THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2019-CP-001449

City of Simpsonville, Janice Curtis, and Adam Randolph,

Respondent,

v.

Sylvia Lockaby, Appellant.

REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

I. Appellant's argument that Robert's Rules of Order does not create an administrative remedy was preserved for review.

Respondents contend that "Lockaby's argument that the Code and Robert's Rules do not create an administrative remedy was not raised until her Motion to Reconsider." (R. p. ___; Respondents' Brief at 14, fn. 6.) This argument is unfounded.

At the hearing for the motion for summary judgment, Appellant stated that "[Respondents] cannot prevail on the idea that they Robert's Rules of Order created an administrative appeal that [Appellant] needed to exhaust," and that "the rules are inconsistent to say the least. That is why, as a matter of law, Your Honor, we think [the remedy] can't be attached." (R. p. ___; transcript at 17-18.) More concretely, Appellant's memorandum in opposition to Respondents' motion for summary judgment argues: "***ROBERT'S RULES OF ORDER*** **DOES NOT PROVIDE A DEFENSE**," and that "an appeal under Robert's Rules of Order is not an administrative remedy." (R. p. ___; memo in opposition to summary judgment at 6.) The lower court, however, found that the Rules did provide a remedy. (R. p. ___; order at 7.)

This order comports with the definition of "judgment" as established in South Carolina's Rules of Civil Procedure, as the order granting Respondents' motion for summary judgment (which, again, included a decision regarding whether Robert's Rules of Order provides an administrative remedy) was an "order which dismisse[d] the action" and "finally determine[d] the rights" of a party. (Rule 54(a), SCRCP.) Thus, the lower court granted a final judgment on the issue and it was adequately preserved for appeal. (Rule 72, SCRCP.)

II. Respondents' reliance on Berkeley is, at best, confusing.

Both Appellant and Respondents are in agreement that Berkeley Elec. Co-op., Inc. v. Town

of Mount Pleasant is relevant here, as it ruled that

> [a] town council has the express duty to keep minutes of its proceedings which shall be a public record. S.C. Code Ann. § 5-7-250(b) (1976). Municipal records properly authenticated or verified are the *only* competent evidence of the proceedings of the transactions of the governing body. 5 E. McQuillan, The Law of Municipal Corporations § 14.05 (3d ed. 1989). Parol evidence *cannot be admitted* to explain, enlarge, or contradict minutes of the proceeding of a town council unless the minutes are incomplete or ambiguous. Id. § 14.07. Otherwise, parol evidence could render official minutes uncertain and unreliable so that the minutes would fail to afford dependable evidence of the proceedings of the municipal body. Id.

308 S.C. 205, 208, 417 S.E.2d 579, 581 (1992) (emphasis added). In quoting this exact passage, Respondents add, "there is no contention that the minutes are inaccurate as to what is reflected therein." (R. p. ___; Respondents' Brief at 12.)

However, the Respondents' memorandum in support of their motion for summary judgment, the lower court's order granting such motion, and the facts as laid out in Respondents' brief all rely on and present evidence outside of the meeting minutes, and therefore run in direct contravention to the very Berkeley passage that Respondents have repeatedly recited. (See memo in support of motion for summary judgment at 8, order granting summary judgment at 7, Respondent's Brief at 12.) Most notably, Respondents and the lower court rely on testimony that Appellant left the meeting voluntarily, which is not reflected in the minutes at all. (See Minutes, memo in support of motion for summary judgment at 5-8, Respondents' Brief at 7-9.) Further, the trial court improperly considered the Graham episode, which occurred at the same meeting but is not set forth nor detailed in the Minutes.

The lower court essentially had two options. First, it could have completely abided by the Berkeley rule, only look to the evidence presented within the Minutes, and not enlarge those minutes by allowing the transcript testimony regarding the voluntariness of Appellant's exit and Mr. Graham's episode. In this circumstance the Minutes, when viewed in a light most favorably

to Appellant, could not have warranted the lower court's granting of Respondents' motion for summary judgment.

The lower court's second option, which was the option it chose, was to allow Respondents to enlarge the record beyond the Minutes and point to outside testimony and affidavits. In doing so and in considering the Berkeley decision, the lower court inadvertently acknowledged that the Minutes presented were either "incomplete or ambiguous." 308 S.C. at 208. That is, the lower court tacitly established that the Minutes needed further explanation. In this case, the Minutes read in a light most favorably to the Appellant *and* the Appellant's testimony provide more than a scintilla of evidence to warrant denial of Respondents' motion for summary judgment. Provide "light most favorably" case citation and cite to Lockaby's depo transcript where she indicated she didn't have time to "appeal" the decision of the chair.

