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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable G. Thomas Cooper, Jr.
Circuit Court Judge

Opinion No. 5388
Appellate Case No. 2016-001538
Circuit Court Case No. 2014-CP-32-00697

Vivian Atkins, Robert P. Frick, and Kay Hollis, in their official capacity as members of the Town Council of the Town of Chapin, ... Respondents,

v.

James R. Wilson, Jr., in his official capacity as Mayor of the Town of Chapin, Gregg White, in his official capacity as a member of the Town Council of the Town of Chapin, and the Town of Chapin, ... Defendants,

of whom

James R. Wilson, Jr., in his official capacity as Mayor of the Town of Chapin, and Gregg White, in his official capacity as a member of the Town Council of the Town of Chapin, are the ..... Petitioners.

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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September 2, 2016
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INTRODUCTION

In opposing Petitioners' request for a writ of certiorari, Respondents provide absolutely no analysis of any issues that are in play. Instead, without any meaningful discussion, they mechanically argue that the Court of Appeals' decision was correct and that there is nothing to be gained by this Court's review of the case. This is simply not true.

Here, the Court of Appeals fashioned its own appellate jurisdiction out of whole cloth and pulled a trial-level party that Respondents excluded from their appeal back into its opinion. In so doing, it ignored this Court's unambiguous instructions regarding timely service of a notice of appeal—instructions that the Court of Appeals deemed to "place form over substance" in this case. (Court of Appeals Opinion at 13 (June 29, 2016); Appx. p. 13.) This assumption of appellate jurisdiction is squarely contrary to virtually every principle that is rooted in the limited jurisdiction of appellate courts: requirements of issue preservation, the two-issue rule, the law-of-the-case doctrine, South Carolina's consistent rejection of the plain-error rule, and so many others.

This case is a prime example of when certiorari is appropriate. In addition to unquestionably conflicting with prior decisions of this Court regarding appellate jurisdiction and statutory construction, Rule 242(b)(3), SCACR, the Court of Appeals' decision generally conflicts with the constitutional principle that courts cannot expand their own jurisdictional boundaries, *id.* 242(b)(4). The Court should grant the Petition and review this case accordingly.

ARGUMENT

I. By omitting the Town as a party to the appeal, Respondents destroyed appellate jurisdiction, but the Court of Appeals ignored this rule.

In opposing certiorari, Respondents do not dispute that they omitted the Town of Chapin from the appellate proceedings. Instead, they argue that the Town's interests were "advanced by

both sides of this appeal" because the parties included in the appeal are elected officials within the Town who, in Respondents' opinion, should be viewed as proxies for the Town itself. (Return to Pet. for Writ of Cert. at 2.) This posturing misses the mark for several reasons.

First, and critically, the General Assembly has specifically provided that a municipality itself is an indispensable party when, as here, the enforceability of an ordinance is at stake. *See* S.C. Code Ann. § 15-53-80 ("In any proceeding which involves the validity of a municipal ordinance or franchise the municipality shall be made a party and shall be entitled to be heard.").

Second, Respondents named the Town of Chapin as a defendant in this case. (Compl. ¶ 5; R. p. 19.) They cannot legitimately claim to speak for an adverse party that they chose to sue.

Third, by omitting the Town of Chapin from this appeal, Respondents foreclosed the Town from advancing any position on appeal.[1] They cannot now avoid certiorari or cure their jurisdictional defect by claiming that it is "unclear to the Respondents what position the Town would have advanced" if it had actually been included in the appellate proceedings. (Return to Pet. for Writ of Cert. at 2.)

Fourth and finally, one of the Respondents—Ms. Atkins—is no longer a member of Chapin Town Council, and her replacement on the Council has not attempted to intervene in this matter on either side. The suggestion that she could speak on behalf of the Town in any manner or in any capacity is simply incorrect.

