private health information of TLC's patients from unnecessary exposure. *Id.* at 388, 745 S.E.2d at 106. After the protective order was issued, the plaintiffs settled their claims against TLC, but continued their litigation against individual physicians. *Id.* at 389, 745 S.E.2d at 107. As that litigation continued, TLC believed plaintiffs had violated the protective order, so it filed a motion for a Rule to Show Cause as well as a motion for sanctions against the plaintiffs. *Id.* The circuit court denied the motion, and TLC moved for reconsideration. *Id.* Before a written order was issued on the motion for reconsideration, the plaintiffs settled their claims with the remaining defendants and the case was dismissed. *Id.*

TLC then made a motion asking that the plaintiffs' counsel be ordered to prepare an order denying the motion for reconsideration. *Id.* at 389-90, 745 S.E.2d at 107. The

circuit court found it lacked subject matter jurisdiction over TLC's motion because the case had been dismissed. *Id.* at 390, 745 S.E.2d at 107. Additionally, the circuit court found the dismissal operated as a final adjudication, which barred further litigation of pre-settlement violations of the protective order. *Id.*

The Supreme Court reversed, finding the circuit court had jurisdiction to rule on TLC's motion for reconsideration because it was timely filed and further finding "a court that issues a protective order retains jurisdiction to enforce it notwithstanding the conclusion of the suit in which it was issued." *Id.* at 391, 745 S.E.2d at 108. Because the plaintiffs were parties to the lawsuit, the circuit court's power to issue a Rule to Show Cause against them was never in question. Furthermore, the lawsuit was not a class action, so the circuit court's Rule 23 powers were never discussed. The *TLC* case has absolutely no bearing on this one.

Finally, Respondents argue, for the first time, that Judge Hayes has the inherent power to issue a Rule to Show Cause against former class representatives and former class counsel because they committed a fraud upon the court. However, Judge Hayes has made no such finding, and no evidence in the Record exists to support this argument. Accordingly, it is not an additional sustaining ground upon which this Court can rely. *See* Rule 220(c), SCACR (allowing the appellate court to affirm an order upon any ground "appearing in the Record on Appeal"). S*ee also I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) ("An appellate court may not rely on Rule 220(c), SCACR, when the reason does not appear in the record, or when the court believes it would be unwise or unjust to do so in a particular case.").

As reflected in the Record, the settlement of the individual suits of Appellants' clients was not done in secret. The Respondents and the trial court were aware that the former class representatives had settled their individual lawsuits because in Respondents' motion to intervene they argued that the "personal settlements between Dryvit and the [former class] Representatives have essentially mooted their claims." (Motion to Intervene and Substitute Class Representatives; Order Granting Intervention at p. 2; December 5, 2005 transcript at p. 30-31) Likewise, the Appellants' receipt of attorneys' fees for their work in the *Posey* action was also disclosed to both the Respondents and the trial court. Prior to being relieved as counsel, Dixon Robertson sent a letter to intervening class counsel informing them (and copying the court) of the fees received from class counsel in *Posey*. (See December 30, 2005 letter from Robertson to Gleissner) This letter was acknowledged by Respondent's counsel in Mr. Gleissner's return correspondence.[2] (See December 30, 2005 letter from Gleissner to Robertson)

III. Due Process

In addition to Judge Hayes's lack of authority to issue the Rule to Show Cause and the deprivation of a jury trial caused by the Rule, the order on appeal also deprives

[2] Not only were Appellants' attorneys' fees in *Posey* disclosed to new class counsel and the trial court, but their receipt was no surprise. Judge Slone's order specifically found that the negotiations between the two fairness hearings resulted in a "substantial increase in the value of benefits" to the class and authorized co-lead counsel to allocate and distribute the attorneys' fees awarded among counsel. (*Posey* Order at p. 5 & p. 10) Mr. Phillips, counsel for Respondents, attended both *Posey* Fairness Hearings, and as reflected in the transcripts of those hearings, was aware that Judge Slone commended Appellants during that hearing for improving the *Posey* settlement. (Second *Posey* Fairness Hearing, p. 72, l. 21 to p. 73, l. 8. *See also id.* at p. 24, l. 21 to p. 26, l. 2; p. 28, l. 4 to p. 29, l. 13) Indeed, Mr. Phillips explained to Judge Kemmerlin that Appellants' "participation in the [*Posey*] settlement resulted in the change of the settlement" and that "the settlement is better because of their actions." (February 26, 2003 Hearing on Motion to Intervene, p. 24, ll. 7-12; *see also* July 6, 2007 transcript, p. 33, l. 11 to p. 40, l. 22)

