THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
G. THOMAS COOPER, JR., Circuit Court Judge

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SC Court of Appeals

Case No.: 2017-CP-40-4534

Mohsen A. Baddourah, as member of the City Council of the City of Columbia, Appellant,

v.

Henry McMaster, in his capacity as Governor for the State of South Carolina, Respondent,

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. **DID THE TRIAL COURT ERR IN DISMISSING APPELLANT'S COMPLAINT ON THE GROUNDS THE COURT LACKS JURISDICTION TO REVIEW "DISCRETIONARY ACTS" OF THE GOVERNOR UNDER THE SEPARATION OF POWERS OF** ARTICLE I, §8 **OF THE SOUTH CAROLINA CONSTITUTION WHEN THE COURT HAS BOTH THE JURISDICTION AND THE PRIMARY DUTY TO INTERPRET THE CONSTITUTION TO DETERMINE THE LIMITS ON EXECUTIVE POWER CONTAINED IN THE CONSTITUTION?**

2. **DID THE TRIAL COURT ERR IN ALTERNATIVELY DISMISSING APPELLANT'S COMPLAINT PURSUANT TO RULE 12(b)(6) SCRCP BECAUSE AS A MEMBER OF THE LEGISLATIVE BRANCH, THE APPELLANT IS NOT SUBJECT TO DISMISSAL UNDER ARTICLE VI, §8 OF THE SOUTH CAROLINA CONSTITUION AND BECAUSE DOMESTIC VIOLENCE, SECOND DEGREE IS NOT A CRIME INVOLVING MORAL TURPITUDE?**

3. **DID THE TRIAL COURT ERR IN DECIDING A NOVEL ISSUE ON A MOTION TO DISMISS?**

STATEMENT OF THE CASE

On March 24, 2017, Appellant filed a Petition with attached Complaint in the original jurisdiction of the South Carolina Supreme Court and a Motion for Temporary Injunction to Stay Enforcement of Executive Order 17-05. On April 3, 2017, the Governor filed a Return and Response in Opposition to Motion for Temporary Injunction. On April 13, 2017, the Governor filed a Return to the Petition consenting to the original jurisdiction of the South Carolina Supreme Court but denying the

substantive relief requested. By Order dated May 25, 2017, the South Carolina Supreme Court denied the petition for original jurisdiction and denied the motion for a temporary injunction as moot. (R.2)

On July 28, 2017, Appellant filed the present action in Richland County Court of Common Pleas seeking, inter alia, a declaration that Appellant, "as a member of the legislative branch . . . is excepted from the Governor's suspension power under Article VI, § 8," (R.17, Compl. ¶ 18), and that "the Governor's Executive Order is not enforceable because the alleged crime is not a crime involving moral turpitude," (R.21, Compl. ¶ 38). In addition to his request for a declaratory judgment, Appellant also seeks mandatory injunctive relief staying enforcement of the Executive Order and an award of attorney's fees. (R.21-22, Compl., ¶43-46) On August 30, 2017, the Governor filed a Motion to Dismiss pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction and Rule 12(b)(6) (R.27). On October 19, 2017, Appellant served a Return to the Motion to Dismiss. (R.32)

A hearing was held before Judge G. Thomas Cooper, Jr. on October 26, 2017, on the motion to dismiss. Judge Cooper issued his order granting the motion to dismiss on November 9, 2017, which was filed and served upon the parties on November 13, 2017. (R.4) Appellant timely served his Notice of Appeal on December 8, 2017. This appeal follows.

FACTS

Appellant Moe Baddourah ("Mr. Baddourah") was elected to the City Council for Columbia, South Carolina on January 1, 2016, to represent District III. This is Mr. Baddourah's 2nd term which will not expire until December 31, 2019. (R.2) Mr. Baddourah and his wife are in the midst of a divorce and custody of their children is at issue. On June 29, 2016, Mr. Baddourah was involved in an altercation with his wife, the facts of which are in dispute. His wife filed charges with the police; Mr. Baddourah was arrested on July 2, 2016, and subsequently indicted on a charge of domestic violence, second degree. It is undisputed that his wife grabbed Mr. Baddourah's iPhone without permission and attempted to leave with it. Mr. Baddourah believes the evidence will show his wife was attempting to shut and lock her car door with his phone in her possession, and that Mr. Baddourah grabbed the car door to keep it from shutting. His wife claims Mr. Baddourah then shut the door causing her to sustain injuries. Whether the alleged acts were accidental or intentional and whether injuries occurred are all issues in dispute. (R.20-21) Mr. Baddourah has pled not guilty to the charge. (R.14)

