STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BARNWELL COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

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OCT 23 2012
SC Court of Appeals

Case No. 11-CP-06-476

Don Alexander, Carolyne Williams, Georgia F. Fields, William R. "Bob" Dixon, Colonel Joe H. Zorn, Jr., Melanie Wright, and Dr. M.O. Khan, ... Appellants,

v.

Freddie Houston, David Kenner, Keith Sloan, Lowell Jowers, Sr., Joe Smith, Harold Buckmon, and Travis Black, individually and in their capacity as members of Barnwell County Council .... Respondents.

APPELLANTS' FINAL REPLY BRIEF

A. Camden Lewis
Ariail E. King
LEWIS, BABCOCK, & GRIFFIN, L.L.P.
1513 Hampton St.
Post Office Box 11208
Columbia, South Carolina 29211
(803) 771-8000

Attorneys for Appellants

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Attorneys for Appellants

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I. There is a justiciable, constitutional question properly before the Court.

Respondents claim that the matters alleged in the complaint amount to a non-justiciable controversy and that a ruling by the Court would violate the doctrine of separation of powers. However, "this Court is duty bound to review the actions of the Legislature when it is alleged in a properly filed suit that such actions are unconstitutional, as the above reference to Sloan v. Hardee illustrates." Segars-Andrews v. Judicial Merit Selection Comm'n, 387 S.C. 109, 123, 691 S.E.2d 453, 460-61 (2010).

The cases cited by Respondents regarding political questions and separation of powers do not apply. In Wilson v. Preston, 378 S.C. 348, 353, 662 S.E.2d 580, 582 (2008), a county council member sought a writ of mandamus requiring the county administrator to give her full access to all financial records pertaining to the operation of the county government. The issue in that case was the ministerial versus discretionary acts of the administrator and whether a writ of mandamus was appropriate. The case involved no constitutional issues and only involved, as Chief Justice Toal's concurrence states "policy decisions."

Respondents claim that the political question doctrine is appropriate, even in light of a claim that another branch of government deprived the plaintiff of a constitutional right, citing Pressley v. Lancaster County, 343 S.C. 696, 542 S.E.2d 366 (Ct. App. 2001). That case was not determined on the basis of a nonjusticiable political question. In Pressley, the plaintiff sought judicial review of a County's Council refusal to issue a certain document (Letter of Consistency) that Plaintiff needed in order to obtain a landfill permit from the State. The plaintiff also sought a writ of mandamus, compelling the Council to issue the Letter of Consistency, and a declaratory judgment that the Council's denial of his request for Letters of Consistency was violated the

constitutional provisions of the Commerce Clause, by acting with improper motive. The trial court dismissed the petition for judicial review based on the failure to exhaust administrative remedies and found that the constitutional claims were without merit.

Respondent only quotes a portion of the Pressley case that states "[j]udicial inquiry into legislative motivation is to be avoided" because of the possibility of endangering the separation of powers doctrine. Resp. Brief, p. 5. Respondent implies that a court can never review a government's actions without violating the separation of powers. However, unlike the case at hand, the court in Pressley was not being asked to review the *actions* of a government entity, but the *motives*. Furthermore, it clear that the trial court did review plaintiff's constitutional challenge on its merits and that the lower court's decision on the merits was affirmed on appeal.[1] This Court stated that "we affirm the trial court's ruling that Pressley failed to prove a violation of the commerce clause arising from council's underlying motives," finding that the council had properly applied the state law on waste management, and thus, had not acted with improper motive. The Pressley case provides no support for the argument that Appellants' case presents only nonjusticiable political question.

Respondents then cite to Baker v. Carr, 369 U.S. 186 (1962), arguing that the court must consider whether there is a "demonstrable constitutional commitment of the issue to a coordinate political department" or a "lack of judicially discoverable and manageable standards for resolving" the issue to determine if the matter is nonjusticiable. Respondents claim the first factor is demonstrated by the Home Rule Act, specifically S.C. 4-9-30 (5)(a) and (6), and claim that it allows Respondents control over all county boards, including the right to abolish such

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[1]In fact, Pressley does not even use the phrase "nonjusticiable controversy."

boards. However, Respondents did not simply abolish the Hospital Board here. Respondents discharged the old Hospital Board and elected (or appointed) themselves as members, thereby simultaneously occupying two positions "for honor or profit" in violation of the Constitution. It is this action that violate the Constitution and renders the lower court "duty bound" to review Respondents' action, not the general power of the Respondents to establish or abolish boards.[2] *See*, Segars-Andrews, *supra*.

Respondents then argue that under the second factor in Baker v. Carr, there is a "lack of judicially discoverable and manageable standards for resolving" because the means of addressing non-compliance are not readily determinable by the judiciary since governance is committed to the local government. However, the "standards for resolving" the issue of dual office holding are clearly set out by the South Carolina Constitution and the case of Richardson v. Town of Mt. Pleasant, 350 S.C 291, 566 S.E.2d 523 (2002), which prohibit the holding of "two offices for honor or profit at the same time." S.C. Const. Art. VI, § 3 and S.C. Const. Art. XVII. Furthermore, state law also dictates noncompliance with the constitutional prohibition; when a person holds two offices in violation of the constitution, the person has deemed to have vacated the first office. Walker v. Harris, 170 S.C. 242, 170 S.E. 270, 272 (1933).

II. Holding positions on both County Council and the Hospital Board violates the prohibition against dual office holding.

Respondents argue that Richardson v. Town of Mt. Pleasant, 350 S.C 291, 566 S.E.2d 523 (2002), has no control over the case at bar because the duties of a member of the Hospital Board are wholly included in the duties of the office of a county council member.