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[1] Without citing anything in support, Respondents state that the "Town did not make an appearance in the action" before the circuit court. (Return to Pet. for Writ of Cert. at 2.) This is not true. (Public Index; Appx. p. 73.) But even if it was, it would be irrelevant to the issue regarding the Court of Appeals' lack of jurisdiction over this matter. *See, e.g.*, *Miner v. Champion*, 95 S.E.2d 668, 670 (Ga. 1956) ("Where, as in this case, an action is brought seeking substantial relief against several defendants, and some of them file demurrers which go to the substance of the whole petition and challenge the plaintiff's right to any of the relief prayed, and the demurrers are sustained, the resulting dismissal of the petition inures to the benefit of all the defendants, and consequently they become interested in sustaining the judgment; and this is true though some may be in default.").

The consequence of Respondents' decision to exclude the Town of Chapin from this appeal should be dismissal of this case. In *Conner v. City of Forest Acres*, 348 S.C. 454, 461–62, 560 S.E.2d 606, 609–10 (2002), this Court unambiguously held that the failure to timely designate a trial-level party as a respondent in the notice of appeal deprived the appellate court of jurisdiction over that party. And because the trial-level rulings here applied equally to a party over whom appellate jurisdiction did not and cannot attach, the law-of-the-case doctrine prohibits review of those rulings. But the Court of Appeals ignored the *Conner* rule and, in fact, issued a decision that is patently inconsistent with *Conner*.

The Court of Appeals never mentioned the *Conner* decision by name, but it declared that adherence to the *Conner* rule "would place form over substance when doing so would not further the interests of justice." (Court of Appeals Opinion at 13 (June 29, 2016); Appx. p. 13.) Respondents do not even attempt to defend the Court of Appeals' ruling, offering only the following without any accompanying explanation: "It is clear that *Conner v. City of Forest Acres* is factually distinguishable from the case on appeal." (Return to Pet. for Writ of Cert. at 2.)

In fact, the only area in which *Conner* is distinguishable from the instant case is that the appellant in *Conner* actually attempted to revise her notice of appeal to include the previously-omitted parties, while these Respondents have never argued that the Town of Chapin is or should have been a party to the appeal. *Cf. Conner*, 348 S.C. at 462, 560 S.E.2d at 610 ("It was not until the Court of Appeals invited Conner to 'correct' the Notice that Conner took any action.").

Unquestionably, the Court of Appeals' ruling conflicts with this Court's *Conner* decision. But the consequences of its disregard of *Conner* are extreme, as the Court of Appeals determined *sua sponte* that this appeal was perfected "as to all parties in this case, including the Town," even though no party had ever advocated such a position. (Court of Appeals Opinion at 13 (June 29,

2016); Appx. p. 13.) The Court of Appeals' expansion of its own jurisdiction is irreconcilable with uniform law regarding an appellate court's limited ability to review trial-level decisions.

Limitations on appellate jurisdiction appear regularly in this Court's case law, and are manifested in principles such as the requirement of timely service of a notice of appeal,[2] the unyielding standards of issue preservation,[3] the law-of-the-case doctrine,[4] the two-issue rule,[5] and the state's rejection of the plain-error rule.[6] If the Court of Appeals' decision is permitted to stand and appellate jurisdiction can be expanded or contracted based on a court's own discretion, each of these bedrocks of appellate law is susceptible to erosion. This must be corrected.

Other than their unsupported sentence that *Conner* is distinguishable, Respondents have not challenged any aspect of Petitioners' argument that the Court of Appeals lacked jurisdiction over this appeal. Moreover, they have rightly conceded the fundamental point that the Town of Chapin was never a party to proceedings before the Court of Appeals. Accordingly, the Court should grant certiorari and dismiss this case for lack of appellate jurisdiction.

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[2] *See, e.g., Elam v. S.C. DOT*, 361 S.C. 9, 14–15, 602 S.E.2d 772, 775 (2004) ("The requirement of service of the notice of appeal is jurisdictional, *i.e.*, if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to 'rescue' the delinquent party by extending or ignoring the deadline for service of the notice.").

[3] *See, e.g., State ex rel. Wilson v. Ortho-McNeil-Janssen Pharms.*, 414 S.C. 33, 59–82, 777 S.E.2d 176, 189–202 (2015) (affirming a judgment in excess of $124 million while noting throughout that the defendant had failed to preserve numerous issues for appellate review, and explaining that the failure to preserve issues "precluded" or "barred" review).

