THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jean H. Toal, Acting Circuit Judge

Case No. 2020-CP-40-02636

RECEIVED
Dec 29 2020
S.C. SUPREME COURT

JONATHON HILL and JONATHON HILL FOR SC HOUSE DISTRICT 8; Appellants,

v.

THE SOUTH CAROLINA REPUBLICAN PARTY and VAUGHN PARFITT Respondents.

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, Appellants petition this Honorable Court to rehear the motion to dismiss the appeal. The case concerns allegedly illegal campaign contributions from one Respondent to the other. After Respondents repeatedly assured the Court, in their reply in support of their motion, that dismissal at this stage in favor of proceedings before the State Ethics Commission would not prevent the Court from reviewing the substantive issues raised by this appeal, the Court issued a two-sentence order, devoid of explanation, granting their motion.

As explained below, such an order complies with Rule 220(b), SCACR, if, and only if, the Court accepted those representations as accurate. However, those representations are not accurate. If the Ethics Commission agrees with Respondents' position on the law—that there are no valid limits on what a political party may accept and funnel to political candidates—the

very existence of Appellants' Ethics Commission complaint and its disposition will become confidential. It would be a criminal matter for Appellants to even file a notice of appeal.[1]

THE IMPORTANCE OF THE ISSUES IN THIS CASE

The Court obviously has many serious cases demanding its attention, during the pandemic. The Court may have overlooked the importance of the issues raised by this case. This case raises the issue of whether there are any enforceable limits on campaign contributions to political candidates.

South Carolina law does not limit contributions to political parties. The order below, challenged here, held there are no valid restrictions on contributions from political parties to candidates.

The only remaining restrictions on contributions are the limits on direct contributions to candidates. Because candidates may now – unless this Court rules differently – receive unlimited funds from any source, provided the source passes the funds through a party, the contribution limits of the Ethics Act are in effect dead.

If there are no enforceable limits on contributions from political parties, there are simply no limits on what corporations, lobbies, interest groups, out-of-state billionaires, and anyone else may give through political parties to candidates.

[1] The only exception would be if Respondents' were to waive their right to confidentiality regarding the Ethics Commission complaint. Counsel for Appellants has asked Respondents to agree to do so. (Ex. 1). They refused. (*Id.*)

BACKGROUND

Facts

Appellant Representative Jonathon Hill is a Member of the South Carolina House. As the 2020 Republican primary approached, he noticed first one, then two, then three sets of mailers sent into his district urging his defeat and the election of his opponent, Respondent Vaughn Parfitt. *See* Init. Br. of Appellants, pp. 4-6. He and his campaign committee, Appellant Jonathon Hill For SC House District 8, filed suit in Richland County Court on June 3, 2020. *Id.* They alleged violations of the campaign contribution limits by the funder of those mailings, Respondent South Carolina Republican Party, and the recipient of those contributions, Mr. Parfitt. *Id.* By the date of the hearing, only two days later, three more sets of mailers flooded into the district. *Id.*

The mailers state such things as, "Call Jonathon Hill . . . Ask him why he chose to support liberal Allison [sic] Lee," and "Vote Vaughn Parfitt on June 9th." *Id.* Respondents acknowledged the mailers to be advocating for the defeat of Rep. Hill and the election of Mr. Parfitt. The costs of the mailers were stipulated to exceed $5,000, which violates the contribution limits of S.C. Code Ann. Sections 8-13-1314 and 8-13-1316, if either of those sections apply. *Id.*[2]

[2] Section 8-13-1314 limits contributions by "any person" to House candidates to $1,000 per election cycle, and 8-13-1300 defines a "person" as any organization or group of persons acting in concert, including incorporated organizations. Section 8-13-1316 allows recognized political parties in certain circumstances to provide contributions of up to $5,000 in an election cycle to House candidates.

Lower Court Proceedings

The Circuit Court, former Chief Justice of the South Carolina Supreme Court Jean H. Toal, held there are no enforceable provisions of South Carolina law limiting such contributions. Order, p. 2.[3] The Court further stated its view that the Legislature had intended to ban such contributions. *See* Init. Br. of Appellants, p. 9 (citing Hearing Transcript). On Motion for Reconsideration, the Circuit Court recognized that another Circuit Court had ruled differently, Order on Mot. Recon., p. 1 (citing R*ichard A. Harpootlian v. South Carolina Senate Republican Caucus*, Case No. 2018-CP-40-05370 (Oct. 19, 2018)), and stated its view that "This case belongs in the South Carolina Supreme Court." Order on Mot. Recon., p. 2.