[2] If Respondents' arguments were correct, no court could ever consider the issue of dual office holding.

In Richardson, the Court stated:

> The dual office holding provisions are in derogation of the common law which prohibited a person from holding two offices only if they were "incompatible." *State v. Buttz,* 9 S.C. 156 (1877). Incompatibility meant either that the offices involved "such a multiplicity of business" that one person could not adequately perform both, or that they were "subordinate and interfering with each other, [inducing] a presumption that they cannot be executed with impartiality and honesty."

Richardson v. Town of Mount Pleasant, 350 S.C. 291, 293, 566 S.E.2d 523, 524-25 (2002). The Court in Richardson expanded the common law rule on dual office holding and held that whether one office was incompatible with another was ***not relevant*** in determining whether the prohibition against dual office holding was violated:

> The 1895 Constitution extended the dual office holding proscription to all persons holding positions of "honor or profit," exempting only from the prohibition notaries public and militia officers.

Id. at 294, 566 S.E.2d at 525. Respondents are attempting to evade Richardson and revert back to the common law prohibition on dual office holding, instead of abiding by the 1895 Constitution and the South Carolina Supreme Court's directives.

Respondents argue that Richardson only controls in cases where the two offices are "incompatible" and that the issue here is not one of "incompatibility." Respondents instead assert that the issue here is that there is no expansion, aggregation or concentration of powers because the Hospital Board is an entity or agent of the County Council. In other words, because the Hospital Boards' powers are derived from County Council, Respondents claim that the relationship is "vertical" not "horizontal" and thus, there is no greater aggregation of power.

Richardson gives no exceptions for "vertical" relationships or where there is no "expansion of power." Respondents argue that Richardson cannot apply to a situation where the

second office (Hospital Board) is an entity created by the first office (County Council). Again, Richardson makes no such distinction. Furthermore, the two offices at issue here actually *are* "incompatible" as that term does not only include a broadening of power but also applies where there are conflicts of duties or interest between the two offices. *See, e.g.*, Reilly v. Ozzard, 166 A.2d 360, 367 (N.J. 1960). Where one office in subordinate to another, there is possibility of incompatibility or conflict of duties and interest:

> Incompatibility is usually understood to mean a conflict or inconsistency in the functions of an office. It is found where in the established governmental scheme **one office is subordinate to another, or subject to its supervision or control,** or the duties clash, inviting the incumbent to prefer one obligation to another.

Reilly v. Ozzard, 166 A.2d 360, 367 (N.J. 1960) (emphasis added). The Hospital Board here is subordinate to County Council and this case clearly involves the conflict of interest or duties that dual office holding seeks to prevent. The Hospital Board's purpose, according to Ordinance No. 2003-178 is to ensure "the operation and maintenance of adequate hospital facilities" in Barnwell County, whereas the County Council's goal is to declare bankruptcy (which the old Hospital Board would not do) and close the Hospital. The members of County Council have a distinct conflict of interest or duties with the Hospital Board. As a result, Respondents' election or appointment of themselves to the Hospital Board was improper and in violation of the prohibition against dual office holding.

CONCLUSION

As set forth herein and in Appellants' Initial Brief, the issue presented is a justiciable, constitutional issue that was properly before the lower court. Furthermore, the Respondents have violated the prohibition against dual office holding. Appellants respectfully request that this Court reverse the ruling of the lower court.

A. Camden Lewis
Ariail E. King
LEWIS, BABCOCK, & GRIFFIN, L.L.P.
1513 Hampton St.
Post Office Box 11208
Columbia, South Carolina 29211
(803) 771-8000
Attorneys for Appellants

Columbia, South Carolina
Oct. 19, 2012

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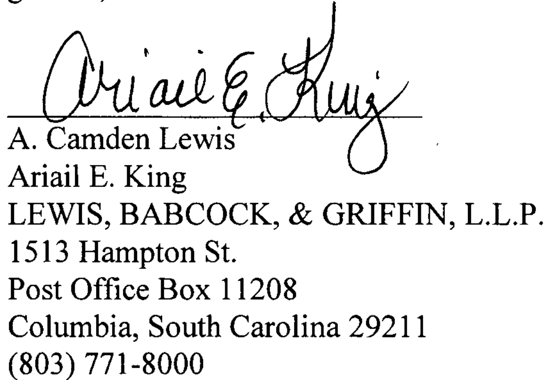
CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Reply Brief of Appellants complies with Rule 211(b) SCACR and with the August 13, 2007 Order of the South Carolina Supreme Court.



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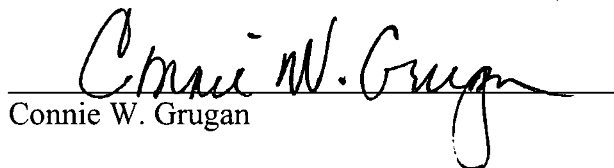
PROOF OF SERVICE

I, Connie W. Grugan, secretary to the law firm of Lewis, Babcock & Griffin, L.L.P., hereby certify that I have served Appellants' Final Reply Brief upon opposing counsel, by mailing a copy of same, postage prepaid and return address clearly indicated, to said opposing counsel at the following address:

Pete Kulmala, Esquire
Harvey & Kulmala, LLC
Post Office Box 705
Barnwell, South Carolina 29812

J.D. Mosteller, III, Esquire
Mosteller Law Firm, LLC
Post Office Box 1832
Barnwell, South Carolina 29812



Connie W. Grugan

This 23rd day of October, 2012.