III. Respondents and the lower court conflate the prior cause for appeal with the incident that gave rise to Appellant's cause of action in this case.

In their brief, Respondents contend that "Lockaby was aware of the appeal procedure, and there had been an appeal from a call for order in the same meeting." (R. p. ___; Respondents' Brief at 14.) The lower court's order granting Respondents' motion for summary judgment also states that "Minutes of the February 9, 2016 Council meeting show[] there was an appeal of a ruling from the presiding officer earlier in the same meeting." (R. p. ___; order at 5, fn. 8.) Both Respondents and the lower court use this prior incident involving Councilmember Graham to show that Appellant could have just as easily appealed Respondent Curtis's decision to eject her. However, the Respondents and the lower court ignored two things: there is a critical distinction, plain from the Minutes, between the call to order for Mr. Graham and Appellant, and, again, an appeal was not a possible remedy here in the first place.

A. It is not stated in the Minutes whether Respondent Curtis called Respondent Randolph, the sergeant-at-arms, in the prior incident. Respondents and the lower court plainly and prejudicially, but reversibly, gloss over this.

As far as the Minutes indicate, the circumstances surrounding Mr. Graham's mere call to order is necessarily different from the circumstances surrounding a forceful ejection. (See R. p. ___; Minutes.) Inherent in Robert's Rules of Order's purported requirement that a person exhaust administrative remedies is the requirement that a person have the opportunity to do that in the first place. Respondents and the lower court contend that Appellant did have the opportunity, at least in part because Mr. Graham did. (See R. pp. ___; order at 4, fn. 8; Respondents' Brief at 14.) Respondents further likened an appeal under Robert's Rules to "an objection through testimony during a trial. There's not a break in the conversation, you just have to do it." (R. p. ___; transcript at 21, lines 16-18.)

Appellant, however, contends that she did not have an opportunity to appeal, and that contextually her incident fundamentally differed from Mr. Graham's. For example, during the hearing on the Respondents' motion for summary judgment, Appellant stated that "the timing, *you can see it in the minutes*, it's happening instantaneously, the disagreement. And then the ordering of the officer coming up." (R. p. ___; transcript at 16, lines 14-17 (emphasis added).) Moreover, the Minutes, read in a light most favorably to the Appellant, indicate that there was not an opportunity to appeal, as Respondent Curtis repeatedly interrupts Appellant and prevents her from speaking, let alone making an appeal, before the call to order even happens. (See R. p. ___; Minutes.)

While Respondents' objection analogy very well may work for describing Mr. Graham's incident (which we have no way of knowing, as it is not detailed in the Minutes or in any depositions), it falls flat in its application to Appellant's circumstances. For example, any objection

made after a judge has called the bailiff to approach you and escort you out of the courtroom will surely be ineffective. *This* is the analogy that is more appropriate for Appellant, and there is a scintilla of evidence to support that: the fact that the minutes reflect that Respondent Randolph had been called by Respondent Curtis to escort Appellant out, but the Minutes do not indicate that there was any involvement whatsoever of the sergeant-at-arms in the incident with Mr. Graham. The lower court was therefore under the obligation to view this fact most favorably to the Appellant, draw the conclusion that there is an issue of material fact on whether Appellant had an opportunity to fulfill this purported requirement and deny Respondents' motion for summary judgment.

B. Once again, Robert's Rules of Order did not provide an administrative remedy in the first place, so Graham's episode and Appellant's similarity to it is of absolutely no consequence.

Section 24 of Robert's Rules provides that an appeal "can be applied to any ruling by the presiding officer except . . . b) when the chair rules on a question about which there cannot possibly be two reasonable opinions." In that case, "an appeal is dilatory and is not allowed." (R. p. ___; memo in opposition to motion for summary judgment at 7.) Further, the Rules provide that an appeal "[i]s in order when another has the floor, but the appeal must be made at the time of the ruling. *If any debate or business has intervened, it is too late to appeal*." Robert's Rules at 256-7. Appellant was somehow supposed to ascertain three things: whether there had been a ruling to appeal in the first place, whether there could have been two reasonable opinions on the matter, and whether debate or business had occurred so as to warrant an appeal. Viewed the Minutes in a light most favorably to the Appellant, it was impossible for these things to have happened. The appeal process set forth in the Rules is not the "remedy" it purports to be, but rather a logistical impossibility in the facts of this case.

Given the summary judgment standard, the lower court's decision to bar Appellant's claim on the grounds that Appellant failed to exhaust administrative remedies cannot stand.

IV. Both the lower court and Respondents' Brief ignore the narrowness of the holding in Whitener, and South Carolina's acknowledgment of that narrowness.