The Appeal

Appellants filed their Initial Brief on July 20, 2020. They argued the Circuit Court erred in statutory analysis by ignoring the definitions provided by S.C. Code Section Ann. Section 8-13-1300 and by misinterpreting the plain language of Sections 8-13-1314 and 8-13-1316, which limit contributions to candidates. Init. Br. of Appellants, pp. 21 -31. In the alternative, Appellants argued that if the lower court properly interpreted the statutes to find that only 8-13-1316 applied, it erred in constitutional analysis. (The lower court held 8-13-1316 to be facially unconstitutional. *Id.*, pp. 32-45. It relied on a federal district court case that held the broad term "committee" in Section 8-13-1300 to be unconstitutionally overly broad, and concluded that the narrower term "party committee" must therefore also be unconstitutionally overly broad. *See id.*)

[3] The lower court held that Section 8-13-1314 does not apply and that Section 8-13-1316 was unconstitutional.

The Motion to Dismiss

Respondents filed no Initial Brief. Instead, Respondents filed a Motion to Dismiss. They did so on August 7, 2020, alleging various and sundry reasons for dismissal of the appeal—they alleged that the case was moot, that the matter was not ripe, and most particularly relevant here, that "This matter belongs in the State [Ethics] Commission." Mot. to Dismiss, p. 13 (Conclusion).

Appellants timely filed a Return on August 20, 2020. In their Return, Appellants addressed each of Respondents' various claims. Most relevant here, Appellants argued that the Court should hear this matter, in substantial part because the issues here are otherwise capable of repetition, yet evading judicial review; and in the alternative that the issues are matters of public interest, which is an independent exception to the mootness doctrine. Appellants' Return, pp. 17-22.

Respondents filed a Reply on August 25. Respondents never addressed Appellants' arguments that the public interest doctrine is an exception to mootness. Rather, Respondents announced that they had not meant that this matter belongs in the State Ethics Commission, but only that a similar matter could be brought there. Reply (*passim*).

Respondents repeatedly assured the Court, in no uncertain terms, that were Appellants to file a Complaint with the Ethics Commission, and were Appellants to be unsuccessful there, Appellants could bring an appeal to this Court. "[I]t is simply not true" that the matter is capable of evading judicial review, they stated. Reply, p. 8. ("[While Appellants argue that] the issue is capable of repetition, yet evading review, that is a red herring. More importantly, it is simply not true." *Id.*)

"Nothing about Respondents' position renders the underlying issues capable of repetition, yet evading review. Instead, Respondents simply argue the case must follow the proper course—pursuant to statutorily prescribed procedures—to be ripe for the Court's review." *Id.*, p. 9 (emphasis added).

Respondents concluded, "After all, if Appellants are not pleased with the result in the State Ethics Commission, they can always come to the Court after a developed record. But the case in this posture is improper. Dismissal is therefore appropriate." *Id.*, pp. 14-15 (emphasis added) (concluding words of Respondents' Reply).

The Order

Assured that the possibility that the issues would evade review was "a red herring" that was "simply not true," the Court granted the motion to dismiss in a two sentence order without explanation of its reasoning. Order of November 25, 2020. That order would have been in keeping with the Appellate Court Rules, if the representations in Respondents' Reply were accurate.

As explained below, no other grounds urged for dismissal are consistent with the Appellate Court Rules, *see* Rule 220(b), SCACR, making it even more likely that the Court rested its order on the false representations.

What Respondents Did Not Tell the Court

Respondents did not inform the Court that if the Ethics Commission agrees with their position on the law—that there are no valid limits on what the Party may accept and funnel to political candidates—the very existence of Appellants' Ethics Commission complaint and its

disposition will be confidential. S.C. Code Ann. Section 8-13-320(10)(b). Appellants would be subject to criminal penalties if they filed a notice of appeal of the Commission's findings.

