

OPINION

Of Former Mississippi Supreme Court Justice David Chandler
On the Attorney General's Report Entitled, "Summary of Investigation and Applicable
Law Regarding Alleged Undue Influence in Building Flowood Frontage Road"

Introduction

I have been tasked with providing an opinion on the Attorney General's Report entitled, "Summary of Investigation and Applicable Law Regarding Alleged Undue Influence in Building Flowood Frontage Road" (the "report"). Specifically, this opinion will outline the Attorney General's authority to bring a suit against Lieutenant Governor Tate Reeves for allegations of conflicts of interest arising from his involvement in the attempted construction of a frontage road running from his neighborhood adjacent to Highway 25 / Lakeland Drive. The opinion will also examine the evidence contained in the report to determine the feasibility of a suit based on those allegations. In summary, I have determined that the Attorney General possesses the authority to bring the proposed suits; however, the evidence is likely insufficient to sustain the proposed civil causes of action.

Facts

Because the analysis, *infra*, focuses primarily on legal principles, and because the facts are more fully laid out in the report, the facts are briefly summarized here. Additionally, the facts are developed solely from the report; their veracity and evidentiary admissibility in any future proceedings are assumed, *arguendo*.

According to the report, Lieutenant Governor “Jonathan Tate Reeves has owned property and resided in the Oakridge Subdivision located in Flowood, Rankin County, Mississippi” since 2004. “As a lot owner, Reeves and his spouse own a membership share in the Oakridge Property Owners’ Association, Inc., (OPOA).” Being a member of OPOA and owning property in the neighborhood, the Lieutenant Governor sought to have a frontage road constructed with public funds outside of his neighborhood, running parallel to Highway 25 / Lakeland Drive. According to a confidential informant (“CI-1”), the Lieutenant Governor “wanted to do something about the traffic on Lakeland Drive because it was bad and that it takes a long time to get from the interstate to his home.”

A series of emails between the legislative liaison for the Mississippi Department of Transportation (“MDOT”) and staff for the Lieutenant Governor’s office show that the concept for the frontage road had been discussed since 2014. The emails show that the Lieutenant Governor’s staff were interested in the progress and development of the concept. Additionally, in an interview with investigators of the Attorney General’s office, CI-1 relayed that political pressure was applied from the Lieutenant Governor and his staff to have the road completed. Statements and assertions from CI-1 include: “CI-1 felt like there was influence from the Lt. Governor by using his position to get the frontage road.”; “[T]he Lt. Governor was not satisfied with pace of the project and that [his] staff wanted more updates.”; “[T]here was not an overt threat made towards [CI-1] pertaining

to the project, but it was implied.”; “[T]he Lt. Governor saying that he knew nothing about the project is not true[.]”

As alleged by the report, Lieutenant Governor Reeves and his office pressured different government entities and personnel to have the road built, including MDOT and the Mayor of Flowood, Gary Rhodes. According to Commissioner Dick Hall and MDOT, “the project would cost anywhere from 1.2 to 2 million.” Eventually, the project “was authorized” *via* an earmark in the 2015 appropriation bill for MDOT.

Since MDOT would need to acquire sections of property owned by OPOA for completion of the road, OPOA initially demanded that “MDOT pay OPOA for any property interest acquired from OPOA for the construction of the frontage road.” But “MDOT did not agree to OPOA[’s] terms and the project stopped.”

Later, though, the project was resurrected, and “[o]n April 17, 2018, the president of OPOA delivered two (2) [instruments] dated October 31, 2017, from OPOA to [MDOT]” purporting to convey OPAO’s property in trust should construction of the frontage road proceed as “described to [OPOA] in numerous previous conversations.” The project began, and during the nascent stages, “MDOT expended \$322,721.00[] in taxpayer funds to obtain rights-of-way and construction easements necessary to construct the frontage road.” However, due to political considerations, the road was never completed.

Law and Analysis

When asked to prepare this opinion, I understood the request to encompass two inquiries: (1) whether the Attorney General possesses authority to bring an action against the Lieutenant Governor for allegations surrounding conflicts of interest and the Flowood frontage road matter; and (2) whether the evidence presented in the report could sustain an action, if brought.