Respondents' contention that the incident at issue here is a lesser version of the encounter laid out in Whitener, and should therefore be protected under legislative immunity (and the lower court's reliance on this contention and granting of legislative immunity), is flatly incorrect. That "[t]he facts of this case or not as extreme as those in Whitener" works *in favor* of Appellant, not against her. (R. p. ___; Respondents' Brief at 17.)

While it is true that the South Carolina Attorney General's Office (hereinafter "the Office"), as cited in the lower court's order granting Respondents' motion for summary judgment, relied on Whitener in advising "that a municipal council1 possesses inherent authority to discipline one of its members by removal from a meeting" (see R. p. ___; order at 11), the Office goes on to state, *in that very same sentence*, that they "emphasize the need for *considerable caution*. There is a fine line between First Amendment rights of free speech and disruption of a meeting. The members of council must thus be *very careful* to avoid infringing upon First Amendment rights." 2016 WL 3355910 at *3 (S.C.A.G. May 31, 2016) (citing Norse v. City of Santa Cruz, 629 F.3d 966 (9th Cir. 2010)) (emphasis added).

The lower court and the Respondents ignore this "fine line." In arguing that the Court should find that it was proper for the lower court to grant legislative immunity because the facts here are not as extreme or egregious as the conduct at issue in Whitener, Respondents are explicitly

1 Moreover, this case does not concern action by the "municipal council", it concerns actions by Curtis, Respondent/Defendant, as the presiding officer of Respondent/Defendant City of Simpsonville. (See R. p. ___; Minutes.)

advocating for (and the lower court has granted) the shift of that line in a direction that South Carolina authorities have amply warned against. Further, it is anything but "absurd to suggest that there is not immunity because the alleged conduct in this case was not as severe." (R. p. ___; Respondents' Brief at 17.) It makes way more sense, in light of the caselaw here and South Carolina's commentary on that caselaw, to grant legislative immunity where conduct is *more* egregious than Whitener, not less. What *is* absurd, however, is overextending caselaw that would cause arbitrary restriction and infringement upon First Amendment rights of the people in this state.

Moreover, it apparently needs reiterating that "[e]ven if, at some level, there is judicially enforceable First Amendment constraint on a legislature's power to discipline one of its members, we certainly do not approach it in this case. Whitener was disciplined for his lack of decorum, not for expressing his view on policy." Whitener v. McWatters, 112 F.3d 740, 741 (4th Cir. 1997). Respondents have presented no evidence that Appellant lacked decorum beyond their denying Appellant's allegation that she was not disorderly (see R p. ___; answer at 2), and even if they had, the Minutes, viewed in a light most favorably to the Appellant, do not reflect a lack of decorum.

Respondents further concede that "Lockaby has correctly pointed out that legislative immunity does not extend to cover any possible speech by a legislator or legislative employee." (R. p. ___; Respondents' Brief at 18.) However, Respondents plainly misunderstand this point, as they go on to state that cases like Whitener and Gravel "preserve immunity when [the speech] is part of a legislative body's meeting process." Id. (citing Gravel v. United States, 408 U.S. 606, 625 (1972)). While Gravel did set forth that "the courts have extended [legislative] privilege to matters beyond pure speech or debate in either House," once again, Respondents conveniently

leave out that courts only make this extension "'when necessary to prevent indirect impairment of such deliberations.'" (See id.; Gravel at 625.) Here, the record is not clear whether restriction of Appellant's First Amendment rights was necessary to prevent such an impairment. Again, Respondents have presented no evidence that Appellant lacked decorum beyond their denying Appellant's allegation that she was not disorderly, and even refer to the incident as less severe than the facts in Whitener. (See R p. ___; answer at 2; Respondents' Brief at 17.) To the contrary, the Minutes and Appellant's testimony, read in a light most favorably to the Appellant, show that Appellant was actually the one trying to engage in "such deliberations" as entertained by Gravel, as she was attempting to ask Mr. Dryhaug questions regarding stormwater issues, and Respondent Curtis was the one directly impairing that dialogue. (See R. p. ___; Minutes at 2.) (For example, Respondent Curtis interrupts Appellant when she was simply raising an issue and accuses her of arguing when she was not.) Therefore, a reversal of the lower court's order granting summary judgment is warranted.

Finally, legislative immunity could not even be applied as a matter of law in the first place. This case *solely* concerns Respondent Curtis's action, as presiding officer of the meeting, not the actions of the Council as a whole. Whitener (and the Office's acknowledgment of Whitener) contemplate legislative immunity where votes by the council as a whole cause a violation of a person's First Amendment rights. A vote plainly did not happen. Legislative immunity therefore cannot exist in this case.

CONCLUSION

This court should reverse the lower court's decision to grant Respondents' motion for summary judgment and should remand this case for trial.

Respectfully submitted,

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