S.C. Code Ann. Section 8-13-320(10)(b) states that the Commission is to dismiss a complaint if, in the Commission's view, it "does not allege facts sufficient to constitute a violation." Further, "The entire matter must be stricken from public record unless the respondent, by written authorization to the State Ethics Commission, waives the confidentiality of the existence of the complaint and authorizes the release of information about the disposition of the complaint." *Id.* Thus, were the Commission to accept Respondent's reasoning on the merits, and dismiss the appeal, it would violate the law for Appellants to even disclose that the complaint was dismissed.

The penalties can include up to a year of imprisonment. "The willful release of confidential information is a misdemeanor, and a person releasing such confidential information, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year." S.C. Code Ann. Section 8-13-320(10)(g).

Appellants, via counsel, asked Respondents to agree to waive their right to confidentiality regarding the Ethics Commission complaint to the extent necessary to enable an appeal. Appellants offered to forego this Petition if Respondents would do so. (Ex. 1, p. 2). They refused. (*Id.*, p. 1)

How, then, are Appellants supposed to alert this Court that the Ethics Commission has ruled, and that the issues are—in Respondents' words—now "ripe" for its review?

Nor did Respondents inform the Court that the advisory opinion from the Ethics Commission they suggested that Appellants pursue would not be binding on Respondents.

Advisory opinions bind only the Commission and the entity seeking the advisory opinion, and no one else. S.C. Code Ann. Section 8-13-320(11)(a).

The Motion for Clarification

Appellants moved for clarification on November 30, 2020, respectfully asking the Court to explain the reasoning behind the dismissal of the appeal. Appellants further moved for expedited briefing. Respondents filed a return in opposition on December 1, the next day, and Appellants filed a reply that same day, making the request for expedited briefing moot.

On December 2, 2020, the Chief Justice issued an order denying the request for expedited briefing, and graciously provided Appellants an extra nineteen days to file their Petition for Rehearing.

ARGUMENT

I. Unless the Court Relied on the Representations in Respondents' Reply Brief, This Is Not a Proper Case for a Rule 220(B)(1) Dismissal. If the Court Did Rely on Respondents' Faulty Representations, the Court Should Adjust Its Order Accordingly.

Rule 220(b)(1) does not apply to the order of dismissal in this case, despite Respondents' urging that it does. *See* Return to Mot. for Clarification, p. 1 (arguing that Rule 220(b)(1) applies). Rule 220(b)(1), SCACR, sets forth two requirements for an order to come within its exception. A memorandum decision under 220(b)(1) is proper provided that a decision would have no precedential value, and that it meets at least one of four additional criteria. Here, the order does not meet the requirements.

Rule 220(b) provides (emphasis added):

> (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. This rule does not apply to the following:

> (1) The Supreme Court may file a memorandum opinion dismissing an appeal, affirming or reversing the judgment appealed from, or granting other appropriate relief when, in unanimous decision, *the Supreme Court determines that a published opinion would have no precedential value* and any one or more of the following circumstances exists and is dispositive of issues submitted to the Court for decision: (A) that a judgment of the trial court is based on findings of fact which are or are not clearly erroneous; (B) that the evidence to support a jury verdict is or is not insufficient; (C) that the order of an administrative agency is or is not supported by such quantum of evidence as prescribed by the statute or law under which judicial review is permitted; or (D) that no error of law appears.

The requirement that a decision would have no precedential value is not met here unless the Court relied on Respondents' inaccurate representations.

If the Court intended to remove election-law cases alleging illegal campaign contributions from the doctrine of capable of repetition, yet evading review, the precedential value would be weighty indeed. Such a holding would be radically inconsistent with this Court's own opinions, s*ee, e.g., S.C. Pub. Interest Found. v. S.C. DOT*, 421 S.C. 110, 121, 804 S.E.2d 854, 860 (2017); *Nelson v. Ozmint,* 390 S.C. 432, 434-35, 702 S.E.2d 369, 370 (2010).