On March 13, 2017, the Governor issued Executive Order 2017-05 suspending Mr. Baddourah from his office pursuant to Article VI, §8 of the South Carolina Constitution. (R.25)

STANDARD OF REVIEW

"A ruling on a motion to dismiss pursuant to Rule 12(b)(6) must be based solely on the factual allegations set forth in the complaint, and the court must consider all well-pled allegations as true." Fabian v. Lindsay, 410 S.C. 475, 481, 765 S.E.2d 132, 136 (2014) (internal citation omitted). "On appeal from the dismissal of a case pursuant to Rule 12(b)(6), an appellate court applies the same standard of review as the trial court." Rydde v. Morris, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). In doing so, the appellate court must construe the complaint in a light most favorable to the non-moving party and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case.' " *Id.* "If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper. Furthermore, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action." Hotel & Motel Holdings, LLC v. BJC Enters., LLC, 414 S.C. 635, 650, 780 S.E.2d 263 (S.C. App. 2015)

ARGUMENTS

I. <u>THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S COMPLAINT ON THE GROUNDS THE COURT LACKS JURISDICTION TO REVIEW "DISCRETIONARY ACTS" OF THE GOVERNOR BECAUSE THE COURT HAS BOTH THE JURISDICTION AND THE PRIMARY DUTY TO INTERPRET THE CONSTITUTION TO DETERMINE THE LIMITS ON EXECUTIVE POWER CONTAINED IN THE CONSTITUTION</u>

The trial court erred in dismissing the matter under Rule 12(b)(1), finding that the judiciary lacks jurisdiction to review "discretionary acts" of the Governor and that to do so would violate the separation of powers of Article I, §8 of the South Carolina Constitution. (R.8) However, for the court to *fail to act* would itself be a violation of the separation of powers doctrine of Article I, §8. To allow the executive to suspend a member of the legislative branch when prohibited by the constitution and then argue the court cannot review this action because it is a "discretionary act" would be a gross violation of the separation of powers. "Where there is an assertion that an act of the Executive is without, or in excess of, authority, or that it is in violation of some other applicable law, the courts have jurisdiction regardless of whether or not the act involves an exercise of so-called 'Executive discretion.'" <u>Johnston v. United States</u>, 175 F.2d 612, 615 (4th Cir. 1949.)

As the United States Supreme Court has stated:

> Petitioners also object that our review of this case will offend the principle of separation of powers, for the executive's responsibility to insure that the laws be faithfully executed requires the power of appointment or removal at will, unimpaired by any judicial oversight. .... More fundamentally, however, the answer to petitioners' objection is that there can be no impairment of

> executive power, whether on the state or federal level, where actions pursuant to that power are impermissible under the Constitution. Where there is no power, there can be no impairment of power. And our determination of the limits on state executive power contained in the Constitution is in proper keeping with our primary responsibility of interpreting that document.

Elrod v. Burns, 427 U.S. 347, 352–53, 96 S. Ct. 2673, 2679, 49 L. Ed. 2d 547 (1976.)

Furthermore, the court is not reviewing the Governor's discretionary act but rather interpreting a provision of the South Carolina Constitution to determine its legality under the constitution. "While we have undoubted authority to judge the legality of executive action, we are on treacherous ground indeed when we attempt judgments as to its wisdom or necessity." Holtzman v. Schlesinger, 414 U.S. 1304, 1309–10, 94 S. Ct. 1, 5, 38 L. Ed. 2d 18 (1973)."

This court should reverse the ruling of the trial court and find that the court has jurisdiction.

II. THE TRIAL COURT ERRED BY CONCLUDING THAT THE APPELLANT IS NOT A MEMBER OF THE LEGISLATIVE BRANCH EXCEPTED FROM DISMISSAL UNDER ARTICLE VI, §8

The trial court erred in concluding that Appellant was not a member of the legislative branch with the meaning of Article VI, §8 and thus not excepted from the Governor's suspension powers. The court reached this conclusion based in part, on an analysis of the constitutional text. "As a textual matter, by specifically referencing the "legislative, executive, and judicial powers" as functions of "one of said departments," the framers are referring to the distinct "departments" addressed in separate articles of the constitution."(R.10) Order, p. 7. However, the full text of Article I, Section 8 states, "[i]n the government of this State, the legislative, executive, and judicial powers of the

government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other." (Emphasis added.) Thus, the text actually supports the Appellant's argument, as will be discussed in more detail later, that Appellant is a person exercising the legislative function delegated to municipal councils by S.C. Const. art. VIII ("Home Rule Act").