I. Whether the Attorney General possesses authority to bring an action against the Lieutenant Governor for allegations surrounding conflicts of interest and the Flowood frontage road matter.

My initial concern was with the Lieutenant Governor's having raised in a response his "legislative privilege," a doctrine that has deep roots in the common law. *Tenney v. Brandhove*, 341 U.S. 367, 372, 71 S. Ct. 783, 786, 95 L. Ed. 1019 (1951) ("The privilege of legislators to be free from arrest or civil process for what they do or say in say in legislative proceedings has taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries."). The privilege protects legislators from civil actions when they are "acting in the sphere of legitimate legislative activity." *Id.* The legislative privilege likely would extend to the Lieutenant Governor when acting in a legislative capacity. MISS. CONST., Art. 5, § 129. *See also, In re Hubbard*, 803 F.3d 1298, 1307–08 (11th Cir. 2015) ("The privilege protects the legislative process itself, and therefore covers both governors' and legislators' actions in the proposal, formulation, and passage of legislation.").

However, suits against legislators have been brought under Section 109 of the Mississippi Constitution. *See, e.g., Frazier v. State By and Through Pittman*, 504 So. 2d 675 (Miss. 1987); *Jones v. Howell*, 827 So. 2d 691 (Miss. 2002). Therefore, it is axiomatic that legislative privilege does not shield legislators—or the Lieutenant Governor—from actions brought to enforce the constitutional requirements of Section 109.

Moreover, “[e]xcept as to vested rights[,] a state legislature has full power to change or to abolish existing common law[.]” *Walters v. Blackledge*, 71 So. 2d 433, 446 (Miss. 1954). Since legislative privilege is based in common law, the Legislature is free to modify its parameters.

As an example, Mississippi Code Annotated Section 25-4-105 provides:

(1) No public servant shall use his official position to obtain, or attempt to obtain, pecuniary benefit for himself other than that compensation provided for by law, or to obtain, or attempt to obtain, pecuniary benefit for any relative or any business with which he is associated.

(2) No public servant shall be interested, directly or indirectly, during the term for which he shall have been chosen, or within one (1) year after the expiration of such term, in any contract with the state, or any district, county, city or town thereof, authorized by any law passed or order made by any board of which he may be or may have been a member.

Miss. Code Ann. § 25-4-105. Under that article, “public servant” is defined as “[a]ny elected or appointed official of the government[.]” Miss. Code Ann. § 25-4-103(n). The “government” is defined as “the state and all political entities thereof, both collectively and separately, including, but not limited to . . . [a]ny . . . legislative or administrative body of the state[.]” Miss. Code Ann. § 25-4-103(g).

“When interpreting a statute that is not ambiguous, th[e] Court will apply the plain meaning of the statute.” *Edmonds v. State*, 234 So. 3d 286, 290 (Miss. 2017) (citation omitted). The statute plainly subjects “[a]ny elected or appointed official of the government” to potential liability under the article. Moreover, the Mississippi Supreme Court has acknowledged enforcement of this statutory section against legislators. *Frazier*, 504 So. 2d at 693.

The article further provides that “[t]he Attorney General of the State of Mississippi . . . may bring a separate civil action against the public servant . . . violating the provisions of this article for recovery of damages suffered as a result of such violation.” Miss. Code Ann. § 25-4-113. Based on the preceding, I conclude that the Legislature has no legislative privilege for suits brought under Section 109 of the Mississippi Constitution or Article 3 of Title 25. Accordingly, the Attorney General possesses the power to bring the proposed actions.

II. Whether the evidence presented in the report could sustain an action, if brought.

The report submits several causes of action, with a Section 109 suit being the primary legal theory. A Section 109 action has four elements: “any public officer or member of the legislature [is prohibited] from

“(a) having any direct or indirect interest in any contract

(b) with the state or any political subdivision

(c) executed during his term of office or one year thereafter, and

(d) authorized by any law, or order of any board of which he was a member.”

Frazier, 504 So. 2d at 693. The following analysis focuses on element (a) because the report contains a dearth of evidence showing that Lieutenant Governor Reeves had an “interest in any contract” respecting the frontage road project.