Strikingly, it would also conflict with decisions of the Supreme Court of the United States regarding similar federal laws. S*ee, e.g., S.C. Pub. Interest Found. v. S.C. DOT*, 421 S.C. 110, 121, 804 S.E.2d 854, 860 (2017); *Nelson v. Ozmint,* 390 S.C. 432, 434-35, 702 S.E.2d 369, 370 (2010); *Storer v. Brown*, 415 U.S. 724, 738 n.8 (1974)[4]; *Federal Election Com'n v. Wisconsin Right to Life,*

[4]As succinctly stated by the *Storer* Court:

> The 1972 election is long over, and no effective relief can be provided to the candidates or voters, but this [is] a case where the controversy is "capable of repetition, yet evading review." . . . The construction of the statute, an understanding of its operation, and possible constitutional limits on its application, will have the effect of simplifying future challenges, thus

Inc., 551 U.S. 449, 463 (2007) (following *Storer*); *Norman v. Reed*, 502 U.S. 279, 287-88 (1992) (similar). It would be strange had the Court had intended to prevent South Carolina appellate courts from hearing such cases, when Article III appellate courts, which are subject to more exacting jurisdictional limits than are State courts, are directed to consider election cases after the election ends. A published opinion so stating cannot be said to be without precedential value.

Appellants do not doubt that the Court has the power to so hold if it sees fit; *see. e.g., Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 81, 64 L.Ed.2d 741, 100 S.Ct. 2035 (1980) (holding that State Supreme Courts may interpret State constitutional provisions contrary to United States Supreme Court interpretations of analogous federal provisions); Appellants merely point out that such a weighty decision diverging from both South Carolina and United States Supreme Court precedent would not be announced via a two-sentence unpublished order in conflict with Rule 220(b)(1).

Thus, if the Court meant to expand the holding of the three-Justice majority in *Rainey v. Haley*, 404 S.C. 320, 745 S.E.2d 81 (2013), a case on which Respondents place great reliance, that a case filed in circuit court outside the 50-day filing window provided by S.C. Code Ann. § 8-13-530(4) does not create jurisdiction in the circuit court, to a holding that appellate courts may not review even timely-filed cases once an election occurs, thereby enabling obviously-capable-of-repetition issues to evade review, it would be of great precedential value. As explained above, a

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> increasing the likelihood that timely filed cases can be adjudicated before an election is held.

Storer v. Brown, 415 U.S. 724, 738 n.8 (1974) (citations omitted).

holding that certain statutes are exceptions to the doctrine of capable-of-repetition, yet evading review, would be a weighty precedent unsuited to a bare-bones dismissal.

Similarly for the unpublished *Harpootlian* order on which Respondents place great reliance. It is neither precedent nor relevant to these issues. *See* Respondents' Ret. in Opp. to Mot. for Clarification, p. 1 (relying on Order, *Harpootlian v. S.C. Senate Republican Caucus*, App. Case No. 2019-001404 (S.C. Sup. Ct. filed Dec. 12, 2019)) as precedent to justify dismissing this appeal pursuant to Rule 220(b)(1), SCACR); *contra* Respondents' Reply in Supp. of Mot. to Dismiss, p. 4. n.3 (acknowledging that the *Harpootlian* order is not precedent).

The question of an issue evading appellate review was simply not before the Court in Harpootlian.

Nor could it have been: Plaintiff *won* in the lower court. There was no pending appeal. Rather, the order arose on petitions for original jurisdiction by the Defendant on the question of which trial-level entity had jurisdiction to regulate discovery. There was simply no question of a matter evading appellate review.

Neither *Haley* nor the unpublished *Harpootlian* order stated anything about enabling issues to evade appellate review. The question was simply not present in those cases.

Appellants do not doubt that the Court could, if it wished, carve out an exception to the well-established doctrine of "capable of repetition, yet evading review" for cases filed in circuit court alleging illegal campaign contributions. Appellants believe that such a decision would be erroneous. The statute does not say "jurisdiction ends with the election." The presumption is, if the Legislature meant something different than the general rules of jurisdiction, it would have said so. If the Legislature meant to exclude election cases from the well-established principle that

issues capable of repetition, yet evading review, are to be heard, it would have said so. It is unlikely the legislature meant to deprive courts of the ability to exercise normal jurisdiction over cases that properly enter the judicial system, and an argument from silence is too weak to carry such a proposition. Nevertheless, if this were the basis for the decision, it would not come within the "no precedential value" requirement of Rule 220(b)(1). This would be a holding of great interest in South Carolina.