Appellants of other important due process rights, such as the right to an impartial judge, the right to confront witnesses, and the right to know what evidence is being used against them. Rather than assuaging the Appellants' fears and assuring them that they will be afforded due process, Respondents argue instead that the case law cited by Appellants regarding fair trials and impartiality are applicable only in the criminal context and that Appellants have "set forth no fact that is an indication that Judge Hayes would be a biased fact-finder." (Resp. Br. at 32-33)

As outlined in Appellants' opening brief, numerous excerpts from the transcript reflect Judge Hayes's bias against Appellants, such as when he admitted that the credibility of counsel for Appellants was "lost with [him] when the facts that [he had] heard for years are so clear" or when he compared the "obvious" guilt of Appellants to the obvious guilt of Timothy McVeigh. (July 21, 2011 Transcript on Motion for Class Certification, p. 137, ll. 20-22; Transcript from March 2010 hearing, p. 79, l. 10 to p. 80, l. 20).

Furthermore, Appellants vehemently disagree with Respondents' argument that impartial judges and fair trials are afforded only to criminal defendants.[3] "The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). The purpose behind the neutrality requirement is to guarantee that a defendant's life, liberty, or property is not taken based on "an erroneous or distorted conception of the facts or the

[3] The Due Process analysis does not begin with the inquiry of whether an action is criminal or civil. Rather, the analysis begins with the inquiry of whether the potential deprivation of life, liberty, or property is caused by "state action." Here, that initial requirement is met because Judge Hayes, a state actor, is threatening to deprive Appellants of the attorneys' fees they earned in the *Posey* action.

law." *Id.* An impartial judge preserves both the appearance and the reality of fairness; it also ensures litigants that the arbiter of their dispute is not predisposed to find against them. *Id.* Here, Judge Hayes's extremely negative comments about Appellants as well as Respondents' apparent belief that impartiality is not guaranteed does not bode well for Appellants' chances of receiving a fair and meaningful opportunity to be heard. *See Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (explaining that due process requires that Appellants have an opportunity to be heard "at a meaningful time and in a meaningful manner").

Additionally, Appellants' due process rights would be trampled in the Rule to Show Cause because they do not know what evidence is being used against them. For approximately seven years, Judge Hayes has been presented with "mountains and volumes" of evidence against Appellants without Appellants being present at the hearings or even being aware that they were under attack. *See Brown v. S.C. State Bd. of Educ.*, 301 S.C. 326, 329, 391 S.E.2d 866, 867 (1990) ("[T]he evidence used to prove the State's case must be disclosed to the individual so that he or she has an opportunity to show it is untrue."); *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) ("In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."). It is impossible for Appellants to know all of the accusations and arguments made against them to Judge Hayes both on and off the record over the last seven years.

CONCLUSION

The simple solution to this entire appeal is to allow the issue Judge Hayes seeks to resolve in the Rule to Show Cause to be fully litigated in the *Treon/Tucker* action. In that

forum, Appellants are entitled to a jury trial, discovery, formal pleading and service, and a full litigation of the accusations against them under the governing substantive law. Judge Newman presides over that matter now that Judge Hayes has recused himself. Despite Respondents' accusations to the contrary, Appellants have not lodged this appeal in bad faith, but were compelled to do so to protect their right to a jury trial. Appellants are eager to have their day in court and to explain their actions; however, a Rule to Show Cause before Judge Hayes does not provide the proper forum for Appellants to have their day in court.

[Signature block on following page]

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