Based on the evidence in the report, Lieutenant Governor Reeves and his office had an interest in the project, but in the sense that they were actively curious about it and lobbied for its origination and completion. Little evidence, though, suggests that the Lieutenant Governor had an interest as contemplated under Section 109.

Cases implicating Section 109 have uniformly involved conflicts where a public servant or legislator have received—or potentially could have received—compensation under a contract or have been appointed to a position for which they received—or potentially could have received—compensation. *Frazier*, 504 So. 2d at 675; *State By & Through Mississippi Ethics Comm’n v. Aseme*, 583 So. 2d 955 (Miss. 1991); *Towner v. Moore ex rel. Quitman Cty. Sch. Dist.*, 604 So. 2d 1093 (Miss. 1992). However, I have been unable to identify a case where a public servant was found in violation of Section 109 for potentially realizing a non-monetary, incidental benefit under a contract to which he is not a party. No evidence in the report shows that Lieutenant Governor Reeves received or potentially could have received any compensation under the contract(s) to install the frontage road.

The same analysis would apply under Section 25-4-105. Subsection (2) tracks much of the language employed under Section 109 of the Mississippi Constitution. Miss. Code Ann. § 25-4-105(2). As for subsection (1), it prohibits obtaining, or attempting to obtain, a “pecuniary benefit.” Miss. Code Ann. § 25-4-105(1). Section 25-4-103(1) defines a “pecuniary benefit” as a “benefit in the form of money, property, commercial interests or anything else the primary significance of which is economic gain.” The report does not suggest that Lieutenant Governor Reeves received a “property interest” in the frontage road project or that he would own any portion thereof.

A reasonable factfinder could review the evidence in the report and conclude that Lieutenant Governor Reeves wanted the frontage road to be built and additionally applied political pressure to that end. However, I do not believe any evidence in the report establishes that the Lieutenant Governor received or could have potentially received any amount of compensation for the project to an extent that liability arises under Section 109 of the Mississippi Constitution or Mississippi Code Annotated Section 25-4-105.

With the above in mind, I will note one potential issue. According to the report, Lieutenant Governor Reeves and his spouse “own a membership share in the Oakridge Property Owners’ Association, In., (OPOA).” This shareholder membership and the actions of OPOA could potentially implicate Section 109.

In *Frazier*, the Attorney General “alleged [Bill F.] Knox was in violation of § 109 as a member of the county board of supervisors which entered into a county depository contract with banks in which Knox was an officer and shareholder.” *Frazier*, 504 So. 2d at 685. The Supreme Court sided with the Attorney General, holding that “a county board member who is a stockholder, director, and officer of a bank, is prohibited by § 109 from authorizing a contract which makes that bank a county depository. *Id.* at 703.

Lieutenant Governor Reeves’s possessing a shareholder interest in OPOA is analogous to Knox’s having a shareholder interest in the banks in *Frazier*. However, it is unclear from the report whether a contract was entered into between OPOA and MDOT. Initially, OPOA “decided to demand that MDOT pay OPOA for any property interest acquired from OPOA for the construction of the frontage road.” But “MDOT did not agree to OPOA[’s] terms and the project stopped.” I cannot ascertain from the report whether a contract was eventually effectuated between OPOA and MDOT. If a contract was entered into, it is also unclear whether OPOA received or could have received any type of compensation for the land transfers. Had OPOA entered into a contract with MDOT for which the association received or could have received compensation, then it would be arguable that Lieutenant Governor Reeves’s shareholder status in the organization would have violated Section 109. *Id.* at 703.

Conclusion

The Attorney General possesses the authority to bring the proposed lawsuit for conflicts of interest in the frontage road matter against Lieutenant Governor Tate Reeves. I submit, however, that the evidence contained in the report likely falls short in establishing liability under the Mississippi Constitution, Article IV, Section 109, or Mississippi Code Annotated Section 25-4-105. To sustain those actions, the Attorney General would need to prove that the Lieutenant Governor received or could have received compensation under the contracts executed for construction of the frontage road. Lieutenant Governor Reeves's status as a member of OPOA, and its engagement with MDOT, could raise potential Section 109 violations; however, the report does not contain sufficient evidence to analyze the applicability of that issue.