This Court should note that Article VI, §8 excepts members of the legislative and judicial *branches*. The drafters could have used "Department" or could have said "General Assembly" but did not; the drafters chose to use the word "branches." A branch is an extension or subdivision of a larger whole. Since Article VI, §8 extends the Governor's power of suspension to "political subdivisions" it does not make logical sense to limit the legislative branch exception to the General Assembly. Thus, the court's argument -that the Appellant's interpretation ignores "the canon of construction *expressio unius est exclusio alterius' or inclusio unius exclusio alterius'* [which] holds that 'to express or include one thing implies the exclusion of another, or the alternative,"- applies with equal force to the trial court's own argument. (internal citation omitted).

Also, the example cited by the trial court that the framers referred to "[a]ll officers, State, executive, legislative, judicial, circuit, district, County, township and municipal . . . ." is not dispositive. Id., citing S.C. Const. art. XVII, § 11 (R.11). The court noted that the framers referred to "legislative" and "County, township and municipal"

separately and therefore the drafters "took care to differentiate." (R.11). However, the drafters also referred to "State" officers which overlaps and is not different than some executive, legislative and judicial officers. The drafters also referred to "judicial" and "circuit" which involves overlaps as well. Therefore, in the light most favorable to Appellant, "municipal" overlaps with "legislative."

Article VIII of the South Carolina Constitution, adopted in 1973 as an Amendment to the South Carolina Constitution of 1895, directed the General Assembly to implement what was popularly referred to as "home rule" by establishing the structure, organization, powers, duties, functions, and responsibilities of local governments by general law. The General Assembly was required to implement home rule, and Article VIII essentially left it up to the General Assembly to decide what powers local governments should have. Acting under this authority, the General Assembly enacted various statutes regarding the powers of counties and municipalities. See Hosp. Ass'n v. County of Charleston, 320 S.C. 219, 464 S.E.2d 113 (1995) (discussing the history of home rule.) Among the statutes adopted to implement 'home rule' is S.C. Code Ann. §5-7-30 which provides, "Each municipality of the State, in addition to the powers conferred to its specific form of government, may enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State."

The City of Columbia has a council-manager form of government. See S.C. Code Ann. §§ 5–13–10 to 100. "Unlike the mayor under other forms of government who may

have mainly administrative or ceremonial duties and who may vote only in case of a tie, the mayor under the council manager form is a regular legislative member of council and has a vote the same as the other members." NAACP v. City of Columbia, 850 F. Supp. 404 (D.S.C. 1993) (emphasis added); S.C. Code Ann. § 5–13–20. "All legislative powers of the municipality and the determination of all matters of policy shall be vested in the municipal council, each member, including the mayor, to have one vote." S.C. Code Ann. §5-13-30.

The South Carolina General Assembly consistent with Article VIII of the South Carolina Constitution shared a portion of its legislative power with the City of Columbia, and that legislative power is exercised by members of Columbia City Council including Mr. Baddourah, a duly elected member of that council. Mr. Baddourah is a member of the legislative branch exercising the legislative power shared by the South Carolina legislature pursuant to Article VIII of the South Carolina Constitution and thus is excepted from the suspension powers of the Governor who is a member of the executive branch. See also Article VIII, §13 providing for the "Joint administration of functions and exercise of powers between the State and its political subdivisions." To hold otherwise would be to violate the separation of powers required by Article I, §8 of the South Carolina Constitution and to ignore the plain language of Article VI, §8.

The court should also take note of S.C. Code Ann. §5-7-200 whereby the legislature specifically proscribed the grounds for removal of a council member including being convicted of a crime of moral turpitude. Thus, it's not absurd that such council members would be excepted from the Governor's suspension powers.

This court should find that the trial court erred and hold that the Appellant has stated a claim as a member of the legislative branch which exercises constitutionally granted legislative power which is excepted from the Governor's suspension power under Article VI, §8.

III. THE LOWER COURT ERRED IN FAILING TO ADDRESS THAT DOMESTIC VIOLENCE, SECOND DEGREE IS NOT A CRIME OF MORAL TURPITUDE.