[4] *See, e.g., Davis v. Parkview Apts.*, 409 S.C. 266, 281, 762 S.E.2d 535, 543 (2014) (explaining that the law-of-the-case doctrine renders decisions unreviewable, "right or wrong").

[5] *See, e.g., Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 328–29, 730 S.E.2d 282, 284–85 (2012) (explaining that appellate review is "barred" under the two-issue rule when a judgment is supported by multiple theories, but only one is appealed).

[6] *See State v. Sheppard*, 391 S.C. 415, 421, 706 S.E.2d 16, 19 (2011) ("This Court, however, has routinely held the plain error rule does not apply in South Carolina state courts.").

II. The remedy for alleged misuse of executive authority or dissatisfaction with a statutory scheme lies with the ballot box, not the Judiciary.

In addition to failing to meet the merits of the Petition on the issue of appellate jurisdiction, Respondents also fail to explain how the Court of Appeals' construction of the Town's ordinances was correct; indeed, it was not. Instead, they again rely on generic assertions that are not supported by any meaningful discussion.

First, Respondents argue that if Chapin's ordinances are construed in a manner to require mayoral approval over all types of meeting agendas—as Judge Cooper held at the trial level—that would "essentially make the Mayor an autocrat subject to no controls whatsoever." (Return to Pet. for Writ of Cert. at 2.) This is not so, as the ballot box provides the ultimate check on any potential misuse of power, as Judge Cooper acknowledged. (R. p. 17.) *See Cox v. Bates*, 237 S.C. 198, 213, 116 S.E.2d 828, 834 (1960) ("Therefore plaintiff and others so minded may seek at the ballot box remedy for what they consider to be a wrong.").

Second, in response to Petitioners' point that Ordinance 2.206 is entitled "AGENDA"—rather than any title suggesting its scope is limited only to "regular" meetings—Respondents argue that "the headings of Ordinances are expressly excluded from consideration." (Return to Pet. for Writ of Cert. at 3.) Again, this is not so, as Ordinance 1.204 provides that the title is designed "to indicate or emphasis the contents" of the ordinance. (R. p. 230.) On its face, Ordinance 2.206 prescribes how agendas are created for meetings in the Town of Chapin, an unremarkable ordinance that the Court of Appeals arbitrarily and improperly limited to agendas only for regular meetings.

Third and finally, Respondents note that FOIA's requirement of a two-thirds vote for amending a meeting agenda is a higher threshold than the Town of Chapin's three-fifths requirement for calling a special meeting. (Return to Pet. for Writ of Cert. at 3.) This observation

is not relevant to any issue pending in this Petition, and Respondents do not even cite it in support of any actual argument. Nevertheless, to the extent the General Assembly established a standard for amending a meeting agenda that is politically inconvenient for Respondents, their relief would be to lobby the Legislature to rewrite the law or the citizenry to elect their political allies, not to seek relief through the Judiciary.

In short, Respondents have provided nothing to rebut Petitioners' request for certiorari review of the Court of Appeals' construction of Chapin's ordinances. Because that construction violates numerous principles of statutory interpretation, the Court should grant this Petition and review and reverse the Court of Appeals' decision in the event the Court finds appellate jurisdiction to be proper.

CONCLUSION

In order to restore fundamentals of appellate jurisdiction, appellate procedure, and statutory construction, Petitioners respectfully request that the Court grant this Petition and either vacate the Court of Appeals' decision and dismiss this case, or reverse that decision on its merits.

Respectfully submitted,

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PROOF OF SERVICE

I, the undersigned Legal Assistant of the law offices of Womble Carlyle Sandridge & Rice LLP, Attorneys for Respondents/Petitioners, do hereby certify that I have served the below parties in this action with a copy of the pleading(s) specified below via United States mail, postage prepaid, to the following address(es):

Pleading: Reply in Support of Petition for Writ of Certiorari

Parties Served: Spencer Andrew Syrett
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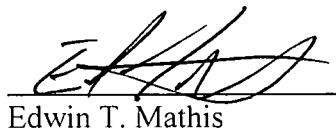

Edwin T. Mathis

September 2, 2016