Nor would Rule 220(b)(1) be a proper vessel for a dismissal on the merits of the case. The Legislature enacted the Ethics, Government Accountability, and Campaign Reform Act, Title 8, Chapter 13 of the South Carolina Code, to prevent corruption in the political process, and promote public confidence in the elections. The General Assembly recognized that "the public's trust was essential for government to function effectively." *State v. Thrift,* 312 S.C. 282, 306 n.17, 440 S.E.2d 341, 354 n.17 (1994). "[U]ndue influence . . . would undermine the public's confidence." That Act therefore limits contributions to political campaigns, including contributions from political parties. S.C. Code Ann. Sections 8-13-1314 and 8-13-1316. A holding that neither section applies to political parties cannot be said to be without precedential value.

Further, such a decision would have repercussions well beyond the present case. There is a sea of money seeking to corrupt the electoral process. The legislature has put up a dike, and placed two moderate holes in the dike to allow moderate amounts to flow through: one thousand dollars in certain situations, and five thousand dollars in others. Respondents' position explodes the dike and allows all that money to wash through. The Legislature obviously intended to outlaw such unlimited contributions.

Again further, a holding against Appellants on the merits also requires a holding that the definitional section of the Ethics Act, Section 8-13-1300, does not apply to the substantive section 8-13-1314. *See* Init. Br. of Appellants, p. 21. A holding that a statute's own definition of its terms does not apply would be a departure from much of this Court's precedent, and again cannot be said to be without precedential value.

Moreover, dismissal on the merits would involve a decision that a South Carolina code section is unconstitutional—a section that one circuit court held to unconstitutional, and another held to be constitutional. A published opinion resolving such a split in the circuit courts regarding the federal constitutionality of State law cannot reasonably be said to have no precedential value.

For all of these reasons, the only way the order makes sense is if the Court accepted the representations in Respondents' reply in support of their motion that "[I]t is simply not true" that anything in their position would render the issues capable of evading judicial review; that "if Appellants are not pleased with the result in the State Ethics Commission, they can always come to the Court after a developed record." If the Court's order is, as it appears, akin to a simple housekeeping-type order, it would be consistent with Rule 220(b)(1).[5]

The Court believed, and thus misapprehended, Respondents' claim that Appellants can always appeal the Ethics Act determination to this Court. This is the only rationale consistent with dismissal of the appeal in a memorandum decision.

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[5] It may be thought that the order meets one or more of requirements (A) through (D) of Rule 220(b)(1). However, here (A) the facts were stipulated and unchallenged; the facts were not dispositive of the issues; (B) and (C) are irrelevant, as there was no jury nor administrative agency; and (D), that no error of law appears, is trumped by the additional requirement that a published opinion would be of no precedential value. As explained in text, that requirement is met only if the Court accepted Respondents' erroneous representations.

Respondents did not inform the Court of the exceptions. Because a decision by the Ethics Commission in favor of the positions Respondents have taken on the merits cause the matter to be confidential, with even the existence of the complaint to the Ethics Commission and its dismissal by that Commission being confidential, Appellants and their counsel would need to risk violating the Ethics Act simply to appeal, and the Court, upon receiving such an appeal, would then have to struggle with whether it could release an opinion on the matter.

RELIEF SOUGHT

It may be thought that Respondents have, by their representations, waived confidentiality to the extent necessary for current Appellants to appeal any Ethics Commission disposition to this Court. However, the text of the relevant statute requires "written authorization *to the State Ethics Commission*, waiv[ing] the confidentiality of the existence of the complaint and authoriz[ing] the release of information about the disposition of the complaint." S.C. Code Ann. Section 8-13-320(10)(b) (emphasis added). Counsel for Appellants emailed all counsel for Respondents on December 22, 2020, offering to forego this motion if their Clients would commit to the representations made by their attorneys by agreeing to waive confidentiality of the Ethics Commission proceedings to the extent necessary to allow an appeal. (Ex. 1). Respondents refused. (*Id.*)

The Court should either:

(A) Issue an order requiring the Respondents to waive confidentiality following any Ethics Commission proceeding stemming from a complaint filed by Appellants raising the claims raised in this case; or

(B) Clarify that it will not be a violation of the confidentiality requirement for Appellants to file an appeal following the termination of proceedings before the Ethics Commission, perhaps with a requirement that the appeal be filed under seal; or

(C) Rehear the motion to dismiss, find that the issues raised here are capable of repetition, yet evading judicial review, and reverse its order of dismissal.

Respectfully Submitted,

December 29, 2020

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