The trial court erred in finding it did not have to address the issue of whether domestic violence, second degree is a "crime of moral turpitude" because the phrase is not defined in the text of the constitution. The lower court reasoned its application must be left to the Governor's discretion. (R.10) While the trial court relied upon McConnell v. Haley, 393 S.C. 136, 138, 711 S.E.2d 886, 887 (2011) in support of its decision; that case is not fully on point and the language relied upon is *dicta*. In *McConnell*, the court stated: "[t]he Governor may on **extraordinary occasions** convene the General Assembly in extra session." Id. (emphasis in original). The court states, "Because there is no indication in the Constitution as to what constitutes an "extraordinary occasion" to justify an extra session of the General Assembly, this matter must be left to the discretion of the Governor and this Court may not review that

decision." Id. (citing Farrelly v. Cole, 60 Kan. 356, 56 P. 492 (1899)). Ultimately, the court decided the case based on the word "extra" and not "extraordinary occasions" because the General Assembly was only in recess and thus the Governor could not call an "extra" session. Therefore, the language about "extraordinary occasions" is dicta.

Furthermore, the phrase "crime of moral turpitude" unlike "extraordinary occasions" is a legal term of art interpreted by numerous judicial decisions. Indeed, the Governor's Executive Order 2017-05 at issue here cites to South Carolina case law in defining "crime of moral turpitude"(R.25). The Governor sought the decision of the South Carolina Attorney General which also interpreted South Carolina case law. (R.44) Thus, it would be an absurd result if the Governor and the Attorney General can review and interpret the case law on what constitutes a crime of moral turpitude, but the court whose primary job it is to interpret the law cannot.

While the lower court did not directly address it, the Governor flatly states in the motion to dismiss that domestic violence, second degree is a crime involving moral turpitude (Motion to Dismiss, paragraph 3) (R.28); however, the Governor does not cite a single case where a South Carolina court has determined this. The cases cited in the motion refer to cocaine possession (a reversal from the previous precedent) and "hit and run".

Historically the precedent on the meaning of "crime involving moral turpitude" ("CIMT") comes from two sources: crimes used for impeachment prior to the adoption

of the standard in Rule 609 SCRE and crimes under the Immigration and Nationality Act (8 U.S.C.A. § 1182(a)(9), 1251(a)(4)), and similar predecessor statutes providing for exclusion or deportation of aliens convicted of such crime. Moral turpitude "is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general." Medina v. United States, 259 F.3d 220 (4th Cir. 2001). "[W]hile all crimes involve some degree of social irresponsibility, not every crime is one that involves moral turpitude." State v. La. Barge, 275 S.C. 168, 172, 268 S.E.2d 278, 280 (1980).

Perhaps because CIMT was used for impeachment, "[m]ost offenses found to involve moral turpitude seem to include some sort of dishonest behavior . . . ." McAninch and Fairey, The Criminal Law of South Carolina, 45 (3rd ed. 1996). Offenses that are so base, vile, and depraved that they qualify as crimes of moral turpitude, for purposes of removal, even though they have no element of fraud, typically involve rather grave acts of baseness or depravity such as murder, rape, and incest. Ramirez-Contreras v. Sessions, 858 F.3d 1298, 1306 (9th Cir. 2017) (noting many serious crimes nonetheless fell short of moral turpitude's extreme threshold). In general, willfulness or "evil intent" is required in order for a crime to be classified as one involving moral turpitude for purposes of the Immigration and Nationality Act (INA). Fernandez-Ruiz v. Gonzales, 468 F.3d 1159 (9th Cir. 2006).

When determining whether a criminal conviction constitutes a crime of moral turpitude, corrupt scienter is the touchstone of moral turpitude. Immigration and Nationality Act, §237(a)(2)(A)(i), 8 U.S.C.A. § 1227(a)(2)(A)(i) De Leon v. Lynch, 808 F.3d 1224 (10th Cir. 2015).

The South Carolina Supreme Court has addressed the issue in the context of assault and battery of a high and aggravated nature concluding that such a crime may be a crime of moral turpitude depending on the facts as particularized in the indictment. Matter of Lee, 313 S.C. 142, 437 S.E.2d 85 (1993) (magistrate made improper sexual advances); cf. State v. Bailey, 275 S.C. 444, 272 S.E.2d 439 (1980)(admission prejudicial since the indictment was not presented) (also noteworthy, Justice Littlejohn in dissent states he would simply hold that assault and battery of a high and aggravated nature is not a crime of moral turpitude.)

The Appellant is informed and believes that extremely grave acts of violence and depravity are CIMT, and thus assault with intent to kill and assault with intent to rape is CIMT. State v. Ball, 292 S.C. 71, 354 S.E.2d 906 (1987)(overruled on other grounds, cases cited therein.) This would be consistent with the description of acts that shock the conscience. Perhaps a similar standard is conduct which creates liability for intentional infliction of emotional distress.

The Criminal Court of Appeals of Oklahoma directly addressed the issue in Tucker v. State, 2016 Ok. Cr. 29 (Dec. 21 2016). "The law does not support the State's claim that domestic violence is a crime of moral turpitude." Id.

The *Tucker* court cited an Eighth Circuit definition which restricted moral turpitude to "the gravest offenses – felonies, infamous crimes, those that are *malum in se*", including crimes of theft, and thus show a defendant is inherent of depraved mind and unworthy of belief. Price v. State, 1976 OK CR 22, ¶ 12, 546 P.2d 632, 638. *Malum in se* refers to crimes which are wrongs in themselves, inherently immoral, such as murder, arson or rape. Black's Law Dictionary 978 (8th ed. 2004).

The Tucker court further reasoned, "Misdemeanor domestic assault and battery would not fit within traditional definitions or the Price standard. Essentially, domestic assault and battery is a crime of violence against the person – like assault and battery. It is difficult to characterize domestic violence as a *malum in se* crime, or one recognized as inherently evil and immoral, given that for centuries it was not recognized as a crime at all, and only recently has our Legislature granted it felony status." Id.

In this case, Appellant was indicted on the charge of domestic violence, second degree. This offense is a lesser included offense of domestic violence first degree, which itself is a lesser included offense of domestic violence of a high and aggravated nature. Per the indictment, on or about June 29, 2016 Mr. Baddourah allegedly "caused physical harm or injury to a household member, or did offer or attempt to

cause physical harm or injury to a household member, with apparent present ability under circumstances reasonably creating fear of imminent peril by striking the household member with a car door an act likely to result in moderate bodily injury in violation of Section 16-25-20 (A-D), S.C. Code of Laws, 1976, as amended." (R.48)

It is undisputed that Appellant's wife grabbed his iPhone without permission and attempted to leave with it. Mr. Baddourah believes the evidence will show his wife was attempting to shut and lock her car door with his phone in her possession, and that Mr. Baddourah grabbed the car door to keep it from shutting. His wife claims Mr. Baddourah then shut the door causing her to sustain injuries. Whether the alleged acts were accidental or intentional and whether injuries occurred are all in dispute. (R.21)

As noted by the *Tucker* court, this conduct cannot be characterized as a *malum in se* crime, or one recognized as inherently evil and immoral. Nor does this show that Appellant is of a depraved mind or that his alleged act, in the light most favorable to Appellant, was an act of grave or extreme violence.

This court should find that it was an error for the trial court not to address the issue of what constitutes a crime of moral turpitude as this is a term of legal art and not discretion. The court should then determine that domestic violence, second degree is not a crime involving moral turpitude, or at least not as alleged in Appellant's indictment.

IV. NOVEL ISSUES SHOULD NOT BE DECIDED BY A MOTION TO DISMISS

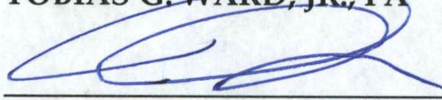
It appears the issues raised by the complaint have not been decided by a South Carolina court and are important novel issues. Our courts have held that novel issues should not be decided on the basis of a demurrer. See Jackson v. Atlantic Soft Drink Co., 286 S.C. 577, 336 S.E.2d 13 (1985). As such, the lower court erred dismissing the matter.

CONCLUSION

A 12(b)(6) motion should not be granted if "facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case." The question is whether, in the light most favorable to the plaintiff [Appellant], and with every doubt resolved in his behalf, the complaint states any valid claim for relief. As noted above, the Appellant has stated valid claims for relief as to a declaration that the Governor exceeded his powers under Article VI, §8 of the South Carolina Constitution by suspending a member of the legislative branch and by construing domestic violence, second degree as a crime involving moral turpitude. This court not only has the jurisdiction but the duty to intervene where actions pursuant to executive power are impermissible under the Constitution. For all these reasons, as set forth in the Appellant's Brief, this court should reverse the trial court and enter a declaratory judgment in favor of the Appellant.

Respectfully submitted,

TOBIAS G. WARD, JR., PA



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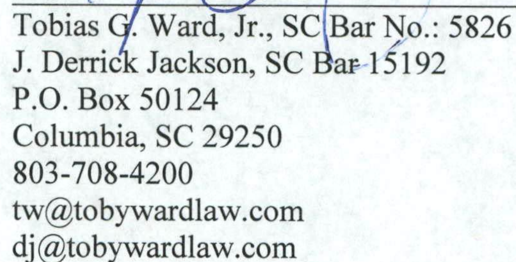
CERTIFICATE OF COUNSEL

The undersigned certifies that the Appellant's Final Brief and Appellant's Final Reply Brief comply with Rule 211(b), SCACR.



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